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NO. 96613-3

SUPREME COURT
OF THE STATE OF WASHINGTON

Court of Appeals, Division II No. 49854-5-II

THE CHURCH OF THE DIVINE EARTH

Petitioner,

v.

CITY OF TACOMA,

Respondent.

APPELLANT CHURCH'S RESPONSE
TO CITY'S SUPPLEMENTAL BRIEF

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I. STATEMENT OF FACTS

Under this heading the City purports in its Respondent's Response to Petitioner's Supplemental Brief (SB-1) to characterize the trial court's Findings and Conclusions. The problem with the City's approach is that the issue for this appeal, *as characterized by the City*, is

The issue here is whether the City knew or should have known [its action was unlawful] *at the time of the final decision*.

(italics added) SB-6

During the entire course of this proceeding the City argued the "final decision" for the purpose of RCW 64.40.020(1) is the Hearing Examiner Decision. Quite aside from the merits of that argument, placing the "final decision" or actionable "act" of the agency as late in the chronology as possible works to the advantage of the government since damages from the government are only due from the time of its "final decision," or "act." See also RCW 64.40.010(4) and (6)

Here, for example, the City argued the April 28, 2014 Director's Letter Decision of Peter Huffman was *not* the "final decision" referenced in RCW 64.40.020 but rather only the subsequent decision of the Hearing Examiner filed on August 19. (Ex. P105)

When the trial court and the Court of Appeals held the "final decision" of the City was the August 19 Hearing Examiner Decision, it not

only cut off several months of damages but also cut off any claim for damages for other improper conditions affirmed by the Director's Decision of April 28 such as sidewalks. The sidewalk condition was dropped during the administrative appeal to the Hearing Examiner but before his August 19 Final Decision. Ex. P105 See Huffman's first declaration (Ex. P96) filed on July 3, 2014.

The trial court and the Court of Appeals agreed the "Final Decision" for the purpose of RCW 64.40 was that of the Hearing Examiner. *Church of the Divine Earth v. City of Tacoma*, 5 Wn. App. 2d 471, 426 P.3d 268, para. 65 (2018) ("...the hearing examiner's decision was the final decision by the city that is actionable under RCW 64.40.020") This court did not grant review of that determination.

Elsewhere the City emphasizes that all decisions prior to the "final decision" are subject to change and it is proper to "make any necessary modifications prior to the final decision." SB-9 However it treats the March 7 letter, Ex. P75, as the "final decision," and ignores the Hearing Examiner Decision for the purpose of determining whether the City knew or should have known the right of way exaction imposed by the Hearing Examiner was unlawful.

In sum: only the "final decision" matters for the purpose of RCW 64.40; the "final decision" as per the Court of Appeals is the Hearing

Examiner Decision of August 19; this court did not grant review on that issue so it is the law of the case, RAP 2.5(c); therefor the issue here is whether the City knew or should have known its final decision was unlawful at the time of the final decision, the August 19 Hearing Examiner Decision.

However the Findings relied upon by the City in pertinent part do not pertain to the Hearing Examiner Decision, the facts it was based upon, nor its rationale.

For example, the City claims it reduced the claimed 30 foot exaction from 30 feet to 8 feet by Kuntz letter of March 7. SB-2, 3 Finding 16, 17 The Church knows this is incorrect because this staffer had no authority to modify the exaction under the TMC and the letter did not advise it was appealable to the Hearing Examiner as required by the TMC, unlike the Huffman letter decision of April 28 which stated the 14 day administrative appeal deadline. Jennifer Kammerzell admitted under oath she had no authority to modify any condition, P140 p. 14, and didn't know if her recommendation was accepted by Director Huffman. P140 p. 28 Huffman testified didn't even see the March 7 letter until after his appealable Letter Decision of April 28 which affirmed all conditions

including the 30 foot right of way dedication. P141 p. 72 David Johnson had no authority under the code to grant any waiver request.¹

If the Kuntz letter was the “final decision” there could have been no administrative appeal because under the Tacoma Municipal Code, (TMC), only the Director of Planning and Development Services, Peter Huffman, had the authority to grant a waiver. TMC 13.05.030 A (5) The Director’s decision is final unless appealed to the Hearing Examiner within 14 days. TMC 13.05.040 A

The Hearing Examiner has jurisdiction to hear appeals from waiver decisions of the Director of Planning and Development Services, not staffers. TMC 1.23.050 B (2) That administrative appeal was not taken from the Kuntz letter of March 7 but from the final Letter Decision of Director Huffman on April 28. Any claim the March 7 letter was even appealable to the Hearing Examiner is facially untenable under the TMC. It wasn’t and couldn’t be.

