

No. 68819-7-1

**COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON**

TYKO JOHNSON, Appellant,

vs.

CITY OF SEATTLE, Respondent.

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

The City appears to limit itself in this appeal to claiming that the citations of Tyko Johnson should be upheld and dismissal of his 42 U.S.C. §1983 ("Section 1983") claim affirmed even though the combination of its citation appeal procedure and process for recognizing a legal nonconforming effectively stripped him of his ability to avoid punishment. See Resp. Br., at 2 (Issues).

The City claims that the citations should be upheld because he did not secure Department of Planning and Development ("DPD") recognition of his longtime nonconforming use before its enforcement wing began citing him for such use, even though the citations did not relate to a failure to apply for DPD recognition, Johnson did not have precognition of, and the City did not inform Johnson of, any such process, and no citation could be defeated by a defense of legality or subsequent DPD recognition of the use. The City also absurdly claims that its procedure accorded Mr. Johnson due process merely by allowing him to vocalize his claim of a legal use where City policy precluded its Hearing Examiner ("HE") from giving meaningful consideration to the defense. The Court should reject the City's position, reverse the citations, remand Mr. Johnson's Section 1983 claims in each action on

appeal for trial, and award him fees and costs.

II. JOHNSON'S PRESENTATION OF UNREBUTTED EVIDENCE OF A LEGAL NONCONFORMING USE IS A VERITY.

The City's claim that Tyko Johnson did not present evidence of his claimed legal nonconforming use at the hearing of the appeal of Citation 1, which formed the basis of the HE's erroneous application of collateral estoppel to Citations 2 and 3, is frivolous. The HE stated in her Finding of Fact 8 on Citation 1 that "[Terry Johnson] stated that the family has stored at least 4 to 5 cars outdoors on the property since the 1970s and claims that such storage is therefore a legal nonconforming use." See No. 68819-7, CP 565-828, AR 30, FF 8. She made the same finding for Citation 2. *Id.*, AR 66, FF 7. The City never challenged these findings, rendering them verities on appeal. *Rosema v. City of Seattle*, 166 Wn.App. 293, 298, 269 P.3d 393 (2012). What the HE concluded as to Citation 1 was only that such testimony did not supply a legal basis to establish a legal nonconforming use based on her misplaced search for "grandfathering" language in the ordinance at issue, SMC 24.44.016, and her disclaimer of jurisdiction to entertain the defense in light of SMC 23.42.102.

The City misrepresents a remark by Terry Johnson at the

hearing of Citation 1 by not disclosing that such remark was not testimony, but simply a request for clarification about the effective date of the three-vehicle limit posed during the City's direct examination of its code enforcement officer. . City Br., at 3. In his direct testimony at a later point in the hearing, Terry Johnson testified as follows:

Q. Are you aware that the code requires three vehicles [*sic*] to be allowed to be parked outside on a single-family residence?

A. You have just made me aware of that. You've also made me aware of the fact that being as we have been doing this continuously since the 1960s, I would claim this is a legal nonconforming uses for non-junk vehicles, in other words, vehicles that are worth more than their price at salvage.

See No. 68819-7, CP 565-828, AR 241.¹

Contrary to the City's misleading and argumentative statement of facts in its brief, Mr. Johnson also supply testimony and evidence of his nonconforming use in response to Citation 2. No. 68819-7, CR 565-828, AR 71 (moved "4-5 of my cars and car-

¹ Furthermore, Tyko Johnson's home was built with a permit and parking of vehicles was indisputably a use appurtenant to such permitted use, such that Johnson had a permitted nonconforming use all along. See SMC 23.84A.030 ("Use, accessory' means a use that is incidental to a principal use"); SMC 23.44.016 (parking on single-family residential lots not limited before three car limit

type projects, AND construction equipment” to the property), AR 72 (“From January of 1957 until NOW, I have always had four or five Cars, Boats, Trailer and/or motor homes on my property . . .”); AR 9, AR 10, AR 66, FF 7 (again noting testimony “that the family has stored at least 4-5 cars outdoors on the property since the 1970s and claim that such storage is therefore a legal nonconforming use of the property”); CP 431, CL 30. The City never tried to rebut any such testimony or to challenge the HE’s finding that Johnson was keeping more than three vehicles outdoors on his property from long before the prohibiting ordinance was adopted. Its own DPD later endorsed the substance of such testimony by granting the permit recognizing the use even while its code enforcement section and attorney was flatly denying the availability of such a defense to its serial citations.

