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Division II  
State of Washington  
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No. 96613-3

NO. 49854-5-II

DIVISION II OF THE COURT OF APPEALS FOR  
THE STATE OF WASHINGTON

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CHURCH OF THE DIVINE EARTH

APPELLANT

V.

CITY OF TACOMA,

RESPONDENT.

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APPELLANT'S SUPPLEMENTAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

I. “FINAL DECISION OF DIRECTOR” WAS LETTER DECISION OF APRIL 28, NOT STAFF MEMO OF MARCH 7. .... 1

II. THE CITY’S ORAL ARGUMENT MISREPRESENTED OTHER FACTS REGARDING THE EXACTION ..... 5

III. THE PUBLIC RECORDS ACT WAS VIOLATED BECAUSE “MISCOMMUNICATION” BETWEEN CITY EMPLOYEES IS NO DEFENSE ..... 7

IV. CONCLUSION..... 8

TABLE OF AUTHORITIES

**CASES**

*Flower v. T.R.A. Indus., Inc.*, 127 Wn. App. 13, 40-41, 111 P.3d 1192  
(2005).....8  
*Rainey v. Am. Forest & Paper Ass'n*, 26 F. Supp. 2d 82, 94 (1998).....7

**RULES**

CR 30(b)(6).....7, 8  
CR 54(b).....4  
RAP 3.1.....4

**ORDINANCES**

TMC 13.05.040.....1  
TMC 13.05.050.....2

**APPENDIX**

Transcript of City’s Oral Argument

The Church of the Divine Earth submits this supplemental brief in response to the City's oral argument on appeal.

**I. "FINAL DECISION OF DIRECTOR" WAS LETTER DECISION OF APRIL 28, NOT STAFF MEMO OF MARCH 7.**

During the course of the City's oral argument the Court pointedly asked "So at what point did the City conclude that it [the exaction or condition] should be eight feet?" Tr. 19 The City responded: "In – long before the final decision, it was a memo that went out in March. Director Huffman's letter went out the next month in April. And the Hearing Examiner was in July." Tr. 20

The significance of this exchange is twofold: (1) the City has abandoned any defense of the 30 foot exaction it attempted to impose on the Church and (2) the City's new claim that it made a final decision in March to impose an eight foot exaction is untenable in fact and law.

TMC 13.05.040 defines a final decision of the Director subject to administrative appeal to the City's Hearing Examiner. This is a formal process as "the decision of the Director shall be set forth in a written summary supporting such decision..." The appealable final decision may be a condition on land use approval including "dedication of land or granting of easements." A copy of the decision must be mailed to the applicant. The applicant has fourteen days, no longer, to pay a filing fee

and appeal to the Hearing Examiner. The Hearing Examiner has jurisdiction to determine an appeal from “any final order, requirement, permit decision, or determination on land use proposals made by the Director” including “interpretations of land use regulatory codes...” TMC 13.05.050

The Letter Decision of April 28, and only that decision, fit code criteria for a final decision—and hence was the *only* final decision of the City. The March 7 memo was *not* the decision of the *City*, it was not binding on the City nor the applicant and was not, and could not have been, the subject of an administrative appeal. It was at most the opinion of a staffer. Director Huffman testified he never even read the March memo before issuing his final decision. P 141, p. 72, RP 573 Huffman testified his Letter Decision was his final decision to deny the requested waiver of the 30 foot exaction and all other conditions. P 141, p.31, 49 Huffman testified but for the LUPA appeal the City would have enforced the 30 foot exaction against the Church. RP 582 The author of the “eight foot” March memo, Jennifer Kammerzell, testified she had no authority to change the 30 foot condition. P140, p.14

The Hearing Examiner Decision incorporated in his order the Amended Huffman Declaration of July 9 to affirm the 30 foot exaction. P 105, p. 9, P 98 The City’s oral argument claimed the Hearing Examiner

decision was the “final decision” of the City for the purpose of RCW 64.40. Tr. 14 That was 30 feet. All communications to the Church and the Hearing Examiner after the Letter Decision of April 28 took the position that the condition was for 30 feet. Deputy Capell was always adamant to Pastor Kuehn that the City’s demand was 30 feet. RP 301, 349, P100 When Kuehn questioned the City’s legal description for 30 feet after reading Huffman’s first Declaration of July 3, Capell prepared an Amended Declaration for Huffman correcting the square footage to affirm the exaction was indeed 30 feet. P100, 101, 98 Only 30 feet would make the right of way uniform, not 8 feet. Attached to Huffman’s Amended Declaration of July 9 was a drawing showing the 30 foot exaction would make the property lines “uniform” as Huffman represented under oath in both declarations as *the* reason for the exaction (not “foot traffic” as stated by the City attorney in oral argument.) P 98, p.2