But let us suppose these staffers *did* have that authority and *did* in fact and law reduce the 30 feet to 8 feet. **THAT IS NOT THE FINAL**

¹ The City claims, SB-23 n. 3, “Mr. Johnson, not Mr. Huffman, had authority to alter the right-of-way request...RP 774-76; 915” The citation is to Johnson’s testimony which was only admitted as evidence of his “understanding,” not as a legal conclusion, over appellant’s objection. RP 774, 777 The trial court made no such finding or conclusion. The code is clear disposition of a waiver request is the exclusive responsibility of the Director of Planning and Development Services, Peter Huffman. TMC 13.05.030 A (5) Johnson never even saw the waiver request. RP 779

DECISION OF THE CITY FOR 64.40 PURPOSES AS A MATTER OF LAW—ONLY THE HEARING EXAMINER DECISION IS.

Even if these findings are supported by substantial evidence, they do not support the judgment which must be based on the Hearing Examiner final decision, not a preliminary decision, even if there was one. Nor are they relevant to whether the City knew or should have known its final decision was unlawful.

The City however cannot and will not defend the actual Hearing Examiner Decision nor even accurately describe it. That decision was based entirely on the July 9, 2014 Amended Declaration of Huffman, Ex . P98, incorporated by reference on page 9 of the Decision: “A building permit, subject to the conditions set forth in the Amended Declaration of Peter Huffman, dated July 9, 2014, may be issued.” Ex. P105

We know exactly what facts the Hearing Examiner Decision considered because the documents are in the record and identified on page 2 and 3 of the Decision. Not only that, but on page 5 the Hearing Examiner recognizes and quotes from the March 7 letter referenced above purportedly reducing the right of way demand from 30 to 8 feet but then states in paragraph 10:

Subsequently, the City further revised its requirements for off-site improvements at 6605 East B Street, stating:

“[T]he City is now merely requiring Appellant to dedicate an area of approximately 2,472 square feet to the front of the Subject Property in order for the Subject Property and surrounding area to have a uniform right-of-way (‘ROW’) width of street frontage...

(italics added) Ex. P105, p. 5, para. 10 Accordingly, the fact and claim presented to the Hearing Examiner was simply the right of way was not uniform and for that reason (and only that reason) the City should be allowed to condition the permit on the Church deeding it the property. Period.

The trial court agreed the Hearing Examiner Decision was based on the claim for right of way uniformity by entering an order in limine excluding any evidence that the exaction was for any reason other than making the right of way uniform. CP 1929, RP 300 There was nothing before the Hearing Examiner about traffic, foot or vehicle, let alone any attempt to justify the exaction by showing any nexus to the proposed construction of the single-family replacement house. Nor was that the basis of his Final Decision. That is the reason Judge Martin granted the LUPA appeal and correctly concluded it didn’t matter whether the exaction was 30 feet, 8 feet, or one inch. The *final decision* of the City was to condition the permit on the Church deeding to the City additional right of way solely for the sake of uniformity. That is not based on a nexus to the permitted activity by any stretch of the imagination.

The only purpose of a LUPA appeal, as admitted under oath by the deputy City Attorney, is to review the Hearing Examiner's Decision. RP 672 The Court relied on this attorney to assist the Court by truthfully disclosing the facts: did the Hearing Examiner exact 30 feet or 8? But Jeff Capell, on behalf of City Attorney Elizabeth Pauli, lied when he said 8, not thirty. But the reason for any dedication as expressed by the City was always uniformity, nothing else.

If Huffman made a "mistake," the Final Decision was based on a mistake. But it was the Final Decision nonetheless. It may well be that Huffman doesn't know what he is doing but simply relies on others; however we know he changed his July 3 declaration calling for the equivalent of 8 feet to 30 in the July 9 declaration specifically because of an email exchange between Pastor Kuehn and Deputy Capell where Kuehn pointed out that the 8 foot exaction called for in the July 3 declaration didn't match the legal description sent to him by the City for 30 feet. The City's solution was to increase the square footage to 30 feet, not amend the legal to 8.

The plain text of the July 9 Huffman Amended Declaration, Ex P98, states the dedication is sought "in order for the Subject Property and surrounding area to have uniform right-of-way ("ROW") width for street frontage (see map attached as exhibit A...)" 30 feet makes the right-of-

way uniform, 8 doesn't. And the attached map shows the dedicated area is to match adjacent property lines to make it uniform. This was no accident. But it doesn't matter—the Final Decision is what it is, and it calls for 30 feet to make the right of way uniform.

