NO. 102036-8

SUPREME COURT
OF THE STATE OF WASHINGTON

Court of Appeals, Division II No. 55737-1

THE CHURCH OF THE DIVINE EARTH

Petitioner,

v.

CITY OF TACOMA,

Respondent.

PETITION FOR REVIEW BY WASHINGTON STATE SUPREME COURT

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Petitioner is The Church of the Divine Earth, a Washington non-profit corporation.

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The Church of the Divine Earth v. City of Tacoma, ___Wn. App.___, (Div. II, January 24, 2023), (attached **Appendix 4** ("Opinion"); Motion for Reconsideration denied April 28, 2023) (attached, **Appendix 5**).

III. ISSUES PRESENTED FOR REVIEW

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IV. STATEMENT OF THE CASE

The Church of the Divine Earth, through its Pastor Terry Kuehn, submitted its building permit application to the City of Tacoma in September 2013 to build a modest single-family parsonage on a previously platted and improved lot in East Tacoma. The City however saw this as an opportunity to extort real property from the Church as an unconstitutional condition to obtain the permit. Thus began a ten-year odyssey through the City's land use bureaucracy, the Pierce County Superior Court, the Court of Appeals, the Washington Supreme Court and now back to the Court of Appeals. No fewer than nineteen judges have sat on this case.

This Petition is yet another step in a long and torturous road for the Church which simply wanted to build a small house where one had stood before. But the City defended this modest although absolutely justified constitutional claim as if

it sought millions, and the Church was required to invest in this litigation an equivalent effort to prevail. As background, attached is Appendix 2, the prior Supreme Court opinion. CP 135-142.

The case should have been simple enough since clearly established constitutional law holds it is the burden of a government agency to prove a land use permit condition is necessary to mitigate some public problem caused by the proposed improvement, and the condition is roughly proportional to the problem created by the development. See e.g. *Nollan v. California Coastal Commi*ssion, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed. 2d 677 (1987). But here the City claimed that the "problem" was not caused by the development at all but by a non-uniform right of way ("ROW") platted more than a century before—which was completely unrelated to whether the Church built a parsonage or not. CP 143-145. Moreover, the City had no plans to even widen the road—just land bank the unused ROW—a constitutional violation in and of itself. The City's "final decision" through its Hearing Examiner affirmed the

condition imposed solely to make the ROW "uniform." CP 146-155. That was followed by the Church's appeal to Superior Court under the Land Use Petition Act (LUPA) and with a RCW 64.40 damages claim. At that LUPA appeal hearing, that Trial Court (Judge Martin) ruled adjacent ROW uniformity was not a proper exaction for the proposed construction of a parsonage, and thus the permit condition lacked a constitutionally required nexus. CP 160-161. The City later changed its purported justification to claim the ROW was needed to mitigate safety impacts of the residential construction, notwithstanding that the new home merely replaced the former. Next, the City argued the condition, although unlawful, was not "reasonably known to be unlawful"—in an attempt to defeat liability under RCW 64.40.020. CP 162-163. This City pivot changed what should have been a straightforward and winning Church summary judgment to instead require a week of trial, where the City prevailed, followed by the Church's unsuccessful appeal to the Court of Appeals, resulting in an award of attorney fees *against* the Church in favor of the City. CP 5. Almost by

miracle, the Supreme Court granted review of the LUPA claim and reversed for the exact reasons recounted above. CP 135-142. This protracted litigation caused the Church to quickly run out of money, defaulting on its hourly rate attorney fee agreement. By September 2016 the Church was $250,000 in arrears with no prospect of ever bringing the debt current. CP 5.

The choice for the Church and its lawyers became (1) abandon its meritorious constitutional claim and walk away from the litigation, leaving intact the award of attorney fees *against the Church*, or (2) continue the struggle with the hope of ultimate substantive and fee payment relief based upon the contingent application of RCW 64.40.020's fee shifting statute. To prevail, the Church not only had to succeed on the merits against its publicly-funded City adversary, prove the City knew or should have known it acted unlawfully, but also persuade the Court to exercise discretion to award the Church its attorney fees. The Church and its lawyers chose to fight for its civil rights even if the cost was great and the odds were long. These facts are

relevant to the issue of multiplying the lodestar based on risk of fee collection, also referred to as "contingency".

Related to the permit condition claim, but procedurally distinct, was a claim under the Public Records Act ("PRA"). During the LUPA case discovery, the Church filed a public record request ("PRR") for the City's permit file. The Church believed the City took an unreasonable time to respond so amended its complaint to include a PRA claim. CP 191. The Church prevailed under one PRA theory and was awarded $24,000 in attorney fees. CP 190. Other PRA theories were dismissed, and affirmed on appeal, and not pursued on remand. The Church made clear it was not seeking is not seeking any further award of PRA fees or costs. CP 191-192. The attorney fees are shown on the table below, as well as what the Court ultimately awarded.

Attorney	Total Hours	Rate	Total
Richard Sanders	1026.7	$395	$405,546.50
Carolyn Lake	44	$295	$12,980.00
Seth Goodstein	33	$200	$6,600.00
Conor McCarthy	0.9	$200	$180.00
Terry Kuehn	196.25	$30	$5,887.00
Total In Support of Church Lodestar Request (before multiplier)	1,104.6		$431,193.5 (before multiplier)
15% Reduction for Presumed PRA Work			-$14,322.37
Church's Lodestar: (1,104.6 hrs. X individual attorney rates)			$416,871.13
Multiply by 1.5 based on Payment Risk			$625,306.69
Deduct from fees for Prior Payments: $1,095.49-- 4/13/15 Trial Court Costs for 1/19/15 Judgment $11,068.87-- Supreme Court Costs 11/15/19			-$12,164.36
Church's Requested Attorney Fee Judgment:			**$613,142.33**
What Court Awarded:	**658.5 (deducted 446.1 hours**	**$385.03 (blended**	**$253,543.66**
Court's Reduction of Fee Award:			**$359,598.67**

In sum, the Court deducted the number of attorney hours by 40% (1110.9 reduced to 658.5, a deduct of 452.4 hours); reduced Retired Justice Sanders' fees by 40% ($613,142 reduced to $253,534); and failed to apply any multiplier. CP 418-423. Most significantly, the Court offered little justification for the many reductions, a particularly glaring omission in light of the large decreases. When pressed, the Trial Court refused to explain his

reasoning RP 13:7-10 & RP 13:16-14:3. The record lacks explanation as to why the lodestar was reduced by 452 hours, as opposed to any other number. The Court failed to identify any particular excessive hours and provided only an elliptical explanation. The Court's only explanation for denying a multiplier is that the blended rate the Court chose to apply was "somewhat high". CP 421. This was despite a previous Court in this case finding the $395 rate reasonable. CP 190. The Court did not acknowledge the civil rights nature of this case and did not address how (or if) the high risk of non-payment factored into his decision to deny the multiplier. The Court stated that many hours were "time that could have been done by legal staff or associate attorneys at far lowers rates" and "not all time was reasonably spent." CP 421. Yet, the Court at the same time denied any Legal Assistant fee award. The record lacks the Trial Court's detailed explanation of how the discretion was exercised. The Church pressed the Court to explain its many and large deductions; the Court refused. RP 13:7-10 and RP 13:16-14:3.

V. ARGUMENT

RAP 13.4 provides review by the Supreme Court will be accepted if (1) the Decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) is in conflict with a published decision of the Court of Appeals; or (3) if a significant question of law under the Constitution of the State of Washington or the United States is involved; or (4) if the petition involves an issue of substantial public interest that should be determined by the Supreme Court. As set forth below these criteria are met in multiple ways.

A. The Court Should Accept Review of The Opinion Which Erred In Finding That A Multiplier Award of Attorney Fees In a Civil Rights Case Is Dependent upon a Contingent Fee Agreement. (Opinion 23).

The Opinion wrongly found that fee multipliers are limited solely to contingency cases: "However, the cases that the Church cites to are, again, contingency fee cases." [Opinion at 23]. The Opinion then upheld the Trial Court's disallowance of a fee multiplier, "because there was an hourly fee agreement…" [Opinion at 24].

This case merits review because it conflicts with decisions of this court, the Court of Appeals, and raises an issue of public

importance. In *Martinez*[1], the Division II Court of Appeals admonished that in civil rights cases, fee agreements, contingent or not, have no place in calculating the award of attorney fees, including multipliers: "*Fahn*[2] and *Blair*[3] teach that the court should award reasonable attorney fees based on market rates ***regardless of the terms of the private compensation*** arrangements between plaintiff and counsel." *Martinez,* 81 Wn. App. 237.

*"**We hold that the trial court abused its discretion in placing undue emphasis on Martinez's contingent fee agreement when determining a reasonable attorney fee for this case**." Martinez* 81 Wn. App. 228 at 241.

The Opinion at 23 wrongly discounted the Church's analysis demonstrating that the "civil rights nature" of the case in support that a multiplier is warranted. As the Church stated,

"'[T]he possibility of a multiplier works to encourage civil rights attorneys to accept difficult cases'" because "'the lodestar figure

[1] *Martinez v. City of Tacoma,* 81 Wn. App. 228, 241 (Wash. Ct. App. 1996).
[2] *Fahn v. Cowlitz County*, 95 Wn.2d 679, 683-84, 628 P.2d 813(1981).
[3] *Blair v. Washington State Univ.*, 108 Wn.2d 558, 570, 740 P.2d 1379 (1987).

[may] not adequately account for the high-risk nature of a case.'" *Br. of Appellant* at 28.

Allard v. First Interstate Bank of Washington, 112 Wn.2d 145, 150-151, 768 P.2d 998, 1002 (Wash. 1989) also directs that the presence of a contingent fee agreement is NOT the sole determination in determining multipliers and attorney fees.

A trial court *may* consider the existence of a contingent fee agreement in making its award of attorneys' fees, but should not rely solely on the terms of such an agreement in determining the amount. *Allard*, quoting Leubsdorf, *Recovering* Attorney Fees as Damages, 38 Rutgers L. Rev. 439, 476 (1986); *Note, Attorney's Fees Computing a "Reasonable Attorney's Fee" Under the Civil Rights Attorney's Fees Awards Act, Cooper v. Singer*, 33 U. Kan. L. Rev. 367, 388 (1985).

And see *Allard* at 151: "The existence of a contingent fee arrangement between an attorney and client s***ays nothing*** about the reasonableness of an award of attorney's fee granted to a plaintiff against a defendant. ***The attorney's fee awarded should be neither enhanced nor diminished by the presence of such an arrangement."***

Fahn and *Blair* are cases where attorneys' fees were awarded in pro bono representations.[4] The *Martinez* court held, "If the plaintiffs in those cases were entitled to recover reasonable fees after paying their pro bono public attorneys nothing, surely Martinez is entitled to recover reasonable fees regardless of the terms of his contingency fee agreement with attorney McGavick". Id at 237.

The *Martinez* Court[5] spoke of how the US Supreme Court disregarded contingent fee agreements in civil rights fee awards, citing *Blanchard v. Bergeron*[6]*:*

> "[t]he contingent-fee model, premised on the award to an attorney of an amount representing a percentage of the damages, is thus inappropriate for the determination of fees

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[4] In *Fahn v. Cowlitz County*, the defendant argued that plaintiffs were not entitled to a fee award because their counsel had agreed to undertake the case on a pro bono basis. The Court held pro bono representation would not preclude an award of reasonable fees under the Law Against Discrimination. In *Blair v. Washington State Univ.*, the trial court had reduced the plaintiffs' fee award because the trial court assumed that it was inevitable that public interest lawyers would lack efficiency and duplicate efforts. The Supreme Court found abuse of discretion. *Martinez* 81 Wn. App at 237, *footnotes omitted.*

[5] *Martinez*, 81 Wn. App at 237-238.

[6] 489 U.S. 87, 109 S. Ct. 939, 103 L. Ed. 2d 67 (1989). "..in the absence of state precedent, we look to federal case law" *Martinez v. City of Tacoma*, 81 Wn. App. 228, 237-38 (Wash. Ct. App. 1996), citing *Blair*, 108 Wn.2d at 570; *Fahn*, 95 Wn.2d at 683-684.

> under § 1988." The Court's decision in *Blanchard* was unanimous. **No member of the United States Supreme Court has accepted the use of a contingent fee for computing a reasonable attorney fee under § 1988**…".

The Opinion includes the *Fisher*[7] case which the court describes as a civil rights "contingency fee" case. [Opinion at 23]. But *Fisher* was neither: "This is not public interest litigation, but rather a dispute between two private parties over a lease affecting only the parties. Fisher has paid its attorney fees all along so its attorneys have not been deprived of the use of the money." *Id at 377.*

However *Fisher does* describe the public policy considerations, which support a multiplier in civil rights case, which should be applied here on Review to the Church's fee award.[8]

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[7] *Fisher Properties, Inc. v. Arden-Mayfair, Inc*., 115 Wn.2d 364, 377, 798 P.2d 799 (1990).

[8] *Fisher* at 375-376: "Fisher relies on federal cases involving public interest litigation. ….This federal fee shifting statute authorizes the court to award reasonable attorney fees to the prevailing party in a civil rights suit as costs paid by the defendant. …The legislative purpose of fee shifting is to provide an incentive for private enforcement of congressional statutory policy. Note, *Attorney Fee Contingency Enhancements: Toward a Complete Incentive To Litigate Under Federal Fee- Shifting Statutes*, 63 Wash. L. Rev. 469, 470 (1988). There are well over 100 federal fee-shifting statutes. 63 Wash. L. Rev. at 469.

The availability of an attorney fee encourages individuals injured by discrimination to seek judicial redress…If successful

2. The Court Should Grant Review of the Opinion As This Is A Civil Rights Case Justifying Multiplier.

Below, early trial court Judge Martin already ruled this is a civil rights case. CP 160-161. "The City of Tacoma violated Petitioner's due process rights as secured by the 14th amendment and Taking Clause by requiring" a dedication of land as a condition of a building permit and by failing to carry it burden to prove the condition complied with the *Nollan/Dollan* requirements."

This Supreme Court agreed – CP 269-276 –noting that the unconstitutionality of the City's land use decision had already been found by the lower court, leaving only the question of whether and what damages and fees are appropriate.[9] Thus the

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plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest.... (Footnote omitted.) *Copeland v. Marshall*, 641 F.2d 880, 889 (D.C. Cir.1980) (*quoting Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 401-02, 19 L. Ed. 2d 1263, 88 S. Ct. 964(1968)). Such awards encourage attorneys to take potentially risky cases with clients who frequently cannot afford to pay an attorney. The goal is to attract competent counsel…*

[9] CP 270: "This is not a case challenging the constitutionality of a land use decision; the propriety of the permit condition was already resolved by the lower court and is not before us on appeal. And because the superior court invalidated the permit condition, for just compensation for a taking. Instead, what we have before us is a claim for damages under RCW 64.40.020 for

determination that this is a civil right case is the law of the case, which cannot be reasonably contested now. The fee award at issue is for the work necessary to eliminate the City's unconstitutional attempted exaction of land through an unlawful permit condition, which violated the 14th Amendment, and is the very definition of a civil rights case. And because this is a civil right case, this Court should accept review to find the Trial Court erred by failing to analyze, articulate and award appropriate attorneys' fees in accordance with lodestar principles in the civil rights context.

Chapter RCW 64.40's legislative history also demonstrates that the legislators intended the attorney fee award provisions to be liberally applied in cases exactly like here. CP 173-179.

Yet the Trial Court failed to acknowledge the civil rights nature of this case and did not address how (or if) the high risk of non-

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an attempted exaction of land through an unlawful permit condition." Ultimately the Supreme Court remanded for the trial court to apply the correct, objective standard to determine whether the Church proved the City knew or should reasonably have known its permit condition for a dedication of land was unlawful. CP 269-276. The Trial Court said yes. CP 420. On remand, the Trial Court granted the Church's Summary Judgement Motion finding the City should have known the condition was unlawful. That ruling triggered the requirement for an award of reasonable attorney fees to the Church, using a civil rights standard.

payment factored into his decision to deny the multiplier, an error to be corrected on Review.

3. This Court Should Grant Review As Fee Awards & Multipliers More Liberally Applied in Civil Rights Cases in Light of Legislative Purposes.

The *Martinez* Court adopted the federal rule that fee awards are more liberally allowed in civil rights cases and further should not be proportionately tied to monetary damages, The Supreme Court has called for liberal construction of the attorney fee entitlement in order to encourage private enforcement of civil rights litigation:[10]

> [**W]e adopt the federal rule allowing more liberal recovery of costs by the prevailing party in civil rights litigation**, in order to further the policies underlying these civil rights statutes: to make it financially feasible to litigate civil rights violations, **to enable vigorous enforcement of modern civil rights legislation while at the same time limiting the growth of the enforcement bureaucracy, to compensate fully attorneys whose service has benefited the public interest, and to encourage them to accept these cases where the litigants are often poor and the judicial remedies are often nonmonetary.[11]**

The *Martinez* Court described the Legislature's goal of the fee shifting statute was "to enable vigorous enforcement

[10] *Martinez*, 81 Wn. App 245
[11] *Martinez*, 81 Wn. App 235.

of modern civil rights litigation and to make it financially feasible for individuals to litigate civil rights violations." "Unlike most private tort litigants, **a civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms**." *Martinez*, 81 Wn. App 236.

Martinez also quoted from the United States Supreme Court's decision in *City of Riverside v. Rivera*.[12] "Because damages awards do not reflect fully the public benefit advanced by civil rights litigation, Congress did not intend for fees in civil rights cases, unlike most private law cases, to depend on obtaining substantial monetary relief." *Martinez*, supra at 236.

The goal was to ensure a reasonable attorney's fee so that when constitutional violations occurred, competent counsel would be willing to come forward and assist the wronged parties in the vindication of their rights. R*iverside,* at 2694-2697. *See also Seattle School District No. 1 v. Washington,*

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[12] C*ity of Riverside v. Rivera*, 477 U.S. 561, 574, 106 S. Ct. 2686, 91 L. Ed. 2d 466 (1986).

633 F.2d 1338 (9th Cir.1980).Otherwise, a small but meritorious civil rights issue such as this would be crushed due to the litigation costs by a stubborn, well-funded defendant, such as present case.

To ensure that lawyers would be willing to represent persons with legitimate civil rights grievances, Congress determined that it would be necessary to compensate lawyers for all time reasonably expended on a case. *Riverside, supra,* at 564–65, 576, 106 S.Ct. 2686 (*plurality opinion); accord Id.* at 585, 106 S.Ct. 2686 (Powell, J., concurring in the judgment);

> "[O]ne purpose of the Civil Rights Attorney's Fees Awards Act of 1976 was to **remove financial impediments that might preclude people from asserting their civil rights**…**fee awards are an integral part of the remedies necessary to obtain such compliance."** *Hamner v. Rios*, supra at 1408, (9th Cir. 1985).