When the HE, at the hearing of Citation 2, referred to her decision on Citation 1 by stating “[f]irst is I didn’t believe that you had proved that you had a nonconforming use,” she could only have been referring there to her Conclusion 3, lack of “grandfathering” language. See No. 68819-7, CP 565-828,

adopted).

AR 157-158. While she found that Mr. Johnson had presented evidence of his nonconforming use, she rendered no decision as to whether he did or did not have such a use. *Id.*, CP 29-30

III. WHEN JOHNSON APPLIED FOR RECOGNITION OF HIS USE DOES NOT AFFECT HIS DUE PROCESS CLAIMS.

The City's discussion of the timing of Mr. Johnson's application for DPD recognition of his use is a *non sequitur* in view of its announced policy that there is no relationship between that permit process and a prior citation appeal process. The City's Code Compliance Analyst clearly announced City policy at the hearing of Citation 2 as being that a nonconforming use defense is not available until after the City issues a "permit" recognizing it for its record and that "[i]f that use is not established, the violations exists at the time the citation was written." No. 68819-7, CP 565-828, AR 174. A contention of having applied for or even having received a post-citation "permit" does not constitute a defense under City policy.

There was no functional linkage between the process of establishing a nonconforming use for the record and the citation appeal process. The permit process was addressed to the DPD while the appeal was directed to the HE. The citation appeal

procedures, Chapter 23.91 SMC, does not refer to the land use permit process under SMC 23.42.102.

Difference in timing also undermine the City's attempt to link the "permit" and appeal processes. The citation procedures provided that the City could issue a separate citation each day. SMC 23.91.024. Citations must be appealed within 15 days of issuance. SMC 23.91.006(B). Contested hearings must be held within 60 days of the filing of the appeal. SMC 23.91.012(A), Under its policy, therefore, the City could issue daily citations against a legal nonconforming use, but the property owner would have no ability to defend against any except those issued after he or she was able to secure DPD recognition through a separate process. All previous citations would still be deemed valid under the City's policy, their rescission being a mere matter of grace on the City's part.

The timeline of this case reveals the emptiness of the City's contention based on the timing of Mr. Johnson's application. The record does not indicate that any City employee mentioned such a "permit" process before or at the time of issuing Citation 1 on September 14, 2010. See No. 68819-7, CP 565-828, AR 38, AR 42. The City's representative did not mention the process at

the first hearing even in the face of the Johnsons' testimony claiming a legal nonconforming use and even though she cross-examined Terry Johnson about it. See *id.*, AR 216-246. The City did not mention the SMC 23.42.102 process until the HE issued her decision on Citation 1 on November 4, 2010, the decision to which she improperly ascribed collateral estoppel effect as to later citations. Just 41 days after this decision, on December 15, 2010. The City issued Citation 3 on February 28, 2011. There is evidence that not until March 16, 2011, did the City accurately advise Johnson of the availability of the permit process that it attempts to deploy against him despite its uselessness as a defense to prior citations. No. 68994-1, AR 57. Note that Johnson explicitly requested such information on the record at the hearing of Citation 2. No. 68819-7, CP 565-828, AR 158, AR 174-175.

