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SUPREME COURT
STATE OF WASHINGTON
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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.

PETITIONER'S SUPPLEMENTAL BRIEF

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I. INTRODUCTION

This Court has granted review of a partially published Court of Appeals Div. II decision terminating review of the Church's appeal from a trial court dismissal on "whether the City of Tacoma is liable for damages because it knew or should have known its action was unlawful."¹

This case began in 2013, when the Church applied for a single-family residential permit to build its parsonage on a previously platted lot in Tacoma. The City refused to process the application unless and until the Church deeded 30 feet from the west side of its property to the City, without compensation, to enlarge an adjacent right of way established over a century ago. The purpose of the exaction was to make the right of way uniform with the right of way adjacent the property immediately to the south. However, widening the preexisting right of way for the sake of uniformity had no relation to construction of the proposed parsonage. Moreover, the City had no plans to widen the existing road in any event.

The Church refused to acquiesce, instead challenging the City's decision, first internally, then in court. In every forum, the Church argued

¹ This is a narrow issue and this brief attempts to address it; however to the extent other issues overlap the court is asked to broaden review to properly address them. Moreover, the trial court's denial of the Church's motion to amend its complaint to add a 42 USC 1983 claim a year before trial as "futile" is based on the same facts and law as the designated issue. The Church requests the Court broaden review to address that issue—otherwise the Church has no opportunity to litigate this constitutional cause of action.

that the refusal to grant the permit was an unconstitutional condition because (1) the exaction had no nexus to the proposed construction of a parsonage and (2) the City had no plans to widen the road in any event. The Church relied upon *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987) and related authority.

First, the Church pursued an internal administrative procedure seeking waiver of the condition by the Director of the City's Department of Planning and Development Services, Peter Huffman. Director Huffman denied the petition in its entirety. An administrative appeal followed to the City's Hearing Examiner. The Director moved for summary judgment based on his Amended Declaration of July 9, 2014, justifying the 30-foot exaction by claiming solely it was necessary to make the preexisting right of way uniform. The Hearing Examiner granted the City's motion, incorporating the Amended Declaration of Huffman to affirm that 30-foot exaction condition to the Church's permit.

The Church's appeal under the Land Use Petition Act (LUPA) to the Pierce County Superior Court followed. At oral argument the City argued for an 8 foot exaction, rather than 30 feet; however on February 19, 2015 Judge Elizabeth Martin of the Pierce County Superior Court

concluded the square footage did not matter² and granted the appeal, finding the due process rights of the Church had been violated by this unconstitutional condition, ordering the permit to issue.

Thereafter the Church sought to recover damages against the City pursuant to RCW 64.40.020. The matter went to trial where the City refused to defend the 30-foot condition claiming such a large swath of land was excessive, unreasonable and mistaken RP 772, exclusively attempting to defend an eight-foot condition, expressly *rejecting* the actual 30 foot condition.

The City knew that the 30-foot exaction was not proportional and has said so at several points in the record. The Hearing Examiner's decision was to require a 30-foot exaction in exchange for granting the permit. The City knew that exaction was not proportional and therefore knew it was unconstitutional, meeting the requirements of RCW 64.40.

II. ISSUE

Is the City of Tacoma liable for damages because it knew or should have known its action was unlawful?

² That is exactly what Ms. Elofson argued to the Court of Appeals: "Well, the truth is eight versus 30 would not have mattered in terms of the constitutional violation." Appellant's Supp. Brief in COA with Excerpt of Verbatim Report of Proceedings p. 19

III. STATEMENT OF THE CASE

The Church originally filed this action in the Pierce County Superior Court to obtain Land Use Petition Act (LUPA) and RCW 64.40 relief against the City of Tacoma for improperly conditioning a building permit. The permit was for a replacement³ single family residential parsonage conditioned upon an uncompensated dedication of thirty feet of Church land adjacent to “B” Street to make the adjacent right of way “uniform” with property to the south. P 46, 50⁴

While it is true the right of way was not “uniform,” that condition arose over a century before at the time of original platting and had no nexus to construction of the proposed parsonage. Moreover, the City had no plan to widen the existing road in any event. RP 782, P142 p.25

Pastor Terry Kuehn, on behalf of the Church, filed a request that the City’s Director of Planning and Development (Peter Huffman) waive the proposed permit conditions P57, as suggested⁴ by a City employee. Only the Director could grant a waiver under the Tacoma Municipal Code (TMC). Pastor Kuehn followed that up with eleven supplements e.g. P58 p.6, P66 p.3, P77 p.5 citing chapter and verse various land use decisions of

³ The parsonage was simply a replacement for a prior single-family residence built in 1909, demolished within six months of the Church’s purchase of the property. RP 20, 234, 468, 469

⁴ Exhibits introduced by plaintiff Church begin with “P,” those from the City begin with “A.” P135-43 are deposition excerpts received into evidence.

the United States Supreme Court and state appellate courts holding a permit condition is an invalid “unconstitutional condition” if the government fails to carry its burden to prove the proposed condition was necessary to correct a problem caused by the proposed development (nexus) and the condition is proportional. Neither the staff nor Director Huffman bothered to read what the Church had submitted. P141 p.19 Of course, here there was no nexus because the right of way had been established more than a century earlier. A permit to construct a parsonage to which the Church was otherwise entitled simply invited an attempt by the City to extort⁵ land from the Church.

On March 7, 2014 a City staffer, without authority to change the condition P190 p.14 suggested by memo that the exaction be reduced to eight feet. P75 However, Director Huffman never saw the memo prior to his “final decision” of April 28 which denied all waiver requests P141p.72 and informed the Church it had two weeks to file an administrative appeal or be bound by his final decision. P84, P141p.31 The Church timely filed that appeal.

