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TREATED AS RESPONDENT'S SUPPLEMENTAL
BRIEF; see clerk's 5/10/19 ruling

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 PETITIONER'S SUPPLEMENTAL
BRIEF

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I. Statement of facts

The following statement of facts is taken entirely from the unchallenged Findings of Fact entered by the Superior Court. Thus, all of the following facts are considered verities on appeal.

On September 20, 2013, the Church of the Divine Earth (Church) submitted an application for a building permit to construct a parsonage on a vacant lot at 6605 East B Street in Tacoma. CP 2401 (FOF 1). On September 25, 2013, City staff reviewed the permit application at its weekly Review Panel meeting. Id. (FOF 2). The Review Panel applied development conditions that included a requirement for the dedication of a 30 foot right-of-way along East B Street. The Review Panel considered the impacts created by the proposed development, including impacts to pedestrian traffic, vehicular traffic, parking, sidewalks, and driveway access. Id. FOF 3. Although the narrow right-of-way on the East B Street side of the property pre-existed the proposed parsonage construction, the new parsonage increased problems associated with the too-narrow right-of-way. CP 2402 (FOF 6). For example, construction of the parsonage would further impair safe pedestrian and vehicular traffic on both South 66th Street and South B Street. Id. The City also

explained to the Church that additional right-of-way was necessary for adequate visibility at the Church's corner lot. Id. (FOF 7).

Mr. Kuehn met with City staff to discuss the conditions. CP 2402 (FOF 10). Mr. Kuehn objected to the conditions so he submitted a request for waiver of all of the conditions. The Church's request for waiver was discussed by the Review Panel on November 20, 2013. CP 2403 (FOF 12). The City provided an initial response to the waiver request on December 2, 2012. Id. (FOF 13).

As a result of the waiver request, Jenifer Kammerzell, an engineer with the Traffic Division of Public Works, discussed the right-of-way dedication with the Public Works Director, Kurtis Kingsolver. 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 (FOF 18). Mr. Kingsolver approved the reduction of the right-of-way requirement. Id.

On March 7, 2014, the City provided its response to the Church's waiver request, which included a memorandum from Ms. Kammerzell.¹ In the memo, Ms. Kammerzell indicated that after

¹ These facts are from finding of fact 17, which the Church initially contested. However, Division II found that the Church did "not

consideration of the Church's proposed and existing improvements, the City was altering its required conditions and that the right-of-way dedication requirement along East B Street would be reduced from 30 feet to eight feet. CP 2403-04 (FOF 17). Mr. Kuehn did not accept the reduced requirement and continued to seek the withdrawal of every development condition. CP 2404 (FOF 21).

The Public Works Director, Planning and Development Services Director, and Environmental Services and Engineering Director met to discuss the Church's concerns and to re-evaluate whether the development conditions satisfied a *Nolan/Dollan* analysis. Id. (FOF 21). The discussion included the impacts that the proposed construction would have on the current infrastructure, such as adding vehicular trips to the existing roadway and the fact that the Church property was located on a school walking route. Id. They also discussed what development conditions were fair and appropriate for the size of the project proposed by the Church. Id. The directors analyzed whether the right-of-way requirement was proportional to the Church's proposed project. Id. The directors

provide argument or authority on whether this finding of fact was supported by substantial evidence." Thus, Division II determined that FOF 17 is a verity on appeal. Church of the Divine Earth, 5 Wn. App. 2d 488, n. 5.

decided to remove all development conditions except for the dedication of right-of-way. CP 2404-05 (FOF 21).

On April 28, 2014 the Director of Planning and Development Services, Mr. Huffman, wrote to Mr. Kuehn informing him that the Church could appeal the City's decision to the City of Tacoma Hearing Examiner per TMC 1.23.050.B.2. CP 2405 (FOF 22). The Church submitted its appeal to the Hearing Examiner. Id. (FOF 23). Prior to the Hearing Examiner's decision, the City had removed all of the development conditions except for the dedication of the right-of-way. Id. (FOF 25).