After Johnson applied for the "permit" in May 2011, in order to try to put an end to the City's serial citations of him for doing something legal, the City took 112 days, until August 31, 2011, to issue the "permit," which must be deemed the date when the use is "established for the record," and not some earlier date in July 2011, as the City contends on page 8 of its brief. SMC 23.90.002(A) ("It is a violation of Title 23 for any person to initiate or maintain or

cause to be initiated or maintained the use of any structure, land or property within The City of Seattle without first obtaining the permits or authorizations required for the use by Title 23"). The Municipal Code provides that the City could have issued up to 112 citations imposing a total of \$56,000 in fines, but under City policy, the fact of the pending application, despite its ultimate success, would have been no defense against any of them. In this case, the City went on to issue Citations 2 and 3 within 41 and 116 days, respectively, of the HE's decision on Citation 1.

Johnson's resort to the permit process is legally irrelevant to the citations at bar, which were issued before the City gave a "permit" to Johnson. In light of the City's policy and actual events, the City's attempt to undermine Mr. Johnson's contentions by referring to a process unconnected with his appeal and that would not practicably have supplied a defense must be rejected.

IV. THE CITY'S POLICY DENIED JOHNSON PROCEDURAL DUE PROCESS.

McMilian v. King County, Lakeside v. Jefferson County, Rosema v. City of Seattle and legion other decisions in this and other states plainly affirm the proposition that legal nonconforming uses are vested rights that are entitled to procedural due process

protections. See *McMilian v. King County*, 161 Wn.App. 581, 591, 255 P.3d 739 (2011); *Jefferson County v. Lakeside Industries*, 106 Wn.App. 380, 23 P.3d 542 (2001); *Van Sant v. City of Everett*, 69 Wn.App. 641, 849 P.2d 1276 (1993).

The City does not appear to deny the foregoing principal yet it has sought to punish Tyko Johnson for engaging in a legal use while depriving him of a meaningful hearing of his defense of legality through the only appeal process it provided. Even at the time of this writing, it is threatening to send to collections the fines that it has levied against what the DPD finally acknowledged to be a legal use after a process that required Mr. Johnson to pay a permit fee and other expenditures to stop the serial issuance of citations that the City effectively prevented him from defending. See Attachment.

The City's mantra in this litigation has been that the only path to proving a legal nonconforming use in order to defend against its punitive actions under Chapter 23.91 is to prove its existence to the satisfaction of the Director of DPD through a protracted administrative process that is so divorced from the citation appeal process that the City's representative pronounced that it would not render a citation void even retrospectively, after

the “permit” is issued. The City urges, therefore, that its HE did not err because she complied with this limit on her jurisdiction. The adherence of the HE as an individual official to an inherently unfair process is not the issue at bar. It is the deficient City policy itself that is under scrutiny.

The City finds fault with Mr. Johnson’s argument that the SMC 23.42.102 process should be deemed just one of several ways to demonstrate a legal nonconforming use and an optional one at that. City Br., at 17-19. In so doing, the City’s establishes with its own words that there exists no practicable means for a property owner cited under Chapter 23.91 SMC to defend based on a legal nonconforming use unless the owner so happened to have pursued recognition of the use for the record before the citation issued. But unlike the readily distinguishable circumstances in *City of Des Moines v. Gray Businesses, LLC*, see City Brief at 19, and contrary to the City’s misplaced emphasis on the time of Johnson’s application under SMC 23.42.102, the Municipal Code does not mandate that legal non-conforming uses be registered in order that they might legally be continued. The City is also not seeking to punish Johnson for failing to make such application. For that reason, the nonmandatory nature of the process under

SMC 23.42.102 creates an inescapable trap for a property owner who is subjected to enforcement against a use he has been engaging in for decades particularly where, as in this case, the City gives no notice of the process before issuing the citation. The City's warnings before issuing Citation 1 simply ordered that the number of vehicles be reduced. The City made no reference to a process for obtaining City recognition of the use for the record until the HE issued her decision on Citation 1. See No. 68819-7, CP 565-828, AR 39 ("Limit the number of vehicles parked outdoors on a single-family lot to three (3)"), AR 42 ("To avoid the \$150 citation, take care of this situation in a timely manner"); AR 43-44 (second page of Citation 1 does not reference SMC 23.42.102 process as an alternative response).

