NO.102036-8

SUPREME COURT OF
THE STATE OF WASHINGTON

THE CHURCH OF THE DIVINE EARTH

Petitioner,

vs.

CITY OF TACOMA,

Respondent.

CITY OF TACOMA'S ANSWER TO AMICUS CURIAE BY THE BUILDING INDUSTRY ASSOCIATION OF WASHINGTON

WILLIAM C. FOSBRE, City Attorney

Barret J. Schulze
WSBA No. 45332
Attorney for Respondent (and former Cross-Appellant)
Tacoma City Attorney's Office
747 Market Street, Suite 1120
Tacoma, Washington 98402
(253) 591-5885

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

COURT RULES

I. Introduction

The City of Tacoma (hereinafter the "City") presents the following Answer to the *Memorandum of Amicus Curiae by the Building Industry Association of Washington* (hereinafter the "Amicus Memorandum") pursuant to the grant of authority for such a response provided through the August 14, 2023 decision letter authored by Commissioner Michael E. Johnston of this Court.

II. Identity of Answering Entity

The City is the Respondent in the above-captioned matter. The City has already filed the *City of Tacoma's Answer to Petitioner's Petition for Review by Washington State Supreme Court* (hereinafter the "City's Answer"), which respectfully requests that this Court deny the *Petition of Review by Washington State Supreme Court* (hereinafter the "Petition) submitted by the Church of the Divine Earth (hereinafter the "Church"). As the *Amicus Memorandum* ignores all relevant portions of the record below, encourages this Court to accept the

Petition for entirely speculative reasons, and the *Amicus Memorandum* cannot assist this Court in any measurable way, the City offers this *Answer*.

III. Relief Requested

The City requests that this Court only give the *Amicus Memorandum* the credence it deserves – i.e., little to none – in light of the fact that it ignores the true procedural history below, only offers speculative sensationalized analysis and argument, and it does not focus upon the issues that are actually at play in the *Petition*.

IV. Statement of the Case

In the interests of brevity and judicial economy, the City incorporates herein by this reference the Statement of the Case set out in the *City's Answer*.

V. Argument

For several reasons, some of which are outlined below, this Court should not give credence to the *Amicus Memorandum* while considering the Church's *Petition*.

A. Inapposite and speculative argument

The *Amicus Memorandum* bases its argument on the conclusory and unsupported position that the Church was somehow not permitted to "obtain adequate redress under fee provisions in RCW 64.40.020." *See* Amicus Memorandum, 8. This is not the issue at play in the *Petition*. The issue at play in the *Petition* is whether the trial court and Division II are correct in the holding that "the superior court provided sufficient reasoning such that [the appellate courts] have insight into the superior court's exercise of discretion and the superior court did not abuse its discretion" in making the lodestar award below. Petition, *Appendix 4* (hereinafter as the "Decision"), at 1. Without ever touching on this – the only issue that is truly and properly at play in this appellate proceeding – BIAW devotes the *Amicus Memorandum* to what BIAW characterizes as the **likely** impact this case will have on the Washington State housing market. *See e.g.*, Amicus Memorandum, 10-11 ("Increasing

artificial costs, such as a significant shift in the **likelihood** of permitting delays presented in the instance case, will increase the economic pain felt by thousands of households across the state." [emphasis added.]) There is no evidence before this Court that demonstrates that this case will cause a "significant shift" in the likelihood of permitting delays. Further, the argument that such a shift will result in the "economic pain" of which BIAW forewarns with sensationalized flair is impermissibly speculative, based on BIAW's research and reporting, and that research is limited to only the last few years (*see* Amicus Memorandum, 11 ("BIAW has seen an increase in holding costs [allegedly resulting from permitting delays…] since its first published report in 2021.")). These speculative arguments can have no impact on this Court's determination as to whether the *Petition* should be accepted for review by this Court.