Gutting actual hours worked and not allowing a justified fee multiplier actually creates incentive for agencies to engage in the very protracted litigation fee award are designed to discourage.

The value in advancing civil rights cases is not limited to

pecuniary considerations, and so an award of fees should not depend on obtaining substantial financial relief for the plaintiff. *Perry v. Costco Wholesale, Inc.*, 123 Wash.App. 783, 808–09, 98 P.3d 1264 (2004). *Ackerley Communications, Inc. v. City of Salem, Or.*, 752 F.2d 1394 (9th Cir. 1985).

4. The Court Should Accept Review As The Opinion Affirms the Lower Court's Disregard of the Risk of Failure to Pay in this Civil Rights Case. A Multiplier Based On Risk Of Loss Was And Is Truly Merited In This Case & Does Not Require a Contingent Fee Agreement.

The record, in Declaration of Richard Sanders at paragraph 20, CP 192-193, as well as CP 5, and CP 11-15, reflects that the Church advised the Trial Court that it lacked financial capacity to pay its attorney's fees. Yet, the Trial Court did not acknowledge the civil rights nature of this case and did not address how (or if) the high risk of non-payment factored into the Court's decision to deny the multiplier.

- The Court was aware that the client is and was broke and could not possibly have paid the hundreds of thousands of dollars necessary to litigate a meritorious claim to success.
- The City had unlimited resources to not only fight the claim but destroy the Church in a war of attrition.

- The RCW 64.40 attorney fees were not only discretionary, but reciprocal, exposing the Church to an award in favor of the City (which actually happened in the Court of Appeals.)
- Making the case that much more difficult, mid-case, the City changed its position on underlying facts of the Hearing Examiner decision to the Court, forcing the matter to trial as opposed to resolution by summary judgment. A permit condition imposed to make a century old ROW uniform is clearly unlawful; however, a permit condition imposed to mitigate an alleged issue claimed to be caused by the construction triggered a trial of factual issues.
- The City also argued it didn't know it acted illegally, which was successful, until remand following Supreme Court review.
- Finally, by the grace of God, the Supreme Court ultimately held the City knowingly imposed an improper condition however the City's tactic immeasurably heighted the risk of failure.

Improving access to the Court is an often-announced goal. This case is the practical reality of achieving that goal. Vindication of civil rights is a grinding, multi-year process, as this case bears out. The Church's attorneys battling to protect civil rights worked for 9 years, facing the possibility they would never be paid. The City's attorneys took home a paycheck on a regular basis – They suffered no downside to protract and extend and battle as if multimillion dollars were at issue. It's been said - - you can't fight city hall. Review by this Court is required lest that phrase becomes reality again.

- **The US Congress** chose to level that playing field in 1976 – as the 9th Circuit observed: "The congressional purpose in providing attorney's fees in civil rights cases was to eliminate

financial barriers to the vindication of constitutional rights and to stimulate voluntary compliance with the law." *Seattle School District,* 633 F.2d at 1348;

- **The US Supreme Court** in *Riverside* "The goal was to ensure a reasonable attorney's fee so that when constitutional violations occurred, competent counsel would be willing to come forward and assist the wronged parties in the vindication of their rights" at 2694-2697; and

- **Washington Courts** followed suit in the 1996 *Martinez case* against this very same defendant, the City of Tacoma: adopting a "liberal recovery in civil right cases" "to make it financially feasible to litigate civil rights violations, to enable vigorous enforcement of modern civil rights legislation while at the same time limiting the growth of the enforcement bureaucracy, to compensate fully attorneys whose service has benefited the public interest, and to encourage them to accept these cases where the litigants are often poor and the judicial remedies are often nonmonetary. That is this case in spades.

B. This Court Should Grant Review Because the Opinion Affirms the Court's Abuse of Discretion by Its Large Fee Reduction and Lack Of Detailed Rationale

A Trial Court's award of substantially less than the amount requested should indicate how the court arrived at the final numbers and explain why discounts were applied. *Absher Constr. Co. v. Kent Sch. Dist.* 415, 79 Wash.App. 841, 848, 917 P.2d 1086 (1995), *Talisen Corp. v. Razore Land Co*., 144 P.3d 1185, 135 Wn. App. 106 (Wash. App. 2006).

In at least three places, the Opinion admits that the Trial Court's rationale lacked detail:

- "while a more thorough explanation of the hours awarded is generally desired" Opinion 12
- "again, the superior (sic) might have been more thorough in its explanations," Opinion 13
- while additional detail may have been desired, Opinion 28

This Court should grant review to find an abuse of discretion. "We conclude that the district court's near total failure to explain the basis of its award was an abuse of discretion." *Stranger v. China Elec. Motor, Inc.*, 812 F.3d 734, 737 (9th Cir. 2016).

1. Large Reduction Requires <u>Greater</u> Rather than <u>Less</u> Detailed Explanation.

Where reductions to fees requests are large, as here, more – not less- justification is required. Review should be accepted as the Opinion affirms the Trial Court's errors:

- A 40% reduction of the hours <u>actually</u> expended, (1110.9 hours reduced to 658.5, a deduct of 452.4 hours); CP 418-423. CP 17-19, Fee Break down.
- The Court cut the lodestar amount –the actual hours spent times the attorneys' usual and customary hourly rate before even applying a multiplier and AFTER deducting 15% for PRA fees.
- The lodestar initial amount of $432,193 after deductions for PRA work of 15% was $ 416,871. **The Court slashed that**

to $253,534, almost 40%.

- Here a **1.5 multiplier was requested,** justified and reasonable, which would have resulted **in an amount of $613,142 – the Court's award was 60% less, with meager explanation.**

In *Stranger*, the 9th Circuit found error where the Court did not adequately explain reducing the lodestar. While the Court noted one or two considerations that might have supported its decision, it failed to explain how it weighed those considerations when calculating the final award.[13]

Further, those **422 hours represented a 30% reduction** of

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[13] The Trial Court here committed the same errors as in *Stranger* which was properly overturned.

> [The Trial Court] It stated that a review of the billing records disclosed "numerous examples of legal tasks being inappropriately [lumped] together." The court did not, however, point to any specific tasks by way of example, much less explain why grouping those tasks was inappropriate, or how any of this affected the ultimate fee award. Instead, the court merely asserted that the case was "a very simple case" and commented that "a lot of high-cost lawyers were not doing work ... that would ... take their expertise to do." Ultimately, the court reduced the lodestar by 422 hours. This resulted in a final fee award of $466,038—a 30% reduction from the original lodestar value, and a 50% reduction from Class Counsel's requested fee.

Stanger v. China Elec. Motor, Inc., 812 F.3d 734, 737-38 (9th Cir. 2016).

the hours compensable under the presumptively correct lodestar. "**A 30% reduction is large enough that the parties were entitled to a more detailed explanation of the court's reasoning**." *Stranger v. China Elec. Motor, Inc.*, 812 F.3d 734, at 739 (9th Cir. 2016). Here, the Court cut 452 hours, 40%, also without Court-supplied detail.

A court's reduction of more than ten percent requires a reasoned explanation. *Johnson v. MGM Holdings, Inc*., 943 F.3d 1239 (9th Cir. 2019). Error was found where "the district court did not offer any additional explanation for its decision to **cut Class Counsel's hours by 30%."** *Stanger v. China Elec. Motor, Inc.*, 812 F.3d 734 (9th Cir. 2016). Especially "**where the disparity [between the requested fee and the final award] is larger, a more specific articulation of the court's reasoning is expected**." *Stranger v. China Elec. Motor, Inc.*, 812 F.3d 734 (9th Cir. 2016), *quoting Moreno v. City of Sacramento*, 534 F.3d 1106, 1111 (9th Cir.2008). **Here the Church's requested multiplier fees were cut by 60%.**

In a 2020 case, the 9th Circuit reversed where the court concluded that "the vast majority of hours expended in this case

were unreasonable." The court applied a 90% "across-the-board percentage cut", *Vargas v. Howell,* 949 F.3d 1188 (9th Cir. 2020). In reversing on appeal, the 2020 *Vagas* Court emphasized that **the larger the difference between the fee requested and the fee awarded, the "more specific articulation of the court's reasoning is** expected." *Id.*

In *Ferland v. Concord Credit Corp*., 244 F.3d 1145 (9th Cir. 2001**),** another award was error where the court eliminated more than half the hours actually expended. Similarly, here the Trial Court:

- Failed to apply any multiplier or explain why or weigh factors. Example: The record lacks explanation as to why the lodestar was reduced by 452 hours, as opposed to any other number of hours.

- The Court failed to identify any particular excessive hours.

- The Court stated that many hours were "time that could have been done by legal staff or associate attorneys at far lowers rates" and "not all time was reasonably spent." CP 421.

- The Trial Court erred by disregarding the Church's Public Record Act ("PRA") fee segregation. The Church properly discounted all services and costs associated with the PRA proceeding by eliminating fees for each PRA entry, and also discounting fees incurred at the Appeals Court level by 15%. "Where the specifics of the case make segregating actual hours difficult" a percentage reduction of fees may be appropriate. *Clausen v. Icicle Seafoods*, Inc., 174 Wn.2d 70,

272 P.3d 827, 834 (2012).

- The Court erred in speculating on allocation of work with resulting reduction in fees. The Court stated that many hours were “time that could have been done by legal staff or associate attorneys at far lowers rates” and “not all time was reasonably spent”. What time? What was unreasonable? We do not know because the Court’s explanation was inadequate to allow review on these issues. Further, Courts may not reduce a fee award based on "speculation as to how other firms would have staffed the case" or "whether it would have been cheaper to delegate the work to other attorneys." *Morenov. City of Sacramento,* 534 F.3d 1106, at 1114-1115 (9th Cir. 2008).

Here, where the reduction was significant, “A conclusory statement about inefficiency can justify "no more than a haircut" in a fee award; it cannot justify a large percent reduction. Id. at 1116,” *Vargas v. Howell*, 949 F.3d 1188 (9th Cir. 2020); quoting *Gonzalez,* 729 F.3d at 1203 ("[T]he district court must explain why it chose to cut the number of hours or the lodestar by the specific percentage it did.").

2. This Court Should Grant Review Because The Opinion Affirms the Trial Court’s Refusal to Articulate Rationale

Review should be granted because the Opinion lets stand the abuse of discretion as the Trial Court actually refused to explain its Ruling when requested by the Church. RP 13:7-10 and RP 13:16- 14:3.

> THE COURT: With respect to that, let me just say one more thing, which is, I don't know that it is reasonable, to be honest with you, to expect the Court to go through six or seven years' worth of billings on an oral record when I have a lot of other cases pending and make that determination at that point in time. There is just no time to do that.

This is error. *Mayer v. City of Seattle, 102 Wash.App. 66, 82–83, 10 P.3d 408 (2000), review denied, 142 Wash.2d 1029, 21 P.3d 1150 (2001).*

> It is worth emphasizing that "[s]ince [the district court] is already doing the relevant calculation**, it is a small matter to abide by the injunction of the arithmetic teacher: Show your work**!" *City of Holyoke Gas & Elec. Dep't v. FERC*, 954 F.2d 740, 743 (D.C.Cir.1992). …The district court made an unfortunately common mistake. While it identified the correct rules, it provided no explanation for how it applied those rules in calculating the costs and attorney's fees.

Padgett v. Loventhal, 706 F.3d 1205 (9th Cir. 2013).

The reason for this is clear: To allow a reviewing Court to conduct a meaningful review, the Court must "provide a concise but clear explanation of its reasons for the fee award." *Hensley v. Eckerhart*, 461 U.S. 424, 437, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983), *Ferland v. Conrad Credit Corp.*, 244 F.3d 1145, 1151–52 (9th Cir.2001). The Trial Court here erred in failing to do so, which this Court should accept review to correct.

VI. CONCLUSION

Review should be granted.

I certify in compliance with RAP 18.17(c)(8), that this Motion for Reconsideration contains 5760 words, excluding certificate of service and signature blocks, which slightly exceeds the 5,000-word limit of RAP 18.17; accordingly a Motion for Over-Length accompanies this Petition.

DATED this 30th day of May 2023.

GOODSTEIN LAW GROUP PLLC

s/Carolyn Lake

Carolyn Lake, WSBA #13980
Attorney for Petitioner

CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below, I caused to be served the foregoing document on the following persons and in the manner listed below:

Margaret A. Elofson Attorney at Law 323 Summit Ave Fircrest, WA 98466-7315 Email: Elofsonma@gmail.com	☐ U.S. First Class Mail ☐ Via Legal Messenger ☐ Overnight Courier ☑ Electronically via email
Barret Schulze, Deputy City Attorney City of Tacoma, Office of the City Attorney 747 Market Street, Room 1120 Tacoma, WA 98402 Email: bschulze@cityoftacoma.org	☐ U.S. First Class Mail ☐ Via Legal Messenger ☐ Overnight Courier ☑ Electronically via email

DATED this 30th day of May 2023, at Tacoma, Washington.

s/*Carolyn Lake*
Carolyn Lake

Attachment 1

Summary of lodestar reasonable hours, rate and cost calculation.

The lodestar reasonable hours claim was and is organized below by phase of the litigation: (1) Pre-Trial; (2) Trial; (3) Post Trial; (4) Court of Appeals; (5) Supreme Court; (6) Remand; and (7) Post Final Judgment/Attorney Fees.

Pre-Trial:

Attorney	Hours	Rate	Total
Richard Sanders	415.5	$395	$164,122.50
Carolyn Lake	16.6	$295	$4,897.00
Seth Goodstein	20.7	$200	$4,140.00
Conor McCarthy	0.9	$200	$180.00
Total Amount:			$173,339.50

Trial:

Attorney	Hours	Rate	Total
Richard Sanders	76.5	$395	$30,217.50
Carolyn Lake	0	$295	0
Seth Goodstein	0	$200	0
Total Amount:			$30,217.50

Post Trial:

Attorney	Hours	Rate	Total
Richard Sanders	56.1	$395	$22,159.50
Carolyn Lake	4.1	$295	$1,209.50
Seth Goodstein	7.0	$200	$1,400.00
Total Amount:			$24,769.00

Court of Appeals:

Attorney	Hours	Rate	Total
Richard Sanders	238.7	$395	$94,286.50
Carolyn Lake	0.8	$295	$236.00
Seth Goodstein	4.8	$200	$960.00
Sub Total:			$95,482.50
Credit City 15% for PRA			-$14,322.37
Total:			$81,160.13

Supreme Court:

Attorney	Hours	Rate	Total
Richard Sanders	97.3	$395	$38,433.50
Carolyn Lake	3.5	$295	$1,032.50
Seth Goodstein	0.5	$200	$100.00

Total Amount:	$39,566.00

Remand:

Attorney	Hours	Rate	Total
Richard Sanders	88.6	$395	$34,997.00
Carolyn Lake	15.5	$295	$4,572.50
Seth Goodstein	0	$200	0
Total Amount:			$39,569.50

Post Final Judgment/Attorney Fees:

Attorney	Hours	Rate	Total
Richard Sanders	54	$395	$21,330.00
Carolyn Lake	3.5	$295	$1,032.50
Seth Goodstein	0	$200	0
Total Amount:			22,362.5

Legal Assistant Fees:

Name	Hours	Rate	Total
Terry Kuehn	196.25	$30	$5,887.00
Total Amount:			$5,887.00

Total Net Lodestar:	$416,871.13
Multiply by 1.5:	$625,306.69
Total credit: Deduct Prior City Payment from total attorney fees due: – $1,095.49-- 4/13/15 Trial Court Costs for 1/19/15 Judgment – $11,068.87-- Supreme Court Costs 11/15/19	-$12,164.36
Total Net Attorney Fee Judgment:	$613,142.33
Amount Court Awarded:	$253,543.66
Final Amount & Amount Awarded Difference	$359,598.67

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449 P.3d 269 (Wash. 2019)
194 Wn.2d 132
194 Wn.2d 132
The CHURCH OF the DIVINE EARTH, Petitioner,
v.
CITY OF TACOMA, Respondent.
No. 96613-3
Supreme Court of Washington
September 19, 2019
Argued June 13, 2019

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Appeal from Pierce County Superior Court, Hon. Vicki Hogan, Judge (No. 14-2-13006-1).

[194 Wn.2d 133] Richard B. Sanders, Carolyn A. Lake, Goodstein Law Group, for Petitioner.

Margaret A. Elofson, City of Tacoma, for Respondent.

Hannah Sarah Sells Marcley, Attorney at Law, Jackson Wilder Maynard, Jr., Building Industry Association of Washington, for Amicus Curiae (Building Industry Association of Washington).

Brian Trevor Hodges, Pacific Legal Foundation, for Amicus Curiae (Pacific Legal Foundation).

OPINION

JOHNSON, J.

[194 Wn.2d 134] **[?1]** This case concerns whether the city of Tacoma (City) can be held liable for damages for imposing an unlawful condition on a building permit. In an appeal brought under the Land Use Petition Act (LUPA), chapter 36.70C RCW, the superior court ruled that the City acted unlawfully when it placed a condition on the Church of the Divine Earth?s (Church) building permit, requiring an uncompensated-for dedication of land for right-of-way improvements. However, the court denied the Church?s action for damages under RCW 64.40.020, and the Court of Appeals affirmed. We reverse and remand for a new trial.

FACTS

[?2] On September 20, 2013, the Church submitted an application to the City to build a parsonage on property it owned. A single-family residence had previously been located on the property, but it had been demolished in 2012. City staff reviewed the permit application and placed a number of conditions on it, including, at issue here, a requirement [194 Wn.2d 135] that the Church dedicate a 30-foot-wide strip of land for right-of-way improvements to a street abutting the property. While the existing street was generally 60 feet wide in other areas, it was 30 feet wide next to the Church?s property. This lack of uniformity had existed for around 100 years.

[?3] The Church challenged the permit conditions, and the City eventually removed most of them but kept the requirement for a dedication. The Church appealed the decision to the City?s hearing examiner, and the hearing examiner granted summary judgment in favor of the City.

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[?4] The Church filed a timely appeal under LUPA, in which it challenged the hearing examiner?s decision and also sought damages under RCW 64.40.020. In addressing the propriety of the dedication, the court confined its review to the administrative record that had been before the hearing examiner and acknowledged that, in that record, the stated purpose by the City for imposing the dedication requirement was to create a uniform street. The court held that this reason was insufficient to justify the requirement and reversed the hearing examiner, invalidating the condition.

[?5] The case then proceeded to trial on the issue of damages. The court issued an order prohibiting the City from entering evidence to show the dedication was imposed for any reason

other than uniformity. However, during trial, City officials testified that the dedication was intended to address a variety of issues, including to alleviate impacts to traffic, visibility, parking, and pedestrian safety, as well as to bring the street into compliance with city codes and industry best practices. The trial court apparently considered the evidence and found that the City imposed the dedication to address increased vehicular and pedestrian traffic and related safety impacts, and to ensure adequate visibility. It then concluded (a) "[t]he City reasonably believed that the development conditions it attached to the permit had a nexus to the project and were proportional" [194 Wn.2d 136] and (b) 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* [1] ." Clerk?s Papers (CP) at 2408. The court denied the Church?s request for damages, and the Church appealed.