It is absolutely imperative the Court understand in fact and law the City’s demand was for 30 feet to make the right of way uniform. Any other contention is a fraud on the Court. And now the City has disowned any claim that a thirty foot exaction can be justified. What more does the Court need to know to conclude the City acted arbitrarily, unconstitutionally and unlawfully when it demanded 30 feet? According to

the oral argument of the City, it *actually* knew a 30 foot demand was unjustified, not only *should* it have known same.

At the time of oral argument in the LUPA appeal the City for the first time claimed the demanded exaction was 8 feet rather than thirty. RP 14, 26, 32 This was an obvious lie as the only subject of the LUPA appeal was the Hearing Examiner decision which specifically incorporated Huffman's Amended Declaration of July 9 to affirm imposing a 30 foot exaction.

The LUPA decision on February 18, 2015 was a final and appealable judgment entered pursuant to CR 54(b). P 116 The City did not appeal, the Church could not appeal because it won and was therefore not an aggrieved party. RAP 3.1 That decision established as a matter of law the City had violated the Due Process rights of the Church—no matter what the size of the exaction.

After that final LUPA decision, the City Attorney decided to double down on the erroneous eight foot language interlineated by the Court at the City's request; however it was always the position of the City that the April 28 letter decision imposing the 30 foot exaction was somehow (secretly) changed *thereafter*, P 141, p.73, in contrast to the City's oral argument which claims the decision was changed *prior* to the Letter Decision. As

Daniel Patrick Moynihan once put it: “You are entitled to your opinion.  
But you are not entitled to your own facts.”

## **II. THE CITY’S ORAL ARGUMENT MISREPRESENTED OTHER FACTS REGARDING THE EXACTION**

The City’s oral argument (tr. 12) claimed the March Kammerzell memo also eliminated the sidewalk requirement, but she didn’t have authority to do that. That was eliminated by Director Huffman in his first declaration in the administrative appeal on July 3 who swore the City changed its position “*Subsequent* to issuing the Letter Decision [of April 28].” P96, p.1

In an apparent effort to justify the mythical eight foot exaction the City argued “But you have to let people walk across the front of your property. That’s our social contract here. That’s how cities are made. That’s how – that’s why all properties basically have to dedicate right of way.” Tr. 12-13 Unfortunately the City government is functioning in another universe. No, you don’t have to let people walk across your property. In fact that is trespass, a crime. And that is not how cities are made. American cities follow the rule of law and don’t steal property from private citizens. If there is a public need and necessity for a piece of private property the government is constitutionally obliged to prove it and to pay for it so as to avoid placing the burden of public improvements on

discrete private shoulders. And there is no evidence in this record that *anyone* else was forced to dedicate right of way. Moreover there is no claim that this proposed project in anyway caused whatever pedestrian traffic there is. If there is preexisting pedestrian traffic which might find it convenient to trespass, that would also apply to a vacant lot (or even a fenced vacant lot) regardless of any permitted construction of a single family residence, i.e. no nexus.

The City tries to justify the Order in Limine which it sought and obtained precluding the Church from presenting evidence that the exaction was 30 feet, not eight. First the City claims everything came into evidence anyway. Not so. The Church did not attempt to introduce evidence which the Court ordered excluded. Second, the City objected to cross examination of deputy Jeff Capell (the deputy who lied about the exaction at the LUPA hearing) based on the Order in Limine. RP 666-76 The Court sustained that objection over the Church's objection and offer of proof. RP 675-76 Moreover by entering the order the Court demonstrated it had prejudged the issue before a word of testimony was offered.