The matter proceeded on administrative appeal to the City’s Hearing Examiner who invited cross motions for summary judgment,

⁵ Without an essential nexus “the building restriction is not a valid regulation of land use but ‘an out and out plan of extortion.’” *Nollan v. California Coastal Commission*, 483 U.S. 825, 837, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987)

which the parties filed. The City's original motion stated it needed eight feet⁶ to make the right of way uniform (which of course it wouldn't). Simultaneously, the City sent Pastor Kuehn a legal description for thirty feet, not eight. Pastor Kuehn responded to Deputy City Attorney Jeff Capell asking the legal be corrected to conform to the motion. P97, P100 Capell responded by email that it was "my error" P100 and filed an Amended Motion and Amended Declaration of Peter Huffman P98, **App. 2**, emphatically correcting the prior motion and declaration to call for thirty feet or its area equivalent to make the right of way uniform.⁷

The Hearing Examiner granted the City's motion P105, CP 9, 17, **App. 1** (p.9), and imposed the thirty-foot exaction by express reference to the July 9, 2015 Amended Declaration of Huffman. P98, **App. 2** This is all in writing and cannot be disputed.

Later, during CR 30(b)(6) discovery depositions, Mr. Huffman and Mr. Capell each testified under oath *but for* the Church's successful LUPA appeal they would have enforced the thirty-foot exaction against the Church. RP 582

⁶ Or equivalent square feet, i.e. 82.4 feet length x 8 feet width = 659.2 sq. ft.; 82.4 feet length x 30 feet width = 2,472 sq. ft; CP 142, Huffman Dec. of 7/3/14 P96

⁷ "...the City is now merely requiring appellant to dedicate an area of approximately 2,472 sq. ft. at the front of the Subject property 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 showing current configuration of the Subject Property)."

The Church filed a LUPA appeal from the Hearing Examiner decision. CP 1 This appeal was ultimately determined on the administrative record by Judge Elizabeth Martin on February 19, 2014. **App. 3**, CP 275 Prior to that the City filed a responsive brief CP 230 and, on the day before oral argument, filed a further response. CP 272 Both of the City's briefs referenced the decision as thirty feet or the square foot equivalent, including the one filed the day before the oral hearing which relied on the amended Huffman declaration. CP 272

As the record shows, oral argument was going against the deputy city attorney: there was no nexus between a 30 foot right of way dedication requirement (which the City had no plan to buildout in any event RP 782, P142 p.25) to make the right of way uniform and building a parsonage. Capell responded three times on the record RP 14, 26, 32 to the court's questions that the exaction "is only 8 feet now" RP 14, arguing the smaller width was "proportional." The Church's attorney, without any prior notice or even hint the City would misrepresent the Hearing Examiner decision, stated it was indeed 30 feet; however, whatever the size, there was no nexus between a century old right of way and building a parsonage to justify the dedication condition. RP 15 The court agreed, found the exaction condition was an unconstitutional condition and consequent due process violation; however, crossed out the reference to 30

feet and interlineated eight. RP 32, **App. 3** The Church won the LUPA appeal and therefore was not an “aggrieved party” entitled to appeal. RAP 3.1.

Nevertheless, your undersigned called Jeff Capell and asked him to agree to correct the eight feet interlineation (based on his oral argument) to thirty for the sake of accuracy. He returned the call on a speaker phone with Margaret Elofson present. Your undersigned asked Mr. Capell to agree to correct the order. He said it did not affect the result of the LUPA hearing.⁸ Ms. Elofson was then overheard telling him to be silent. She said put it in writing, which was done in the form of a letter to City Attorney (now city manager) Elizabeth Pauli who belatedly responded she was familiar with the facts and refused to correct anything. CP 2469-75

The matter proceeded to trial on the 64.40 claim in May 2017. The trial judge (now Judge Vicky Hogan) concluded the eight-foot interlineation in the LUPA judgment collaterally estopped the Church and the Court RP 297, 345, and precluded the Church from even offering evidence the Hearing Examiner decision called for thirty feet, not eight, entering an order in limine to that effect. CP 1927 During the trial the *City*

⁸ It *should not* have mattered based on Judge Martin’s ruling that the width of the unconstitutional condition was not determinative as *any* width lacked nexus between widening the right of way and building a parsonage, nor did the City intend to widen the street in any event.

claimed the “initial” thirty-foot decision was excessive, unreasonable and mistaken RP 772, exclusively defending an eight-foot condition while expressly *rejecting* the actual 30-foot condition. Neither Huffman nor Capell ever withdrew it in the administrative appeal. RP 645

The Court of Appeals affirmed all around in a partially published opinion. That Decision expressly held:

Because the TMC provides for an administrative appeals process, the city’s permit decision was not final until that administrative appeals process concluded. Accordingly, the hearing examiner’s decision was the final decision by the City that is actionable under RCW 64.40.020.

Decision para. 65

However, if the “final decision” of the City is the Hearing Examiner’s decision of August 19, 2014, what was that decision and why? That is the most fundamental fact upon which the Church’s petition was premised; however, the 32 page Decision never discloses the nature of that decision much less its rationale.⁹

IV. ARGUMENT

RCW 64.40.020 establishes a cause of action for damages against an agency for unlawful actions provided:

⁹ Isn’t it sad the Court of Appeals would rather cover up than callout dishonesty in the courtroom?

That the action is unlawful...only if the final decision of the agency was made with knowledge of its unlawfulness...or it should have been known to have been unlawful...

Therefore, the ultimate issue here is whether the City imposed the exaction condition with (1) knowledge of its unlawfulness and /or (2) it should have known it was unlawful.

However, the Conclusions of Law entered by the trial court finessed the statutory criteria by concluding the City “reasonably believed” the condition had a nexus to the project and was proportional; and “did not know” the *Superior Court* would conclude the condition would violate the *Nollan/Dolan* doctrine. Neither the Findings nor the Conclusions address the stand-alone constitutional violation of having no plan to build out the right of way in any event. The Church submits the statutory criteria is otherwise and these conclusions on their face do not even support the judgment of dismissal.