[?6] The Court of Appeals affirmed the trial court, holding that "[b]ecause the City reasonably believed that it satisfied the requirements of *Nollan / Dolan ,* it did not know and should not have known that its action was unlawful." *Church of Divine Earth v. City of Tacoma,* 5 Wn.App.2d 471, 494, 426 P.3d 268 (2018). The Court of Appeals also awarded attorney fees to the City. The Church petitioned this court, and we granted limited review.[2] *Church of Divine Earth v. City of Tacoma,* 192 Wn.2d 1022, 435 P.3d 285 (2019).

ISSUE

?7 1. Whether the City knew or should reasonably have known its requirement for a dedication of land was unlawful.

ANALYSIS

[?8] We should first settle what this case is not about. This is not a case challenging the constitutionality of a land use decision; the propriety of the permit condition was already resolved by the lower court and is not before us on appeal. And because the superior court invalidated the permit condition, this is not a claim for just compensation for a taking. Instead, what we have before us is a claim for damages under RCW 64.40.020 for an attempted exaction of land through an unlawful permit condition.

[194 Wn.2d 137] **[?9]** RCW 64.40.020(1) allows a property owner who files an application for a permit to bring an action for damages

> to obtain relief from acts of an agency which are arbitrary, capricious, unlawful, or exceed lawful authority, or relief from a failure to act within time limits established by law: PROVIDED, 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.

This statute does overlap to some degree with LUPA insofar as, to obtain damages under RCW 64.40.020, the land use decision must, necessarily, be invalid. But not every successful LUPA appeal will justify damages, as is expressly acknowledged in RCW 36.70C.130(2) (stating that "[a] grant of relief

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by itself may not be deemed to establish liability for monetary damages"). To establish liability for such damages under RCW 64.40.020, a plaintiff must meet a higher burden than is required in LUPA, establishing actual or constructive knowledge, or that the government entity acted in an arbitrary or capricious manner.

[?10] Our review here is limited to the question of whether the Church may obtain damages for the City?s unlawful action. As the statute indicates, the City incurs liability for an unlawful action "only if the *final decision* of the agency was made with knowledge of its unlawfulness ... or it should reasonably have been known to have been unlawful." RCW 64.40.020(1) (emphasis added). The City argued,

and the trial court held, that the final decision was that of the hearing examiner. Therefore, the issue in this case is whether the City knew or should reasonably have known the hearing examiner?s decision to allow the permit condition was unlawful. The trial court appears to have based its findings of fact and conclusions of law on arguably improper, irrelevant evidence, and the Court of Appeals, in turn, applied the wrong standard in its review.

[194 Wn.2d 138] **[?11]** Whether the City should reasonably have known the final decision was unlawful is an issue involving related questions of both law and fact. *Isla Verde Int?l Holdings, Ltd. v. City of Camas,* 147 Wn.App. 454, 467, 196 P.3d 719 (2008). It requires an examination of the law, which the City is presumed to have known, *see, e.g., State ex rel. Dungan v. Superior Court,* 46 Wn.2d 219, 222, 279 P.2d 918 (1955), and the material facts underlying the final decision. The statute creates an objective standard, asking whether a reasonable person looking at the facts utilized in the final decision would be expected to know the decision violated established law. *See, e.g.*, *In re Forfeiture of One 1970 Chevrolet Chevelle*, 166 Wn.2d 834, 841, 215 P.3d 166 (2009) (holding that while "actual knowledge" is a subjective standard, having "reason to know" is an objective standard); *Cloud v. Summers,* 98 Wn.App. 724, 731, 991 P.2d 1169 (1999) (recognizing the objective nature of whether a plaintiff should have known of an injury).

[?12] A permit condition for an uncompensated dedication of land is unlawful where it fails to fulfill the requirements laid out in two formative cases on unconstitutional conditions, *Nollan v. California Coastal Commission,* 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987), and *Dolan v. City of Tigard,* 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994). Taken together, the *Nollan* and *Dolan* cases create a framework for analyzing the constitutionality of a permit condition involving an uncompensated land dedication. First, the government must show the development will create or exacerbate an identified public problem. Second, the government must show the proposed condition will tend to solve or alleviate the public problem. Finally, the government must show that the condition is roughly proportional to the development?s anticipated impact. In fulfilling these requirements, the government must, to some degree, quantify its findings, and cannot rely on speculation regarding the impacts or mitigation of them.

[?13] The City provided little documentation to the hearing examiner to justify its requirement for a dedication.[194 Wn.2d 139] The record contained minutes from a September 25, 2013 review panel where the Church?s permit was discussed, and a declaration from the director of planning and development services, Peter Huffman. The review panel minutes state that the Church was being required to dedicate the land "to provide consistent right-of-way widths" along the street, and 30 feet was being required "to stay consistent and provide adequate street and sidewalk area." CP at 598. Huffman?s declaration summarized the City?s reason for the dedication as "It is important to the City that the [right of way] in all City streets be uniform." CP at 127. Thus, the City?s stated reason for the dedication was to create a consistent, uniform street.

[?14] The hearing examiner?s ruling was the "final decision," and the City provided the hearing examiner only with documentation evidencing consistency and uniformity as justifications for the dedication requirement. Therefore, under RCW 64.40.020(1) the question for the superior court was whether the Church proved the City knew or should reasonably

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have known that its goal for a consistent, uniform street did not justify the permit condition under *Nollan* and *Dolan.* As noted above, despite an order from the trial court properly limiting evidence to the reasoning presented to the hearing examiner for the final decision, the court permitted City officials to testify extensively regarding other reasons the City imposed the condition. The City asserted that the dedication was imposed to address increased vehicular and

pedestrian traffic from the development, and concerns about visibility and obstructions to pedestrians, as well as to meet general standards for roads. None of these reasons had been presented to the hearing examiner. Nevertheless, the court apparently considered this additional reasoning and, in its findings of fact, asserted that the Church?s parsonage would both increase and impair safety for vehicular and pedestrian traffic and that the dedication was necessary to ensure adequate visibility.

[194 Wn.2d 140] **[?15]** The trial court erred in permitting testimony of reasons for the dedication that had not informed the City?s final decision to impose the permit condition. Since these additional reasons did not inform the City?s final decision, the City could not use them as justification for having imposed the condition. Evidence of these other justifications was not relevant to the issue before the court, which was whether the Church proved the City knew or should reasonably have known the hearing examiner?s decision did not satisfy a *Nollan* and *Dolan* analysis. The court?s findings of fact leave no doubt that the additional evidence led the court to conclude damages were not warranted. Because the court?s findings were based on evidence not considered by the hearing examiner, they lack the necessary support and cannot justify the court?s conclusions of law. *Hegwine v. Longview Fibre Co.,* 162 Wn.2d 340, 352-53, 172 P.3d 688 (2007) (holding that findings of fact must be supported by substantial evidence and must, in turn, justify a court?s conclusions of law).

[?16] The Court of Appeals then erred on review by applying the wrong legal standard under the statute. The court held that because the City "reasonably believed" its requirement for a dedication was lawful, "it did not know and should not have known that its action was unlawful." *Church of Divine Earth*, 5 Wn.App.2d at 494, 426 P.3d 268. But whether the City believed in the lawfulness of its actions is a subjective question and conflicts with the statutory standard of RCW 64.40.020. As discussed above, the statute requires an objective standard, asking whether the City?s final decision "should reasonably have been known to have been unlawful." Thus, damages are not available if reasonable minds with the necessary knowledge and expertise could have concluded that the City?s decision was lawful. The City?s subjective belief that the dedication was lawful does not determine what it objectively should reasonably have known. The Court of Appeals erred in reasoning otherwise.

[194 Wn.2d 141] CONCLUSION

[?17] We reverse the Court of Appeals and remand for a new trial. On remand, the trial court should confine its review addressing the propriety of the dedication to evidence relevant to the hearing examiner?s final decision. In deciding whether damages are justified, the court must determine whether the Church proved the City knew or should reasonably have known its permit condition for a dedication of land was unlawful.

WE CONCUR: Madsen, J., Owens, J., Stephens, J., Wiggins, J., Gonzalez, J., Gordon McCloud, J.

YU, J. (dissenting)

[?18] In this case, we granted review as to whether a city should be held liable for damages in accordance with RCW 64.40.020 for initially imposing a condition on a building permit that was later deemed unlawful in an appeal brought pursuant to the Land Use Petition Act (LUPA), chapter 36.70C RCW. Because the majority omits key facts, misinterprets

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the trial court?s preliminary pretrial evidentiary ruling, and misreads the Court of Appeals opinion regarding the standard for imposing damages pursuant to RCW 64.40.020, it incorrectly declines to address the sole issue presented, and instead reverses and remands for a new trial that is entirely unnecessary.

[?19] I would hold the trial court did not err when it considered additional evidence in the

damages proceeding beyond that presented in the separate LUPA appeal to determine whether the city reasonably should have known that its actions were unlawful. I would also hold that the Court of Appeals applied the correct legal standard for assessing liability pursuant to RCW 64.40.020, and I would affirm its holding that the city is not liable for damages in this case. I therefore respectfully dissent.

[194 Wn.2d 142] FACTUAL BACKGROUND AND PROCEDURAL HISTORY

[?20] In September 2013, the Church of the Divine Earth (Church) applied for a building permit to construct a parsonage on a vacant lot that the Church had recently acquired. Clerk?s Papers (CP) at 782. After the initial review, the city of Tacoma (City) imposed a number of conditions on the building permit. *Id.* at 106. Viewed as a whole, these development conditions sought to create a safe and accessible roadway for pedestrians and visitors to the parsonage. The City also cited multiple deficiencies in the permit application that would need to be cured before the application review could continue. *Id.* at 869.

[?21] The Church did not attempt to cure the deficiencies in its application until after litigation had begun, *id.* at 879-880, opposed all the City?s conditions, and submitted a waiver request. *Id.* at 600. Despite the incomplete application, the City removed all of the conditions except for a 30-foot right-of-way dedication. *Id.* at 13. This dedication requirement was eventually reduced from 30 feet to 8 feet. *Id.* at 105. The main purpose for the right-of-way dedication was to create a uniform street, but in context, the dedication was simply one of many conditions imposed to generally improve safety and bring the neighborhood into compliance with the Tacoma Municipal Code.[1]

[?22] The Church and the City continued to negotiate the permit application due to some confusion over whether the building would be used solely as a parsonage or would also be used for religious assembly.[2] *See id.* at 108. Finally, [194 Wn.2d 143] in April 2014, the director of planning and development services sent a letter to the Church clarifying the status of the application and advising the Church of its right to seek review. *Id.* at 155-57. Shortly thereafter, the Church appealed the City?s actions to a hearing examiner, raising primarily constitutional challenges to the City?s development conditions. *Id.* at 603. After determining that the constitutional issues raised by the Church were beyond its jurisdiction, the hearing examiner granted summary judgment in favor of the City, allowing the City to impose the right-of-way dedication as a development condition. *Id.* at 9-17.

[?23] The Church then appealed the hearing examiner?s decision to the Pierce County Superior Court pursuant to LUPA. Meanwhile, in a separate proceeding, the Church alleged the City violated the Public Records Act (PRA), chapter 42.56 RCW, and brought a claim for damages pursuant to RCW 64.40.020. *See id.* at 220 (Stipulated Order Bifurcating LUPA Appeal from PRA & Damages Claims).

[?24] In the LUPA appeal, Judge Martin found that the City had failed to "carry its burden to prove the condition complied with the requirements" of the *Nollan / Dolan* analysis[3] and invalidated the right-of-way dedication

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requirement. *Id.* at 275. The case before us concerns only the separate damages claim, and as noted below, the sole issue was whether the City knew or reasonably should have known the dedication was unlawful. RCW 64.40.020(1).

[194 Wn.2d 144] **[?25]** In the damages proceeding, a different judge, Judge Hogan, found that the City had, in fact, conducted a *Nollan / Dolan* analysis, cited several reasons for imposing the conditions beyond street uniformity, and concluded that the City was not liable for damages pursuant to RCW 64.40.020. CP at 2400-09.

[?26] The Court of Appeals affirmed, holding that there was substantial evidence to

support the trial court?s findings of fact and that the trial court correctly concluded "that the City did not know and should not have known that the dedication requirement would later be found to violate *Nollan / Dolan* and, therefore, was unlawful." *Church of Divine Earth v. City of Tacoma,* 5 Wn.App.2d 471, 495, 426 P.3d 268 (2018). We granted review of one issue: "whether the City of Tacoma is liable for damages because it knew or should have known its action was unlawful." Order, *Church of Divine Earth v. City of Tacoma,* No. 96613-3, 192 Wn.2d 1022, 435 P.3d 285 (Wash. Mar. 6, 2019).

ANALYSIS

[?27] The only claim before us is the Church?s claim for damages pursuant to RCW 64.40.020(1), which provides,

> Owners of a property interest who have filed an application for a permit have an action for damages to obtain relief from acts of an agency which are arbitrary, capricious, unlawful, or exceed lawful authority, or relief from a failure to act within time limits established by law: PROVIDED, 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.

(Emphasis added.) The only issue relevant to this claim on which we granted review is whether the City knew or should have known that the 8-foot right-of-way dedication would ultimately be determined to be an unlawful development [194 Wn.2d 145] condition. Yet the majority does not reach this issue and instead reverses and remands for a new trial based on perceived errors regarding the trial court?s evidentiary rulings and the Court of Appeals? alleged reliance on an incorrect legal standard. I would hold the trial court?s evidentiary rulings in the damages proceedings were within its discretion and the Court of Appeals applied the correct legal standard to reach the correct conclusion. I would therefore affirm.

[?28] First, I agree with the majority that the hearing examiner?s decision is the final agency decision and thus the relevant point in time for reviewing whether the City knew or reasonably should have known the right-of-way dedication was unlawful. However, the majority is incorrect to hold that the trial court in the damages proceeding relied on "arguably improper, irrelevant evidence." Majority at __ - __.

[?29] While the trial court in the damages proceeding did preliminarily grant a motion to exclude evidence of reasons justifying the conditions other than street uniformity, the court ultimately allowed extensive testimony on this topic because it was relevant to determine whether the City?s actions were arbitrary or capricious. *See* Verbatim Report of Proceedings (Apr. 27, 2016) at 50. When City staff testified as to reasons for the conditions other than uniformity, the Church?s counsel properly did not object because allowing this testimony was entirely within the trial court?s discretion. The trial court in the *LUPA appeal* may have been limited to the evidence before the hearing examiner, RCW 36.70C.

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120(1), but the trial court in the separate *claim for damages* was bound only by the ordinary Rules of Evidence, and therefore had the discretion to consider relevant evidence as to whether the City reasonably should have known that the hearing examiner?s decision was unlawful.

[194 Wn.2d 146]**[?30]** Moreover, while the hearing examiner?s record was limited,[4] it in fact contains evidence that the City had discussed reasons for the conditions other than street uniformity. CP at 106 (citing a need to provide an adequate street sidewalk area and compliance with the Americans with Disabilities Act and "Public Right of Way Accessibility Guidelines"). Although the City did not expressly state that the reason for the right-of-way dedication was safety,

the reasoning for the other conditions initially imposed was tied to safety. Taken as a whole, it is reasonable to infer that the reason for imposing all of the conditions was to improve safety.

[?31] Ultimately, the trial court in the damages proceeding and the Court of Appeals both recognized that the City had performed a *Nollan / Dolan* analysis by discussing nexus and proportionality in the City?s initial review of the permit application. *Id.* at 2401. This finding is supported by the testimony of City staff members and the documents considered in the record, which were properly admitted in the damages proceeding at the trial court?s discretion and without objection. I would therefore not hold that the trial court in the damages proceeding considered improper and irrelevant evidence, nor would I hold that this alleged, unpreserved error requires a new trial.

[?32] Second, the majority claims that the Court of Appeals applied the wrong standard in determining whether the City was liable for damages. Majority at __. It did not. The Court of Appeals? opinion contains a single, arguably [194 Wn.2d 147] unartful recitation of the standard as asking whether the City "reasonably believed that it satisfied the requirements of *Nollan / Dolan* ," which may suggest an improper, subjective standard. *Church of Divine Earth*, 5 Wn.App.2d at 494, 426 P.3d 268. However, throughout the rest of the opinion, the Court of Appeals clearly applies the proper objective standard in its analysis and correctly states that standard multiple times. *Id*. at 485, 426 P.3d 268 ("the City did not know and should not have known that the dedication was unlawful"), 490, 426 P.3d 268 (quoting RCW 64.40.020(1)), 493, 426 P.3d 268 ("The relevant question is whether the City knew or should have known that the right-of-way dedication requirement was unlawful."), 494, 426 P.3d 268 (quoting RCW 64.40.020(1)), 495, 426 P.3d 268 ("the City did not know and should not have known that the dedication requirement would later be found to violate *Nollan / Dolan* and, therefore, was unlawful"). A single, arguably unartful statement in the context of an otherwise proper analysis does not constitute reversible error.

CONCLUSION

[?33] Without objection, the trial court in the damages proceeding properly considered relevant evidence as to whether the City should have known that the hearing examiner?s decision would ultimately be held unlawful. Based on this evidence, the court determined the City could not be held liable for damages pursuant to RCW 64.40.020 and the Court of Appeals, applying the correct legal standard, properly affirmed. Because the majority fails to address the sole issue on which we granted review and reverses for an unnecessary new trial based on an incorrect reading of the record and the Court of Appeals? decision, I respectfully dissent.

Fairhurst, C.J.

Notes:

[1] *Nollan v. Cal. Coastal Comm?n,* 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987); *Dolan v. City of Tigard,* 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994).

[2] Amicus briefs in support of the Church were filed by Pacific Legal Foundation and the Building Industry Association of Washington.

[1] Other purposes included improving visibility, achieving compliance with the Americans with Disabilities Act of 1990, 42 U.S.C. ? 12101, and mitigating the potential increase in vehicular traffic due to the construction of the parsonage on the vacant lot. *See* CP at 106; Verbatim Report of Proceedings (VRP) (May 9, 2016) at 801.

[2] Additionally, the Church had constructed a garage in advance of the permit application. CP at 106. City attorney Jeff Capell explained that the City wanted the Church to "tie ... up" the loose ends with regards to the permit application. VRP (Feb. 19, 2015) at 20.

[3] *Nollan v. Cal. Coastal Comm?n,* 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987); *Dolan v. City of Tigard,* 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994). A *Nollan / Dolan* analysis must be conducted when "government demands that a landowner dedicate an easement allowing public access to her property as a condition of obtaining a development permit." *Lingle v. Chevron U.S.A., Inc.,* 544 U.S. 528, 546, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005). Such conditions will be deemed unconstitutional takings of private property without just compensation unless the

government shows that the conditions are proportionate and that they have a nexus to the problem created by the development.