B. No meaningful analysis of trial court discretion on lodestar

The *Amicus Memorandum* also argues that "if the prevailing party against a local government is no longer able to realize his or her reasonable fees and costs, the remedy provided in the statute is meaningless and local government will be able to put up barriers that delay and increase the cost of housing with impunity." Amicus Memorandum, 14. The key term in this reaching and speculative argument is the reference to "reasonable fees and costs." At no point in the *Amicus Memorandum* does BIAW address what would be "reasonable fees and costs" in the case below; at no point in the *Amicus Memorandum* does BIAW comment upon the case law that interprets how a trial court may properly exercise its discretion in making a lodestar award in this Chapter 64.40 RCW matter or in relation to any other fee shifting statue or mechanism – in fact, the *Amicus Memorandum* uses the phrase "discretion of a trial court" only once (Amicus Memorandum, 5) when it comments

that "the case at bar appears to present a relatively straightforward legal issues on the discretion of a trial court to award attorney's fees pursuant to statutory authority[…]". That is indeed what the case at bar presents and no further qualification is necessary or appropriate. Because BIAW does not meaningfully address the propriety of a trial court's exercise of its discretion in making a lodestar award, its *Amicus Memorandum* is of little to no value to this Court in relation to the subject *Petition*.

C. BIAW misunderstands or misconstrues the facts below

The *Amicus Memorandum* incorrectly states that the trial court "slash[ed]" the Church's requested lodestar award "by up to 40% **without explanation**." Amicus Memorandum, at 5 [emphasis added]. The record below, the *Decision* from Division II, and the *City's Answer* all thoroughly document the adequate "explanation" provided by the trial court in support of its discretionary lodestar award. *See e.g.*, Decision, 1, 12-15, 22-25; and, City's Answer. When claiming that the trial court acted

"without explanation," BIAW conveniently ignores all the following:

- Division II confirmed that the trial court "provided sufficient reasoning such that we have insight into the superior court's exercise of discretion and the superior court did not abuse its discretion" in making the lodestar award. Decision, 1.
- The trial court concluded that the "allowed blended rate of $385.03/hour" provided for the Church's counsel in the lodestar award was "somewhat high for this case." CP 588; Decision, 23.
- The trial court concluded that the "case was not complicated factually nor did the case present novel legal issues." CP 588; Decision, 23.
- Division II confirms that the trial court "here addressed outright that it believed many hours were not reasonably expended." Decision, 12.

- The trial court concluded that the "Church pursued various unsuccessful claims," fees for which are not recoverable. Decision, 12.
- The trial court carefully considered each phase of the litigation and "made a deliberate decision as to the number of hours it reduced." Decision, 13.
- The trial court explained on the record that many line items on the Church's fee/cost sheets were "relatively general" and difficult to determine if they were recoverable pursuant to RCW 64.40.020. Decision, 25.
- Even if this Court agrees with BIAW and the Church in their argument that this is a "civil rights" case (which it is not), BIAW and the Church have both failed to identify any authority that holds that a plaintiff's attorney in a prevailing civil rights case *shall be* entitled to recover all claimed fees or that attorney *shall be* entitled to a multiplier. Instead, it remains undeniable that these concepts are squarely in the trial

court's discretion. *See e.g.*, Berryman v. Metcalf, 177 Wn.App. 644, 661-675, 312 P.2d 745 (2013).

- BIAW does not identify any "irrelevant factor" that was relied on by the trial court below in relation to the denial of the Church's requested multiplier. *See* City's Answer, 23; Chuong v. Van Pham v. Seattle City Light, 159 Wn.2d 527, 543, 151 P.3d 976 (2007) (as long as an "irrelevant factor" is not considered by the trial court in relation to a multiplier adjustment, it is at the trial court's discretion whether to apply a multiplier).

BIAW's claim that it "is familiar with the issues raised in this case" (Amicus Motion, 1) is belied by the above. It is clear that BIAW is not familiar with the facts and issues relevant to the *Petition*, and it may be ignoring the record in an attempt to assist the Church's counsel in obtaining an undeserved fee award. The facts (with accurate citation to the record below) and true issues that are at play in the *Petition* are addressed by the *City's Answer*. In the interests of brevity, the City incorporates those arguments

by this reference in relation to the City's *Answer* to the *Amicus Memorandum*.