The City might contend that responding to a code enforcement case, such as a notice and order by the City to cease a purported illegal nonconforming use is a scenario in which a property owner might apply to establish the use for the record and it is, in a practical sense, true that such use might be extinguished if the property owner fails to do so. It is not, however, a process for terminating a use, but punishment for engaging in a use, that is at issue here and the City's policy, as enunciated by its Code

Compliance Analyst and maintained by the City throughout this litigation, is that "If that use is not established, the violation exists at the time the citation was written" regardless of a subsequent application under SMC 23.42.102. The City does not contend the contrary. It has always maintained the propriety of imposing of the fines. Imposition of such fines without a real opportunity to defend amounts to an order of immediate cessation of a legal nonconforming use, which cannot meet constitutional muster.

City of Des Moines v. Gray Businesses, LLC, 130 Wn.App. 600, 124 P.3d 324 (2006), is not in point. *Gray Businesses* was strictly a regulatory takings case involving a mobile home park established decades earlier in which the owner claimed a taking by virtue of a later-adopted ordinance requiring submission of a site plan in order to perpetuate the right to continue leasing spaces to new tenants and bringing in new homes. 130 Wn.App. at 603. It is, in that sense, a case addressing the propriety of amortization procedures rather than civil or criminal enforcement, as in this case. The owner claimed a regulatory taking because the effect of the City's ordinance would eventually have been to render the mobile home park economically unviable and stated no other claims, such as, the Court took pains to point out, claims for denial

of procedural or substantive due processes. *Id.* at 608. The Court rejected the lone takings claim solely because the ordinance in question did not destroy a fundamental attribute of ownership, but merely regulated its use. *Id.* at 613-614. Whether or not a legal nonconforming use existed and its status under land use enforcement procedures were not in issue in *Gray*.

Gray has no applicability to the facts of this case. Johnson's compliance or lack thereof with a police regulation regulating the right to continue a legal nonconforming use is not at issue. The Municipal Code favors the continuation of nonconforming uses with no general requirement of any permit to continue it. His legal nonconforming use has existed at all relevant times and continues to be legal, a circumstance to which the City's "recognition" of such use adds nothing. The City did not rely on any ordinance that suggests that Johnson's use might have become unlawful before it cited him because of any default on his part. It did not attempt to fine Mr. Johnson because, although his use was legal, he did not comply with some police regulation affecting the right to continue it, unlike the site plan requirement in *Gray*. It is using a citation procedure to enforce against a purported unlawful land use (*i.e.*, a zoning violation) under Chapter 23.91 SMC, not a notice and order

procedure for failing to comply with a permit application process under Chapter 23.90 SMC. Nor did the HE require Johnson to apply for recognition of his use. She merely stated that only the DPD could review the claim of legal nonconforming use, but such fact did not in any way preclude affirmation of the penalty.

The combined effect of SMC 23.42.102 and the Code provisions that the City claims precluded the HE from considering legal non-conforming use was an infliction of a denial of procedural due process upon Mr. Johnson as applied in these cases. He has repeatedly pointed out that the construction of the Municipal Code urged by the City deprived him of procedural due process. Mr. Johnson reserved his constitutional arguments starting at the first hearing before the HE and has consistently pursued those arguments before the Superior Court and this Court. See No. 68819-7, CP 565-828, AR 220.

V. JOHNSON'S DUE PROCESS RIGHTS WERE VIOLATED.

The City's argument that Mr. Johnson was not denied procedural due process because he has not been prohibited from appealing to the HE and to the courts is mere wordplay. The City's contention of due process purportedly had before the Superior Court is irrelevant, this being an appeal of a local land use

decision. It is the deprivation of a meaningful opportunity to be heard at the municipal level that is relevant, not what happened in the Superior Court. See *Rosema*, 166 Wn.App. at 297 (under LUPA, Court of Appeals reviews “City’s actions on the administrative record, without reference to the superior court.”). As for Mr. Johnson’s Section 1983 claims, this Court reviews *de novo* the trial court’s dismissal of those claims under CR 12(b)(6) and CR 56.