The Church and the City filed cross-motions for summary judgment before the Hearing Examiner. The Hearing Examiner ruled in favor of the City, and the Church then filed a LUPA appeal with the Superior Court. CP 2405 (FOF 25 & 26). The Superior Court granted the Church's LUPA appeal, ruling that the City had failed to meet its burden to prove the required right-of-way dedication complied with the requirements of Nolan/Dollan. The Superior Court ruled that the permit could issue without the right-of-way dedication although the Church was still required to rectify the deficient building plans and complete the permit application process. CP 2405-06 (FOF 26). The Church's building plans were

deficient and the City had identified 25 specific ways in which the plans for the structure needed revision. CP 2401 (FOF 4). As of the time of trial, the Church had not corrected the deficiencies in the building plans, had not submitted revised plans, and its permit application remained incomplete. CP 2401; 2406 (FOF 4 & 27).

Following a bench trial, the Superior Court ruled that the City had not violated RCW 64.40. The Court of Appeals, Division II, affirmed the decision of the Superior Court. This Court accepted review of the Court of Appeals' decision on the single issue of whether for purposes of RCW 64.40 the City knew or should have known that its action was unlawful.²

II. Standard of review

The single issue on review is whether for purposes of RCW 64.40 the City knew or should have known that its action was unlawful. This was denominated by the trial court as a conclusion of law. CP 2408. However, reported cases treat the issue as a question of fact that “involves related questions of law.” Isla Verde

² The Church asks this court to expand its review to include review of the trial court's denial of the Church's motion to amend its complaint, which was affirmed by Division II. The Church does not present any argument on this issue and this Court has specifically limited review to the single issue identified above, so the City has not included any briefing on the trial court's denial of the plaintiff's motion to amend its complaint.

Int'l Holdings v. City of Camas, 147 Wn. App. 454, 467, 196 P.3d 719 (2008). As a question of fact, the Church has the burden of showing that a finding of fact is not supported by substantial evidence. Frank Coluccio Constr. Co. v. King County, 136 Wn. App. 751, 761, 150 P.3d 1147 (2007).

The Church contends that the City has a burden to prove the permit condition complies with *Nollan* and *Dolan*.” Supp Brief, at 10-11. However, that is not correct because the only issue on review in this case is whether for purposes of RCW 64.40 the City knew or should have known that its action was unlawful. This is Conclusion of Law No. 5 entered by the trial court and affirmed by Division II. As the Court of Appeals pointed out, it is undisputed that the right-of-way dedication requirement was ultimately determined to be an unlawful condition on the permit. Church of the Divine Earth, 5 Wn. App. 2d 471, 493, 426 P.3d 268 (2018). The issue here is whether the City knew or should have known that at the time of the final decision.

The Church also contends that it is the City’s burden to “overcome the presumption it knew the law.” Supp. Brief at 11. The Church attempts to shift the burden of proof to the defendant with this statement. However, a presumption should not be used “to

supply a fact material to the controversy.” Hutson v. Wenatchee Fed. Sav. & Loan Assoc, 22 Wn. App. 91, 100, 588 P.2d 1192 (1978). A “presumption is not evidence of anything, and only relates to a rule of law as to which party shall first go forward and produce evidence sustaining a matter in issue.” Gardner v. Seymour, 27 Wn.2d 802, 807, 180 P.2d 564 (1947).

In addition, the Church does not cite to any legal authority concerning RCW 64.40 for this proposition and the City is unable to locate any relevant authority for this proposition. Instead, as with any tort action, the plaintiff bears the burden to make a prima facie case and present facts supporting each of the elements of the cause of action. See e.g., Tacoma Auto Mall, Inc. v. Nissan N. Am., Inc., 169 Wn. App. 111, 118, 279 P.3d 487 (2012)(Plaintiff’s case will be dismissed if there is a failure of proof as to any essential element). Therefore, it is the Church’s burden to show that the City knew or should have known that its action was unlawful.