A. Standard of Review

Conclusions of Law are reviewed de novo. *Morello v. Vonda*, 167 Wn. App. 843, 848, 277 P.3d 693 (Div. 2, 2012) “Generally, the failure of the trial court to make an express finding on a material fact requires that the fact be deemed to have been found against the party having the burden of proof.” *Crites v. Koch*, 49 Wn. App. 171, 176, 741 P.2d 1005 (Div. 3, 1987) Here the City has the burden to prove the permit condition complies

with *Nollan. Dolan*, 114 S. Ct. at 2320 n. 8 (“in this situation the burden properly rests with the city. See *Nollan*, 483 U.S. at 836”) and the city has the burden to overcome the presumption it knew the law. (See item C)

B. City Liability for Unconstitutional Condition is Clear

The unlawfulness question was answered when Judge Elizabeth Martin entered final judgment on February 19, 2015 holding the City’s dedication condition was an unconstitutional condition under *Nollan* and related cases.¹⁰ The City failed to carry *its burden* to prove *Nollan* had been satisfied. *Dolan*, 114 S. Ct. at 2320 n. 8 (“in this situation the burden properly rests with the city. See *Nollan*, 483 U.S. at 836”) That judgment was not revisited by the trial court and collaterally estopped the City from denying its action was unconstitutional. *Lutheran*, 119 Wn.2d at 115-116 Judge Martin’s conclusion the City violated *Nollan* was based on two independent considerations: (1) there was no nexus to any problem caused by construction of the single family residence which replaced a previous single family residence recently demolished; and (2) if there was a problem created by the development, the exaction of additional right-of-

¹⁰ See e.g. *Dolan v. Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994); *Koontz v. River Water Management District*, 133 S. Ct. 2586, 186 L. Ed. 2d 697 (2013); *Unlimited v. Kitsap County*, 50 Wn. App. 723, 750 P.2d 651 (1988), rev. denied, 111 Wn.2d 1008 (1998); and *Burton v. Clark County*, 91 Wn. App. 505, 958 P.2d 343 (1998), rev. denied, 137 Wn.2d 1015 (1999)

way was no solution because there was no current plan to build out the right-of-way in any event. *Burton*, 91 Wn. App. at 525-529, *Unlimited*, supra. As to the second prong, the Court of Appeals, as well as trial court Findings and Conclusions, simply ignored this fundamental shortcoming. As illustrated by the LUPA decision, whether the exaction was 8 feet or 30 the legal result is a constitutional violation.

As set forth in the LUPA judgment P116 the City violated the doctrine of unconstitutional conditions. This doctrine is an aspect of due process. It is ripe immediately. *Mission Springs*, 134 Wn.2d 947, 964-5, 954 P.2d 250 (1998) Mark Fenster, *Substantive Due Process by another Name; Koontz, Exactions, and the Regulatory Takings Doctrine*, 30 *Touro L. Rev.* 403, 415: “The entire field of exactions now, apparently, falls under the unconstitutional conditions doctrine rather than the Takings Clause.” Richard A. Epstein, *Unconstitutional Conditions, State power, and the Limits of Consent*, 102 *Harv. L. Rev.* 4, 11 (1998): “[The doctrine of unconstitutional conditions] has found expression in decisions under the equal protection and the due process clauses. [citing cases]”

The doctrine is designed to avoid government extortion:

By conditioning a building permit on the owner’s deeding over a public-right-of-way, for example, the government can pressure an owner into voluntary giving up property for which the *Fifth Amendment* would otherwise require just compensation [citing cases]...Extortionate demands of this sort frustrate the Fifth

Amendment right to just compensation, and the unconstitutional conditions doctrine prohibits them.

Koontz, 133 S. Ct. at 2594-95 Although not a taking as such because nothing was taken, “the impermissible denial of a governmental benefit is a constitutionally cognizable injury.” *Id.* 2596

RCW 64.40 recognizes causes of action for arbitrary *or* capricious government actions *or* actions that are unlawful *or* deprive a property owner of his or her constitutional rights. RCW 64.40.020; *see also*; *Mission Springs*, 134 Wn.2d at 961-62 (arbitrary and capricious acts actionable under RCW 64.40); *Sintra v. Seattle*, 119 Wn.2d 1, 22, 829 P.2d 765 (1992) (deprivation of due process actionable under RCW 64.40).

Local government’s imposition of a permit condition which violates RCW 82.02.020¹¹ will also support a claim for damages and attorneys’ fees under RCW 64.40. *See, e.g., Sintra; Isla Verde Int’l Holdings, Ltd. v. City of Camas*, 147 Wn. App. 454, 460-61, 464-65, 196 P.3d 719 (Div. 2 2008) (“*Isla Verde IP*”); *Cobb v. Snohomish County*, 64 Wn. App. 451, 459-60, 829 P.2d 169 (1992) *rev. denied*, 119 Wn.2d 1212; *Ivy Club Investors Ltd. P’ship v. City of Kennewick*, 40 Wn. App. 524,

¹¹ “...no county, city, town, or other municipal corporation shall impose any tax, fee, or charge, either direct or indirect, on the construction or reconstruction of residential buildings...However, this section does not preclude dedications of land...which...the city...can demonstrate are reasonably necessary as a direct result of the proposed development...to which the dedication of land...is to apply.”

531, 699 P.2d 782 (1985). In all these cases local government acted under authority of a regulation, the application of which was later determined to be invalid (either facially or as-applied).

A local government's imposition of unlawful fees or conditions on a permit application constitutes an unlawful act under RCW 64.40, regardless of whether the act was authorized by a local regulation in force when the act occurred. *See Isla Verde II*, 147 Wn. App. at 464-65; *View Ridge Park Assocs. v. Mountlake Terrace*, 67 Wn. App. 588, 603, 839 P.2d 343 (1992), rev' denied 121 Wn.2d 1016; *Ivy Club*, 40 Wn. App. at 531 Enforcement of a regulation that is oppressive or unlawful constitutes an unlawful act under RCW 64.40, regardless whether the regulation is determined unlawful after the act is complete. *See, e.g., Mission Springs*, 134 Wn.2d at 961-62; *Sintra*, 119 Wn.2d at 22; *West Main*, 106 Wn.2d at 50-53. Same also violates RCW 82.02.020 and TMC 13.05.040, both of which incorporate the *Nollan* nexus standard into statute and code.