Substantively, the question is not whether Mr. Johnson has been literally prohibited from enunciating a defense, but whether his defense has received a meaningful hearing, which is what due process requires. With the City pronouncing that his defense of legal nonconforming use was not entitled to consideration in the only avenue of appeal it supplied, he did not receive a meaningful opportunity to be heard. The contention that the HE disagreed with Mr. Johnson is not the issue. The issue is that City policy required her to disagree without regard to the merits and, thereby, to deny Johnson a meaningful hearing. The denial of meaningful consideration of his nonconforming use defense essentially deprived him of a right to an adequate hearing. The barrier that faced Mr. Johnson is highly analogous to those found to violate

procedural due process in *Devine v. Department of Licensing* and *City of Redmond v. Moore*. See 126 Wn.App. 941, 110 P.3d 237 (2005); 151 Wn.2d 664, 91 P.3d 875 (2004).

The problem in *Moore* was state statutes which mandated suspension of driver's licenses without any right of hearing before the Department of Licensing ("DOL") to determine whether there was an error in the record cited to justify the suspension (*e.g.*, a record of a delinquent traffic ticket). Just as the City's policy in this case purported to require Johnson to seek a permit from the Department recognizing his legal nonconforming use before it could be considered as a defense, the statutes at issue in *Moore* directed aggrieved drivers to pursue process before the courts of the jurisdictions that issued the tickets and denied any hearing before the DOL. The Washington Supreme Court held in *Moore* that the lack of a meaningful opportunity to present a defense before or, indeed, after the deprivation was a fatal defect in the process. 151 Wn.2d at 672.

The absence of a meaningful opportunity to be heard, despite the purely superficial opportunity for a hearing under Chapter 23.91 SMC, is no less fatal a defect in this case. The nature of the interest threatened by the lack of a meaningful City

process was substantial. The citation ordinances permitted the City to issue a citation every day and to levy a fine of \$150 for the first citation and \$500 for each additional citation. Although the City in this case is defending three citations imposing a total of \$1150 of fines, it could have imposed up to \$56,000 in fines over the 112 days following the HE's affirmation of the first citation, which was the timeframe the Department required to issue a "permit" and City policy would have precluded any defense to such fines based on nonconforming use. Imposition of such punishment constitutes a severe burden on the recognized right to maintain a nonconforming use. The risk of an erroneous deprivation from being barred from showing a legal use in avoidance of a fine was total in this case. There would be substantial value in permitting a landowner like Mr. Johnson to present a legal nonconforming use defense at the hearing that, according to City ordinance, is supposed to address whether the violation was committed. See SMC 23.91.006(A)(3). The City's interest would not be cognizably impacted by ruling that Mr. Johnson's defense should have received a meaningful hearing, because its interest in avoiding changes to its policy cannot be deemed to outweigh a property owner's interest in avoiding unmerited punishment, including potentially very substantial

penalties for engaging in legal land uses. See *Moore*, 151 Wn.2d at 670-677 (applying due process factors supplied by *Mathews v, Eldridge*, 424 U.S. 319, 333 (1976)).

Finally, the City's contention that there was substantial evidence to support a conclusion by the HE that Johnson did not have a legal nonconforming use must be rejected because, not only did City policy preclude her from deciding the issue, there would have been no factual basis for such a conclusion. The City has abandoned any contention that the absence of grandfathering language in the SMC 23.44.016 is of any significance.

Mr. Johnson also presented substantial evidence to support that he had an established use before the three-vehicle limit was adopted, the City never attempted to rebut any of that evidence, and the HE, in findings not appealed by the City, stated that the Johnsons had, indeed, supplied such testimony at the hearings. The HE did not reject such testimony. She simply determined that she could not consider it in light of SMC 23.42.102 and went on a misplaced search for grandfathering language in the three vehicle limit despite the general City ordinances recognizing the right to maintain legal nonconforming uses.