Second, the City argued "That was the whole problem is there were square footages. Had some – had one of those declarations said eight feet or 30 feet, the *error* probably would have been caught." If this was an error—it was the City's error, not the Church's. The Court must require

the City to compensate the Church for its error. But to say this was an error is a lie. The record plainly shows the Church informed the City that the legal description of the exaction matched 30 feet, not eight. P100 The City's reaction was not to correct the legal description but amend the Huffman declaration to make sure the square footage matched 30 feet, not eight. P98 And the record plainly shows the Hearing Examiner, P105, p. 9, relied on that Huffman Amended Declaration to affirm the 30 foot dedication requirement—which the City *now* concedes was “excessive” (Tr. 15) and, in effect, indefensible.

**III. THE PUBLIC RECORDS ACT WAS VIOLATED BECAUSE  
“MISCOMMUNICATION” BETWEEN CITY EMPLOYEES  
IS NO DEFENSE**

“Um, Counsel says, well, there's no good explanation and some of these people testified that they don't know, maybe it was miscommunication. Some of that happens when you ask people that don't know and aren't familiar with the facts. If you ask someone who didn't produce the record how did it happen, they're going to say, 'I don't know. Miscommunication.' You can't use that same testimony to say that this particular person didn't know.”

Tr. 7-8 This was binding on the City, however.

However, this witness was selected and prepared for a CR 30(b)(6) deposition on the topic by Deputy City Attorney Elofson, not your undersigned. That deposition testimony was received at trial as substantive evidence. P143, p.5, 22 Such testimony is binding on the City. *Rainey v. Am. Forest & Paper Ass'n*, 26 F. Supp. 2d 82, 94 (1998) (binding a

corporation to 30(b)(6) testimony) See also, e.g. *Flower v. T.R.A. Indus., Inc.*, 127 Wn. App. 13, 40-41, 111 P.3d 1192 (2005) (the corporate party is obligated “to prepare one or more witnesses so that they may give knowledgeable, complete, and non-evasive answers on behalf of the corporation [citing cases]. An individual employee’s lack of personal knowledge is irrelevant: the organization must provide a witness to ‘testify as to matters known or reasonably available to the organization.’ CR 30(b)(6)” The City’s testimony was it was a mistake not to produce the video and the notes and that mistake was caused by “miscommunication.” P143, p. 22 Apparently the City Attorney makes an issue of this because she recognizes miscommunication is no defense to a PRA claim for silent withholding. She’s right about that.

#### IV. CONCLUSION

Hopefully the Court will not be misled by the City’s oral argument. Other points argued by the City are adequately covered by the briefs; although that which was first asserted by oral argument deserves a considered reply.

RESPECTFULLY SUBMITTED this 9th day of March, 2018.

GOODSTEIN LAW GROUP PLLC

By: s/Richard B. Sanders  
Richard B. Sanders, WSBA #2813  
Attorneys for Appellant

**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:

<p>Jeff H. Capell, Deputy City Attorney Margaret Elofson, Deputy City Attorney City of Tacoma, Office of the City Attorney 747 Market Street, Room 1120 Tacoma, WA 98402 Email: <a href="mailto:jcapell@ci.tacoma.wa.us">jcapell@ci.tacoma.wa.us</a> <a href="mailto:margaret.elifson@ci.tacoma.wa.us">margaret.elifson@ci.tacoma.wa.us</a></p>	<p><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</p>
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DATED this 9th day of March, 2018, at Tacoma, Washington.

s/Deena Pinckney \_\_\_\_\_  
Deena Pinckney

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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CHURCH OF THE DIVINE EARTH,	)	
	)	Court of Appeals No.:
	)	49854-5
	)	
Appellant,	)	Pierce County Superior Court
	)	No.: 14-2-13006-1
v.	)	
	)	
CITY OF TACOMA,	)	
	)	
	)	
Respondent.	)	

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EXCERPT OF VERBATIM REPORT OF PROCEEDINGS  
(FROM TAPED PROCEEDINGS)

BE IT REMEMBERED that the foregoing and numbered proceeding was heard on February 22, 2018, before THE HONORABLE LISA WORSWICK, LINDA LEE AND LISA SUTTON, Judges.

RICHARD B. SANDERS AND CAROLYN A. LAKE, Attorneys at Law, 501 S. G. St., Tacoma, WA 98405, appearing on behalf of the Appellant;

MARGARET A. ELOFSON, Deputy City Attorney, 747 Market St., #1120, Tacoma, WA 98402, appearing on behalf of the Respondent.