1. The law concerning dedication requirements as development conditions on a permit.

Development conditions placed on a building permit must comply with the nexus analysis of Nollan v. California Coastal Commission, 483 U.S. 825, 97 L. Ed. 2d 677, 107 S. Ct. 3141 (1987)

and the rough proportionality analysis of Dolan v. City of Tigard, 512 U.S. 374, 129 L. Ed. 2d 304, 114 S. Ct. 2309 (1994). City of Federal Way v. Town & County Real Estate, LLC, 161 Wn. App. 17, 44, 252 P.3d 382 (2011) (“A Nollan Dolan analysis is also called “the ‘nexus’ and ‘rough proportionality’ tests, after the United States Supreme Court’s decisions”). In a nexus analysis the government must show that its proposed condition or exaction tends to solve, or at least to alleviate, a public problem created or made worse by the applicant’s project. Burton v. Clark County, 91 Wn. App. 505, 522, 958 P.2d 343 (1998). The Dolan part of the test requires the condition or exaction to be roughly proportional. Town & Country, 161 Wn. App. at 44. It requires the permitting agency to “make some sort of individualized determination that the required dedication [of private land] is related both in nature and extent to the impact of the proposed development.” Id. (quoting Dolan, 512 U.S. at 391).

2. The City had no actual knowledge the dedication requirement was unlawful

The Church contends that the City knew that the dedication was unlawful. Supp. Brief, at 15. However, the Church does not point to any actual evidence of such knowledge on the part of the

City. Instead, the Church points out that the original dedication requirement of 30' was determined by City staff as lacking proportionality so it was modified to eight feet. It is a verity on appeal that the City modified the dedication from 30' to eight feet and communicated the modification as well as the basis for the dedication requirement to the Church in the Kammerzell memo of March 7, 2014. This is exactly what permitting agencies are required to do, which is to evaluate each site and the conditions imposed according to the facts and circumstances of the specific site and the specific application, and make any necessary modifications prior to the final decision.

The Church also contends that the City had actual knowledge that the dedication requirement was unlawful because, according to the Church, the City lied about the requirement during the litigation. The Church's argument on this point is based on an error in the square footage of the required dedication that appeared in one of the declarations signed by Peter Huffman, the Planning and Development Services Director. It is a verity on appeal that the dedication requirement had been altered to eight feet and that the alteration was communicated to the Church. Nevertheless, in one of the declarations signed by Mr. Huffman, dated July 9, 2014, the

dedication is represented by a square footage that is equal to a 30' dedication. Mr. Huffman became aware of this discrepancy during his deposition on April 22, 2015. RP 570, 576. Until being notified of the error, Mr. Huffman believed that his declarations accurately reflected the reduction of right-of-way to eight feet that had been approved by the Building Official, David Johnson. RP 570-73. Subsequent to that deposition, the Church has contended that the error was deliberate.

The Church contends that the City misrepresented the facts to the LUPA judge, causing the LUPA judge to come to the conclusion that the City was requesting only an eight foot dedication. However, the record reflects otherwise. At the LUPA hearing, the Church's counsel referred to a 30 foot easement. CP 549. Judge Martin then interjected, "I thought it was only 8 feet. Did I miss something?" CP 549. Judge Martin observed that she "thought it was only 8 feet, not 30 feet. I thought they changed it." Id. Counsel for the Church agreed that it "seems a little confusing in the record." Id. But the Court's conclusion that the City had altered the right of way requirement to eight feet was not the result of any misrepresentation on the part of the City. Judge Martin understood that there had been a reduction based on the

administrative record before her, including the submissions of the Church. See e.g., CP 12, 45, 62, 69, 94.

Thereafter, the Church vigorously pursued its misrepresentation theory before both Judges Martin and Hogan at the Superior Court, and also before Division II, to no avail. This theory does not have any apparent relevance to whether the City had actual knowledge that its action on the Church's permit was unlawful.