In an ordinary case, the lack of a finding on the credibility of

evidence would call for a remand for further proceedings, but City policy precludes the conduct of such a proceeding, rendering remand futile. That fact mandates reversal of the HE's affirmations of the citations and reversal of the Superior Court's dismissal of the Section 1983 claims in light of the absence of a meaningful appeal process.

VI. THERE IS A LEGITIMATE DISPUTE OF MATERIAL FACT TO REQUIRE REMAND OF THE SECTION 1983 CLAIM FOR TRIAL.

The City's discussion of Mr. Johnson's Section 1983 claim is unresponsive to his contention that its policy concerning nonconforming uses in the context of an appeal of a citation for engaging in such a use deprived him a meaningful opportunity to be heard and that such deprivation is actionable in itself. See *Norton v. Town of Islip*, 239 F.Supp.2d at 271-272. The City cites a federal decision, *Scott v. City of Seattle*, which involved the notice of violation adjudication procedure under a separate portion of the Municipal Code, Chapter 23.90 SMC. 99 F.Supp.2d 1263 (1999). That procedure takes place in Seattle Municipal Court, not a citation appeal process to the HE. The court in *Scott* pointed out that the mere issuance of the Notice of Violation or Order based on it could not in themselves give rise to Section 1983 claim because

such Notice and Order were simply a contention by the City that a violation existed and did not inflict a deprivation until adjudicated through a civil action by the City in Municipal Court or a LUPA appeal by the owner (the court apparently assuming a LUPA procedure would have been available). For *Scott* to apply here, Mr. Johnson would have to be arguing that the mere issuance of the citations deprived him of due process, which he is not. He is contending that the exclusive process for appealing the citations did so. The Notice and Order in *Scott*, by contrast, had never been adjudicated in any forum, the property owners claiming their mere issuance deprived them of due process.

The City also make no attempt to equate the expansive scope available for litigating notices of violation through Municipal Court, where judges have jurisdiction to consider any cognizable defense, and the clipped jurisdiction of the HE in this case. See Opening Br., at 42-43. *Scott* is inapplicable.

Post v. City of Tacoma is, however, applicable in that, as in that case, the City imposed fines without any real means of appealing. 167 Wn.2d 300, 217 P.3d 1179 (2009). The City appears to have abandoned any contention that a property owner's interest in not being unjustly fined does not merit due process

protections.

With respect to *Norton v. Town of Islip*, the City elects to distinguish its facts in lieu of acknowledging the principal for which Mr. Johnson cited it, which is that a denial of procedural due process is actionable in itself under Section 1983 without regard to the underlying merits of the action. Additional authorities on that point are cited in the footnote.²

VII. THE CR 12(b)(6) DISMISSAL WAS REVERSIBLE ERROR.

Although the City admits that Mr. Johnson contended that he had a claim of legal nonconforming use and that he had a right of notice and an opportunity to respond, it rests on criticizing the

² *Gavlak v. Town of Somers*, 267 F.Supp.2d 214 (D. Conn. 2003) (city denied hearing); *South Lyme Property Owners Assoc. v. Town of Old Lyme*, 121 F.Supp.2d 195, 201-202 (D.Conn. 2000) (town denied meaningful opportunity to be heard where it referred only to its own and other agencies' records before determining whether or not the use of a property was legal nonconforming, even though there was no pre-existing requirement that the use be reflected in those records and would consider only "independent documentation" by an aggrieved property owner and disregarded testimony demonstrating the nonconforming use); and *Mator v. Ecorse*, 301 Fed Appx. 476, 2008 WL 4935964 (6th Cir. 2008) (city, without any opportunity for a prior hearing, independently decided that the use of the plaintiffs' properties was not legal nonconforming and then offered aggrieved owners only the opportunity to apply to the zoning board for a variance to continue the use, but board had no power to reverse the city's prior decision and to permit the use by variance)