(Proceedings transcribed by: Adrienne Kuehl)

WHEREUPON, the following proceedings were had and done, to wit;

INDEX

Pages

Argument Margaret Elofson

4-21

EXHIBITS

Offered   Admitted   Denied

None admitted.

1 (BEGIN EXCERPT AT 20:44)

2 MS. ELOFSON: May it please the Court, Margaret  
3 Elofson on behalf of the City of Tacoma.

4 And I'll start with -- as did Counsel -- opposing  
5 Counsel, the PRA violation. The City contends that there's  
6 substantial evidence to support the trial court's finding  
7 that the City did conduct a reasonable search. There was a  
8 lot of testimony on that topic. The City witnesses  
9 describe the many computers, paper files, all the different  
10 ways, different search terms. The huge number of people --  
11 over 30 people contacted. Seventeen responded. The number  
12 of people that did a thorough search.

13 It is true that one video was missed. And videos are  
14 taken before review -- or were taken before a review panel.  
15 This case -- in this case, there was a second review panel  
16 because of the waiver request. So there wasn't an initial  
17 thought that oh, we've got to go look for a second video.  
18 The video was taken by an intern who was no longer with the  
19 department. So he was not asked -- and this was his only  
20 involvement with the case.

21 So the initial question of when you're seeking records  
22 from all of these 35 people, he was not one of them because  
23 he was no longer there. And it was not -- it did not  
24 appear that there would be reason to ask him. You can't  
25 ask all 3,500 people at the City, do you all have records

1 on every single request when we're getting ten requests a  
2 day.

3 So the process, which is a very thorough process and  
4 was very thoroughly explained to the trial court as to how  
5 they're farmed out. The sub-coordinators within each  
6 department, how they determine who to send the request to.  
7 How they check off every single system that has been  
8 searched. There was a lot of testimony on this. There was  
9 substantial evidence to show that the City's PRA program is  
10 robust, it's thorough, and it was followed.

11 Is it true as the courts have now acknowledged that  
12 sometimes even the best search that you can possibly do  
13 might miss a document? Yes. And the courts have said it  
14 need not be successful to be -- nor exhaustive to be the  
15 adequate search that the law requires.

16 The record also shows that as soon as this -- the way  
17 that we actually found the video and it was before the  
18 trial court was in reviewing the documents, the 3,500 pages  
19 we gave to Plaintiff, I read an email that mentioned this  
20 person. And I thought, wow, there could be a second video  
21 here.

22 Videos are stored by date. We can't search by date  
23 because if you do a search through all these computer  
24 drives of date, who knows how many -- you're going to get  
25 every document that's created on that date. There's only -

1 - we used a lot of search terms. We even used the wrong  
2 spelling of Church of the Divine Earth that was given to us  
3 by the requestor.

4 But you can't search by date. And what date would you  
5 use in this case?

6 So it didn't come up. But I read it. I said, you  
7 know, there could be one out there. Let's go find it. If  
8 there is, it was uncontroverted at trial that as soon as we  
9 found it, we turned it over.

10 Same with the second document. Shanda France  
11 (phonetic) showed up for her dep preparation with some  
12 notes. I said, "Oh, my gosh, those don't look familiar to  
13 me. What are they?"

14 She testified at trial that we picked up the phone  
15 right then and there, called counsel for the Church and  
16 said, "We may have a document you may have not been  
17 provided because it's not familiar to me. We'll send it  
18 right over before her deposition."

19 The testimony at trial was that it didn't get printed  
20 out along with everything else because of the way that Ms.  
21 France put those particular notes under a particular tab.  
22 They -- while most of the documents get printed from that  
23 particular screen with pushing a certain button, this  
24 particular tab needed to be copied and pasted into a new  
25 Word document in order to print.

1           It was a peculiarity of that computer system. And the  
2 person that was printing the docs for that Department  
3 didn't realize that this one tab would not print. As soon  
4 as it was found, it was turned over.

5           And there are a number of cases since the courts have  
6 been following the adequate search protocol or approach to  
7 Public Records Act violations, that find similarly that if  
8 you provide it as soon as you've got it, if there's a  
9 reasonable explanation for why it didn't go over the first  
10 time, or why it didn't get sent out that there's not a  
11 violation. And that's within the discretion of the trial  
12 court judge to find that there was or was not a violation  
13 based on the facts of the case.