C. The City *knew* the condition to make a preexisting right of way uniform was unlawful

The Court of Appeals agreed with the City that the "final" decision of the City for the purpose of RCW 64.40 was the Hearing Examiner Decision. That Decision, and the basis for that decision, is in the record and beyond doubt: it required a 30 foot exaction to make the century old

right of way “uniform.” The trial court correctly concluded that rationale was an unconstitutional condition whether it called for 8 feet, 30 feet or one inch. It simply lacked nexus to the proposed construction of a parsonage. Moreover, the City had no plans to build out the road in any event. It was simply extorting the Church to bank its land to avoid paying the just compensation required by the Fifth Amendment.

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 there newly requested 8-foot exaction. The City *knew* it acted unlawfully but did it anyway. The whole trial was a phony attempt by the City to lie about the true final decision of the City in an attempt to justify a decision it didn’t make. Unfortunately, the Court of Appeals didn’t call this out but covered it up. Hopefully this Court can do better.

Although the record in this case demonstrates the City had actual knowledge of its unlawful behavior, the case law establishes a *presumption* the city knows the law in any event. Therefore, the City should have the burden to overcome the presumption.

Whether the final decision of the agency was made with knowledge of its unlawfulness or in excess of lawful authority, or should reasonably have been known to be such, should be determined in the

affirmative as a matter of law because the City is *presumed* to know the law. *See, e.g., State ex rel Dungan v. Sup'r Ct.*, 46 Wn.2d 219, 279 P.2d 918 (1955) (City officials are presumed to know the law); *Hutson v. Savings and Loan*, 22 Wn. App. 91, 98, 588 P.2d 1192 (1978) (“The presumption that people know the law...In the civil area, most cases wherein the presumption is applied concern dealings with a governmental entity such as a municipal corporation [citing cases]”)

D. The City *should have known* its action was unlawful

This criterion raises a question of law to be reviewed *de novo*; however, the Court of Appeals treated it as a factual question. Moreover, the Court’s reasoning on this point (paragraph 53) is not based on the Hearing Examiner’s “final” decision but on conclusory testimony from City employees who rejected that decision. Nor does it account for the City’s unconstitutional failure to have a plan to widen the road in any event. *See Burton*, 91 Wn. App. At 525-29 and *Unlimited*, *supra*

By dictionary definition “should” “ordinarily implie[s] duty or obligation.”¹²

The reciprocal of “should have known” is “should not have known.” To claim a government agency “should not have known” the law

¹² *Black’s Law Dictionary* 1237 (5th ed. 1979)

seems ridiculous. Everyone “should” know the law, and certainly private parties are held to this standard mercilessly: ignorance of the law is no excuse. It is the job of the government to know the law because it made it and administers it. By the plain language of the statute the government “should,” at least, know the law. If it is a close call, the government *should* act at its peril: respecting individual rights is paramount. This is an objective test. City land use officials (and their lawyers) “should” know the law, shouldn’t they?

The only suggested bright line rule consistent with this statute is that the government “should” know the law. If it doesn’t, it is liable.

However as illustrated by the trial court’s Conclusions of Law it did not apply an objective test or even a coherent one. Rather Conclusion 4 says the City “reasonably believed” the condition had a nexus to the project and was proportional. This doesn’t square with the Hearing Examiner Decision or the Amended Declaration of Huffman dated July 9. These documents tell us *exactly* what the City did and why. Neither the trial court nor the Court of Appeals properly applied the statutory test of “should have known” the law. Their analysis sounds more like a good faith test; although as stated above, the City admitted on the record its final decision of the Hearing Examiner was unjustifiable. Conclusion 5 is equally flawed: The City did not reasonably know its dedication of right

of way condition “would be considered violative (sic) of *Nollan/Dolan* by the Superior Court.” If predicting what a judge is going to do is the test, few could pass it (certainly not your undersigned). These Conclusions of Law do not support the judgment of dismissal on their face which requires reversal.

V. CONCLUSION

The conclusion is inescapable that the City *both* knew *and* should have known its extortionate attempt to seize the Church’s property through an unconstitutional condition was blatantly unlawful. Lying about the nature of the final decision was its failed strategy, but even the lie did not correct the constitutional violation. The City is presumed to know the law—it has the burden to overcome that presumption. The City also has the burden to prove the condition meets the *Nollan* nexus test. But it couldn’t carry that burden. Enlarging a right of way platted over a hundred years ago has nothing to do with building a single-family house on previously platted property. If the City has a public use and necessity to do so, it must do it the old-fashioned way: pay for it. Moreover, even if other factors were present (nexus and proportionality) the condition would be equally unconstitutional absent a present plan to actually widen the road. Land banking is unlawful.

The City *should* know the law. Who is to say it should *not*?

RESPECTFULLY SUBMITTED this 5th day of April 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:

Margaret Elofson, Deputy City Attorney City of Tacoma, Office of the City Attorney 747 Market Street, Room 1120 Tacoma, WA 98402 Email: margaret.elfson@ci.tacoma.wa.us	<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
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DATED this 5th day of April 2019, at Tacoma, Washington.

s/Deena Pinckney
Deena Pinckney

APPENDIX 1

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OFFICE OF THE HEARING EXAMINER

CITY OF TACOMA

THE CHURCH OF THE DIVINE
EARTH,

Appellant,

v.

CITY OF TACOMA,

Respondent.

FILE NO. HEX 2014-016
(CMB2013-40000209742)

ORDER ON MOTION FOR
SUMMARY JUDGMENT

THIS CASE involves an appeal by The Church of the Divine Earth (Appellant) of dedication and improvement requirements imposed by the City of Tacoma (Respondent) in connection with a building permit for a residential structure at 6605 East B Street within the City.

In this proceeding the Appellant is represented by Terry Kuehn who is a spokesman for The Church of the Divine Earth but who is not a lawyer. The Respondent is represented by Jeff Capell, Deputy City Attorney.

Procedure:

Tacoma, through its Director of Planning and Development Services, affirmed the City's requirements for dedication and improvements in connection with the proposed construction at 6605 East B Street by letter on April 28, 2014. Appellant filed a Notice of

ORDER ON MOTION FOR
SUMMARY JUDGMENT

- 1 -

City of Tacoma
Office of the Hearing Examiner
Tacoma Municipal Building
747 Market Street, Room 720
Tacoma, WA 98402-3768

ORIGINAL

1 Appeal on May 12, 2014, asserting that the requirements violated its rights under the
2 Constitution of Washington State.