The Church argues that the City admits that the initial requirement of a 30 foot dedication was determined to be inappropriate for this site and application. Given that the dedication was altered, there can be no liability for this initial decision. A cause of action does not accrue under RCW 64.40 until the agency has reached and communicated a final decision. A plaintiff in a RCW 64.40 lawsuit is not free to select an interim point in the application process as a final decision, and in essence, create a continuing violation from some point prior to the final decision. See, Callfas v. Dep't. of Constr. & Land Use, 129 Wn. App. 579, 592-93, 120 P.3d 110 (2005). See also, Coy v. City of Duvall, 174 Wn. App. 272, 280, 298 P.3d 134 (2013), review denied, 178 Wn.2d 1007 (2013)(plaintiff sought damages for "conduct during the application

process, not the hearing examiner's final decision approving the application", and thus did not state a viable claim for relief under RCW 64.40). The fact that the City initially required a 30' dedication, which it later in the application process determined was not proportional, does not give rise to claim under RCW 64.40.

The Church also relies on Burton v. Clark County, 91 Wn. App. 505, 958 P.2d 343 (1998) for its argument that the City had actual knowledge that the development condition was unlawful. Apparently the Church is arguing that every requirement for a dedication of right-of-way where there is no plan to immediately build out the actual roadway is automatically a violation of Nollan/Dolan, so the City must have had actual knowledge the dedication was unlawful. See e.g., Brief at 10 (there was a "stand alone constitutional violation of having no plan to build out the right-of-way."). But the Burton court did not say that every requirement to dedicate right-of-way where there is no plan on the books to build out the actual roadway is unlawful.

First, Burton did not involve a claim under RCW 64.40, so there was no analysis of whether the agency should have known that conditioning the permit on dedication of right-of-way and construction of a road would be unlawful. But, Burton did involve

a Nollan/Dolan analysis of development conditions, which included a right-of-way dedication, attached to the permit but it still does not support the Church's arguments.

In Burton, the county conditioned the approval of a three-lot short plat on the owner dedicating a 50 foot right-of-way, building a 32 foot wide road, and installing curbs and sidewalks. Burton objected to the requirements and appealed to the hearing examiner. The hearing examiner affirmed the county, finding that the requirements satisfied nexus and proportionality. Burton then appealed to the Board of County Commissioners, which also affirmed. Burton then appealed to the Superior Court, which ultimately removed the exacted road from the short plat application.

The Burton court explained that nexus requires that the agency show that the development will create or exacerbate an identified problem, and the government's solution tends to solve or at least to alleviate the identified public problem. Burton, 91 Wn. App. at 521-22. The county had identified one problem in that Burton's project would bring more residents to the neighborhood and generate about 30 vehicle trips per day on neighborhood roads. This meant an increase in the need for adequate traffic circulation in and out of the neighborhood; in the congestion on neighborhood

roads (with or without better circulation); and in the likelihood that police and fire units will be called to and from the neighborhood in emergency situations. Burton, 91 Wn. App. at 526. Thus, the problems “will be exacerbated by Burton’s project to at least a slight degree.” Id.

The Burton court determined that the proposed development conditions were roughly proportional. The Court found that the government’s proposed solution to the identified problem is roughly proportional to that part of the problem that is created or exacerbated by the landowner’s development. Id. at 523.

However, the problem in Burton was that the required roadway would not connect up to any other roads. It would be required to be built with the intention that at some future time another road may connect up to it. But for the time being, “[i]t will, in short, be a road to nowhere.” Burton, at 527. Given that the road Burton was required to build would not connect to another road, the Court could not find that “the government’s solution tends to solve or at least to alleviate the identified public problem.” Burton, at 521.