[4] The hearing examiner?s record includes (1) review panel minutes, September 25, 2013, (2) Tacoma Planning and Development Services? letter decision, April 28, 2014, (3) affidavit of Steven Weinman, June 9, 2014, (4) assessor?s parcel summary for 6605 East B Street, (5) corporation?s division registration data for Church of the Divine Earth, (6) declaration of Peter Huffman, July 3, 2014, (7) WSBA lawyer search showing no listing for Terry Kuehn, (8) aerial photograph and drawing of lots in neighborhood, (9) amended declaration of Peter Huffman, July 9, 2014, (10) Tacoma Public Works Department memorandum (Kuntz to Kammerzell), March 5, 2014, (11) Tacoma Planning and Development Services? letter (Kuntz to Kuehn), March 7, 2014, (12) various scenarios put forward by City for development at 6605 East B Street. CP at 10-11.

NO. 55737-1

DIVISION II OF THE COURT OF APPEALS FOR
THE STATE OF WASHINGTON

CHURCH OF THE DIVINE EARTH

APPELLANT

V.

CITY OF TACOMA,

RESPONDENT.

APPELLANT'S OPENING BRIEF

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ASSIGNMENTS OF ERROR

1. The Court erred by adopting Finding 16, CP 420:

> **16. The Church's lawyers claimed 1,104.6 hours of attorney time representing the Church in the portion of this case relating to the permit dedication. The vast majority of the time requested is for one lawyer. While this case did proceed over several years, the actual trial was approximately 8 court days. To put this request another way, assuming a 40 hour, 5-day week, 1,104.6 hours approximates: 138 full days; 27.6 weeks; or nearly 6.4 months (still assuming 5-day weeks) for one lawyer exclusively dedicated to this case**

Issues:

A. Is there substantial evidence to support the Court's characterization of the hours spent, where Court fails to acknowledge the hours were spent over seven plus years, and include multiple motions, LUPA hearing, appeals to Court of Appeal and Supreme Court, Trial, Summary Judgement and fee motion on remand (85 months which equates to average 12.99 hours a month).

B. Should this be reviewed as a legal conclusion?

2. The Court erred by adopting Finding 17, CP 421:

> **17.In addition to this time, the Church's lawyers asserted work done by the Church's representative (an additional 196.25 hours) should be compensated as "legal assistant" fees, FNT: Counsel's claimed legal assistant is Petitioner's Pastor, Terence Kuehn. Pastor Kuehn was not and is not an employee of Petitioner's counsel's law firm, Goodstein Law Group.**

Issues:

A. Should this be reviewed as a legal conclusion?

B. So long as legal assistant is supervised by attorney, does the law require legal assistant to be employed by the same firm in order to qualify for fee payment where all other criteria are met?

3. The Court erred by adopting Finding 19, CP 421:

19. Of the hours claimed for attorney services this court finds 658.5 hours were reasonably expended at a blended hourly rate of $385.03 for a total reasonable attorney fee of $253,543.66. "Blended" meaning combining the relative contributions of lawyers providing services at various hourly rates. See, for example, the much lower hourly rates for attorneys Lake, Goodstein and McCarthy who also worked on this matter for Petitioner. A multiple of 1.5 requested by the Church should be denied. First, the allowed blended rate of $385.03/hour is somewhat high for this case. While Petitioner's lawyers did good work, the case was not complicated factually nor did the case present novel legal issues. In addition, many hours for which compensation is being awarded is for time that could have been done by legal staff and/or associate attorneys at far lower rates of compensation. Other than the legal assistant claim of $5,887.50 by the lawyer's client's representative, Pastor Kuehn, no other staff time was requested. The court finds not all the time claimed was reasonably spent.

Issues:

A. Should this be reviewed as a legal conclusion?

B. Did Court Err in Rejecting Church's Substantiated, Reasonable Lodestar Rates?

C. Was Court's Rate Reduction Error?

D. Was Court's Denial of Multiplier Error?

E. Did Court Err in Reducing Hours Expended and Fee Award?

F. Did Court Err by Improperly Speculating on Allocation of Work with Resulting Reduction in Fees?

G. Did Court Err in Not Showing its Work to Explain Reductions, where Court must state not only the grounds on which it relied, but also how it weighed the various competing considerations?

H. Did Court Err in Not Explaining its Fee Reductions, Especially Were Reductions Were Large (40%)?

I. Did Court Err in Reducing Fees in this Civil Right Case where Damages Awarded Are Not Determinative of Attorney Fee Award?

J. Did Court Err in Failing to Recognize that Risk of Non-payment Justifies Upward Lodestar Adjustment?

K. Did Court Err in Failing to Give Detailed Explanation Why a Multiplier Where Risk of Non-payment Justifies Upward Lodestar Adjustment?

4. The Court erred by adopting Finding 20, CP 422**:**

20. Attorney hours claimed and allowed for various phases of the litigation are as follows:

Phase of Litigation	**Hours claimed**	**Hours awarded**
Trial	**76.5**	**76.5**
Post-trial	**67.2**	**25.0**
Court of Appeals	**244.3**	**102.0**
Supreme Court	**101.3**	**40.0**

Remand	**104.1**	**90.0**
Post-judgment	**57.5**	**40.0**

Issues:

A. Should this be reviewed as a legal conclusion?

B. Did Court Err in Rejecting Church's Substantiated, Reasonable Lodestar Rates?

C. Was Court's Denial of Multiplier Error?

D. Did Court Err in Reducing Hours Expended and Fee Award?

E. Did Court Err by Improperly Speculating on Allocation of Work with Resulting Reduction in Fees?

F. Did Court Err in Not Showing its Work to Explain Reductions, where Court must state not only the grounds on which it relied, but also how it weighed the various competing considerations?

G. Did Court Err in Not Explaining its Fee Reductions, Especially Were Reductions Were Large (40%)?

5. The Court erred by adopting Conclusion 3, CP 422:

   3. **The Church's request for reimbursement of "legal assistant" fees for time claimed by the Church's representative is denied**.

Issues:

A. Did Court Err in Denying Fees where so long as legal assistant is supervised by attorney the law does not require legal assistant to be employed by the same firm in

order to qualify for fee payment where all other criteria are met?

B. Did Court Err in Not Showing its Work to Explain Reductions, where Court must state not only the grounds on which it relied, but also how it weighed the various competing considerations?

C. Did Court Err in Not Explaining its Fee Reductions?

6. The Court erred by adopting Conclusion 4, CP 422:

4. The Church's request for a lodestar multiplier is denied.

Issues:

Same as Assignment of Error No. 3.

7. The Court erred by adopting Conclusion 5, CP 422:

4. **Judgment for reasonable attorney fees in the amount of $253,543.66 should be entered against the City of Tacoma.**

Issues:

Same as Assignment of Error No. 3.

8. Trial Court Erred When Addressing Lodestar Attorney Fees

    1. Court Erred in Rejecting Church's Substantiated Reasonable Hourly Rates
    2. Court Erred in Not Applying Upward Adjustment Here Where Justified Due to Risk of Collection

9. Court Erred Where Multiplier Is Also Independently Justified for Fees in Civil Rights Cases

10. Court's Fee Award Was Error.

    1. Court's Rate Reduction was Error.
    2. Court's Denial of Multiplier was Error.

I. FACTS

The Church of the Divine Earth, through its Pastor Terry Kuehn, submitted its building permit application to the City of Tacoma in September 2013 to build a modest single-family parsonage on a previously platted and improved lot in East Tacoma. The City however saw this as an opportunity to extort real property from the Church as an unconstitutional condition to obtain the permit. Thus began an eight-year odyssey through the City's land use bureaucracy, the Pierce County Superior Court, the Court of Appeals, the Washington Supreme Court and now back to the Court of Appeals. No fewer than sixteen judges have sat on this case.

This appeal culminates (hopefully) a long and torturous road for the Church which simply wanted to build a small house where one had stood before. But the City defended this modest although absolutely justified constitutional claim as if it sought millions, and the Church was required to invest in this litigation an equivalent effort to prevail.

As background, attached as **Exhibit A** is the Church's

Court of Appeals Opening Brief & Errata (which was also the primary basis of subsequent review by the Supreme Court) CP 20-86, 130-134, as well as **Exhibit B**, Supreme Court opinion. CP 135-142.

The case should have been simple enough since clearly established constitutional law holds it is the burden of a government agency to prove a land use permit condition is necessary to mitigate some public problem caused by the proposed improvement, and the condition is roughly proportional to the problem created by the development. See e.g. *Nollan v. California Coastal Commi*ssion, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed. 2d 677 (1987). But here the City claimed that the "problem" was not caused by the development at all but by a non-uniform right of way ("ROW") platted more than a century before—which was completely unrelated to whether the Church built a parsonage or not. CP 143-145. Moreover, the City had no plans to even widen the road—just land bank the unused ROW—a constitutional violation in and of itself. The City's "final decision" through its Hearing Examiner affirmed the condition imposed solely to make the

ROW "uniform." CP 146-155. That was followed by the Church's appeal to Superior Court under the Land Use Petition Act (LUPA) and with a RCW 64.40 damages claim. At that LUPA appeal hearing, that Trial Court (Judge Martin) ruled adjacent ROW uniformity was not a proper exaction for the proposed construction of a parsonage, and thus the permit condition lacked a constitutionally required nexus. CP 160-161. The City later changed its purported justification to claim the ROW was needed to mitigate safety impacts of the residential construction, notwithstanding that the new home merely replaced the former. Next, the City argued the condition, although unlawful, was not "reasonably known to be unlawful"—in an attempt to defeat liability under RCW 64.40.020. CP 162-163. This City pivot changed what should have been a straightforward and winning Church summary judgment to instead require a week of trial, where the City prevailed, followed by the Church's unsuccessful appeal to the Court of Appeals, resulting in an award of attorney fees *against* the Church in favor of the City. CP 5. Almost by miracle, the Supreme Court granted review of the LUPA claim and reversed

for the exact reasons recounted above. CP 135-142. This protracted litigation caused the Church to quickly run out of money, defaulting on its hourly rate attorney fee agreement. By September 2016 the Church was $250,000 in arrears with no prospect of ever bring the debt current. CP 5.

The choice for the Church and its lawyers now became (1) abandon its meritorious constitutional claim and walk away from the litigation, leaving intact the award of attorney fees *against the Church*, or (2) continue the struggle with the hope of ultimate substantive and fee payment relief based upon the contingent application of RCW 64.40.020's fee shifting statute. To prevail, the Church not only had to succeed on the merits against its publicly-funded City adversary, prove the City knew or should have known it acted unlawfully, but also persuade the Court to exercise discretion to award the Church its attorney fees. The Church and its lawyers chose to fight for its civil rights even if the cost was great and the odds were long. These facts are relevant to the issue of multiplying the lodestar based on risk of fee collection, also referred to as "contingency".

Related to the permit condition claim, but procedurally distinct, was a claim under the Public Records Act ("PRA"). During the LUPA case discovery, the Church filed a public record request ("PRR") for the City's permit file. The Church believed the City took an unreasonable time to respond so amended its complaint to include a PRA claim. CP 191. The Church prevailed under one PRA theory and was awarded $24,000 in attorney fees. CP 190. Other PRA theories were dismissed, and affirmed on appeal, and not pursued on remand. The Church made clear it was not seeking is not seeking any further award of PRA fees or costs. CP 191-192. The Church also eliminated any double dipping. Where records itemized PRA fees and costs, the Church deducted same. Because the PRA Court of Appeals fee records did not itemize by issue, the

Church reduced its request by 15%, substantially more than the PRA services actually rendered. CP 191-192. An updated summary of the Church's requested attorney fees is shown on the table below, as well as what the Court ultimately

Attorney	Total Hours	Rate	Total
Richard Sanders	1026.7	$395	$405,546.50
Carolyn Lake	44	$295	$12,980.00
Seth Goodstein	33	$200	$6,600.00
Conor McCarthy	0.9	$200	$180.00
Terry Kuehn	196.25	$30	$5,887.00
Total In Support of Church Lodestar Request (before multiplier)	1,104.6		$431,193.5 (before multiplier)
15% Reduction for Presumed PRA Work			-$14,322.37
Church's Lodestar: (1,104.6 hrs. X individual attorney rates)			$416,871.13
Multiply by 1.5 based on Payment Risk			$625,306.69
Deduct from fees for Prior Payments: $1,095.49-- 4/13/15 Trial Court Costs for 1/19/15 Judgment $11,068.87-- Supreme Court Costs 11/15/19			-$12,164.36
Church's Requested Attorney Fee Judgment:			**$613,142.33**
What Court Awarded:	**658.5 (deducted 446.1 hours**	**$385.03 (blended**	**$253,543.66**
Court's Reduction of Fee Award:			**$359,598.67**

awarded. See **Appendix 1** for Church's detailed supporting Fee Award backup.

In sum, the Court reduced Retired Justice Sanders' hourly fee rate ($395 to $385.03); deducted number of attorney hours by 40% (1110.9 reduced to 658.5, a deduct of 452.4 hours); reduced fees by 40% ($613.142 reduced to $253,534);

and failed to apply any multiplier. CP 418-423 Most significantly, the Court offered little justification for the many reductions, a particularly glaring omission in light of the large decreases. In fact, when pressed the Trial Court refused to explain his reasoning RP 13:7-10 & RP 13:16-14:3. The record lacks explanation as to why the lodestar was reduced by 452 hours, as opposed to any other number of hours. The Court failed to identify any particular excessive hours and provided at best only an elliptical explanation. The Court's only explanation for denying a multiplier is that the blended rate the Court chose to apply was "somewhat high". CP 421. This was despite a previous Court in this case finding the $395 rate reasonable. CP 190. The Court did not acknowledge the civil rights nature of this case and did not address how (or if) the high risk of non-payment factored into his decision to deny the multiplier. The Court stated that many hours were "time that could have been done by legal staff or associate attorneys at far lowers rates" and "not all time was reasonably spent." CP 421. Yet, the Court at the same time denied any Legal Assistant fee award. The record lacks the detailed explanation of how the

Trial Court's discretion was exercised. The Church pressed the Court to explain its many and large deductions; the Court refused. RP 13:7-10 and RP 13:16-14:3

Significantly, all fee award-related submittals were in writing, including the Church's expert declaration from former Justice Talmadge, and City's opposition pleadings. Therefore, this Appeals Court is in as good a position to review the record as was the (last) Trial Court, which had no familiarity with the case other than the final summary judgment on the merits and the attorney fee award. Instead of remanding a matter to the trial court for a factual finding, an appellate court may independently review evidence consisting of written documents and make the required findings. See *Lobdell v. Sugar 'N Spice, Inc.*, 33 Wn. App. 881, 887, 658 P.2d 1267, *review denied*, 99 Wn.2d 1016 (1983), cited with approval in *Bryant v. Joseph*, 119 Wn.2d 210, 222 (1992). Here, the trial court did not hear testimony, only argument from counsel. The documents in the record therefore provide the only evidence regarding whether the complaints had a factual and legal basis. Accordingly, to avoid this over eight-year-old case from being even further

protracted, the Church requests that upon successful appeal, the Court not remand, but instead directly award the appropriate fees as requested on **Attachment 1,** as well as fees incurred on appeal.

II. STANDARD OF REVIEW

A trial court's award of attorney fees is reviewed for an abuse of discretion. *Rettkowski v. Dep't of Ecology,* 128 Wash.2d 508, 519, 910 P.2d 462 (1996). An appellate court will uphold an attorney fee award unless it finds the trial court manifestly abused its discretion. Discretion is abused when the trial court exercises it on untenable grounds or for untenable reasons. *Chuong Van Pham v. City of Seattle,* 159 Wash.2d 527, 538, 151 P.3d 976 (2007), as quoted in *Berryman v. Metcalf,* 177 Wash.App. 644, 312 P.3d 745 (Wash. App. 2013).

But trial courts also must exercise their discretion on articulable grounds, making an adequate record so the appellate court can review a fee award. *Mahler v. Szucs,* 135 Wash.2d 398, 435, 957 P.2d 632 (1998). Further, the trial court must enter findings of fact and conclusions of law to support an attorney fee award. "[A]bsence of an adequate record upon

which to review a fee award will result in a remand of the award to the trial court to develop such a record" *supra* at 435, as quoted in *Just Dirt, Inc. v. Knight Excavating, Inc.,* 157 P.3d 431, 138 Wn. App. 409 (Wash. App. 2007).

Further, an award of substantially less than the amount requested should indicate how the court arrived at the final numbers and explain why discounts were applied. *Absher Constr. Co. v. Kent Sch. Dist.* 415, 79 Wash.App. 841, 848, 917 P.2d 1086 (1995), *Talisen Corp. v. Razore Land Co.,* 144 P.3d 1185, 135 Wn. App. 106 (Wash. App. 2006).

Federal Courts agree that award of attorneys' fees is at Court's discretion. *Seymour v. Hull & Moreland Engineering*, 605 F.2d 1105, 1116 (9th Cir. 1979); *Kerr v. Screen Extras Guild, Inc., 526* F.2d 67, 69 (9th Cir. 1975), *cert. denied*, 425 U.S. 951, 96 S.Ct. 1726, 48 L.Ed.2d 195 (1976).

However, it is error to fail to consider the guidelines for making fee awards initially set forth by the Fifth Circuit in *Johnson v. Georgia Highway Express, Inc.,* 488 F.2d 714 (5th Cir. 1974), and adopted by the 9th Circuit in *Kerr v. Screen Extras Guild, Inc., supra*. See, e. g., *Seymour v. Hull &*

Moreland Engineering, *supra*. Where a trial judge has failed to consider these factors, Courts have remanded for findings and conclusions detailing the factors. *Gluck v. American Protection Industries, Inc.,* 619 F.2d 30 (9th Cir. 1980).

A court also abuses its discretion when it applies an incorrect rule of decision, or when it applies the correct rule to factual conclusions that are "illogical, implausible, or without support in the record," *Rodriguez v. Disner (Rodriguez II),* 688 F.3d 645, 653 (9th Cir.2012), or if its decision is based on an erroneous conclusion of law or if the record contains no evidence on which the decision was rationally based.*In re Mercury Interactive Corp. Sec. Litig.,* 618 F.3d 988, 992 (9th Cir.2010) (quoting *Fischel v. Equitable Life Assurance Soc'y,* 307 F.3d 997, 1005 (9th Cir. 2002)); *Stanger v. China Elec. Motor, Inc*., 812 F.3d 734 (9th Cir. 2016).

Findings of fact are reviewed for clear error; conclusions of law are reviewed de novo. *Stanger*, 812 F.3d at 738. *Stetson v. Grissom*, 821 F.3d 1157 (9th Cir. 2016).