3 After a telephone conference, a Prehearing Order was issued on May 23, 2014,
4 providing, among other things, for the submission of dispositive motions by July 3, 2014.
5 Pursuant thereto, Appellant filed a Motion for Summary Judgment on June 9, 2014.

6 The Respondent filed a response on July 3, 2014, amended on July 9, 2014.
7 Appellant replied to Tacoma's Response on July 14, 2014. The City replied further on
8 July 16, 2014. Appellant filed an additional reply on July 21, 2014.

9 Along with the motions and briefs, the following exhibits were submitted. With the
10 pleadings and briefs, these items constitute the record considered on the Motion for Summary
11 Judgment:

- 12 1. Tacoma Planning and Development Services Review Panel
13 Minutes, Wednesday, September 25, 2013, regarding File
14 No: CMB2013-40000209742, containing requirements for
development on new one story single-family dwelling at 6605
East B Street, Parcel No. 5860000030.
- 15 2. Tacoma Planning and Development Services's letter decision
16 of April 28, 2014.
- 17 3. Affidavit of Steven Weinman, dated June 9, 2014.
- 18 4. Assessor's Parcel Summary for 6605 E, B Street.
- 19 5. Corporations Division's registration data for Church of
Divine Earth.
- 20 6. Declaration of Peter Huffman in Support of City's Response
21 to Motion, dated July 3, 2014.

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- 7. WSBA Lawyer Search showing no listing for Terry Kuehn.
- 8. Aerial photograph and drawing of lots in subject neighborhood.
- 9. Amended Declaration of Peter Huffman in Support of City's Response to Motion, dated July 9, 2014.
- 10. Tacoma Public Works Department Memorandum (Kuntz to Kammerzell), dated March 5, 2014 regarding improvements specific to East B street, dated March 5, 2014.
- 11. Tacoma Planning and Development Services's letter (Craig Kuntz), to Terry Kuehn, dated March 7, 2014.
- 12. Various scenarios put forward by City, through July 9, 2014, for development at 6605 East B Street. (Exhibit E to Appellant's Amended Reply dated July 14, 2014)

Uncontested Facts:

1. The Appellant's proposal is to build a single-family residence at 6605 East B Street in Tacoma. The property is owned by The Church of the Divine Earth. The proposed residence is to be used as a "parsonage" for the church and not to conduct religious services.

2. The Appellant church describes itself as "a non-denominational solemn spiritualistic earth-centered Baltic-influenced Pagan church," and as "a religion that focuses on the sanctity of trees, rivers, stones and other outpourings of the gods and the veneration of ancestors." It is a non-profit corporation registered with the State of Washington.

3. On September 20, 2013, the Appellant, through its representative Terry Kuehn, applied for a single-family residential building permit for 6605 East B Street. Mr. Kuehn is not an attorney. In its review, the City proposed a number of permit conditions pursuant to

1 Tacoma Municipal Code (TMC) Section 2.19, including dedication of right-of-way and
2 construction of frontage improvements.

3 4. Discussions ensued, eventuating in the issuance of a letter decision dated
4 April 28, 2014, from the City. In it, the City declined to issue the permit without the
5 imposition of the conditions, stating that it was treating the development application like that
6 for "any similarly situated residential real property."

7 5. In its Notice of Appeal, dated May 12, 2014, the Appellant church asserted that
8 the requirements the City seeks to impose will "subject the church to substantial burdens in
9 having to destroy and decimate the sanctity of an unspecified amount of lineal footage of its
10 coveted and sacred tree line."

11 6. There are no sidewalks, curbs and gutters, or wedge curbing along East B Street
12 on either side of the street from East 64th Street to within approximately 100 feet of the
13 southwest corner of East 72nd Street (approximately 2,600 feet). This street segment
14 includes the frontage at 6605 East B Street, as well as the frontage area at 6453 East B Street.

15 7. In connection with the subject building proposal, the City initially specified the
16 following conditions of approval (Review Panel Minutes, September 25, 2013, File No.
17 CMB2013 - 40000209742):

- 18 a) Dedication of approximately 30 feet right-of-way along East
19 B Street to provide consistent right-of-way widths along East
20 B Street.
21 b) Construction of cement sidewalk along B Street and East
66th Street abutting the site.

**ORDER ON MOTION FOR
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- c) An asphalt wedge curb constructed along East B Street and East 66th Street abutting the site.
- d) Removal and replacement of any damage or cuts to the City right-of-way abutting the site. Restoration of paving abutting the site must also accommodate required asphalt curbing.
- e) Driveway access from East 66th Street, not East B Street.
- f) Submittal of street plans by a licensed professional civil engineer for review and approval following the City's work order process.

8. The residence at 6453 East B Street, approximately 480 feet north of 6605 East B Street, was permitted and constructed during the time period in which Appellant submitted its building permit application, without requirements like those required of Appellant

9. By letter dated March 7, 2014, the City denied Appellant's request for waiver of all required frontage improvements, but amended the right-of-way dedication required to that stated in the Public Works Memo of March 5, 2014. The latter reads (in part):

"After consideration of the applicant's proposed and existing improvements, the City will allow a modification of the City of Tacoma Design Manual Standards for off-site improvements on East B Street. An 8 ft dedication along East B Street would be acceptable. . . . A 5 ft pedestrian pathway adjacent to the roadway would be required within the 8 ft dedication. "

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 at the front of the Subject Property in order for the Subject Property and surrounding area to have a uniform right-of-way ('ROW') width for street frontage. . . .

1 Appellant will access the Subject Property off of East B Street, as
2 will all City services. . . .Based on a cost assessment of recent
3 property transactions and values in the area, the requested ROW
4 area for dedication is valued at approximately \$4,770.96."
(Huffman Amended Declaration of July 9, 2014.)

5 11. Through its Amended Reply to the City's Amended Response to Appellant's
6 Motion for Summary Judgment and Cross Motion, dated July 14, 2014, Appellant declined to
7 accept the City's revised requirements.

