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NO. 96613-3

SUPREME COURT
OF THE STATE OF WASHINGTON

Court of Appeals, Division II, No. 49854-5-11

CHURCH OF THE DIVINE EARTH

Petitioner,

v.

CITY OF TACOMA,

Respondent.

RESPONDENT'S RESPONSE TO BRIEFS OF AMICUS CURIAE OF
PACIFIC LEGAL FOUNDATION & BUILDING INDUSTRY
ASSOCIATION OF WASHINGTON

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I. Response to Pacific Legal Foundation

Pacific Legal Foundation's (Pacific) primary argument is that "[g]overnment officials have a duty to know the law in the area of their work." Pacific brief, at 3. However, the City has never argued that it did not know the law or that it should be relieved of its obligation to know the law.

Liability under the statute requires that "the final decision of the agency was made with knowledge of its unlawfulness or that it was in excess of lawful authority, or it should reasonably have been known to have been unlawful or in excess of lawful authority." Pacific brief at 1, quoting RCW 64.40.020(1). Here, the trial court found that the City conducted multiple Nollan/Dolan analyses concerning the right-of-way dedication during the permitting process and evaluated the impacts of the project on the infrastructure (nexus) in an effort to ensure the required development conditions were not excessive (proportionality). The trial court found that the City "did not know and should not have reasonably known that its requirement for a dedication of right of way would be considered violative of Nollan/Dolan by the superior court." Conclusion of Law 5, CP 2408.

Despite this record, Pacific states that the “City acknowledged that its right-of-way demand was subject to Nollan and Dolan, but still failed to show any facts satisfying either requirement.” However, this is not accurate. It is an unchallenged finding of fact that the City staff discussed impacts created by the proposed development, including to the pedestrian traffic, vehicular traffic, parking, sidewalks, and driveway access. CP 2401 (FOF 3). “Construction of the parsonage would further impair safe pedestrian and vehicular traffic on both S. 66th Street and S. B Street.” CP 2402 (FOF 6). In addition, unchallenged finding of fact 7 established that the “City explained to Mr. Kuehn that the dedication requirement was also necessary for adequate visibility at the intersection of S. 66th Street and East B Street.” CP 2402.

The record contains abundant testimony and documentary evidence concerning the facts considered by the Superior Court when it concluded that the City had not violated RCW 64.40. Indeed, eight witnesses testified over the course of six days about the plaintiff’s RCW 64.40 claim. See RP 159- 1105 (testimony of Kuehn, Weinman, Huffman, Capell, Kingsolver, Kuntz, Frantz, Johnson, Kammerzell). To say that Division II had inadequate facts before it to analyze nexus (Brief at 7) and that the City failed to

present any actual facts upon which it based its analysis of nexus (Brief at 9), is completely contrary to the actual record in this case.

Pacific relies on a series of cases concerning the doctrine of qualified immunity in § 1983 cases. Under that doctrine, an individual governmental defendant may be shielded from liability if “their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” Harlow v. Fitzgerald, 457 U.S. 800, 818, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982)(overruling Wood v. Strickland, 420 U.S. 308, 322 (1975), which denied qualified immunity to government officials either if they “knew or reasonably should have known that their actions would violate the constitution or if they acted with malicious intent to cause a constitutional or other type of injury)). However, there are no individual defendants in this case and RCW 64.40 does not provide a cause of action against individual governmental defendants. The doctrine of qualified immunity has no application here.

However, if this court chooses to import the qualified immunity standard to determine the knowledge of the governmental agency in a RCW 64.40 case, the City amply demonstrated in its briefing and in the testimony of its witnesses a very competent

understanding of the law surrounding Nollan, Dolan, and Washington cases applying the nexus and proportionality tests. Amicus has not pointed to any part of the testimony that reflects an inadequate understanding of what Nollan and Dolan require.