Moreover, both Huffman and Capell later testified under oath they would have enforced the 30 feet against the Church but for the successful LUPA appeal. RP 582

Another interesting point is the City claims the exaction was not unlawful because there was no plan to build out the road, claiming the City only wanted a path, not a road. SB-15 This is apparently based on the assertion that the city wanted 8 feet rather than 30 as per the March 7 letter. Not only was this NOT the Final Decision of the Hearing Examiner, who had nothing whatsoever presented to him by the City about a path, but is inconsistent with the City condition at that time requiring the Church to install sidewalks. Finding 16 specifically states “On March 7, 2014...The City *denied* the Church’s request that all development conditions be dropped [including sidewalks] but it did modify the right of way dedication.” (italics added)² The sidewalk condition was not dropped until the Huffman Declaration of July 3. Ex. P96

² “O, what a tangled web we weave, when first we practice to deceive.” Sir Walter Scott, “Marmion” (1808)

To further consider the city's "Statement of Facts," the City points to Finding 6 to the effect the proposed construction "increased problems associated with the too-narrow right of way. For example, construction of the parsonage would further impair safe pedestrian and vehicular traffic on both S. 66th Street and S. B Street." SB-1, 2 This does not meet the *Dolan* requirement that the impact be specifically identified and quantified. *Dolan v. City of Tigard*, 512 U.S. 374, 395, 114 S. Ct. 2309, 129 L. Ed.2d 304 (1994) Moreover this is not a finding of how the proposed construction would "impair traffic" let alone quantify it. More fundamentally, none of this was before the Hearing Examiner and it played no part in his "final decision."

The City claims various individuals "agreed that an eight foot dedication was the minimum right-of-way necessary to allow for a safe roadway and safe pedestrian passage on East B Street. CP 2404 (FOF 18)" SB-2 Once again, this is clearly not a reference to the City's "final decision" by the Hearing Examiner. Moreover this does not meet the *Dolan* requirement that the impact be identified and quantified, that some individuals "agreed" to something is irrelevant to whether the City carried it burden to demonstrate nexus and proportionality. It provides no basis upon which a nexus can be based. If alteration of the pre-existing right-of-way was required for public safety reasons, the City must exercise eminent

domain, pay just compensation to the property owner, and plan to actually widen the road within a reasonable time.

In summary, whether the City knew or should have known its final decision was unlawful requires the court to identify the Hearing Examiner Decision as the final decision and consider the facts upon which that decision was based, i.e. the Amended Declaration of Huffman dated July 9, 2014 incorporated in that decision by reference. If the City cannot defend that decision under the law, it can hardly claim it did not know, nor should not have known, that decision was unlawful.

II. STANDARD OF REVIEW

In this section, SB-5-7, the City claims whether it knew or should have known its action was unlawful is not really a legal conclusion although denominated as such by the trial court which adopted the findings and conclusions as proposed by the *City*. It claims, “the Church has the burden of showing that a finding of fact is not supported by substantial evidence.” SB-6 This argument is incoherent. Whether the City “should know the law” is obviously a legal question not a factual one. One can debate what legal criteria should be applied, but same is not a fact but a conclusion.

The City claims the Church is incorrect to claim the City has the burden to prove the permit condition complies with *Nollan* and *Dolan*

“because the only issue on review in this case is whether the purposes of RCW 64.40 the City knew or should have known that its action was unlawful.” SB-6 But the *law is* the City has the burden to prove it complied with *Nollan/Dolan*. The Church doesn’t have to prove anything. If the City doesn’t carry *its* burden to quantify the impact, its action is unlawful. For example, if the City hasn’t done a traffic study, (which it didn’t) it may not be able to *prove* an increase in traffic justifies an exaction even if had such a study been performed maybe it could be proved. But actually the City’s claim was simply it could lawfully impose a permit condition to make a preexisting right of way “uniform.” Logically, and obviously, this doesn’t satisfy the *Nollan* test because it does not even attempt to prove a nexus to the proposed permitted activity on its face. The City must know, or at least should know, this is unlawful.

The City’s point about presumptions, SB-7, seems to be they don’t matter; although in this situation the presumption is the City *knows* the law, the precise point at issue. While a presumption, one supposes, may be overcome, the burden is on the one against whom the presumption runs to do so.

1. The Law Concerning dedication requirements as development conditions on a permit.

In this section the City acknowledges “In a nexus analysis the government *must show* that its proposed condition or exaction tends to solve, or at least to alleviate, a public problem created or made worse by the applicant’s project.” (italics added) SB-8 But if there is a problem with the right of way it was not of the Church’s making. This right of way was established more than 100 years prior to the Church’s permit application. Moreover, the City had no plans to widen the road in any event so the proposed condition wouldn’t solve a problem even if one existed.