8 **Discussion**

9 ***1. Standing***

10 The City argues that Appellant lacks standing to bring this appeal, citing Ahmad v.
11 Town of Springdale, 178 Wn. App 333 (2013) and Cottinger v. Employment Security
12 Department, 162 Wn. App. 782 (2011) for the proposition that a corporation must be
13 represented in court by an attorney. However, that limitation does not apply in these
14 administrative proceedings, which are governed by the *Rules of Procedure for Hearings,*
15 *Office of Hearing Examiner, City of Tacoma*. Under Section 2.09(b) of the *Rules*, any
16 authorized person designated as a representative may speak for an association, corporation or
17 other collective entity.

18 The Examiner takes notice that laymen often speak for groups in matters of this kind
19 at this level. He concludes that Appellant has no problem with standing here.

20 ***2. Issues***

21 After reviewing all the pleadings and briefing, the Examiner has concluded that the
only issues raised in this case are Constitutional issues. The Appellant principally relies on

**ORDER ON MOTION FOR
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Article I, Section II of the Washington State Constitution which states that "no one shall be molested or disturbed in person, or property, on account of religion." The argument is simply that the proposed requirements for the dedication of property and frontage improvements constitute an unconstitutional molestation or disturbance of religious "property."

Tacoma's proposed imposition of conditions is based on *TMC 2.19.040* which addresses development standards requiring off-site improvements. Appellant argues that the ordinance, as applied to the Church's project, is impermissibly in conflict with the State Constitution and therefore cannot validly be used as the basis for the conditions.

Reference is also made to the allowance of another residence nearby along the same street front without conditions similar to those being proposed for Appellant. This appears to be a form of equal protection argument, also constitutional in nature.

Appellant contends that the Tacoma's building permit system represents "a system of individual exemptions" which it may not refuse to apply to cases of religious hardship without compelling reason, relying principally on First Covenant Church v. City of Seattle, 114 Wn.2d, 392 (1990) and 120 Wn.2d 203 (1992).

Further, Appellant asserts that the requirement for dedication of property constitutes an unconstitutional taking of private property contrary to the holdings in Nollan v. California Coastal Commission, 483 U. S. 825 (1987) and Dolan v. City of Tigard, 512 U.S. 374 (1994).

**ORDER ON MOTION FOR
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3. Jurisdiction

Administrative tribunals have jurisdiction only over matters expressly granted by legislative authority or necessarily implied. Human Rights Commission v. Cheney School District, 98 Wn.2d 118 (1982); Kaiser Aluminum v. Department of Labor and Industries, 121 Wn.2d 776 (1993). This means that unless authorized by statute or ordinance, a hearing officer may not even apply principals of common law or equity. Chausee v. Snohomish County Council, 38 Wn. App. 630 (1984). *See also*, Skagit Surveyors v. Friends of Skagit County, 135 Wn.2d 542 (1998).

The limitations on administrative jurisdiction apply specifically to deny jurisdiction over matters of substantive constitutional law. Yakima County Clean Air Authority, 85 Wn.2d 255 (1975); Grader v. Lynnwood, 45 Wn. App. 876 (1986).

4. Instant Case

No authority has been cited and the Examiner knows of none which would confer jurisdiction upon him to decide the constitutional issues raised in this case.

On the other hand, no question has been raised concerning whether the City would be acting beyond its authority in imposing the proposed conditions under the governing ordinances.

Therefore, the Examiner concludes that he is without power to decide the issues raised by Appellant. Yet, there is no contest as to whether the City's proposed conditions are consistent with the relevant City legislation. Thus, as to matters over which the Examiner does

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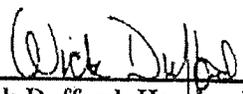
have jurisdiction, there are no issues of material fact and the City is entitled to judgment as a matter of law.

Conclusion:

The Appellant's Motion for Summary Judgment is denied. Summary Judgment is granted to the City. A building permit, subject to the conditions set forth in the Amended Declaration of Peter Huffman, dated July 9, 2014, may be issued.

The Examiner notes that the issues on which he has declined to rule may be raised before the Superior Court.

DONE this 19th day of August, 2014.



Wick Dufford, Hearing Examiner Pro Tempore

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NOTICE

RECONSIDERATION/APPEAL OF EXAMINER'S DECISION

RECONSIDERATION TO THE OFFICE OF THE HEARING EXAMINER:

Any aggrieved person or entity having standing under the ordinance governing the matter, or as otherwise provided by law, may file a motion with the Office of the Hearing Examiner requesting reconsideration of a decision or recommendation entered by the Examiner. A motion for reconsideration must be in writing and must set forth the alleged errors of procedure, fact, or law and must be filed in the Office of the Hearing Examiner within 14 calendar days of the issuance of the Examiner's decision/recommendation, not counting the day of issuance of the decision/recommendation. If the last day for filing the motion for reconsideration falls on a weekend day or a holiday, the last day for filing shall be the next working day. The requirements set forth herein regarding the time limits for filing of motions for reconsideration and contents of such motions are jurisdictional. Accordingly, motions for reconsideration that are not timely filed with the Office of the Hearing Examiner or do not set forth the alleged errors shall be dismissed by the Examiner. It shall be within the sole discretion of the Examiner to determine whether an opportunity shall be given to other parties for response to a motion for reconsideration. The Examiner, after a review of the matter, shall take such further action as he/she deems appropriate, which may include the issuance of a revised decision/recommendation. (*Tacoma Municipal Code* 1.23.140)

NOTICE

APPEAL TO SUPERIOR COURT OF EXAMINER'S DECISION:

Pursuant to the Official Code of the City of Tacoma, Section 1.23.160, the Hearing Examiner's decision is appealable to the Superior Court for the State of Washington. Any court action to set aside, enjoin, review, or otherwise challenge the decision of the Hearing Examiner shall be commenced within 21 days of the entering of the decision by the Examiner, unless otherwise provided by statute.

**ORDER ON MOTION FOR
SUMMARY JUDGMENT**

City of Tacoma
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APPENDIX 2

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BEFORE THE HEARING EXAMINER
CITY OF TACOMA

THE CHURCH OF THE DIVINE EARTH,

Appellant,

v.

CITY OF TACOMA,

Respondent.