14           There was a lot of testimony. It's rare for a PRA  
15 violation to go to trial and there to actually be  
16 testimony. But this is one of those few cases where there  
17 was a lot of testimony and it did go to trial. And the  
18 trial court found there was substantial -- that there was  
19 evidence to support a finding that there was no PRA  
20 violation in this case.

21           Um, Counsel says, well, there's no good explanation  
22 and some of these people testified that they don't know,  
23 maybe it was a miscommunication. Some of that happens when  
24 you ask people that don't know and aren't familiar with the  
25 facts. If you ask someone who didn't produce the record

1 how did that happen, they're going to say, "I don't know.  
2 Miscommunication." You can't later use that same testimony  
3 to say that this particular person didn't know.

4 Um, as to the 64.40, and I'll just start with the  
5 collateral estoppel issue. Counsel for the Church relies  
6 on Lutheran Daycare. Lutheran Daycare predates the  
7 adoption of LUPA. There's no mention in Luther Daycare of  
8 LUPA.

9 At the time, LUPA-type violations were handled under a  
10 writ. And there was no LUPA. There was certainly no  
11 provision in LUPA that says a violation of LUPA does not by  
12 itself entitle you to damages. So that case is not  
13 relevant at all on this issue.

14 And I think the Court is correct that there isn't --  
15 there aren't the elements of collateral estoppel because  
16 the questions answered by the LUPA judge and the trial  
17 court judge on 64.40 were very different. Then --

18 THE COURT: There are cases, though, that say  
19 unconstitutional action, right, is -- is arbitrary. So how  
20 do you respond to that argument?

21 MS. ELOFSON: In this case -- and I don't think that  
22 there -- I don't think that the cases say that they're  
23 automatically arbitrary and capricious the same way these  
24 are. This one, it says that arbitrary and capricious  
25 action is unreasoning action, willfully ignorant of the

1 facts. There was none of that finding here.

2 As a matter of fact, the trial court judge said, I am  
3 hampered by the scant record. I've got a problem here.  
4 You haven't met your burden, City. Because the way this  
5 case has come up to me, there's almost nothing here. I  
6 have the administrative record, which was really just a  
7 summary judgment record. There was no discovery. There  
8 was no real record for her to make those types of findings  
9 whatsoever.

10 And that's one of the reasons, I think, that she  
11 clarified on the record many, many times that she hadn't  
12 made a finding of a constitutional violation. She said  
13 this doesn't past muster under the standards in *Nollan* and  
14 *Dolan*. You haven't shown me that this is -- that there's  
15 nexus and proportionality. That the right of way you're  
16 asking for is made necessary by this particular --

17 THE COURT: But aren't *Nollan* and *Dolan* due process  
18 cases?

19 MS. ELOFSON: They're takings cases, yes.

20 THE COURT: Uh huh.

21 MS. ELOFSON: And she said, "I do not find a taking."

22 INTERVIEWER: Okay.

23 MS. ELOFSON: Many times. She says, I -- nothing's  
24 been taken in part because in this case, the application  
25 wasn't yet complete and nothing had been denied. Nothing

1 could be taken. He was never ordered to give it up. She  
2 said this is -- I -- this is a potential taking. It's not  
3 a taking. Therefore, I can never make that finding. She  
4 says there's inartful language in the order I signed, and I  
5 -- perhaps that needs some clarification. But I don't find  
6 a taking. There could never be a taking here.

7 When Plaintiff brought his motion to amend the  
8 complaint, it was understood by the trial court and by me  
9 that that's what exactly -- under 1983, which is just the  
10 vehicle -- you have to allege some sort of constitutional  
11 violation -- that it was a taking. There was no mention of  
12 un -- the Doctrine of Unconstitutional Conditions. That's  
13 not what *Nollan* and *Dolan* have to do with the Doctrine of  
14 Unconstitutional Conditions.

15 So -- and this -- it couldn't be in this case because  
16 unlike *Mission Springs*, this -- and that's why we kept  
17 saying he never had a complete application. There were no  
18 vested rights. He never completed -- he submitted  
19 basically some hand drawn plans, which we handed back to  
20 him and says -- with pages and pages of review comments and  
21 said this is so deficient that your application is  
22 incomplete. It's not even a completed application.  
23 Nothing has vested.