2. The City had actual knowledge the dedication requirement was unlawful

Here the City engages in a deeply deceptive argument claiming “...the Church points out that the original dedication requirement of 30’ was determined by the City staff as lacking in proportionality so it was modified to eight feet” SB-9 [therefore the Church claims the City knew its action was unlawful.] The Church certainly does *not* claim the condition was “modified” to 8 feet. To the contrary. What the Church actually wrote was:

The City knew that the 30 foot exaction affirmed by the Hearing Examiner was not rational, characterizing it as unreasonable, mistaken and “excessive” in the trial, as a way to distinguish the

newly requested 8-foot exaction. The City knew it acted unlawfully but did it anyway.

Church Supp. Br. 15 As previously noted at some length, the only “final decision” of the City was the 30 foot exaction approved by the Hearing Examiner for the purpose of uniformity. The letter of March 7 calling for 8 feet was not the City’s “final decision.” The point here is the City specifically denounced the 30 foot exaction in its trial testimony as unreasonable, mistaken and excessive, RP 772, thereby evidencing its knowledge that the 30 foot exaction was unlawful. Perhaps the court would entertain a follow up question to the City attorney at oral argument: “Did the City know a 30 foot exaction was unlawful?”

Next the City contends the Church argues the actual dedication requirement was unlawful because the City lied about it during the litigation. SB-9 No, not because the City attorney lied, but because the Final Decision lacked nexus to the project. A desire for a uniform right of way does not demonstrate any nexus to building a house.

The City continues “The Church argument on this point is based on an error in square footage of the required dedication that appeared in one of the declarations signed by Peter Huffman, the Planning and Development Services Director. It is a verity on appeal that the dedication requirement had been altered to eight feet...” SB-9 This is a subterfuge

repeated again and again in different forms by the City. It is **not** a verity on appeal that the “final decision” of the City was for 8 feet, there was no factual finding to that effect, and the Hearing Examiner Decision which imposes 30 feet by reference to the Amended Declaration of Huffman speaks for itself. Essentially the City disowns the Hearing Examiner Decision by claiming Huffman didn’t know what he was doing and made a “mistake.” But as previously stated at length, it wasn’t a “mistake;” but even if it was, the decision of the Hearing Examiner called for 30 feet, not 8, and the City testified under oath it was going to enforce the 30 feet against the Church but for its successful LUPA appeal.

The City states “Judge Martin understood that there had been a reduction based on the administrative record before her, including the submissions of the Church. See e.g. CP 12, 45, 62, 69, 94.” SB-10-11 To the contrary, the only way one can understand the Hearing Examiner Decision was to read it or take the City attorney’s word for it. Unfortunately, Judge Martin did the later. The references to the record do not demonstrate otherwise: CP 12 references 30 feet; CP 45 is a page from the Church’s pro se motion for reconsideration which was denied by the Hearing Examiner; CP 62 is the same; CP 69 is a copy of page 5 of the Hearing Examiner final decision stating specifically the alleged reduction to 8 feet was “further revised” to 30 feet; CP 94 is page 2 of the

Church's pro se amended reply arguing Huffman's Amended Declaration seeking 30 feet was inconsistent with the March 7 letter (which it was). The Hearing Examiner however rejected the claim of 8 feet and entered the final decision of the City as 30 feet as explained at CP 69. All that can be said here is that obviously the Church would have preferred 8 feet to 30 but the City demanded 30 and got it in its Final Decision.³ But Judge Martin reasoned even if the exaction was 8 feet to promote a more uniform right of way, that bore no relation to the proposed construction of a home.

Ironically, the City then proceeds to remind the Court "A plaintiff in a RCW 64.40 lawsuit is not free to select an interim point in the application process as a final decision, and in essence, create a continuing violation from some point prior to the final decision. {citing cases}" SB-11 If so, is a government *defendant* in said lawsuit free to select some interim point in the application process as a final decision to manufacture a defense? But this is precisely what the City is trying to do.