The Burton court stated that the court “assumes that the government may sometimes rely on the future as well as the present when attempting to establish nexus”, but “it may not rely on the

future unless the record furnishes a basis for inferring what the foreseeable future holds.” Burton, at 525. In Burton, the county failed to provide either direct or circumstantial evidence as “a basis for reasonably inferring that the exacted road will connect with Northeast 20th Avenue in the foreseeable future; and, without such an inference, the exacted road lacks any tendency to solve or even alleviate the public problems that the county identifies.” Burton, at 525; 528.

The facts and legal issues in Burton are not analogous to our case. First, Burton did not involve RCW 64.40 so there is no discussion of whether the county knew or should have known that attaching the roadway exaction was unlawful. And, the facts are not similar because in our case there is no question but that the exaction in our case would be put to immediate use. Here, nexus does not depend on some future plan to build a wider roadway. The testimony at trial was that the Church’s right-of-way would be used immediately for a pathway for the general public, including children walking to school on the designated school walking route, and increasing public safety. The roadway in front of the Church’s property was insufficient in terms of safety. RP 801. This condition would be made even more unsafe because the Church’s project

would create additional pedestrian and vehicular traffic and add two additional access points to the roadway, one from the rear garage and one from the front driveway. The additional right-of-way with its walking path would immediately alleviate those impacts, with an immediate increase in safety. RP 801-803; 782-83. This amelioration of the impacts would be realized even if the roadway itself were never widened. It is true that the initial 30' right-of-way would allow any future roadway in front of the Church's property to comply with the City's standard design for roadways, and there was no plan on the books to actually construct a wider roadway. RP 1093-94. However, the 30 foot exaction is not relevant to the issue before this Court; the exaction relevant to the issue before this Court is the eight foot requirement.

Thus, Burton does not support the Church's argument that the City knew its dedication requirement was unlawful. There is no evidence that the City had actual knowledge that the dedication it was requiring was unlawful.

3. The trial court and the Court of Appeals correctly determined that the City should not have known its action was unlawful.

The Church merely argues that the City should always know the law. In response to this argument, Division II observed that such

an analysis would “transform chapter 64.40 RCW into an insurance system in which local governments would indemnify applicants for losses from any action later deemed unlawful.” Church of the Divine Earth, 5 Wn. App. 2d at 494. Division II observed that “[n]othing in the statute’s terms or its purpose as inferred from those terms suggests that was the legislature’s intent.” Id. Such an interpretation of the statute essentially nullifies the statute’s language that an “action is unlawful or in excess of lawful authority only if the final decision of the agency was made with knowledge to 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. RCW 64.40.020 (1) (emphasis added).

In Isla Verde Int’l Holdings, Ltd. v. City of Camas, 147 Wn. App. 454, 196 P.3d 719 (2008), the Court considered whether the City of Camas knew or reasonably should have known that its mandatory 30 percent open-space set-aside condition was an unlawful act when it was imposed on the plaintiff’s project. To answer this question, the Court looked at other cases deciding the same or similar issue, and evaluated whether the facts and legal issues in those other cases were similar enough to put the current plaintiff on notice. On summary judgment, the trial court determined

that the City should have known the set-aside ordinance as applied was invalid, and the trial court had stated that the “wealth of reported case law in existence at this time supports this conclusion.” Isla Verde, 147 Wn. App. at 461. However, the Court of Appeals reversed, concluding that the law “arguably remained unclear.” Id. at 474.

Here, there was no clear law that indicated the City’s dedication requirement was unlawful. For example, in Sparks v. Douglas County, 127 Wn.2d 901, 904 P.2d 738 (1995), the property owner filed four short plat applications. In reviewing the applications, the county determined that the width of existing streets bordering the plats were too narrow to accommodate modern road design and would thus prevent future construction of street improvements. The county required dedication of additional right-of-way, and the property owner appealed. The Supreme Court affirmed the county’s requirements, holding that the county had established the nexus and rough proportionality requirements of Nollan and Dolan. Id., at 916-17. In affirming the right-of-way exaction, the Court noted that the county had documented the deficiencies in the existing road width and had recorded its evaluation of how and why it determined that the new plats would

increase vehicular traffic. Thus, the county had fulfilled its requirement to make an individualized assessment of nexus and to make a decision as to rough proportionality. The Supreme Court concluded that the right-of-way dedications were constitutional.