Here, all fee award-related submittals were in writing. Where review is de novo, this Appeals Court is in as good a

position to review the record as was the (last) Trial Court, whose only familiarity with the case was for the final summary judgment on the merits and attorney fee award. Accordingly, to avoid this over eight-year-old case from being even further protracted, the Church requests that upon successful appeal, the Court not remand, but instead directly award the appropriate fees as requested on **Attachment 1,** as well as fees incurred on appeal.

III. ANALYSIS

A. TRIAL COURT ERRORED WHEN ADDRSSING LODESTAR ATTORNEY FEES

1. Introduction

The City's liability for reasonable attorney fees was established by the Trial Court's partial summary judgment (May 22, 2020) and final judgment (February 2, 2021). This case was previously dismissed by the trial court, affirmed on appeal with an award of attorney fees *against* the Church, and as if by miracle reversed and remanded by the Supreme Court. The Supreme Court opinion CP 135-142 provides a good overview. This case was made exceptionally difficult by the

City's disproportionately litigious stance. A "reasonable" attorney fee award must reflect this reality.

2. General Principles of the Lodestar Method

Washington adopts the lodestar method of calculating reasonable attorney fees in fee shifting statutes. The Court is called upon to determine the lawyers' reasonable hourly rate and multiply that reasonable rate by the reasonable number of hours to obtain success.[1] *Mahler, supra at* 650-51 (1998); *Travis v. Wash. Horse Breeders Ass'n Inc.* 111 Wn.2d 396, 759 P.2d 418, 425-26 (1988).[2] A reasonable fee involves the time it should take a competent practitioner to perform the necessary work upon which a successful result is predicated. *Scott Fetzer Co. v. Weeks (Scott Fetzer II)*, 122 Wn.2d 141, 859 P.2d 1210, 1216 (1993). The "lodestar" is only the starting point, and the fee thus calculated is not necessarily a "reasonable" fee. *Fetzer*, 122 Wash.2d at 151, 859 P.2d 210.

[1] See excellent law review article by former Justice Philip A. Talmadge and Thomas M Fitzpatrick which is paraphrased herein without further citation. "The Lodestar Method for calculating a reasonable Attorney Fee in Washington" Gonzaga Law Review, Vol. 52:1 (2016/17).

[2] In *Scott Fetzer Co., v. Weeks (Scott Fetzer I)*, 114 Wn.2d 109, 786 P.2d 265, 273 (1990) the Washington Supreme Court rejected the prior approach of applying the factors enumerated in RPC1.5(a). The prior approach's weakness was imprecision giving the court virtually a free hand without meaningful application of defined criteria on review.

"'Reasonableness is the goal, and mechanical or formulaic application of either method, where it yields an unreasonable result, can be an abuse of discretion." *Fischel*, 307 F.3d 997 (2002), at 1007 (*quoting In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.,* 109 F.3d 602, 607 (9th Cir.1997) ('Petroleum Prods.'))." *Stanger v. China Elec. Motor, Inc.*, 812 F.3d 734 (9th Cir. 2016).

In rare instances, courts may adjust the lodestar figure downward or in an appropriate case, increase the award to account for the risk of or contingency of payment. *Mahler*, 135 Wn.2d at 434. Courts will reverse an attorney fee award where the trial court used an improper method to calculate the attorney fee award. *Seattle-First Nat'l Bank v. Wash. Ins. Guar. Ass'n,* 94 Wn. App. 744, 762, 972 P.2d 1282 (1999). As discussed below, the Trial Court here gave no detailed explanation why the lodestar hours were substantially reduced.

Federal Courts also consider the factors set forth in *Kerr v. Screen Extras Guild, Inc., supra* at 70, in determining the number of hours reasonably expended, the reasonable hourly rate and the resultant basic fee. These factors include the

novelty or difficulty of the case, the preclusion of other employment, time limitations, the amount at stake, the results obtained and the undesirability of the case. *Stewart v. Gates,* 987 F.2d 1450 (9th Cir. 1993).

3. Court Erred in Rejecting Church's Substantiated Reasonable Hourly Rates

The Church's lodestar reasonable hours claim was organized below by phase of the litigation: (1) Pre-Trial; (2) Trial; (3) Post Trial; (4) Court of Appeals; (5) Supreme Court; (6) Remand; and (7) Post Final Judgment/Attorney Fees. CP 17-19. An updated summary table is provided in **Attachment 1.** Here, contemporary records attached to Attorney Sanders Declaration[3] was a proper basis to begin determining the lodestar fee. *Bowers v. Transamerica Title,* 100 Wn.2d 581, 597, 675 P.2d 193 (1983). Such records need not be exhaustive or in minute detail but should inform the number of hours worked, the type of work performed, and the lawyer that did the work, which the Church's records provide, as well as the dollar amount per entry. Here the hourly rates were reasonable without risk of payment, i.e., without contingency: Sanders

[3] CP 187-276

$395; Lake $295; Goodstein $200 per hour. Adding in the huge payment risk justifies the multiplier. Previous Trial Court in this case had awarded Sanders' $395/hr fee rate as reasonable. CP 190. These rates' reasonableness was substantiated by each lawyer's declarations,[4] as well as by the necessity of the services rendered to obtain the result achieved. Fees were verified under oath and PRA fees eliminated. Where the attorneys, as here, have a usually hourly rate for billing clients, that rate will likely be a reasonable one. *Mahler*, 957 P.2d at 651.[5]

But here, the Court reduced Retired Justice Sanders' hourly fee rate ($395 to $385.03); deducted number of attorney hours by 40% (1110.9 reduced to 658.5, a deduct of 452.4 hours); reduced fees by 40% ($613,142 reduced to $253,534); and failed to apply any multiplier. Most significantly, the Court gave little justification for the may reductions, particularly glaring omission in light of the large decreases, and in fact refused to explain at request of the Church. RP 13:7-10 and RP

[4] An expert's declaration was provided by former Justice Talmadge. CP 267-296.

[5] To determine a "reasonable hourly rate," the court should consider: "experience, reputation, and ability of the attorney; the outcome of the results of the proceedings; the customary fees; and the novelty or the difficulty of the question presented." *Chalmers v. City of Los Angeles* , 796 F.2d 1205, 1211 (9th Cir. 1986) (citing *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975)).

13:16-14:3. The record lacks explanation as to why the lodestar was reduced by 452 hours, as opposed to any other number of hours. The Court failed to identify any particular excessive hours and provided at best only an elliptical explanation.

4. Courts Recognize that Risk of Non-payment Justifies Upward Lodestar Adjustment.

Under Washington law, the lodestar may be adjusted up to account contingency risk and/or exceptional work. *Bowers v. Transamerica Title*,100 Wn.2d 581, 675 P.2d 193, 204 (Wash. 1983). In *Bowers*, the Supreme Court ruled the lodestar could be adjusted upward to reflect the risk the attorneys assumed for unsuccessful litigation, where no fee might be obtained. *Bowers v. Transamerica Title Ins*., supra at 597–602. The appropriate incremental factor, or multiplier, is determined "by reference to the chances of success in the litigation." *Bowers*, at 601, 675 P.2d 193.

Also, in *Allard v. First Interstate Bank of Washington*, 112 Wn.2d 145, 768 P.2d 998, 1002 (Wash. 1989), the Supreme Court used the risk of fee recovery when calculating a reasonable fee. In *Physicians Insurance Exchange v. Fisons Corp*., 122 Wash.2d 299, 334, 858 P.2d 1054 (1993), a 1.5

multiplier based on quality of work and contingency of case, and the Court in *Ethridge v. Hwang*, 20 P.3d 958, 105 Wash.App. 447 (Wash. App. 2001) upheld multiplier of 1.25.

The 9th Circuit *Stranger* Court also approved where "if Lead Plaintiff's Counsel had not achieved the Settlement, **there was a risk of either a smaller or no recovery."** *Stanger v. China Elec. Motor, Inc.*, 812 F.3d 734 (9th Cir. 2016).

5. Court Erred in Not Applying Upward Adjustment Here Where Justified Due to Risk of Collection

Below, the Church sought a 1.5 multiplier to account for the risky nature of achieving fee payment. A court should award a multiplier if it would further the purpose behind the multiplier itself. *Travis*, 759 P.2d at 425-26 A contingency risk multiplier is intended to serve two purposes: to "mak[e] it possible for poor clients with good claims to secure competent help"[6] and to encourage attorneys to accept "risky" cases. *Bowers*, 675 P.2d at 204.

A multiplier was and is truly merited in this situation. The client is and was broke and could not possibly have paid the hundreds of thousands of dollars necessary to litigate a

[6] *Pennsylvania v. Del. Valley Citizens' Council for Clean Air*, 483 U.S. 711, 730-31 (1987).

meritorious claim to success. The City had unlimited resources to not only fight the claim but destroy the Church in a war of attrition. The amount at issue was small so a contingency based on a percentage of the recovery was not viable. The RCW 64.40 attorney fees were not only discretionary, but reciprocal, exposing the Church to an award in favor of the City (which actually happened in the Court of Appeals.)

Making the case that much more difficult, mid-case, the City changed its position on underlying facts of the Hearing Examiner decision to the Court, forcing the matter to trial as opposed to resolution by summary judgment. A permit condition imposed to make a century old ROW uniform is clearly unlawful; however, a permit condition imposed to mitigate an alleged issue claimed to be caused by the construction triggered a trial of factual issues. The City also argued it didn't know it acted illegally, which was successful, until remand following Supreme Court review. Finally, by the grace of God, the Supreme Court ultimately held the City knowingly imposed an improper condition however the City's tactic immeasurably heighted the risk of failure.

"Most important 'the contingency adjustment is designed solely to compensate for the possibility…that the litigation would be unsuccessful and that no fee would be obtained.'" *Bowers*, 675 P.2d at 204. Here, that "possibility" was very real. Absent the successful Supreme Court review, the award of attorney fees would have not been *to* the Church but rather *against* it. On remand, had the Church failed to convince the Court that not only did the City act unlawfully and that it knew it, or should have, the award of attorney fees would have been *against* the Church, not for it. Even then if the Church had proved every element of the statute, the statute allows the court which made such a finding the discretion not to award fees to the Church in any event.

This case required doing the work for over 7 years in what seemed like a hopeless battle, all with the looming possibility of not getting paid. Other than the Church's counsel, who would have done this?

The Washington Supreme Court has affirmed a multiplier of 1.5 where similar criteria was met. *Wash. State Physicians Ins. Exchange and Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 858

P.2d 1054, 1073 (1993). Accepting the risk to bring this proceeding to a successful conclusion justifies the fee multiplier and the Trial Court erred in not doing so.

Present case is similar to *Clark,*[7] where Plaintiffs' case was rejected by at least 10 other attorneys before Counsel agreed to assist them. Despite what the court described as the "extreme undesirability of this case," Counsel stayed with this litigation throughout and helped produce the practical result that his clients sought. The Court cited that Counsel's involvement "necessarily precluded" him from accepting other employment for which compensation may have been guaranteed. There, counsel waited nine years to be paid for his services. In present case, counsel has waited over seven years.

The *Clark* Court also found that until the jury verdict, it was unclear that Counsel would receive anything. On appeal, the Court affirmed the Trial Court correctly found this to be one of the "rare" / "exceptional" cases in which an upward

[7] *Clark v. City of Los Angeles*, 803 F.2d 987 (9th Cir. 1986). Accord: *Delaware Valley Citizens' Council*, 106 S.Ct. at 3098 (citing *Blum v. Stenson*, 465 U.S. 886, 898-901, 104 S.Ct. 1541, 1548-50, 79 L.Ed.2d 891 (1984)).

adjustment is justified and upheld a 1.5 multiplier, the same requested by the Church.

The *Fadhl* Court found **a 2.0 multiplier** was required to ensure that counsel will accept civil rights contingency fee cases. *Fadhl v. City and County of San Francisco,* 859 F.2d 649, 650 (9th Cir.1988).

D'Emanuele[8] is in accord, where the presence of a risky contingent fee combined with a finding that enhancement is necessary to ensure that attorneys will accept civil rights cases, create an exceptional circumstance requiring enhancement, resulting on appeal, **a multiplier of 2.0** increasing the Trial Court's attorneys' fee award of $112,765.80 to $225,531.60, *supra* at 1384.

B. COURT ERRED WHERE MULTIPLIER IS ALSO INDEPENDENTLY JUSTIFIED FOR FEES IN CIVIL RIGHTS CASES

"RCW 64.40 creates a statutory remedy cause of action and remedy for owners of property interests damaged by agency actions in processing land use permit applications." *Wilson v. Seattle*, 122 Wn.2d 814, 817, 833 P.2d 1336 (1993). Remedial statutes "should be construed liberally of effectuate

[8] *D'Emanuele v. Montgomery Ward & Co., Inc*., 904 F.2d 1379, 1385 (9th Cir.1990).

[their] purpose." *Inter'l Ass'n of Fire Fighters v. Everett,* 146 Wn.2d 29, 33, 42 P.2 1265 (2002).

Liberal application of a lodestar multiplier to attorney fees encourages plaintiffs to pursue their remedies promotes the public purpose of the statute. Agencies like the City of Tacoma have unlimited resources for defense. An attorney fee award to a hard-fought plaintiff must reflect reality if the statute's liberal purpose is to be realized.

In determining the award, the court must consider the purpose of the statute allowing for attorney fees. *Fetzer*, 122 Wash.2d at 149, 859 P.2d 1210; *Brand v. Dep't of Labor & Indus.*, 139 Wash.2d 659, 667, 989 P.2d 1111 (1999). A statute's mandate for liberal construction includes a liberal construction of the statute's provision for an award of reasonable attorney fees. *Progressive Animal Welfare Soc'y v. Univ. of Wash*., 114 Wash.2d 677, 683, 790 P.2d 604 (1990); *Eagle Point Condo. Owners*, 102 Wash.App. at 713, 9 P.3d 898; *Brand*, 139 Wash.2d at 668, 989 P.2d 1111. Most of the cases in which multipliers have been considered were brought under remedial statutes with fee-shifting provisions designed to

further the statutory purposes. *Berryman v. Metcalf,* 177 Wash.App. 644, 312 P.3d 745, 763 (Wash. App. 2013).

Chapter RCW 64.40's legislative history demonstrates that the legislators intended the attorney fee award provisions to be liberally applied to cases exactly like here. CP 173-179.[9] The *Bill Report* at page 2 describes that "government sometimes imposes excessive regulations"… and [without the bill] "Existing remedies are inadequate- sometimes it takes years for a successful lawsuit and then the regulation is only voided and no attorney's fees are allowed." This is the present case in spades.

The "*Discussion of Issues*" underscores that [without the new law], "If the owner chooses to go to court, the costs, even if he prevails, may exceed the value of the property. HB 1006 would make a court challenge possible by at least giving the owner a chance to recover damages and litigation expenses." Last, the "*Case History in Support of HB 1006 (No.*2)", describes a case of regulatory overreach near identical to that of

[9] CP 173-179. is excerpts from legislative history for Chapter 232, Laws of 1982, Sub House Bill 1006 which became Chapter 64.40 RCW.

the Church's.[10] The state passed HB 1006, now Chapter 64.40, to give relief to small property owners exactly like this present Plaintiff, to provide an even playing field when it becomes necessary to defend against the deep pocket of taxpayer-funded lawyers.

As the court explained in *Fisher Properties, Inc. v. Arden-Mayfair, Inc.*,[11] a rate adjustment is appropriate in civil rights and other public interest litigation "to compensate the attorney for delay in payment or the risk of losing and not getting paid at all." Allowing such an adjustment encourages attorneys to take potentially risky cases with clients who may not be able to afford to pay an attorney and allows public interest lawyers to benefit as would attorneys in private practice.[12] *Steele v. Lundgren*, 982 P.2d 619, 96 Wash. App. 773 (Wash. App. 1999).

In *Martinez*, the Court began its support of a fee

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[10] See: CP 173-179.

1. Cover sheet to the Bill History
2. Bill report – expressly stating one reason for the bill is to allow attorney fee recapture
3. Discussion of bill, also reinforcing that a big reason for the bill was to allow especially small property owners to have a fighting chance to recover litigation expenses, and
4. Case History submitted for the bill support.

[11] Citing to *Fisher*, 115 Wash.2d 364, 375-378, 798 P.2d 799 (1990); *see also Mahler*, 135 Wash.2d at 434, 957 P.2d 632.

[12] *Citing Fisher*, 115 Wash.2d at 376-77, 798 P.2d 799.

multiplier with the language of Washington's Law Against Discrimination, RCW 49.60. The Law proclaims:

> *that "[t]he provisions of this chapter shall be construed liberally for the accomplishment [914 P.2d 90] of the purposes thereof."[13] Any person injured by discrimination in employment may bring an action for injunctive relief and damages "together with the cost of suit including reasonable attorneys' fees or any other appropriate remedy authorized by this chapter or the United States Civil Rights Act of 1964 as amended...."[14]*
>
> The incorporation of remedies under the Federal Civil Rights Act of 1964 led the Washington Supreme Court to look to federal case law in awarding reasonable attorney fees under the Law Against Discrimination.[15]

The *Martinez* Court stated that the Legislature's goal in enacting the fee shifting statute was "to enable vigorous enforcement of modern civil rights litigation and to make it financially feasible for individuals to litigate civil rights violations."[16] The Court has called for liberal construction of the attorney fee entitlement in order to encourage private enforcement of the Law Against Discrimination.[17]

This attention to attorney fee awards applies to the gammit

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[13] *Martinez, supra at* 235 n.4.
[14] *Martinez*, supra at 235 n.5.
[15] Martinez, supra, 235 n.6, quoting *Blair v. Washington State Univ*., 108 Wn.2d 558, 570, 740 P.2d 1379 (1987); *Fahn v. Cowlitz County*, 95 Wn.2d 679, 683-84, 628 P.2d 813 (1981).
[16] *Martinez, supra at* 235 n.7 citing *Hume v. American Disposal Co.*, 124 Wn.2d 656, 675, 880 P.2d 988 (1994),*Blair*, 108 Wn.2d at 572-73, cert. *denied*, 115 S. Ct. 905 (1995)
[17] *Fahn*, 95 Wn.2d at 684-85.

of civil rights litigation. When litigation under the Consumer Protection Act produces protection for everyone who might in the future be injured by a specific violation, then it follows that the reasonableness of the attorney's fee should be governed by substantially more than the import of the case to the plaintiff alone. *Connelly v. Puget Sound Collections. Inc.,* 16 Wash.App. 62, 65, 553 P.2d 1354 (1976).

Similarly, in cases brought under the Washington Law Against Discrimination, the prospect of an upward adjustment in a contingency case is recognized as "an important tool in encouraging litigation." *Wash. State Commc'n Access Project v. Regal Cinemas, Inc.,* 173 Wash.App. 174, 221, 293 P.3d 413, *review denied,* 178 Wash.2d 1010, 308 P.3d 643 (2013).