D. This is not a "civil rights" case

The *Amicus Memorandum* contributes to the Church's argument, which the Church has made at every possible turn, that the matter below was a "civil rights case." *See e.g.*, Amicus Memorandum, § V(B). The City does not relish the need to – yet again – state for the record that the matter below has already been determined by this very Court to be a case involving a six-month permit delay; this is not a case involving a challenge to the constitutionality of a land use decision – this is not a claim for just compensation for a taking – this is not a civil rights case. City's Answer, 5-7; Church of Divine Earth v. City of Tacoma, 194 Wn.2d 132, 136, 449 P.3d 269 (2019). BIAW's arguments relating to "civil rights" and citation to civil rights case law presented in the *Amicus Memorandum* are inapposite and not helpful to this Court in any way. Additionally, even if this is deemed to be a "civil rights" case, nothing in the *Amicus*

Memorandum assists this Court in its analysis as to whether the trial court properly exercised its discretion in making the lodestar award, and there is no citation in the *Amicus Memorandum* to any authority that would confirm that a trial court **must** award a prevailing plaintiff in a civil rights case all requested attorney fees and costs. Without any such authority or argument, the *Amicus Memorandum* is unable to assist this Court in any measurable way.

VII. Conclusion

Based on the foregoing, the City respectfully requests that this Court give little to no credence to the *Amicus Memorandum* in relation to this Court's analysis of the Church's *Petition*. As set out in greater detail in the *City's Answer*, the City renews its request that this Court deny the *Petition* and allow the trial court's appropriate exercise of its discretion in making the lodestar award below, and the affirmation by Division II below, to stand – thereby allowing this matter's odyssey through our State's courts to come to a final end.

VIII. Certificate

Pursuant to RAP 18.17(b), the undersigned certifies that this *Objection* (excluding the caption, table of contents, table of authorities, this certification, the signature block, and any language below) contains 1,747 words.

RESPECTFULLY SUBMITTED this 29th day of August, 2023.

BILL FOSBRE, City Attorney

By: /s/ *Barret Schulze*
BARRET J. SCHULZE
WSBA No. 45332
Deputy City Attorney
Counsel for Respondent City of Tacoma

I, Barret J. Schulze, declare under penalty of perjury and pursuant to the laws of the State of Washington that the foregoing is true and correct.

Signed in Tacoma, Washington on August 29, 2023.

/s/ *Barret Schulze*
BARRET J. SCHULZE

[end of document]

DECLARATION OF SERVICE

I hereby certify that on August 29, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Attorney for Plaintiff
Richard B. Sanders
Carolyn A. Lake
Goodstein Law Group, PLLC
510 South G Street
Tacoma, WA 98405
Rsanders@goodsteinlaw.com
clake@goodsteinlaw.com

Counsel for BIAW

Jackson Wilder Maynard, Jr.
General Counsel
Building Industry Association of Washington
300 Deschutes Way SW, Suite 300
Tumwater, WA 98501

Ashli Tagoai
Associate General Counsel
Building Industry Association of Washington
300 Deschutes Way SW, Suite 300
Tumwater, WA 98501

DATED: August 29, 2023

*/s/ Gisel Castro*_____
Gisel Castro, Legal Assistant
Tacoma City Attorney's Office

CITY OF TACOMA, CITY ATTORNEY OFFICE

August 29, 2023 - 3:01 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	102,036-8
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:

- 1020368_Briefs_20230829150112SC767966_6905.pdf
  This File Contains:
  Briefs - Answer to Amicus Curiae
  The Original File Name was 2023.08.29-COT Answer to AMICUS-The Building Industry Association of WA.pdf

A copy of the uploaded files will be sent to:

- ElofsonMA@gmail.com
- ashlit@biaw.com
- clake@goodsteinlaw.com
- dpinckney@goodsteinlaw.com
- gcastro@ci.tacoma.wa.us
- jacksonm@biaw.com
- jwmaynard2003@yahoo.com
- rsanders@goodsteinlaw.com

Comments:

Sender Name: Barret Schulze - Email: BSchulze@cityoftacoma.org
Address:
747 MARKET ST SUITE 1120
TACOMA, WA, 98402-3726
Phone: 253-591-5888

Note: The Filing Id is 20230829150112SC767966