NO. HEX 2014-016

AMENDED DECLARATION OF
PETER HUFFMAN IN SUPPORT OF
THE CITY OF TACOMA'S
RESPONSE TO MOTION FOR
SUMMARY JUDGMENT AND CROSS
MOTION

I, Peter Huffman, under the laws of the State of Washington and under penalty of perjury, declare and state as follows:

1. I am over the age of 18 and competent to testify in this matter.
2. I am currently employed as the Director of the Planning and Development Services Department of Respondent, City of Tacoma, and I have been employed in that position since January 1, 2013. I have worked for the City of Tacoma for the past 20 years approximately.
3. I have personal knowledge of the proceedings and interaction regarding Appellant's desire to build a parsonage on the real property located at 6605 East B Street in the City of Tacoma (the "Subject Property"). I personally issued the letter decision dated April 28, 2014 (the "Letter Decision") to Appellant's representative, Mr. Terry Kuehn, that is now the subject of this appeal.

APPENDIX 2

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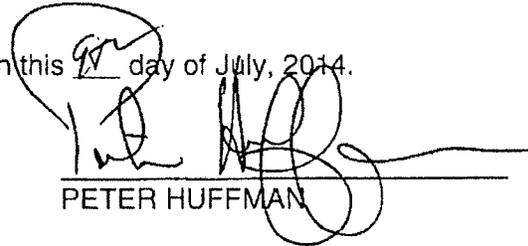
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- 4. Subsequent to issuing the Letter Decision, City staff has revised its position regarding this development and the previously required off-site improvements, and the City is now merely requiring Appellant to dedicate an area of approximately 2,472 sq. ft. at the front of the Subject Property 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 showing current configuration of the Subject Property). This dedication will allow Appellant to proceed with its needed permit applications.
- 5. Appellant will access the Subject Property off of East B Street, as will all City services. It is important to the City that the ROW in all City streets be uniform.
- 6. Based on a cost assessment of recent property transactions and values in the area, the requested ROW area for dedication is valued at approximately \$4,770.96.
- 7. Appellant has represented to the City that the Subject Property will be used only for a parsonage and not to conduct religious services. As a result, the City anticipates Appellant only needing a residential building permit and not a conditional use permit for a religious use as is required for churches, synagogues and the like.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed and dated at Tacoma, Washington this 17 day of July, 2014.