Under a qualified immunity analysis, a governmental defendant is charged with knowledge of a clearly established right. "A clearly established right is one that is sufficiently clear that every reasonable official would have understood that what he is doing violates that right." Mullenix v. Luna, 136 S. Ct. 305, 308, 193 L. Ed. 2d 255 (2015) (internal quotation marks omitted). While "officials can still be on notice that their conduct violates established law even in novel factual circumstances," Hope v. Pelzer, 536 U.S. 730, 741, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002), "existing precedent must have placed the statutory or constitutional question beyond debate." Ashcroft v. al-Kidd, 563 U.S. 731, 741, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011). To deprive the governmental defendant of his immunity, there must be either "controlling authority" or a "robust 'consensus of cases of persuasive authority.'" Ashcroft v. al-Kidd, 563 U.S. at 741-42. As the Supreme Court has repeatedly cautioned, in determining whether the right at issue was clearly established at the time of the incident,

the analysis “must be undertaken in light of the specific context of the case, not as a broad general proposition.” Brosseau v. Haugen, 543 U.S. 194, 198, 125 S. Ct. 596, 160 L. Ed. 2d 583 (2004).

Here, despite Pacific’s argument to the contrary, existing law on the issue of an exaction for an eight foot right of way where the applicant is constructing a residence on a vacant lot and putting increased pedestrian and vehicular traffic in the middle of a developed residential neighborhood was not so clear as to put “the statutory or constitutional question beyond debate.” Ashcroft v. al-Kidd, 563 U.S. at 741.

Apparently, Pacific is also claiming that because the briefing at the LUPA hearing was inadequate to persuade the LUPA judge, the City should have known it was not going to prevail at the LUPA hearing. Pacific argues “that the City knew or should have known, that a failure to put facts on the record demonstrating nexus and proportionality would result in a decision that its demand violates the doctrine of unconstitutional conditions.” Pacific brief, at 6. Whether that is true or not has no bearing on the issue to be decided in a RCW 64.40 case. RCW 64.40 imposes liability for a knowingly unlawful decision by the agency in the permitting process, but there

is no provision in the statute for liability for inadequate briefing at a LUPA hearing.

Pacific also argues that the City's failure to provide thorough and persuasive briefing of nexus and proportionally at the LUPA hearing "establishes, as a matter of law, that the right of way demand was both unlawful and exceeded the City's lawful authority." Pacific brief, at 2. However, that statement is contrary to the LUPA statute which provides that a "grant of relief by itself may not be deemed to establish liability for monetary damages or compensation." RCW 36.70C.130. Thus, the fact that the City lost at LUPA does not establish as a matter of law the requirement of RCW 64.40 that the City's action was unlawful.

In support of this statement, Pacific cites to portions of the summary judgment hearing on the RCW 64.40 claim where the trial court commented that the administrative record at the LUPA hearing was not as fully developed as the facts as presented later at RCW 64.40 summary judgment. See Amicus brief at 4, citing CP 2049; 2061-62. Given the accelerated timeframe of LUPA and the fact there is generally no discovery in a LUPA matter, the record at the LUPA hearing was not as developed as it later became during the trial of the RCW 64.40 claim. Again, RCW 64.40 does not impose

liability for inadequate briefing. RCW 64.40 imposes liability for egregious permitting behavior where the agency knows or should know that it is imposing an unlawful condition. Here, it is uncontroverted that the City did a Nollan/Dolan analysis, taking into account the individual characteristics of this piece of property, the impacts of this particular project, and whether the developments conditions to be imposed were proportional to the project. CP 2404-05 (FOF 21).

In Section II of its brief, Pacific argues that the “City’s right of way demand plainly exceeded its ordinary authority to impose conditions on a building permit.” Brief, at 8. Pacific argues that the doctrine of unconstitutional conditions enforces the primacy of the U.S. Constitution against the States. Id. As the Court of Appeals explained in its opinion, “An agency action performed without lawful authority is also known as an ultra vires act.” Church of the Divine Earth v. City of Tacoma, 5 Wn. App. 2d 471, 492, 426 P.3d 268 (2018). “Even when an agency act violates the agency's statutory directive, it is not considered an ultra vires act if the act is within the agency's realm of power.” Id., citing Bd. of Regents of Univ. of Wash. v. City of Seattle, 108 Wn.2d 545, 552, 741 P.2d 11 (1987). Division II concluded, “Here, the City acted within its realm

of power to impose conditions on building permits. Simply because the LUPA court later found that the City's action was unlawful, the City's imposition of condition on the Church's building permit was not an ultra vires act. Therefore, the trial court properly concluded that the City did not act without lawful authority for the purposes of liability under RCW 64.40.020." This Court has not accepted review of the Court of Appeals' decision that the City's action was not ultra vires. Therefore, Pacific's argument on this topic is beyond the scope of review.