length of his written presentation in such response to the CR 12(b)(6) as he was able to mount under the circumstances without addressing the very steep standard its motion faced under that rule. See City Br. at 9-10. To the contrary, the trial court was obligated to examine the basis for the City's motion and would have been so obligated even had Johnson not responded at all, in addition to not appearing at the hearing. See *Graves v. P.J. Taggares Co.*, 94 Wn.2d 298, 616 P.2d 1223 (1980) (summary judgment improper even where nonmoving party did not submit opposing affidavits or appear at the hearing). In view of the burden posed by CR 12(b)(6), it is apparent that the trial court's dismissal of the Section 1983 claims under that rule resulted only from his not appearing at the hearing. That makes the trial courts' dismissal of those claims akin to entry of a default judgment, requiring reversal under the authorities Mr. Johnson cites in his opening brief.

The City also admits that it addressed only a substantive due process claim in its CR 12(b)(6) motion even though Johnson raised procedural due process. City's Br. at 36. The City, therefore, never actually moved to dismiss the procedural due process aspect of Mr. Johnson's Section 1983 claims. Despite

this, the City seeks to profit from an order that swept up such unaddressed claim. Plainly, it is possible for there to exist a set of facts that would entitle Johnson to recover damages for denial of procedural due process. The standard of CR 12(b)(6) was not met.

VIII. THE TRIAL ERRED IN DENYING MR. JOHNSON'S MOTIONS FOR RECONSIDERATION AND TO VACATE.

Mr. Johnson contends that the Court should have granted each of his motions to the trial court to reconsider and to vacate its decisions based on the grounds set forth in his opening brief. He contends that the trial court erred in entering the complained-of orders and compounded its errors by not vacating or correcting its orders for the reasons stated.

IX. EVEN IF THE CITY PREVAIL ON APPEAL, IT WOULD NOT BE ENTITLED TO AN AWARD OF ATTORNEYS' FEES.

The City cites no authority for its contention that RCW 4.84.370 provides for an award of attorneys' fees under the LUPA portion of this case and appears to defy the statute's plain language in claiming that it does so. RCW 4.84.370(1) provides in relevant part as follows:

Notwithstanding any other provisions of this chapter, reasonable attorneys' fees and costs shall be awarded to the prevailing party or substantially prevailing party on appeal before the court of appeals or the supreme court of a decision by a county, city, or town to issue, condition, or

deny a development permit involving a site-specific rezone, zoning, plat, conditional use, variance, shoreline permit, building permit, site plan, or similar land use approval or decision.

(emphasis added).

It is clear from this provision that attorneys' fees are available to the prevailing party only in the context of a permitting process, not code enforcement, as in this case. See *Prekeges v. King County*, 98 Wn.App. 275, 990 P.2d 405 (1999) (application for conditional use permit); *West Coast, Inc. v. Snohomish County*, 104 Wn.App. 735, 16 P.3d 30 (2000) (developer's application requesting modification of preliminary plat approval). While a permitting process reflects a city's decision to approve or deny a development proposal, code enforcement refers to a city's ability to change the *status quo*, *i.e.*, to prohibit what already exists.

Nor might enforcement be deemed a "similar land use approval or decision" under RCW 4.84.370(1) alongside the permit-related actions it enumerates. If the Legislature had intended to include any "land use decision," *i.e.*, the broader range of actions listed in RCW 36.70C.020(2), in the ambit of as RCW 4.84.370, it would either have incorporated such definition or cross-referred to it. See *Wash. Natural Gas Co. v. Pub. Util. Dist. No. 1*, 77 Wn.2d

94, 98, 459 P.2d 633 (1969) ("[w]here a statute specifically designates the things or classes of things upon which it operates, an inference arises in law that all things or classes of things omitted from it were intentionally omitted by the legislature"). Therefore, the City cannot be entitled to an award of its fees.