Discrimination "is not just a private injury which may be compensated by money damages." *Martinez v. City of Tacoma,* 81 Wash.App. 228, 241, 914 P.2d 86, *review denied,* 130 Wash.2d 1010, 928 P.2d 415 (1996). The law "places a premium on encouraging private enforcement" of antidiscrimination law. *Chuong Van Pham,* 159 Wash.2d at 542, 151 P.3d 976.

Chuong Van Pham was a case brought under the Washington Law Against Discrimination, chapter 49.60 RCW. In remanding the fee award, the court opened the door for applying a multiplier because in antidiscrimination cases the law "places a premium on encouraging private enforcement and, as discussed above, the possibility of a multiplier works to encourage civil rights attorneys to accept difficult cases." *Chuong Van Pham*, 159 Wash.2d at 542, 151 P.3d 976. In such a case, it is possible that "the lodestar figure does not adequately account for the high-risk nature of a case." *Chuong Van Pham,* 159 Wash.2d at 542, 151 P.3d 976.

Federal Courts also recognize that adjustments, both upward and downward, to the lodestar amount are sometimes appropriate. *Clark v. Clark v. City of Los Angeles, 803 F.2d 987, 991 (9th Cir. 1986)* quoting *Blum.*[18] These Courts have repeatedly upheld fee increases based on the contingent nature of fee arrangement, recognizing the risk and delay in payment, finding such adjustment are fully justified by the purpose of section 1988 and other analogous fee-award statutes.

[18] *Blum v. Stenson*, 465 U.S. 886, 898 (1984).

The United States Supreme Court discerned a similar legislative intent in 42 U.S.C. § 1988, the Civil Rights Attorney's Fees Awards Act of 1976.[19] It noted the difference between private tort actions and civil rights actions: "Unlike most private tort litigants, a civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms."[20]

The legislative purpose behind civil rights law section 1988 was reviewed by the Supreme Court in *City of Riverside v. Rivera*, 477 U.S. 561, 574, 106 S.Ct. 2686 2694, 91 L.Ed.2d 466 (1986). The Court explained that in cases covered by section 1988, the plaintiffs seek to vindicate civil and constitutional rights guaranteed to everyone. Through these suits, plaintiffs often secure important results benefiting society as a whole. The importance of these societal benefits is frequently not reflected in the nominal or relatively small damage awards that these cases produce. As a result, skilled

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[19] Titles II, III and VII of the Civil Rights Act included attorney fee entitlements before 1976. In 1975, the Supreme Court held that attorney fees could not be granted in civil rights actions on a "private-attorney-general" theory. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 95 S. Ct. 1612, 44 L. Ed. 2d 141 (1975). Congress responded by enacting 42 U.S.C. § 1988 to award a reasonable attorney fee to prevailing parties in civil rights litigation. *Hensley v. Eckerhart*, 461 U.S. 424, 429, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983).

[20] *Martinez v. City of Tacoma*, 81 Wn. App. 228, 236 (Wash. Ct. App. 1996).

attorneys were often unable or unwilling to prosecute civil rights cases despite the dramatic infringements of rights that were sometimes involved. Section 1988 was enacted as an exception to the general rule that each party to a lawsuit shall bear its own attorney's fees. The goal was to ensure a reasonable attorney's fee so that when constitutional violations occurred, competent counsel would be willing to come forward and assist the wronged parties in the vindication of their rights. *Clark v. City of Los Angeles,* 803 F.2d 987 (9th Cir. 1986), quoting *Riverside* at 2694-97.

"[O]ne purpose of the Civil Rights Attorney's Fees Awards Act of 1976 was to remove financial impediments that might preclude people from asserting their civil rights… Congress's intent [was] to assure access to counsel in civil rights cases." *Hamner v. Rios,* 769 F.2d 1404 (9th Cir. 1985).

The legislative history of section 1988 indicates that "the effects of such fee awards are ancillary and incident to securing compliance with [the Civil Rights] laws, and that fee awards are an integral part of the remedies necessary to obtain such compliance." *Hamner v. Rios,* supra at 1408, (9th Cir. 1985),

quoting S.Rep. No. 94-1011, 94th Cong.2d Sess. 5, reprinted in 1976 U.S. Code Cong. & Ad.News 5908, 5913.

"As stated in *Seattle School District*,[21] 'The congressional purpose in providing attorney's fees in civil rights cases was to eliminate financial barriers to the vindication of constitutional rights and to stimulate voluntary compliance with the law." 633 F.2d at 1348; see also *American Constitutional Party v. Munro*, 650 F.2d 184, 187 (9th Cir.1981).'" *Ackerley Communications, Inc. v. City of Salem,* Or., 752 F.2d 1394 (9th Cir. 1985).

An award of attorney's fees is "essential to effectuate the congressional purpose of encouraging future constitutional litigation in similar circumstances ...." *Seattle School District*, 633 F.2d at 1350. Attorney's fees under Section 1988 are thus not only an added burden to encourage voluntary compliance, but an entitlement to a prevailing party which encourages and facilitates access to the courts. *Ackerley Communications v. City of Salem, Or*, 752 F.2d 1394, 1397 (9th Cir. 1985), quoting *Seattle School District* at 1348.

[21] *Seattle School District No. 1 v. Washington*, 633 F.2d 1338 (9th Cir.1980).

The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, is designed "to ensure 'effective access to the judicial process' for persons with civil rights grievances." *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) (quoting H.R.Rep. No. 94-1558, p. 1 (1976)).

C. COURT'S FEE AWARD WAS ERROR.

In the present case, the Trial Court erred in multiple ways by its reduction to the actual hourly rate, reduction of the hours expended, reduction in requested fee award, denial of any fee multiplier, failure to recognize the civil rights aspect that justifies a fee multiplier, and failure to adequately explain its fee calculation, particularly in light of the large fee decreases. In sum, the Court reduced Retired Justice Sanders' hourly fee rate ($395 to $385.03); deducted number of attorney hours by 40% (1104.6 reduced to 658.5, a deduct of 446.1 hours); reduced fees by 40% ($613,142 reduced to $253,534); and failed to apply any multiplier. The Court also denied any Legal Assistant fees award. Most significantly, the Court offered little insight into his basis for the various deduction, and actually refused to identify what should have performed by junior counsel, or what hours were not reasonably spent. RP 13:7-10

and RP 13:16-14:3.[22]

1. Court's Rate Reduction was Error.

Despite noting that the vast majority of work was performed by one attorney, (Retired Justice Sanders), the Trial Court nonetheless created a bended rate of **$385** using rates from three contributing attorneys. CP 421. What the Court did not clearly explain is that the rate for Attorney Sanders who performed the "vast majority of the work" was **$395**. CP 421.Thus, by imposing the lower "blended rate" of $385, the Court actually reduced the hourly rate for the "vast majority of the work". CP 418-423.

Further, after creating that blended rate, the Court then characterized that rate as "high". CP 421. Yet, in this same case, previous Trial Court had approved Attorney Sanders' $395 hourly rate. CP 169-170.

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[22] Report of Proceedings (RP) 3/19/21 hearing
SANDERS: The Church requested the Court specifically identify the attorney services disallowed from the fee award … RP 13:7-10.
THE COURT: With respect to that, let me just say one more thing, which is, I don't know that it is reasonable, to be honest with you, to expect the Court to go through six or seven years' worth of billings on an oral record when I have a lot of other cases pending and make that determination at that point in time. There is just no time to do that. I broke it down into some detail in that transcript as to each of the, I guess, seven phases of litigation. I broke it down by that. That was enough detail for you to have some understanding as to what the Court was doing and its basis for it. It wasn't in any way arbitrary." RP 13:16 -14:3.

The Court's rate reduction is even more questionable, as opposing counsel for the City conceded it "was not contesting Mr Sander's hourly rate" and "does not contest the hourly rates of the other attorneys." CP 344. Only the Court did, and it did so without any explanation, which is error.

2. Court's Denial of Multiplier was Error.

Next, because the Court characterized its self-created blended rate as "high", it then used that unexplained conclusory remark to deny any multiplier. The Court erred by not acknowledging the civil rights nature of this claim and how that fact was or was not considered in its decision to deny any multiplier. The Court did not address how (or if) the high risk of non-payment factored into his decision to deny the multiplier. The Court erred as it gave no other or detailed explanation for denying the requested multiplier. The record lacks detailed explanation of how the Trial Court's discretion was exercised.

3. Court's Reduction of Hours Expended and Reduction of Fee Award was Error.

Here, the Court reduced the Church's hours from 1,104.6 to 658.5, a 40% reduction from the actual hours billed. The

Trial Court's only offered explanation was the case was not "factually complicated" and did not "present novel legal issues" CP 418-423. As a result, the fees of $613,142.33 was reduced to $253,543, also a 40% reduction. In Finding 16 CP 420, the Court mischaracterized by omission that Church's counsel spent what equated to 6.4 months assuming 40-hr/5-day week for "an actual trial that was approximately 8 court days", but where Court fails to acknowledge the hours were spent over seven plus years, and include multiple motions, LUPA hearing, appeals to Court of Appeal and Supreme Court, Trial, Summary Judgement and fee motion on remand (85 months which equates to average 12.99 hours a month).

In *Stranger*, the 9th Circuit found error where the Court did not adequately explain its reasons for reducing the lodestar. While the Court noted one or two considerations that might have supported its decision, it failed to explain how it weighed those considerations when calculating the final award. Specifically, the Court found the record lacked any explanation as to why the lodestar was reduced by 422 hours, as opposed to any other number of hours. Further, those **422 hours**

represented a **30%** reduction of the hours compensable under the presumptively correct lodestar. “A 30% reduction is large enough that the parties were entitled to a more detailed explanation of the court's reasoning.” *Stanger v. China Elec. Motor, Inc*., 812 F.3d 734, at 739 (9th Cir. 2016), quoting *Costa v. Comm'r of Soc., Sec. Admin*., 690 F.3d 1132, 1136 (9th Cir.2012) (requiring "relatively specific reasons" where compensable hours were reduced by nearly one-third). Notably, here, the Court cut **452 hours, 40%,** also without Court-supplied detail. This Appeals Court should similarly find error.

4. Court Erred in Speculating on Allocation of Work With Resulting Reduction in Fees.

The Court stated that many hours were “time that could have been done by legal staff or associate attorneys at far lowers rates” and “not all time was reasonably spent”. Yet, the Court at the same time denied any Legal Assistant fee award. Further, Courts may not reduce a fee award based on "speculation as to how other firms would have staffed the case" or "whether it would have been cheaper to delegate the work to other attorneys." *Moreno v. City of Sacramento*, 534 F.3d 1106, at 1114-1115 (9th Cir. 2008). 534 F.3d at 1114–15. “A

conclusory statement about inefficiency can justify "no more than a haircut" in a fee award; it cannot justify a large percent reduction. Id. at 1116," *Vargas v. Howell*, 949 F.3d 1188 (9th Cir. 2020); quoting *Gonzalez*,[23] 729 F.3d at 1203 ("[T]he district court must explain why it chose to cut the number of hours or the lodestar by the specific percentage it did."). Here the record lacks that detailed explanation.

5. Court Erred in Not Showing its Work.

The Court in *Maher* found error where the Trial Court omitted adequate explanation and detailed findings:

> **Because the trial court made no findings regarding the specific challenged items, the record does not allow for a proper review of these issues**. On remand, therefore, the trial court is directed to enter thorough findings regarding these specific challenged time entries.

Mayer v. City of Seattle, 102 Wash.App. 66, 82–83, 10 P.3d 408 (2000), *review denied*, 142 Wash.2d 1029, 21 P.3d 1150 (2001). Emphasis provided.

The present case findings and conclusions case suffer from the same lack of required detail as in *Mayer* and must be reversed. "Courts must take an active role in assessing the

[23] *Gonzalez v. City of Maywood* , 729 F.3d 1196, 1203 (9th Cir. 2013).

reasonableness of fee awards, rather than treating cost decisions as a litigation afterthought." *Mahler v. Szucs*, 135 Wash.2d 398, 434–35, 957 P.2d 632, 966 P.2d 305 (1998). Significantly, all fee award-related submittals were in writing. Therefore, this Appeals Court is in as good a position to review the record as was the (last) Trial Court, whose only case involvement was final summary judgment on the merits and attorney fee award. Accordingly, this Appels Court should determine the fee award without need of remand. *Bryant*, supra.

In parallel to Washington law, federal Courts also "have long held that courts must show their work when calculating attorney's fees." *Padgett v. Loventhal,* 706 F.3d 1205 (9th Cir. 2013).

In *Chalmers v. City of Los Angeles,* the 9th Circuit vacated an award of attorney's fees when the district court reduced plaintiff's fees because the plaintiff was only partially successful, but the order "contain[ed] no explanation of how the court arrived at the" award. 796 F.2d 1205, 1213 (9th Cir.1986), amended by 808 F.2d 1373 (9th Cir.1987). The lack of explanation was problematic because review of the award

was impossible. "Absent some indication of how the district court's discretion was exercised, this court has no way of knowing whether that discretion was abused." Id.

Other Courts similarly underscore the importance of a Trial Court's fee award explanation.

> It is worth repeating that "[s]ince [the district court] is already doing the relevant calculation, it is a small matter to abide by the injunction of the arithmetic teacher: Show your work!" *City of Holyoke Gas & Elec. Dep't v. FERC*, 954 F.2d 740, 743 (D.C.Cir.1992). The requirement that courts show their work is frequently forgotten, and we have often needed to reiterate its importance. See, e.g., *Evon v. Law Offices of Sidney Mickell*, 688 F.3d 1015, 1034 (9th Cir.2012) (remanding fee award for lack of explanation); *McCown v. City of Fontana*, 550 F.3d 918, 922–23 (9th Cir.2008), amended by 565 F.3d 1097 (9th Cir.2008) (same); *McGrath v. Cnty. of Nevada*, 67 F.3d 248, 254 (9th Cir.1995) (same); *United Steelworkers of Am. v. Phelps Dodge Corp*., 896 F.2d 403, 406–07 (9th Cir.1990) (same); *Jordan v. Multnomah Cnty*., 815 F.2d 1258, 1263–64 (9th Cir.1987) (same).

Padgett at 706 F.3d 1209. The *Padgett* Court found that the mandate that courts show their work is all the more important in cases where, there are many overlapping claims and a very mixed result, quoting *Thomas*,[24] 410 F.3d 644, 646 (9th Cir. 2005) at 648–49.

[24] *Thomas v. City of Tacoma*, 410 F.3d 644, 646 (9th Cir. 2005)

> The district court made an unfortunately common mistake. While it identified the correct rules, it provided no explanation for how it applied those rules in calculating the costs and attorney's fees.

Padgett v. Loventhal, 706 F.3d 1205 (9th Cir. 2013).

In order for a reviewing Court to conduct a meaningful review of the fee award's reasonableness, the court must "provide a concise but clear explanation of its reasons for the fee award." *Hensley v. Eckerhart*, 461 U.S. 424, 437, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983).

> The fee explanation should include a discussion of the factors relied upon in determining the number of hours reasonably expended and the reasonable hourly rate. If it employs a percentage reduction, the court should explain how it arrived at the chosen percentage… When, as here, the district court provides only an elliptical explanation for its decision, we must reverse the fee

Stewart v. Gates, 987 F.2d 1450, at 1453 (9th Cir. 1993). The Court must state not only the grounds on which it relied, but also how it weighed the various competing considerations. "*Hall v. Bolger*, 768 F.2d 1148, at 1151 (9th Cir. 1985) (the district court should provide a "detailed account of how it arrives at appropriate figures for `the number of hours reasonably expended' and `a reasonable hourly rate'") (quoting

Blum, 465 U.S. at 898, 104 S.Ct. at 1548).” *Chalmers v. City of Los Angeles*, 796 F.2d 1205, 1211 (9th Cir. 1986).

"Without some indication or explanation of how the district court arrived at the amount of fees awarded, it is simply not possible for [the appellate court] to review such an award in a meaningful manner… "[a]bsent some indication of how the district court's discretion was exercised, this court has no way of knowing whether that discretion was abused."" *City of L.A.*, 796 F.2d 1205, 1213 (9th Cir.1986); see also *Ferland v. Conrad Credit Corp*., 244 F.3d 1145, 1151–52 (9th Cir.2001). The Trial Court here erred in failing to do so.

6. Trial Court Erred as Explanation Is Required Even More Where Fee Reduction is Large

Especially "where the disparity [between the requested fee and the final award] is larger, a more specific articulation of the court's reasoning is expected." *Stranger v. China Elec. Motor, Inc.*, 812 F.3d 734 (9th Cir. 2016*), quoting Moreno v. City of Sacramento*, 534 F.3d 1106, 1111 (9th Cir.2008).

Here the Trial Court reduced the Church’s fees by **40%.** A court’s **reduction of more than ten percent requires a reasoned explanation**. *Johnson v. MGM Holdings, Inc*., 943

F.3d 1239 (9th Cir. 2019). Error was found where "the district court did not offer any additional explanation for its decision to cut Class Counsel's hours by **30%."** *Stanger v. China Elec. Motor, Inc*., 812 F.3d 734 (9th Cir. 2016).

In a 2020 case, the 9th Circuit reversed where the court concluded that "the vast majority of hours expended in this case were unreasonable." The court had applied an "across-the-board percentage cut" of **90 percent**, and where Plaintiff had estimated his damages at over $1 million, but "[t]he case ultimately settled for $99,999, less than 10% of the lower bound of any of plaintiff's estimated damages." That Trial Court found "[i]t was unreasonable for ... Terry to incur over $184,000 in attorney's fees himself before realizing the value of his client's case was $99,999." *Vargas v. Howell*, 949 F.3d 1188 (9th Cir. 2020). In reversing on appeal, the 2020 *Vagas* Court emphasized that the larger the difference between the fee requested and the fee awarded, the "more specific articulation of the court's reasoning is expected." *Id*; see also *Chaudhry v. City of Los Angeles*, 751 F.3d 1096, 1112 (9th Cir. 2014) ("[A] reduction of **88 percent** requires a more specific explanation.");

Gates v. Deukmejian , 987 F.2d 1392, 1399–1400 (9th Cir. 1992). "[T]he district court must explain why it chose to cut the number of hours or the lodestar by the specific percentage it did." *Vargas v. Howell,* 949 F.3d 1188 (9th Cir. 2020). Here the Trial Court erred when it failed to do so.

In *Ferland v. Concord Credit Corp.*, 244 F.3d 1145 (9th Cir. 2001), another award was error where the court eliminated more than half the hours actually expended. The appeals court concluded the **explanation for the very large cut in the number of hours was not adequate**. Error was found because the court failed to identify any particular excessive hours, nor did it explain in any other fashion how it decided how many hours to cut, or by what percentage to reduce the documented hours, and thus the Court failed its obligation "to articulate . . . the reasons for its findings regarding the propriety of the hours claimed or for any adjustments it makes either to the prevailing party's claimed hours or to the lodestar." *Ferland v. Concord Credit Corp*., 244 F.3d 1145 (9th Cir. 2001), quoting *Gates v. Deukmejian,* 987 F.2d 1392, 1398 (9th Cir. 1992).