Finally, in Section II of its brief, Pacific argues that the appellate court committed obvious error when it concluded that "an unconstitutional act is not unlawful." Brief at 18. However, this argument ignores the statute's definition of unlawful. The statute provides: "That the action is unlawful or in excess of lawful authority only if the final decision of the agency was made with knowledge of its unlawfulness or that it was in excess of lawful authority, or it should reasonably have been known to have been unlawful or in excess of lawful authority." That is the question this Court has accepted for review- whether the City knew or should have known that imposing the right of dedication was unlawful.

This portion of Pacific's brief does not address that issue and is not helpful.

II. Response to Building Industry Association of Washington

Like Pacific, the Building Industry Association of Washington (BIAW) asserts that the City failed to provide a factual analysis and that the Court of Appeals "erred by failing to engage in any analysis of the facts." Brief, at 3. As outlined above, the Court of Appeals had over a thousand pages of trial testimony before it on the issues of the Church's proposed project and the City's evaluation of the Church's permit. To claim that the Court of Appeals failed to engage in a factual analysis is to claim that the Court of Appeals failed to read the record. In addition, the Court of Appeals had before it unchallenged Findings of Fact that detailed multiple Nollan and Dolan analyses undertaken by City staff on the Church's project. Thus, BIAW's argument is contrary to the facts and the record in this case.

BIAW claims that the Court of Appeals "simply stated that the litigant-City had thought about the requirements of the applicable law and so should not have known that its actions were unlawful." BIAW brief, at 4. Again, this characterization is completely contrary to the facts. Not only is it uncontroverted that

the City engaged in multiple Nollan and Dolan analyses specific to this property and this project, there was significant testimony by multiple witnesses at trial that demonstrated their familiarity with and knowledge of the applicable legal requirements of Nollan and Dolan. See e.g., RP 564, 573. The testimony was that City staff apply Nollan and Dolan's nexus and proportionality tests at the first level when the application was initially reviewed by the Review Panel and conditions were placed on the permit that are required by the Tacoma Municipal Code. The review panel placed six separate development conditions on the permit, which were authorized by the Tacoma Municipal Code and were designed to address the impacts created by the parsonage. RP 921-22. Then, it was reviewed by supervisors and upper management, who also considered whether the specific conditions imposed on the project met nexus and proportionality. See, e.g., RP 564, 573, 578, 580, 591-93, 904-914, 931.

As a result of this review, the conditions were changed, including the dedication of right of way, which was reduced from 30 to 8 feet. The factual basis for the necessity of the right of way dedication and the reduction to eight feet was explained to the Church in the memo of March 7, 2014. Throughout this process,

there were consultations between City engineering and permitting with the legal department. The Church still objected and the directors of three departments met with a Deputy City Attorney and again reviewed the conditions for nexus and proportionality. They concluded that all conditions could be dropped except for the dedication of an eight foot right of way with a gravel path for pedestrians. This final decision of the City was affirmed by the Hearing Examiner. Given the testimony at trial, as well as the unchallenged findings of fact, BIAW's arguments are clearly contrary to the facts and the record.

BIAW also criticizes the Court of Appeals because it “never examines the law available to the City or the reasonable application of that law to the facts.” Brief, at 10. BIAW argues that the Court of Appeals “should have asked what a reasonable city would have concluded based on the available law.” Brief, at 10. But BIAW fails to provide any analysis. On the other hand, the Court of Appeals had before it extensive analysis by the City of Tacoma as to why the City reasonably believed that the development conditions had a nexus to the project and were proportional, and why the City did not know and should not have reasonably known that its requirement for a dedication of right of way would be considered violative of

Nollan/Dolan by the superior court. CP 937- 956; 1329-1342; 1910-16; 1932- 2087 2408. Thus, there is no basis to say that the Court of Appeals did not have before it evidence of the City's legal analysis.

III. Conclusion

Neither Pacific Legal Foundation nor BIAW provide any reasoned, supported basis to overturn the decision of the Superior Court and the Court of Appeals that the City of Tacoma did not know and should not have known that its action was unlawful.

DATED this 6th day of May, 2019.

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By:



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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of May, 2019, I filed, through my staff, the foregoing with the Clerk of the court for the Supreme Court of the State of Washington via electronic filing.

A copy of the same is being filed and emailed to:

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EXECUTED this 6th day of May, 2019, at Tacoma, WA.


MARGARET ELOFSON

CITY OF TACOMA

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