Similarly, in Isla Verde Int'l Holdings, Inc. v. City of Camas, 146 Wn.2d 740, 49 P.3d 867 (2002), the Court affirmed an exaction of right-of-way similar to the exaction sought by the City here. In Isla Verde, the City of Camas required the applicant construct a secondary access road to its development. Camas justified the requirement by pointing out that the existing access road was inadequate under current code requirements for emergency vehicle use. Isla Verde, at 767. In addition, the existing access road could become impassable in inclement weather. Id. Isla Verde objected to the development condition, arguing that “the problem of inadequate access via the [the existing access road] existed prior to its proposed development, and it has not contributed to the need for a secondary access road.” Id., at 768. Isla Verde characterized the “decision to request a secondary access road as the City’s ‘mere desire’ to have a second road.” Id., at 766. Isla Verde contended that placing the requirement on Isla Verde was oppressive and violated RCW 64.40. Id., at 767, 769.

The appellate court acknowledged that “while a municipality has authority to make appropriate provisions for the public health, safety, and welfare, and to condition plat approval accordingly, it does not have authority to require a developer ‘to shoulder an economic burden, which in justice and fairness the public should rightfully bear.’” Weden v. San Juan County, 135 Wn.2d 678, 706, 958 P.2d 273 (1998)(quoting Orion Corp. v. State, 109 Wn.2d 621, 648-49, 747 P.2d 1062 (1987)). The Court acknowledged that the inadequate access pre-existed Isla Verde’s development. However, the Court pointed out that Isla Verde’s development would contribute to the existing problem. Isla Verde, at 767. And, the evidence showed that the City had legitimate safety concerns about the absence of a secondary road. Id. Thus, the “City made a reasonable decision when it required Isla Verde to provide a secondary access road for emergency vehicles” and the Court held that the requirement did not violate RCW 64.40. Id., at 770.

Similarly, in Trimen Dev. Co. v. King County, 124 Wn.2d 261, 877 P.2d 187 (1994), the developer challenged the county’s development permit condition that Trimén dedicate land for park space or pay a fee in lieu of the dedication. Trimén argued that the county’s deficit of park space pre-existed Trimén’s development, as

evidenced by the county's assessment of park needs done in 1985. The Court did not dispute that the deficit pre-existed Trimen's proposed development. But, the Court indicated that the Trimen development would contribute to the deficit and that the dedication requirement was therefore made reasonably necessary by Trimen's development, establishing the nexus required by Nollan. Trimen, 124 Wn.2d at 274. And, the Court found that the amount of park space required of Trimen, or the in lieu fee, bore a "rough proportionality" as required by Dolan to the impact that Trimen's development would have on the already existing parkland deficit. Id.

Again, in City of Federal Way v. Town & Country Real Estate, LLC, 161 Wn. App. 17, 252 P.3d 382 (2011), the Court rejected the developer's argument that the problem pre-existed its proposed development and that its development should not be responsible for alleviating a pre-existing problem. In Town & Country, the cities of Tacoma and Federal Way required that the developer provide a traffic mitigation payment to offset the impacts that the new development would cause to both cities. The developer pointed out that the cited traffic problem pre-existed his planned development and that the cities had actually developed plans to

address that specific traffic problem long before Town & Country ever submitted its application. Town & Country, at 51. The hearing examiner had agreed with this argument, but the appellate court pointed out that “[o]ur Supreme Court has held otherwise.” Id. The Court reversed the hearing examiner’s decision, citing to Trimen for authority that developers can properly be required to rectify pre-existing deficiencies if their projects will contribute an additional burden. Town & County, at 51. The Court held that the required mitigation met the “analysis embodied in the *Nollan/Dolan* standard.” Id., at 45.