D. COURT ERRED AS DAMAGES AWARD IN CIVIL RIGHT CASE ARE NOT DETERMINATIVE OF ATTORNEY FEE AWARD.

The Washington Supreme Court has adopted the federal rule that fee awards are more liberally allowed in civil rights cases and should not be proportionately tied to monetary damages.

> [W]e adopt the federal rule allowing more liberal recovery of costs by the prevailing party in civil rights litigation, in order to further the policies underlying these civil rights statutes: to make it financially feasible to litigate civil rights violations, to enable vigorous enforcement of modern civil rights legislation while at the same time limiting the growth of the enforcement bureaucracy, to compensate fully attorneys whose service has benefited the public interest, and to encourage them to accept these cases where the litigants are often poor and the judicial remedies are often nonmonetary.[25]

Martinez v. City of Tacoma, 914 P.2d 86, 81 Wn.App. 228 (Wash. App. 1996). In *Martinez*, the Court noted the US Supreme Court concluded that attorney fee awards in civil rights litigation should not be tied to monetary damages:

> Because damages awards do not reflect fully the public benefit advanced by civil rights litigation, Congress did not intend for fees in civil rights cases, unlike most private law cases, to depend on obtaining substantial monetary relief. Rather, Congress made clear that it 'intended that the amount of fees awarded under [section 1988] be governed by the same standards which prevail in other types of equally complex Federal litigation, such

[25] Quoting *Blair*, 108 Wash.2d at 573, 740 P.2d 1379 (citation omitted).

> as antitrust cases and not be reduced because the rights involved may be nonpecuniary in nature.'[26]
> The Court further quoted the legislative history of the Act that "[c]ounsel for prevailing parties should be paid, as is traditional with attorneys compensated by a fee-paying client, 'for all time reasonably expended on a matter.' "[27]
> In other words, the purpose of section 1988 is to encourage private attorneys to undertake representation in cases in which "the damages likely to be recovered are not sufficient to provide adequate compensation[914 P.2d 91] to counsel, as well as those frequent cases in which the goal is to secure injunctive relief to the exclusion of any claim for damages."[28].

In another part of the *Martinez* opinion, the Court quoted a statement from the United States Supreme Court's decision in *City of Riverside v. Rivera*[29]. "Because damages awards do not reflect fully the public benefit advanced by civil rights litigation, Congress did not intend for fees in civil rights cases, unlike most private law cases, to depend on obtaining substantial monetary relief." *Martinez, supra* at 236.

In that *Riverside* case, the Supreme Court upheld an attorney fees award of more than $240,000 in a case in which the plaintiffs were awarded only $33,350 in damages. The

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[26] Citing to *City of Riverside*, 477 U.S. at 575, 106 S.Ct. at 2694 (*emphasis theirs*) (quoting S.Rep. No., 94-1011, at 6, U.S.Code Cong. & Admin.News 1976, p. 5913).
[27] Citing to *City of Riverside*, 477 U.S. at 575, 106 S.Ct. at 2694 (*quoting S.Rep.* No. 94-1011, p. 6 (1976), which in turn cited *Davis v. County of Los Angeles*, 8 EPD p 9444, 1974 WL 180 (C.D.Cal.1974) (emphasis in original)).
[28] *Martinez* supra at 91, quoting *Pennsylvania v. Delaware Valley Citizens' Coun. for Clean Air*, 483 U.S. 711, 726, 107 S.Ct. 3078 3087, 97 L.Ed.2d 585 (1987).
[29] *City of Riverside v. Rivera,* 477 U.S. 561, 574, 106 S.Ct. 2686 2694, 91 L.Ed.2d 466 (1986).

Court explained that requiring the fee award to be proportional to the damages awarded in a civil rights case would undermine Congress' purpose for enacting 42 U.S.C. sec. 1988:

> A rule of proportionality would make it difficult, if not impossible, for individuals with meritorious civil rights claims but relatively small potential damages to obtain redress from the courts. This is totally inconsistent with Congress' purpose in enacting sec. 1988. Congress recognized that private-sector fee arrangements were inadequate to ensure sufficiently vigorous enforcement of civil rights. In order to ensure that lawyers would be willing to represent persons with legitimate civil rights grievances, Congress determined that it would be necessary to compensate lawyers for all time reasonably expended on a case.[23]

Riverside, supra, at 564–65, 576, 106 S.Ct. 2686 (plurality opinion); accord id. at 585, 106 S.Ct. 2686 (Powell, J., concurring in the judgment); In accord, *Vargas v. Howell*, 949 F.3d 1188 (9th Cir. 2020), ("A rule of proportionality is inappropriate.").

In *Mission Springs, Inc.* the Court found action under RCW 64.40 akin to federal civil rights cause of action under 42 U.S.C sec.1983 "A similar result must follow under 42 U.S.C. sec.1983. A prima facie case under 42 U.S.C sec.1983 requires the plaintiff to show that a person, acting under color of state

law, deprived the plaintiff of a federal constitutional or state-created property right without due process of law." *Mission Springs, Inc. v. City of Spokane,* 134 Wn.2d 947, 954 P.2d 250 (Wash. 1998).

"Appellants shall recover appellate costs and reasonable attorney fees pursuant to 42 U.S.C. sec.1988 and RCW 64.40.020." *Mission Springs, Inc. v. City of Spokane,* 134 Wn.2d 947, 954 P.2d 250 (Wash. 1998).

In *Blair v. Washington State University,* 108 Wash.2d 558, 573, 740 P.2d 1379 (1987), the Supreme Court adopted the federal rule allowing more liberal recovery by the prevailing party in civil rights litigation to further the policies underlying the civil rights statutes. See also *Steele v. Lundgren,* 982 P.2d 619, 96 Wash. App. 773 (Wash. App. 1999), which fund that in civil rights cases, heavy reliance on the degree of success may constitute an abuse of discretion.

Civil rights litigation is often characterized by intense litigation to obtain a low damage award. Without adequate compensation under the applicable fee shifting statute those rights would go unprotected. See Thomas A. Eaton and

Michael Wells, "*Attorney Fees, Nominal Damages, and Section 1983 Litigation,*" 24 Wm. & Mary Bill Rts. J. 89 (2016).

"We will not overturn a large attorney fee award in civil litigation merely because the amount at stake in the case is small." *Mahler v. Szucs,* 135 Wash.2d 398, 433, 957 P.2d 632 (1998), quoted in *Mayer,* supra at 83, and see *Talisen Corp. v. Razore Land Co.*, 144 P.3d 1185, 135 Wn. App. 106 (Wash. App. 2006).

The value in advancing civil rights cases is not limited to pecuniary considerations, and so an award of fees should not depend on obtaining substantial financial relief for the plaintiff. *Perry v. Costco Wholesale, Inc*., 123 Wash.App. 783, 808–09, 98 P.3d 1264 (2004).

This case illustrates exactly why that is the rule. Otherwise, a small but meritorious civil rights issue such as this would be crushed due to the burden of litigation to overcome a stubborn defense by a well-funded defendant.

E. COURT ERRED IF IT DISREGARDED CHURCH'S PRA FEE SEGREGATION

Present case included at select times, two claims based on: (1) the unconstitutional property exaction condition and (2)

the PRA. Below, when requesting fees based on the successful constitutional claim, the Church properly discounted all services and costs associated with the PRA proceeding by eliminating fees for each PRA entry, and also discounting fees incurred at the Appeals Court level by 15%. This method comports with City's counsel (unsuccessful) argument earlier in this case, that the Church's Supreme Court cost bill be reduced by 25% as appropriate PRA claim allocation. This was more than fair and reasonable. "Where the specifics of the case make segregating actual hours difficult" a percentage reduction of fees may be appropriate. *Clausen v. Icicle Seafoods, Inc*., 174 Wn.2d 70, 272 P.3d 827, 834 (2012).

Because the Court gave no reasoned explanation, we cannot know from the record whether the Court's hour reduction is or is not based on rejection of the Church's PRA fee segregation calculation. If the Trial Court did reject, it would be error. But this is one more mystery that cannot be solved based on the Trial Court's lack of any "'concise but clear'" explanation of "how it came up with the amount."

Moreno, 534 F.3d at 1111 (quoting *Hensley*, 461 U.S. at 437, 103 S.Ct. 1933).

F. COURT ERRED IN DENYING PARALEGAL AWARD

Paralegal time is also subject to an award under the lodestar method in a fee shifting statute. *Johnson v. Dept. of Trans*., 313 P.3d 1197, 1201 (Wash. Ct. App. 2013). Here, Mr. Kuehn's declaration documents and modestly requested 196.25 hours at $30 per hour for a total of $5,887, where expert declaration attested rates of $150 hour are common. Mr Kuehn was uniquely qualified to perform these services because of his factual familiarity with the case and motivation for success.

Time for paralegals may be recovered as a part of a reasonable attorney fee, provided the work is legal in nature rather than merely clerical. Here, based on his declaration as well as that of attorney Sanders, the request meets the standard of recovery for non-lawyer time as articulated in *Absher Const. Co., v. Kent School Dist. No. 415*, 917 P.2d 1086, 1088 (Wash. Ct. App.1995).[30]

[30] the services by the non-lawyer must be legal in nature;
- the services must be supervised by an attorney
- the qualifications of the person performing the services must be set forth in sufficient detail to demonstrate the person is qualified
- the services performed were legal rather than clerical;

As noted by the Supreme Court, certain types of paralegal work, such as drafting correspondence or fact investigation, "lies in a gray area of tasks that might appropriately be performed either by an attorney or a paralegal." *Missouri v. Jenkins* by Agyei, 491 U.S. 274, 288 n.10 (1989). The Court also noted that "[o]f course, purely clerical or secretarial tasks should not be billed at a paralegal rate, regardless of who performs them." *Id*. State law courts approved billing separately for paralegal work "at a reasonable market value rate." *Guinn v. Dotson*, 23 Cal. App. 4th 262, 269 (1994) ("An award of attorney's fees which does not compensate for paralegal service time would not fully compensate the attorney.").

Mr. Kuehn has formal paralegal training, specific real estate training and critical knowledge of the issues, worked under the supervision of attorney Sanders, and his time records are detailed and set forth in the application. Entries which may not meet the legal assistant standard were deleted.

- the amount of time must be set forth and reasonable;
- the charges must reflect reasonable community standards

The criteria set forth above is met regarding Mr. Kuehn

G. REQUEST FOR ATTORNEY FEES ON APPEAL.

RCW 64.40.020(2) provides that reasonable attorneys' fees and costs may be awarded to the prevailing party under RCW ch. 64.40. *Cox v. City of Lynnwood*, 72 Wn. App. 1, at 11-12, (Wash. Ct. App. 1993). Such fees are allowed on appeal, too. Id.; see also, *Lutheran Day Care v. Snohomish County*, 119 Wn.2d 91, 127-128, 829 P.2d 746 (1992). The Church so requests.

H. CONCLUSION AND REQUEST FOR RELIEF OF REASONABLE ATTORNEY FEE AWARD WITHOUT REMAND.

This Appeal Court should find the Trial Court erred in multiple ways by its reduction to the actual hourly rate, reduction of the hours expended, reduction in requested fee award, denial of any multiplier, denial of legal assistant fees, failure to recognize a fee multiplier is independently justified in this civil rights case, and in its overall failure to adequately explain its calculations, especially where fee decrease was large.

The US Supreme Court has admonished that "[a] request for attorney's fees should not result in a second major litigation." *Hensley*, 461 U.S. at 437. The Court is urged to

avoid this over eight-year-old case from being even further protracted. The fee issue is based on written argument and undisputed fact of the litigation, all of which records are before this Court. The Trial Court below had no greater familiarity with this case, as it was assigned solely at the final summary judgement and fee award stage after remand. The Church requests that the Court **not** remand, but instead directly award the appropriate fees as requested on **Attachment 1.**

IV. CERTIFICATE

I certify the number of words contained in the document, exclusive of words contained in the appendices, the title sheet, the table of contents, the table of authorities, the certificate of compliance, the certificate of service, signature blocks, and pictorial images (e.g., photographs, maps, diagrams, and exhibits) comply with the 12,000 word limit of RAP 18.17.

RESPECTFULLY SUBMITTED this 21st day of October, 2021.

GOODSTEIN LAW GROUP PLLC

By: */s/Richard B. Sanders*
By: */s/ Carolyn A. Lake*
Richard B. Sanders, WSBA #2813
Carolyn Lake, WSBA #31980
Attorneys for Appellant

CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below, I caused to be served the foregoing document on the following persons and in the manner listed below:

Margaret A. Elofson Attorney at Law 323 Summit Ave Fircrest, WA 98466-7315 Email: Elofsonma@gmail.com	☐ U.S. First Class Mail ☐ Via Legal Messenger ☐ Overnight Courier ☑ Electronically via email
Barret Schulze, Deputy City Attorney City of Tacoma, Office of the City Attorney 747 Market Street, Room 1120 Tacoma, WA 98402 Email: bschulze@cityoftacoma.org	☐ U.S. First Class Mail ☐ Via Legal Messenger ☐ Overnight Courier ☑ Electronically via email

DATED this 21st day of October, at Tacoma, Washington.

s/Deena Pinckney
Deena Pinckney

Attachment 1

Summary of lodestar reasonable hours, rate and cost calculation.

The lodestar reasonable hours claim was and is organized below by phase of the litigation: (1) Pre-Trial; (2) Trial; (3) Post Trial; (4) Court of Appeals; (5) Supreme Court; (6) Remand; and (7) Post Final Judgment/Attorney Fees.

Pre-Trial:

Attorney	Hours	Rate	Total
Richard Sanders	415.5	$395	$164,122.50
Carolyn Lake	16.6	$295	$4,897.00
Seth Goodstein	20.7	$200	$4,140.00
Conor McCarthy	0.9	$200	$180.00
Total Amount:			$173,339.50

Trial:

Attorney	Hours	Rate	Total
Richard Sanders	76.5	$395	$30,217.50
Carolyn Lake	0	$295	0
Seth Goodstein	0	$200	0
Total Amount:			$30,217.50

Post Trial:

Attorney	Hours	Rate	Total
Richard Sanders	56.1	$395	$22,159.50
Carolyn Lake	4.1	$295	$1,209.50
Seth Goodstein	7.0	$200	$1,400.00
Total Amount:			$24,769.00

Court of Appeals:

Attorney	Hours	Rate	Total
Richard Sanders	238.7	$395	$94,286.50
Carolyn Lake	0.8	$295	$236.00
Seth Goodstein	4.8	$200	$960.00
Sub Total:			$95,482.50
Credit City 15% for PRA			-$14,322.37
Total:			$81,160.13

Supreme Court:

Attorney	Hours	Rate	Total
Richard Sanders	97.3	$395	$38,433.50
Carolyn Lake	3.5	$295	$1,032.50
Seth Goodstein	0.5	$200	$100.00

Total Amount:	$39,566.00

Remand:

Attorney	Hours	Rate	Total
Richard Sanders	88.6	$395	$34,997.00
Carolyn Lake	15.5	$295	$4,572.50
Seth Goodstein	0	$200	0
Total Amount:			$39,569.50

Post Final Judgment/Attorney Fees:

Attorney	Hours	Rate	Total
Richard Sanders	54	$395	$21,330.00
Carolyn Lake	3.5	$295	$1,032.50
Seth Goodstein	0	$200	0
Total Amount:			22,362.5

Legal Assistant Fees:

Name	Hours	Rate	Total
Terry Kuehn	196.25	$30	$5,887.00
Total Amount:			$5,887.00

Total Net Lodestar:	$416,871.13
Multiply by 1.5:	$625,306.69
Total credit: Deduct Prior City Payment from total attorney fees due: – $1,095.49-- 4/13/15 Trial Court Costs for 1/19/15 Judgment – $11,068.87-- Supreme Court Costs 11/15/19	-$12,164.36
Total Net Attorney Fee Judgment:	$613,142.33
Amount Court Awarded:	$253,543.66
Final Amount & Amount Awarded Difference	$359,598.67

NO. 49854-5-II

DIVISION II OF THE COURT OF APPEALS FOR
THE STATE OF WASHINGTON

CHURCH OF THE DIVINE EARTH

APPELLANT

V.

CITY OF TACOMA,

RESPONDENT.

APPELLANT'S OPENING BRIEF

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EXHIBIT 20

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I. INTRODUCTION TO CHAOS

This action arises under RCW 64.40 to recover damages for imposition of an unconstitutional 30 foot right-of-way exaction as a condition to a single family residential building permit; and to recover reasonable attorney fees and penalties for silently withholding documents contrary to the Public Records Act, RCW 42.56.

Fundamental to any 64.40 action is proper identification of the "final decision" of the agency. The Church argued the final decision was the Letter Decision of Director Huffman dated April 28, 2014. P84[1] The City argued the final decision was that of the City's Hearing Examiner dated August 19, 2014. P105 Both called for a 30 foot right-of-way exaction as a permit condition.[2] The Court entered Conclusion of Law 1 holding the "final decision" was the Hearing Examiner's decision. CP 2407

However at the oral hearing of the Church's LUPA appeal on February 19, 2015, Deputy City Attorney Jeff Capell, for the first time, stated the exaction required of the Church was 8 feet, not 30. RP 14 ("It's only 8 feet *now*"), 26, 32 Judge Elizabeth Martin trusted him,

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[1] Exhibits identified by plaintiff Church begin with "P", those from the City begin with "A." P135-143 are deposition excerpts received into evidence.

[2] See note 10 infra for Huffman testimony that his Letter Decision called for 30 feet.

interlineating same on the face of the order,[3] notwithstanding the clear text of the Hearing Examiner order and prior LUPA briefs by all the parties, *including the City,* referencing a 30 foot exaction. CP 230[4], 233, 272[5] Nonetheless Judge Martin concluded even an 8 foot exaction was an unconstitutional condition lacking nexus to the project, but based on that 8 interlineation trial Judge Vicky Hogan considered herself bound to conclude 8 feet was the exaction and entered an order in limine excluding all evidence to the contrary CP1927; and announced at the beginning of trial she had prejudged the issue. RP 297, 345 Quixotically the court also granted the Church's motion in limine excluding evidence that the dedication condition was imposed for any reason other than right of way uniformity although only 30 feet, not 8, would make it uniform. CP 1929, RP 300

The primary legal issue at the trial was whether the City knew or should have known the condition was unlawful as per RCW 64.40.020. Since the 30 foot condition was justified on its face to require the Church to make B Street right of way uniform with adjacent property to the South

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[3] "The City of Tacoma violated the Petitioner's due process rights as secured by the Fourteenth amendment and the Takings clause of the United States Constitution by requiring a 8 foot dedication of land to the City as a condition to issuance of a single family residential building permit...and by failing to carry its burden to prove the condition complied with the requirements of *Nollan*..."

