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Division II
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No. 96613-3

NO. 49854-5-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

CHURH OF THE DIVINE EARTH

Appellant,

v.

CITY OF TACOMA,

Respondent.

RESPONDENT'S SUPPLEMENTAL BRIEF

WILLIAM B. FOSBRE, City Attorney

MARGARET A. ELOFSON
WSB# 23038
Attorney for Respondent

Tacoma City Attorney's Office
747 Market Street, Suite 1120
Tacoma, Washington 98402
(253) 591-5885

Respondent City of Tacoma submits this supplemental brief for the sole purpose of responding to the Church's allegations that the City's attorney misrepresented the record and committed a fraud on the Court at oral argument.

The Church contends that at oral argument the City "claimed for the first time that the City changed its mind before the April 28 Letter Decision of Huffman in a memo between staffers sent out in March." Appellant's Motion to File Supplemental Brief at 2-3. That is incorrect. The City's argument all along has been that the Kammerzell memo of March 5, 2014, which contained the reduced right-of-way dimension of eight feet, was attached to and a part of the City's response to the Church's request for a waiver of all conditions. The City has never contended otherwise. And, the City's brief expressly discussed the reduced dedication being a part of the Kammerzell memo while refuting any argument that the March 5 memo was the final decision. See, e.g. Respondent's Brief, p. 54 ("The Church also argues that the March 7, 2014 letter and memo should not be interpreted as constituting the 'final decision' of the City. Again, the City agrees. The final decision is the hearing examiner's decision."). While the memo altered the development conditions the City was placing on the Church's application, and

was later incorporated into the final decision, it was not the final decision in this case and the City has never contended that this was the final decision. The Church's current assertion that the City made this argument for the first time at oral argument is simply wrong.

In its supplemental briefing the Church also argues that the City continued to seek a thirty foot dedication and that "[a]ny other contention is a fraud on the Court." Supp. Brief, at 3. The Church also contends that the City's attorney misrepresented at oral argument the fact that the Hearing Examiner and Deputy City Attorney Capell understood that the City had reverted to a 30 foot dedication requirement, not eight feet. Supp. Brief., p. 3. Again, this is incorrect.

There was significant testimony at trial about the City's decision to reduce the right of way requirement to eight feet because that was the bare minimum that would allow for safe passage. See, e.g., RP 801-803 (Kingsolver); RP 1035-36 (Huffman); RP 1066-69; 1090 (Kammerzell). Moreover, unchallenged Finding of Fact No. 18 states that the "reduced dedication requirement was approved by the director of Ms. Kammerzell's department, Kurtis Kingsolver, Public Works Director and City Engineer. Mr. Kingsolver and Ms. Kammerzell 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. Only the building official, David Johnson, and the Public Works Director/City Engineer, Kurtis Kingsolver, could authorize the reduction of the right of way because the reduction meant that the roadway would deviate from the City’s standards for roadway design. RP 1068; RP 910-13; RP 922. Ms. Kammerzell obtained authority for the reduction and it was incorporated into the City’s response to the Church’s request for a waiver of all development conditions. These facts have been established through documentation and testimony ever since discovery began in the case. Reciting these facts at oral argument did not constitute a fraud on the Court.

The Church also continues with its allegations that the City lied about the fact that the dedication sought by the City was changed to eight feet from thirty feet. Supp Brief, at 4. The Church states that “the City Attorney decided to double down on the erroneous eight foot language interlineated by the Court at the City’s request.” Supp. Brief, at 4. That is incorrect. The City did not request that the court interlineate the Church’s order. The court stated,

THE COURT: I have slightly modified this order. I made it 8-foot rather than 30-foot because I believe that the record was it was an 8-foot, although it was originally 30 foot.”

CP 567. The court indicated it had read the administrative record, which included documents submitted by the Church, which reflected the change to eight feet.