24 So -- and that's uncontroverted that at the time of  
25 trial, he had never revised any of those comments or

1 completed his application. In fact, he confused it more by  
2 applying for new -- new things.

3 So this whole thing went through a pretty standard  
4 process. There was a lot of confusion in the beginning  
5 when he turned in his application because Church of the  
6 Divine Earth, they were thinking is this a church building.  
7 And make clear to us what you want. Because there's one  
8 path for a residential parsonage. There's another path for  
9 a commercial building or church in a residential area.

10 And because of that confusion and the Church's  
11 reliance on, for example, his religious liberties if he  
12 were gonna have a church building and that sort of thing.  
13 So it took -- the initial theory of this case by Plaintiff  
14 really was delay. And so we were explaining, well, this is  
15 the reason it got delayed is you said -- once you go the  
16 review comments back, we said yes, you've got these six  
17 development conditions. You said, okay, I'm going to build  
18 a church instead. Well, we said then you're going to have  
19 different development conditions. Then it was okay, then  
20 I'm back to a parsonage. I'm just going to build a  
21 parsonage. Okay. Then we'll deal with the development  
22 conditions of a parsonage.

23 It -- the development conditions that are -- the  
24 condition that is primarily at issue in this case is the  
25 right of way dedication. And it's true that in this area,

1 the right of way goes along in a pretty straight line until  
2 it gets to the Church's property, and it juts out. Because  
3 when it was platted 100 years ago, somehow there was no  
4 right of way dedicated.

5 So when he brought in his application for a parsonage,  
6 they said you've got to dedicate a portion of your property  
7 for a right of way. Not fee title. A right of way  
8 easement, which is what right of way traditionally is.  
9 Which gives the public and the City a right to passage, not  
10 to own it.

11 THE COURT: And how wide was that? Are we talking  
12 eight feet or 30 feet wide?

13 MS. ELOFSON: Initially, the request was 30. And then  
14 during the process -- he -- he objected. The City had two  
15 different tracks. One a waiver request track. And that  
16 was also sent to public works, which is in charge of the  
17 right of way. Both of them went through their normal  
18 process, meetings with their supervisors, another review  
19 panel and determined that yes, 30 feet was excessive. We  
20 are going to reduce it to eight.

21 And that was a memo. So when they replied to his  
22 waiver request, they sent him a memo saying we're reducing  
23 it to eight. And you don't have to build a sidewalk. A  
24 pedestrian pathway -- a gravel path, something like that  
25 will be sufficient. But you have to let people walk across

1 the front of your property. That's our social contract  
2 here. That's how cities are made. That's how -- that's  
3 why all properties basically have to dedicate right of way.  
4 This one was not, but they said you cannot build out to the  
5 very edge of your property so that now no -- every person  
6 that walks by your property has to step into the street, so  
7 that firetrucks can't get around your corner property.  
8 You've got -- if you build out to the corner.

9 THE COURT: But wouldn't setbacks -- aren't there  
10 setbacks?

11 MS. ELOFSON: Not as to, say, fences and that sort of  
12 thing. No. He could build a -- he acknowledged at trial,  
13 yes, I intend -- I can build a fence out to the very  
14 corner. And I can prevent people from walking on my  
15 property. That's my right.

16 And the City said no, you're building a new structure.  
17 The building code requires right of way and the ability for  
18 pedestrians to pass. We are going to apply this.

19 THE COURT: And then address for me then the Church's  
20 question of what's the final decision. It seemed like  
21 there was a -- a letter by the director that was actually  
22 appealed that said 30 feet, and why wouldn't we go off  
23 that.

24 MS. ELOFSON: No, that was a -- and the letter  
25 decision -- and the reason that that came up is --

1 primarily is because if the letter of Mr. Huffman in April  
2 is the final decision of the City, that brings back into  
3 the equation conditions that the City had dropped between  
4 that letter and what the City contends is the final  
5 decision, which is the Hearing Examiner.

6 So that brings back into the argument the City's  
7 requirement for a berm -- an asphalt berm to prevent storm  
8 water, sidewalks, installation of concrete sidewalks, which  
9 the City had dropped. Um, but that was still part of the  
10 whole process at the time of Mr. Huffman's letter.