³ The difficulty of your undersigned defending the proposition that the City's "final decision" was for 30 feet, not eight, is perhaps best summarized by G. K. Chesterton: "It is very hard for a man to defend anything of which he is entirely convinced... He is only really convinced when he finds that everything proves it. And the more convincing reasons he finds pointing to this conviction, the more bewildered he is if asked suddenly to sum them up." *Orthodoxy* p. 83, Image Books 1959

The City then claims there can be no standalone constitutional violation for its failure to plan a build out of the demanded additional right of way by attempting to distinguish *Burton v. Clark Co.*, 91 Wn. App. 505, 958 P.2d 343 (1998) SB-12 *Burton* found an unconstitutional condition violation because the road building condition was a “road to nowhere” which did not solve any problem caused by the permitted activity. But here, says the City, the “exaction would be put to immediate use” because “The testimony at trial was that the Church’s right-of-way would be used immediately for a pathway for the general public, including children walking to school on the designated school walking route, and increasing public safety.” SB-15

There are at last three problems with this claim. First, before the Hearing Examiner was the City’s claim that it wanted 30 feet to make the road right of way “uniform.” There was no claim it wanted 8 feet to have a foot path. The Final Decision was to condition the Church’s permit on dedicating 30 feet of additional right of way to the City. Period. If there is a difference in the eyes of the law between forcing a property owner to build a road to nowhere and forcing a property owner to dedicate land to the City to build nothing at all, it escapes your undersigned.

The second problem is that at the time of the March 7 letter the City was conditioning the permit on the Church building sidewalks,

gutters etc., not a foot path. The same Finding which characterized the March 7 letter as modifying the right of way dedication also states the Church's request to drop all other development conditions [including sidewalks] was denied. Finding 16 The footpath is inconsistent with sidewalks.

The third problem is that a path for walking the "general public, including children walking to school on the designated school walking route, and increasing public safety" SB-15 has no nexus to and was not necessitated by the proposed permitted activity which did not alter the right of way. These may be reasons to invoke the power of eminent domain, but that would require the City to pay the church; however it is so much cheaper to extort it's property than to pay for it.

The City claims "safe streets require a uniform width RP 801-3...tapering of streets to narrow widths poses dangerous conditions for emergency vehicles as well as normal traffic." SB-24 The City tries to confuse right-of-way with the actual nature of the street. Here the preexisting street is absolutely uniform and the trial court did not find otherwise. In any event the nature of the right-of-way or the street had nothing to do with the Church's proposed construction of single family residence to replace one recently demolished.

3. The Trial Court and the Court of Appeals incorrectly determined that the City should not have known its action was unlawful

The City relies upon *Isla Verde Int'l Holdings, Ltd. v. City of Camas*, 147 Wn. App. 454, 196 P.3d 719 (2008) for the proper test of whether the City should have known its final decision was unlawful. However, that was not the test applied by the trial court or the Court of Appeals.

As described by the City, *Camas* applied an objective test “evaluat[ing] whether the facts and legal issues in those other cases were similar enough to put the current plaintiff (sic) on notice” the agency action was unlawful. SB-17 Here, however, the trial court simply found “City staff conducted a *Nollan/Dolan* analysis...” Finding 5 The Court of Appeals held the City should not have known its act was unlawful simply relying on Finding 5 at an analysis had been conducted, without determining whether the analysis was objectively accurate and reasonable under existing case law much less its specific result, as was done in *Camas Church*, 5 Wn. App. 2d para. 53 Nor did the Court of Appeals reference the Final Decision of the Hearing Examiner which has nothing to do with whether staff did not did not conduct a *Nollan* analysis, much less determine what it was.

The trial court never concluded the City did not know or should not have known the *Final Decision of the Hearing Examiner* was unlawful. That the City violated the doctrine of unconstitutional conditions to achieve a uniform right of way platted more than a hundred years before the permit application, without even intending to build it out, seems as obvious an unconstitutional condition as can be imagined. The Hearing Examiner Decision and the Amended Declaration of Huffman dated July 9, 2014 which it incorporates speak for themselves.

RESPECTFULLY SUBMITTED this 28th day of May 2019.

GOODSTEIN LAW GROUP PLLC

s/Richard B. Sanders

Richard B. Sanders, WSBA #2813

Attorney for Petitioner

CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below, I caused to be served the foregoing document on the following persons and in the manner listed below:

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Jackson Maynard, Jr. Hannah Marcley Building Industry Association of Washington 111 21st Ave SW Olympia, WA 98501 Email: jacksonm@biaw.com hannahm@biaw.com	<input type="checkbox"/> U.S. First Class Mail, postage prepaid <input type="checkbox"/> Via Legal Messenger <input type="checkbox"/> Overnight Courier <input checked="" type="checkbox"/> Electronically via email <input type="checkbox"/> Facsimile

DATED this 28th day of May 2019, at Tacoma, Washington.

s/Deena Pinckney
Deena Pinckney

GOODSTEIN LAW GROUP PLLC

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