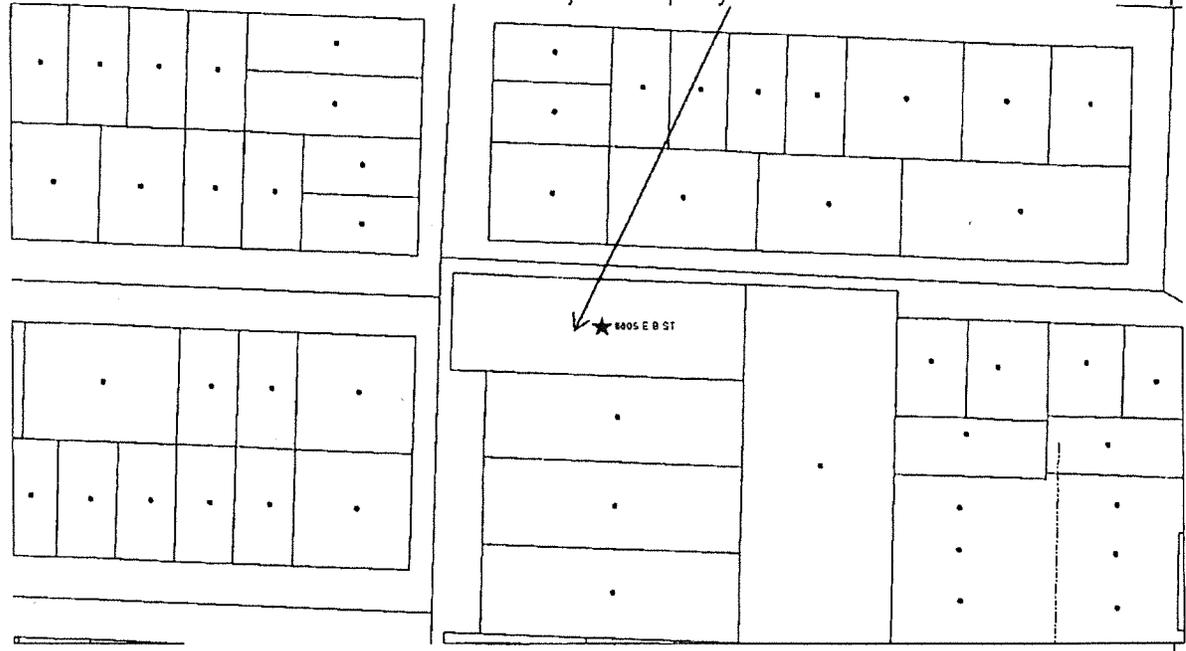
PETER HUFFMAN

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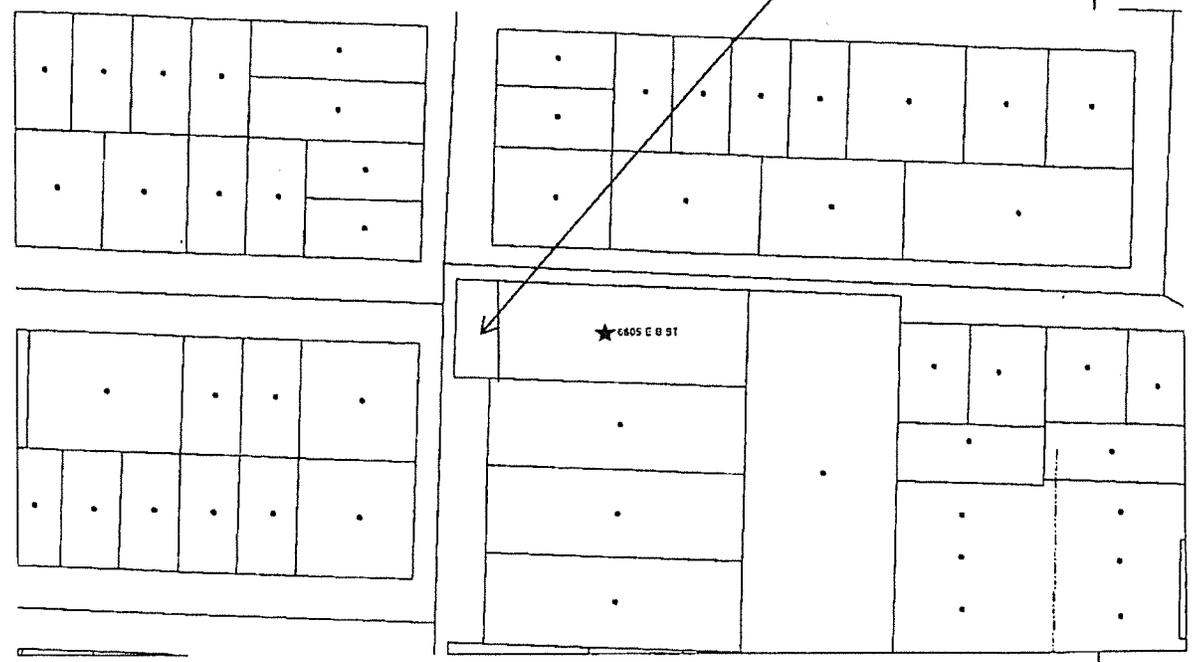
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EXHIBIT A
The Subject Property



Area to be dedicated (approximately)



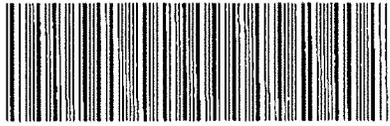
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DECLARATION OF PETER HUFFMAN IN
SUPPORT OF THE CITY OF TACOMA'S
RESPONSE TO MOTION FOR SUMMARY
JUDGMENT AND CROSS MOTION - 3

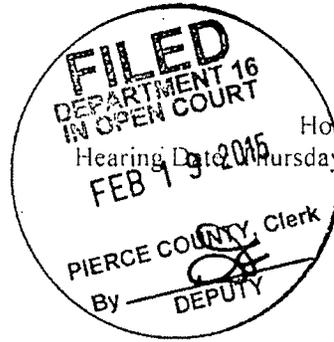
Tacoma City Attorney
Civil Division
747 Market Street, Room 1120
Tacoma, WA 98402-3760
(253) 591-5885 / Fax 591-5155 **128**

APPENDIX 3

56230135
2/23/2015



14-2-13006-1 44170313 ORRR 02-23-15



Hon. Elizabeth Martin
Hearing Date: Thursday, January 19, 2015
Time: 9:00 a.m.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR PIERCE COUNTY

THE CHURCH OF THE DIVINE EARTH

NO. 14-2-13006-1

Petitioner,

ORDER GRANTING LUPA APPEAL

vs.

CITY OF TACOMA,

Respondent.

The undersigned judge of the above entitled Court conducted a hearing on the
Petitioner's LUPA appeal, considered the administrative record, and the arguments of counsel.
Wherefore this Court does now:

ORDER, ADJUDGE, and DECREE as follows:

- This Court has jurisdiction to consider Petitioner's LUPA appeal;
 - The City of Tacoma violated the Petitioner's due process rights as secured by the Fourteenth Amendment and the Takings Clause of the United States Constitution by requiring a ^{8 foot} 30 foot dedication of land to the City as a condition to issuance of a single family residential building permit for property located at 6605 East B Street, Tacoma, Washington and by failing to carry its burden to prove the condition complied with the requirements of *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S. Ct. 3141 (1987) and related authority;
- ORDER GRANTING LUPA APPEAL.

GOODSTEIN LAW GROUP PLLC
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Tacoma, WA 98405
253.779.4000
Fax 253.779.4411

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APPENDIX 3

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3. Petitioner's appeal is GRANTED.

4. The decision of the Hearing Examiner is reversed

5. The City of Tacoma is ordered to process Petitioner's building permit application without imposing the subject dedication condition;

6. The Petitioner is awarded its taxable costs, including those costs incurred in the administrative proceeding and before this Court, in an amount to be determined; and

7. This Court finds that the entry of this judgment as a final judgment pursuant to CR 54 (b) is justified because the LUPA portion of the proceeding has been bifurcated from other pending claims by prior orders of this Court, there is no just reason to delay entry of the judgment, and this Court does now expressly direct entry of the judgment as a final appealable judgment.

Done in Open Court this 19th day of February, 2015.

Elizabeth Martin
Judge Elizabeth Martin

PRESENTED BY:

GOODSTEIN LAW GROUP PLLC

Richard B. Sanders
Richard B. Sanders, WSBA # 2813
Attorney for Petitioner

FILED
DEPARTMENT 16
IN OPEN COURT
FEB 19 2015
PIERCE COUNTY, Clerk
By *[Signature]*
DEPUTY

Approved as to form:

CITY OF TACOMA

By: *Jeff Capell*
Jeff Capell, WSBA # 45207
Attorney for Respondent City of Tacoma

ORDER GRANTING LUPA APPEAL

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Tacoma, WA 98405
253.779.4000
Fax 253.779.4411

EPH

*as it relates to taking
based on factual record & cross-motions for summary judgment here the court.*

statutory

GOODSTEIN LAW GROUP PLLC

April 05, 2019 - 4:44 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 96613-3
Appellate Court Case Title: Church of the Divine Earth v. City of Tacoma
Superior Court Case Number: 14-2-13006-1

The following documents have been uploaded:

- 966133_Supplemental_Pleadings_20190405164056SC684398_9727.pdf
This File Contains:
Supplemental Pleadings
The Original File Name was 190405.Church Supplemental Brief with Appendices.pdf

A copy of the uploaded files will be sent to:

- clake@goodsteinlaw.com
- margaret.elfson@ci.tacoma.wa.us

Comments:

Sender Name: Deena Pinckney - Email: dpinckney@goodsteinlaw.com

Filing on Behalf of: Richard B Sanders - Email: rsanders@goodsteinlaw.com (Alternate Email: dpinckney@goodsteinlaw.com)

Address:
501 South G Street
Tacoma, WA, 98405
Phone: (253) 779-4000

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