11 And if you look at the letter, the letter says, this  
12 is not a final decision. If you want a final decision, you  
13 must go to the Hearing Examiner. And here's how you do  
14 that. And attached is the Code provision that requires  
15 that. And explains to you how to go to the Hearing  
16 Examiner and get a final decision. Because so far, we  
17 haven't given you a final decision. And in fact, Plaintiff  
18 did go to the Hearing Examiner and got that final decision.  
19 That's -- and that -- the Hearing Examiner's decision,  
20 that's the last opportunity the City has to correct its  
21 errors.

22 All through this process, you have people looking at  
23 the development conditions, modifying, saying okay -- okay,  
24 that's excessive. You're right. 30 feet. We shouldn't  
25 ask for that much. I get it. Because this is a smaller

1 lot, and blah, blah. So we're going to drop that. That's  
2 the -- that's the process.

3 But the City isn't liable under 64.40 unless you get  
4 to the final decision. And at that point, you have  
5 unlawful activity, that he should have known it would be  
6 unlawful. You have arbitrary and capricious behavior or  
7 something like that.

8 So at the process that Mr. Huffman, the Director of  
9 Planning and Development wrote to Mr. Kuehn and said,  
10 you've asked me why the land use people are doing what  
11 they're doing and you're complaining about land use.  
12 Because they're requiring you to do certain things, and  
13 they're saying you can't have a church building here. And  
14 you can't -- if you're going to have worship services,  
15 that's a church building. And even if you worship in the  
16 open air, that's a church building. If that's a church,  
17 we're gonna go the -- the other route, the conditional use  
18 permit.

19 What you've got on your application now are  
20 development conditions of the building permit. And if you  
21 want to appeal those and get a final decision, here's how  
22 you do that. And he went ahead and did that.

23 The *Smoke* case, which is what the Church relies on in  
24 this case, is entirely different. In *Smoke*, the letter  
25 that was sent to the applicant said there is no appeal,

1 this is the final -- the final base in your turnaround  
2 (Inaudible). I mean, you're done. There is no way to  
3 appeal this. This is, in essence, our final decision.

4 And the court in *Smoke* said if you send a letter to an  
5 applicant that clearly tells them that this is a  
6 consummation of the administrative process, that no more  
7 administrative process is due or available, at that point  
8 you can use that letter as the final decision because  
9 there's nothing that can come after that for the applicant.

10 In our case, it was entirely different. Our letter  
11 said, this is not final. This is not a consummation. If  
12 you want to consummate this -- this whole process, you need  
13 to appeal and you will get a final decision. In those  
14 words, "you will get a final decision". The -- quote,  
15 unquote, "a final decision" from the Hearing Examiner. And  
16 in almost all the cases you see, that is the final  
17 decision. Sometimes it's a decision beyond the Hearing  
18 Examiner. But most of the cases it's -- it's the Hearing  
19 Examiner's decision.

20 There's the outlier, which is *Smoke*, where you had a  
21 letter and there was no -- no process available after that.

22 THE COURT: So here, though, obviously the parties  
23 disagree about what constitutes the final decision. And  
24 the Appellant here is saying we were precluded from arguing  
25 our theory at trial because of the motion in limine being

1 granted and that basically gutted any argument about the 30  
2 feet versus the eight.

3 MS. ELOFSON: Two responses to that, Your Honor.  
4 First off, it didn't gut the case and it didn't prevent  
5 that testimony from being heard by the trial court. And as  
6 I quoted in my brief, the trial court says, well, I don't  
7 know what you're doing. You obviously are all gonna argue  
8 all of this anyway.

9 There were days of testimony on 30 versus eight and  
10 how the error of 30 got into the declaration -- the second  
11 declaration of Peter Huffman. And by the way, it's  
12 important to note, 30 never made it into those  
13 declarations. That was the whole problem is there were  
14 square footages. Had some -- had one of those declarations  
15 said eight feet or 30 feet, the error probably would have  
16 been caught.

17 Those declarations had square footage amounts in it.  
18 And it just --

19 THE COURT: So the City's error would have been  
20 caught?

21 MS. ELOFSON: Yes. And in fact, as Mr. Huffman  
22 testified at both at deposition and at trial, he didn't  
23 even know that the error had occurred until he was at his  
24 deposition in this case and it was pointed out to him that  
25 well, your second declaration has a square footage that if

1 you divide it out would be 30 feet. And he says, it was  
2 always eight feet. We went down to eight feet. That's the  
3 memo we sent him.