Like the applicants in Sparks, Isla Verde, Trimen, and Town & Country, the Church proposed a project that would make worse an already existing problem of insufficient right-of-way. As explained to the Church on a number of different occasions, the need for increased right-of-way is a safety consideration for automobiles, emergency vehicles, and pedestrians using the streets bordered by the Church property. The Church’s project will exacerbate the existing problem. RP 801. The Church had already constructed a garage and planned on installing a driveway, two access points to the property. In addition, the Church was adding a single family home to a vacant lot. The City’s impact analysis relied in part on the

Trip Generation Manual used by traffic engineers and it established that residential construction like the Church's parsonage would generate a minimum of 10 additional journeys per day. RP 1065. Thus, the Church's project would have created additional impacts on the already insufficiently narrow roadway. Ms. Kammerzell's memo also outlined the ways in which the eight foot dedication would alleviate the problem and provide increased safety and efficiency. RP 1072- 84.

The individualized site-specific analysis was also performed by the Building Official, David Johnson.³ RP 915. Mr. Johnson testified that it was his opinion that nexus had clearly been shown but that prior to the reduction of the right-of-way dedication he had a concern about proportionality. RP 911; 917-18. He testified that he "wanted to hear the debate and the dialogue or at least the results of the analysis of the request for waiver." RP 912. As modified, the dedication requirement was proportional to the nature of the project in his opinion. RP 914; 922; 930-31.

³ Mr. Johnson, not Mr. Huffman, had authority to alter the right-of-way requirement that had been attached to the building permit. Under the Tacoma Municipal Code, only the Building Official and the Public Works Director could alter or waive the right-of-way requirement on the building permit. RP 774-76; 915.

The Public Works Director also performed a site-specific individualized review of the dedication being required of the Church. See RP 763- 776. He also concluded that the an eight foot dedication of right-of-way would alleviate some of the problems posed by the Church's project and that the dedication requirement, as reduced, was proportional.

The Church characterizes the City's dedication requirement as satisfying the City's desire for uniformity, as if the requirement were some aesthetic consideration. The argument is similar to that made by the plaintiff in Isla Verde who complained that the City's requirement for an access road was a "mere desire" for a new road. Here, as was explained multiple times a trial, safe streets require a uniform width. RP 801- 03. Tapering of streets to narrow widths poses dangerous conditions for emergency vehicles as well as normal traffic. Id. Insufficient right-of-way suc as in front of the Church's property forces pedestrians into the street. Id. The City required a uniform street width as an important safety component of street system, not a mere desire to have rights-of-way appear uniform or the land grab characterized by the Church. Ultimately the 30 foot dedication was reduced to eight feet, but the concern for uniformity was primarily a safety consideration. The testimony at

trial was that whether the dedication was eight feet or 30 feet, a uniformity was important and achievable. RP 781.

Given that Washington law supported the City's right-of-way request, and given that state law and City code provide authority for the City's request, and given that the City altered the requested right-of-way to the bare minimum that would allow for safe pedestrian passage under applicable national transportation standards, the City should not have known that the dedication requirement was unlawful.

IV. Conclusion and Request for Attorney Fees

The Court of Appeals affirmed the trial court's decision that the City did not know and should not have known that its action was unlawful. Substantial evidence supports this determination. Given that ample Washington case law supported the City's action, the City respectfully requests that this Court affirm the Court of Appeals.

Finally, the City requests its attorney fees on appeal under RCW 64.40.020, which authorizes fees for the prevailing party.

DATED this 6th day of May, 2019.

BILL FOSBRE, City Attorney

By: 
MARGARET A. ELOFSON
WSBA #23038
Deputy City Attorney
For Respondent

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 emailed and sent via legal messenger to:

1. Richard B. Sanders
Attorney for Appellant
Goodstein Law Group, PLLC
501 South G street
Tacoma, WA 98405

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


MARGARET ELOFSON

CITY OF TACOMA

May 06, 2019 - 4:04 PM

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