Even if the citations and related fines with respect to parking more than three vehicles are upheld on appeal, the City could not be deemed a substantially prevailing party because the trial court reversed its junk storage charge, a decision the City did not cross-appeal, and the City's enforcement action did not yield the removal in the complained -of vehicles from the property, contrary to its request for equitable relief in its answers to the LUPA petitions. No. 68819-7, CP 510-512, CP 547-549. The main objective of the City's serial citations and its requests for equitable relief before the trial court were to have the vehicles removed. That did not happen. The only relief the City received was affirmation of three fines against Johnson for engaging in use that section of the DPD determined was legal at all relevant times. The City cannot be deemed a substantially prevailing party under these standards.³

³ Compare *Piepkorn v. Adams*, 102 Wn.App. 673, 686, 10

RESPECTFULLY SUBMITTED this 18th day of December,

2013.

A handwritten signature in black ink, appearing to read "Charles R. Horner". The signature is written in a cursive style with a horizontal line extending to the right.

Charles R. Horner, WSBA No. 27504
Limited Appearance Attorney for Appellant

P.3d 428 (2000) (party substantially prevailed by securing injunction although court denied accompanying damages claim).

ATTACHMENT



Friday, November 22, 2013

TYKO JOHNSON
TYKO JOHNSON
4146 53RD AVE SW
SEATTLE, WA 98116

DebtorNbr:

146220

Notice of Intent To Report To Collections

Debt ID: 200397 **Departmental Ref Nbr:** 1022942
Date of Occurrence: 12/15/2011
City Department: Department of Planning and Development
Sub Department: Construction Permits
Reason: Compliance Test - CODE COMPLIANCE
Debt Amount: 1,394.00

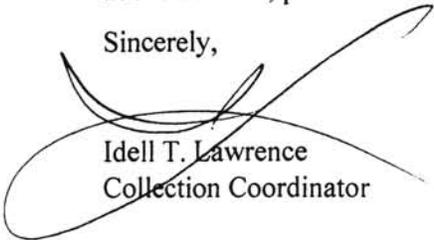
The above City Department has referred your past due account to the Department of Finance and Administrative Services for collection. If you have already paid this past due amount, please contact our office immediately.

Please remit your check or money order payable to the City of Seattle and send to the following address:

Collection Unit/Idell T. Lawrence
Department of Finance and Administrative Services
700 5th Avenue, Suite 4250
PO Box 34214
Seattle, WA 98124-4214

If we do not receive payment within 30 days from the date of this letter, please be advised that failure to pay this past due amount by the due date may result in the referral of this debt to the Law Department or an outside collection agency for further collection action. If we pursue legal action through the agency, you may be asked to pay attorney fees, interest and court costs. Accounts transferred to the collection agency will be reported to the credit bureau if not paid within 90 days from date of referral or original due date of this letter. This action would negatively affect your perceived credit worthiness. If you have any questions regarding the above account, please contact the Collection Unit at (206) 684-8825.

Sincerely,


Idell T. Lawrence
Collection Coordinator

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON,
DIVISION I**

TYKO JOHNSON,

Appellant,

vs.

CITY OF SEATTLE,

Respondent.

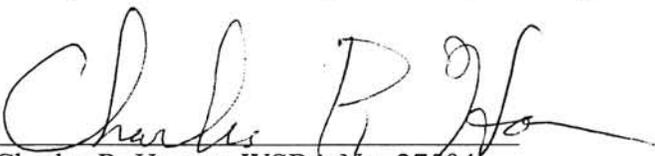
NO. 68819-7

PROOF OF SERVICE
SERVICE

I, Charles R. Horner, declare the following matters to be true and correct under penalty of perjury under the laws of the state of Washington:

1. On December 18, 2013, I served respondent City of Seattle with the Appellant's Reply Brief by personally delivering a copy of it to the Office of the Seattle City Attorney, 600 Fourth Avenue, 4th Floor, Seattle.

SIGNED this 18th day of December 2018, at Seattle, Washington.


Charles R. Horner, WSBA No. 27504

ORIGINAL