The Church contends that the City misrepresented to the Court that the Kammerzell memo also eliminated the sidewalk requirement in favor a pedestrian pathway. Supp. Brief, at 3. However, that fact is clearly stated in the memo itself. In addition, Ms. Kammerzell testified to this at trial. RP 1066-67; 1097; 1100-01.

The Church also contends that the City’s attorney misrepresented at oral argument that one of the bases for imposing the dedication requirement was consideration of “foot traffic.” Supp. Brief, at 3. However, Finding of Fact No. 3 was not challenged by the Church and it states that City staff “considered the impacts created by the proposed development, including to pedestrian traffic.” CP 2401. Given that this is a verity on appeal, the City’s attorney did not misrepresent anything by repeating it.

As to the City's error in the Huffman declaration which contained a square footage that, if calculated out, would match a 30' dedication, the Church contends that "to say this was an error is a lie." Supp. Brief, at 7. However, the error was thoroughly explored by both Judge Martin and Judge Hogan and they firmly rejected that there was any lying. At trial, both Peter Huffman and Jeff Capell were questioned at length about the error and explained how it came about, as well as why it was not relevant to the Church's litigation. See, Huffman testimony at RP 547 -54; 566- 77; 581-83; 585-87; 597-98; 1042-47; Capell testimony at RP 637-49; 654-85. The Church also claims that if it was an error, the City should compensate the Church for the error. However, such an error is not compensable under RCW 64.40, and Mr. Kuehn testified at trial that the size of the dedication was not relevant. RP 465

The Church makes the statement that the "Letter Decision of April 28, and only that decision, fit code criteria for a final decision." Supp. Brief, at 2. There is no explanation of this statement and it is unclear what is meant by it particularly since it ignores the portion of Mr. Huffman's letter containing the Code provision that provides for an appeal and for obtaining a final decision. No amount of capitalizing and repeating of the Church's phrase, "Letter Decision"

can transform Mr. Huffman's correspondence into a final decision, especially when the contents of the correspondence expressly refute such a connotation. Though the Church has continued to refer to the Huffman letter as the final decision throughout this litigation, that is contrary to the City's arguments throughout this lawsuit and is contrary to the decisions of the superior courts. See e.g., CP 547-48 (Hon. Elizabeth Martin); CP 2407 (Hon. Vicki Hogan).

The Church claims that at oral argument the City for the first time "disowned any claim that a thirty foot exaction can be justified." Supp. Brief at 3. Again, that is incorrect. At trial, City management staff testified that they felt that the original 30 foot dedication request was excessive and might not be proportional to the Church's project. RP 772 (Kingsolver); RP 907-15 (Johnson); RP 1034 (Huffman). That is what led to the reduction in the amount of right of way being required. Id. Then, both at trial and on appeal, the City argued that decisions made during the application process, even if arbitrary, cannot serve as a basis for a claim under RCW 64.40. An agency can correct its errors prior to the final decision without liability under RCW 64.40. See, Respondent's Brief, at 55-60. See also, Brower v. Pierce County, 96 Wn. App. 559, 566, 984

P.2d 1036 (1999). The City did not disown the 30 foot dedication
for the first time on appeal.

Dated this 4th day of April, 2018.

WILLIAM A. FOSBRE, City Attorney

By:



Margaret A. Elofson, WSBA# 23038
Deputy City Attorney
Attorney for Respondent
747 Market Street, Suite 1120
Tacoma, WA 98402
(253) 591-5885
Fax (253) 591-5755

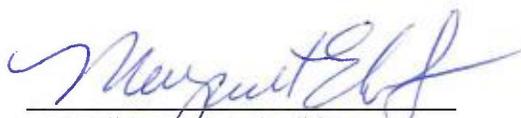
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2. Richard B. Sanders
Carolyn A. Lake
Goodstein Law Group, PLLC
510 South G Street
Tacoma, WA 98405

EXECUTED this 4th day of April, 2018, at Tacoma, WA.



MARGARET ELOFSON

CITY OF TACOMA

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