4 And as I pointed out in my briefing, the  
5 administrative record that Judge Martin looked at at the  
6 LUPA hearing was full of references to eight feet. And  
7 those references were by the Church. They knew it had gone  
8 down to eight feet, too.

9 Later on when the error was discovered, it all of a  
10 sudden became, oh, you were -- you did a bait and switch.  
11 You were arguing for 30 feet. Well, why? No, there was no  
12 bait and switch. There was an error. This was thoroughly  
13 explored. We had almost a full day of testimony from  
14 Attorney Jeff Capell for the City who drafted that  
15 declaration for Huffman's signature about how that error  
16 got made. And that no, we never went back. And it was  
17 always eight feet.

18 That's what -- Plaintiff says, well, we -- we  
19 convinced the LUPA judge that it was eight feet. No, the  
20 LUPA judge, if you look at the transcript, the LUPA says --  
21 the LUPA judge said on her own, "I thought it was eight  
22 feet. What am I missing here?" And at that point, the  
23 City Attorney said, "Yes, it was eight feet."

24 Nobody tried to pull the wool over anybody's eyes on  
25 that.

1 THE COURT: So then what was the effect at trial of  
2 the motion in limine if they could argue their theory  
3 anyway?

4 MS. ELOFSON: There was none. The Court went ahead  
5 and allowed all of that evidence to come in. And the other  
6 thing -- the reason that it didn't matter is as Counsel for  
7 the Church has said in his briefing, the point of eight  
8 versus 30, the Church's theory is that eight is more  
9 palatable. It looks less constitutionally infringing than  
10 30. It makes us look like a little bit less of a land  
11 grabber than we are.

12 Well, the truth is eight versus 30 wouldn't have  
13 mattered in terms of the constitutional violation. And the  
14 trial -- the LUPA judge found that. She said -- and  
15 Counsel for the Church argued to the LUPA judge eight  
16 versus 30 is irrelevant.

17 THE COURT: So --

18 MS. ELOFSON: It doesn't matter the size.

19 THE COURT: -- okay --

20 MS. ELOFSON: And he said the same thing to the trial  
21 court judge. Eight versus 30 is irrelevant. So the fact  
22 that he's now saying that it gutted his case is contrary to  
23 the way that he presented it to the trial court.

24 THE COURT: So at what point did the City conclude  
25 that it should be eight feet?

1 MS. ELOFSON: In -- long before the final decision, it  
2 was a memo that went out in March. Director Huffman's  
3 letter went out the next month in April. And the Hearing  
4 Examiner was in July. So it was eight. But the rest of  
5 the conditions remained on it. And it wouldn't have  
6 mattered if it was eight versus 30 because the Church  
7 admitted at trial no condition whatsoever was going to be  
8 acceptable to them. They were going to argue that there  
9 was a violation regardless of what the -- what the  
10 condition was. That they should have none.

11 So we had already told him in March, no, all the other  
12 conditions remain. But you can go down to an eight foot.  
13 That's the minimum that's required for safety to let people  
14 walk by, to not force people into the street, to allow  
15 firetrucks to get by and around that corner, we need to  
16 have a small amount of right of way. You can't build out  
17 to that corner and block it off. You can't plant trees out  
18 to the corner and block it off that way, which doesn't  
19 require a building permit or a setback.

20 Um, so they knew back then. And that's why they're --  
21 the materials that the Church submitted both to the Hearing  
22 Examiner and to the LUPA court referenced eight feet. The  
23 unfortunate fact was that the error hadn't been yet  
24 discovered that the second declaration of Peter Huffman  
25 included an inaccurate square footage calculation.

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THE COURT: Your time is up, Counsel.  
MS. ELOFSON: Thank you.  
(END EXCERPT AT 45:43)



# GOODSTEIN LAW GROUP PLLC

March 09, 2018 - 3:30 PM

## Transmittal Information

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 49854-5  
**Appellate Court Case Title:** Church of the Divine Earth, Appellant v. City of Tacoma, Respondent  
**Superior Court Case Number:** 14-2-13006-1

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