[4] 2,472 square feet divided by length of 82.4 feet (RP 192) equals an exaction 30 feet wide

[5] The City brief filed one day before the LUPA hearing relies on the Amended Declaration of Huffman which calls for 30 feet.

by dedicating 30 feet to the City, not because of any impact of the project, the Letter Decision and the Hearing Examiner decision were facially indefensible, as was the mythical 8 foot decision which obviously didn't even achieve uniformity of right of way. Moreover, the City had no plans to build out any increased right of way in any event. RP782, P142 p.25

At trial the City didn't even try to justify the actual 30 foot exaction, rather attempted to justify *8 feet* as meeting nexus requirements, despite the court's order in limine which said the only justification for the exaction could be to achieve a uniform right of way. Ultimately the court legally concluded that City *reasonably believed* the right of way dedication condition was lawful dismissing the Church's 64.40 cause of action. This was an error of law

Approximately one year before the trial the Church moved to amend its complaint to add a cause of action for the federal constitutional violation under 42 USC 1983. Despite language in CR 15 that leave should be "freely given" to amend in such situations, and the City claimed no prejudice, the court denied the amendment claiming the amendment was "futile.". CP 573, 639 This was also an error of law.

The court also dismissed the Church's claim under the Public Records Act (PRA) notwithstanding requested notes and a video were silently withheld for a full year after the original request, long after the

City had closed its response. Apparently the court legally concluded mistakes or human error is a defense under the PRA for withholding documents. This was also an error of law.

II. STATEMENT OF THE CASE: EXTORTION, LIES AND VIDEO TAPE

1. EXTORTION

In September 2013 Pastor Terry Kuehn, a gentleman in his mid-seventies, attempted to realize his life's dream by submitting an application to the City of Tacoma's Department of Planning and Development Services to build a parsonage where he and his wife of many years could live out the remainder of their lives.[6] However within a handful of days the Department had stopped all processing of the building permit until and unless Mr. Kuehn deeded to the City, without compensation, a 30 foot wide strip of land facing B Street, i.e. 2,472 square feet. P50 The stated reason for the dedication was to make the Church property lines, established by platting more than 100 years prior, "uniform" with the lot line of neighboring property immediately to its south, thereby increasing City right-of-way by that measure. P46 Pastor Kuehn's dream had become a nightmare.

Of course the dimensions of the lot previously platted a century before had nothing whatsoever to do with the planned construction of a

[6] Sadly Mrs. Kuehn did not survive the process. She died of cancer in the winter of 2014.

parsonage, which was simply to replace a prior single family residence built in 1909, demolished within six months of the church's purchase of the property. RP 20, 234, 468, 469

However Pastor Kuehn was a man not only of spiritual persuasion but also worldly experience, a man of business and a licensed real estate agent, who recognized the condition for what is was, extortion.

And Pastor Kuehn had firm legal ground upon which to take his stand. A long line of cases starting with *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987) holds to require a real property exaction as a development condition the government has the burden to justify the condition as a proportional remedy to some problem caused by the newly permitted development. Without this essential nexus "the building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion.'" [Citing cases] *Nollan,* 483 U.S. at 837

In an effort to fight this condition as well as others Pastor Kuehn followed the advice of City staff to file a request on a City form directed to the Director of Planning and Development Services, Peter Huffman, to "waive" the objectionable conditions. Pastor Kuehn filled out the form and

filed it with the City on November 12. 2013. P57[7] At that time, and over the ensuing months, Pastor Kuehn further supported his waiver request with eleven "supplements" where he quoted relevant case law and city ordinances regarding the unconstitutional exaction. See e.g. P58 p.6 ("unconstitutional exaction"), P66 p. 3 ("unlawful and unconstitutional exaction"), P77 p.5 (quotes *Koontz*) There is no evidence City staff much less Director Huffman bothered to read the waiver request (Huffman testified he didn't, P141, p.19) much less read or seriously consider the grounds spelled out to support it in the Church's 11 supplements. The City *never* provided Pastor Kuehn a substantive response why the exaction was *not* extortion. RP 279

In March 2014 a Public Works staffer, Jennifer Kammerzell, recommended the exaction be reduced to 8 feet, P75, but argued no supporting nexus to the proposed construction of a single family residence to even support that. She testified she had no authority to change the condition herself, P140 p.14, and didn't know if her recommendation was accepted by Director Huffman. P140 p. 28 In fact her recommendation was not even seen by Director Huffman when he issued his final *appealable* Letter Decision on April 28, 2014. P141 p.72 There he summarily denied the waiver request, and every part thereof, including the

[7] "proposed demands by city of Tacoma are unlawful exactions..."

request to waive the 30 foot dedication. P141 p.49 The Letter Decision advised the Church it had 14 days to file an administrative appeal to the city's hearing examiner or be barred from further challenge. P84 Huffman testified his was the final denial on the waiver. P141, p.31 Thereupon, the Church paid the filing fee and sought administrative review.

On August 19, 2014 the Hearing Examiner rendered summary judgment in favor of the City. P105 He relied on Mr. Huffman's Amended Declaration of July 9, 2014, P98, wherein Mr. Huffman repeated the City's demand for a 30 foot dedication totaling 2,472 square feet for the sake of right-of-way uniformity—not any problem caused by building a small replacement house on a residential lot. The Hearing Examiner directed that the permit only issue upon fulfillment of that condition referenced in that Amended Huffman Declaration.

The Church obtained counsel and timely appealed to Superior Court under the Land Use Protection Act (LUPA) joining this claim with one for damages under RCW 64.40.020. CP 1 On February 19, 2015, Judge Elizabeth Martin of the Pierce County Superior Court struck the condition for the real property exaction as unconstitutional under *Nollan*, opining, however, that based on the oral argument of the City attorney she believed the exaction was for 8 feet rather than 30. RP 32 However since

neither bore any nexus to the proposed development she concluded the result was the same: the unconstitutional condition must be stricken.

The significance of the alteration from 30 feet to 8 feet will be discussed in the next section. The damage portion of the case proceeded under 64.40 before Judge Martin until shortly before the trial which was conducted by Judge Vicky Hogan (now retired).

In the Spring and Summer of 2015 the church sought timely amendments to its complaint to add causes of action for the federal constitutional violation under 42 USC 1983 and add specific reference to a sidewalk condition actionable under the 64.40 claim. The city bitterly opposed these amendments even though the trial was a year away. The trial court denied leave to amend claiming "futility", CP 573, 639, which is also assigned as an error of law.

In May 2016 the 64.40 claim and a separate claim under the Public Records Act (PRA) went to trial before Judge Hogan. Judge Hogan granted motions in limine filed by the City forbidding the Church from even offering any evidence the exaction sought and defended by the City was 30 feet rather than 8 CP 1927 and forbid the church from offering any evidence that the sidewalk condition was arbitrarily imposed without code authority. Moreover the Judge granted the Church's motion in limine to exclude any evidence that the "8 foot" exaction was imposed for any

purpose other than right of way uniformity RP 1929; although 8 feet couldn't make it "uniform" in any event. She ultimately denied the Church any relief under 64.40 legally concluding the City did not know nor should it have known the exaction was unlawful. She also denied any relief under the PRA legally concluding the City conducted a "reasonable" search even though it mistakenly silently withheld a video and staff notes for a year after the original request, long after it closed its response to the request. The church's motion for reconsideration was denied CP 2478 and this appeal follows.

2. LIES

Lawyers must zealously advance the cause of their clients, and should be commended for doing so; however there are limits, such as honesty. In this case Tacoma City Attorney Elizabeth A. Pauli, through her deputies, crossed the line by lying to the court and cheating the Church of a fair trial.

The facts are quite straight forward. Throughout the course of the administrative appeal, and before, the City Attorney defended the 30 foot development condition (2,472 square feet). This was perfectly consistent with Director Huffman's Letter Decision of April 28, 2014 which denied the Church's request to waive this and other conditions. Whenever

meeting with Pastor Kuehn, Deputy Capell was always adamant that the City demanded 30 feet. RP 301, 349, P100

After the Hearing Examiner made the parties aware that he would entertain motion(s) for summary judgment, the parties filed cross motions. The City's motion was supported by a declaration from Peter Huffman dated July 3, 2014. P96 That declaration stated the City would waive all contested conditions except for an exaction of 659 square feet (equivalent to 8 feet) to achieve a "uniform" right-of-way. At the same time Deputy Capell emailed Pastor Kuehn a proposed legal description for the dedication deed which described a 30 foot exaction. P93 Pastor Kuehn immediately emailed Deputy Capell asking the legal description be corrected to conform to the Huffman declaration of July 3 as that was a welcome change from the Church's perspective. P97 Capell discovered the discrepancy, emailing back to Pastor Kuehn that he, Capell, had made a mistake because he and the City all along was demanding 30 feet, as he had personally told Pastor Kuehn for weeks. P100 He refused to correct the "*accurate*" legal description and then amended his summary judgment motion P101 and the Huffman declaration P98 to reflect the proper square footage for a 30 foot exaction. Attached to the Amended Declaration was a map showing the right-of-way increased by 30 feet to make the right of

way uniform. The City Attorney stood on that Amended Declaration[8] for the remainder of the administrative appeal, never informing the Hearing Examiner RP 645, 671 or Pastor Kuehn anything to the contrary. RP 367-8

That 30 foot decision was then taken up in a LUPA appeal. Briefs filed by the Church argued the 30 foot dedication condition violated the *Nollan* nexus rule. The Respondent City's brief of January 29, 2015 stated: "In the HEX decision, the Hearing Examiner upheld the City's ability to require dedication of an aria of real property approximately 2,472 square feet in area..." CP 230 He further stated: "...the Subject property protrudes out a distance of approximately thirty (30) feet farther to the West than all other lots..." CP 233 He argued CP 238 lack of uniformity was the problem which in turn caused other problems. Only an exaction of 30 feet would solve the uniformity "problem," however.

Deputy Capell attached various documents to his brief not before or germane to the hearing examiner decision even though documents outside the administrative record are not admissible in a LUPA appeal. RCW 36.70C.120. One of those attached documents was the Kammerzell

[8] Throughout the trial the City attempted to impeach the Amended Declaration as "mistakenly signed." Director Huffman verified an interrogatory response under oath that "A staff person, who did not know that the right of way dedication had been reduced to eight feet, made what she thought was a correction to the declaration but what, in fact, was an error." RP 569 At trial Huffman testified the declaration was presented to him for signature by Jeff Capell, who is neither his staffer nor a "she." RP 569-70 Of course the Amended Declaration of Huffman was presented to the Church and the Hearing Examiner, never modified or withdrawn, and was the basis of the examiner's decision.

memo of March 5, 2014 P75 which referenced her suggestion the exaction could be reduced to 8 feet—a suggestion the hearing examiner found had been subsequently changed by the City to 30 feet. P105, CP 13, para. 9 – 10 Moreover the City's Response to the Church's Motion to Strike signed on behalf of City Attorney Elizabeth Pauli on February 18th (one day before the oral hearing) specifically notes the Hearing Examiner decision incorporated the condition set forth in the Huffman Amended Declaration of July 9, i.e. 30 feet.

But the next day February 19 at the oral hearing, when the court expressed doubt the City's condition could pass constitutional muster, the City Attorney through her deputy misrepresented to the Court on three separate occasions that the exaction decision was "now" only 8 feet rather than 30. RP 14, 26, 32 This false statement was apparently an effort to make the exaction more palatable to the court. Notwithstanding, the court recognized there was no nexus to the condition in any event. Unfortunately she trusted the City Attorney to tell her the truth about the demanded exaction rather than relying upon the Hearing Examiner decision, review of which was the only issue before her.

Mr. Capell was later to testify at trial as a City witness. He admitted that the only purpose of a LUPA appeal and hearing was to review the decision of the Hearing Examiner. RP 672 He was asked

Did you appraise the [LUPA] court either in writing or orally that the decision from the hearing examiner was for a 30 foot dedication? A. We discussed with the LUPA judge repeatedly it was not 30 feet; it was 8 feet. So to that extent, the answer to your question is, yes, she was apprised of that. RP 672

Unfortunately the LUPA court trusted him and modified language in the LUPA order from 30 feet as submitted by the Church and specified by the Hearing Examiner to 8 feet as orally argued by the City Attorney. RP 32, CP 275 The City did not appeal and the Church couldn't because it wasn't an aggrieved party. RAP 3.1 After all, it had "won" because the condition was stricken as unconstitutional in any event.

As the record shows, after the hearing the lawyer for the Church called Deputy Capell to request he voluntarily correct the record that the final decision of the City was 30 feet rather than 8. He returned the call on a speaker phone with Deputy Elofson by his side. He responded that the discrepancy in size did not affect the result of the LUPA hearing. At that point Deputy Elofson told him to stop talking and asked the Church's lawyer to put his concerns in writing, which he did. Eventually City Attorney Pauli wrote back doubling down on the claim the exaction was for 8 feet, not 30, and refused to correct the mistaken judgment. She did not, however, state *when* the City changed its demand to 8 feet from 30. The Church lawyer followed up by asking that exact question. She did not respond. CP 2469-75

At trial Peter Huffman testified if the Church had not appealed the Hearing Examiner decision the City would have enforced his 30 foot exaction against the Church. RP 582 Deputy Capell testified to the same effect in his deposition which the court refused to consider.

Although this lie did not affect the result of the LUPA appeal since *any exaction* lacked nexus to the project, it did have profound consequences in the 64.40 proceeding. It was used to defeat proposed amendments to the church's complaint and it induced Judge Hogan to enter an order in limine to bar evidence challenging the imaginary " 8 foot" exaction.

More fundamentally the lie undercut a clear understanding by the court that the reason for the exaction was uniformity of right-of-way which could only be achieved by taking 30 feet, not 8. This played into the City's argument at trial (and before) that other factors justified an 8 foot exaction rather than uniformity, notwithstanding the record shows a 30 foot exaction was imposed for uniformity, and for that reason alone. This is the underlying error of the whole proceeding which poisoned the well. The City Attorney LIED.

3. VIDEO TAPE

In October 2014, the Church submitted a PRA request to obtain the City's records regarding the subject permit application. P106 When it

appeared the City was not going to promptly respond, the Church filed an amended complaint adding a PRA cause of action. Although there were further PRA proceedings not relevant to this appeal, the City took the position that it had fulfilled its obligation for production of all requested documents by January 8, 2015. CP 316

The City redacted and withheld a number of documents on claim of privilege. The Court found its privilege log, which failed to provide a brief explanation of why the document fit the claimed privilege, violated the statute and awarded some reasonable attorney fees to the Church CP 489; although trial testimony from the City demonstrated it had not changed its procedure regarding the brief explanation requirement even though almost a year had passed since the Church's summary judgment on this issue. RP 996 It continued to flout the law.

Not produced, and silently withheld from disclosure and production until October 15, 2015 (a full year after the original request), was a video of a site visit in January, 2014 P70 and notes from staffer Shanta Frantz regarding an October 10, 2013 meeting with the applicant. P54 The City admitted "mistakes were made" RP 1180 by not locating these documents however claimed it did not violate the PDA because its search was "reasonable." The Court agreed and denied any further recovery under the PRA to the Church. Further circumstances regarding

this "mistake" will be discussed in the relevant argument section as well as legal authority that staff "mistakes" are no defense.

III. ASSIGNMENTS OF ERROR

1. The court erred by adopting Finding 5, CP 2401:

> **At the Review Panel meetings, City staff conducted a *Nollan/Dolan* analysis, considering the impact that the construction of the parsonage would have on the existing infrastructure and determined that the dedication requirement was made necessary, in part, to address the impacts created by the new structure. For example, the Church was building a parsonage on a vacant lot, which would create an increase in both vehicular and pedestrian traffic.**

Issues:
A. Is there substantial evidence that the Review Panel conducted a *Nollan* analysis?
B. Should this be reviewed as a legal conclusion?
C. Was this a "vacant lot" for the purpose of a *Nollan* analysis when the record shows a prior single family residence existing for more than 100 years was demolished within six months of the Church's purchase of the property?
D. If a *Nollan* analysis is conducted which is improper, or reaches the wrong conclusion, does that satisfy the requirements of *Nollan*?
E. Does it matter what a review panel thinks or does under RCW 64.40 if it doesn't make the "final decision" of the agency?

2. The court erred by adopting Finding 16, CP 2403:

> **On March 7, 2014 Craig Kuntz, on behalf of the City provided its response to the Church's waiver request. The City denied the Church's request that all development conditions be dropped but did modify the right of way dedication.**

Issues:
A. Was this a "final decision" for the purposes of RCW 64.40?
B. Did Jennifer Kammerzell/Craig Kuntz have authority to "modify the right of way dedication?

3. **The court erred by adopting Finding 17, CP 2403:**

> **The Kuntz letter City response to the Waiver request, included a memorandum from Jennifer Kammerzell, which indicated that after consideration of the applicant's proposed and existing improvements, the City was reducing its required conditions and that the right of way dedication requirement along East B Street would be reduced from 30' to eight feet. P75**

Same issues as above

4. **The court erred by adopting Finding 29, CP 2406:**

> **In locating and providing records responsive to the Church's request, the City searched in all places reasonably likely to contain responsive materials. There was detailed testimony at trial about how each department and sub-department at the City processed the Church's request for records as well as about the various methods for gathering and storing information.**

Issues:

A. Is there substantial evidence the City searched the entire computer drive which held the site visit videos?

B. Is there substantial evidence the City *produced* notes from Shanta Frantz on the SAP drive/operating system?

C. Did City employees charged with responsibility to locate the January 2014 video and the October 10, 2013 Frantz notes mistakenly fail to locate and/or produce to the Church the video and notes?

5. **The court erred by adopting the following language in Finding 30, CP 2406:**

> **Both hard copies and electronic documents were searched. The electronic documents are maintained on various hard drives, servers, and data bases, all of which were searched for responsive documents.**

Issues:

A. Is there substantial evidence that the drive holding the video of January, 2014 was *thoroughly* searched?

B. If there substantial evidence that the SAP operating system was thoroughly searched, why weren't the notes timely disclosed or produced?

C. Was the January 2013 video and Frantz notes of October 2013 located *and* timely produced to the Church?

6. The court erred by adopting Finding 31, CP 2406:

> **The City searched using the appropriate search terms such as address, applicant name, permit application number, and parcel number.**

Issues:

A. Is there substantial evidence that any of these terms would locate the January 2014 video which was stored by date?

B. Why weren't either the video or notes were timely disclosed much less produced to the Church? Is human error or lack of training a defense?

7. The court erred by adopting Finding 33, CP2407:

> **The City conducted a complete and detailed search that was broad enough in scope to identify all responsive documents and material even though two items were missed and were not included in the City's production: 1) a video approximately two minutes in length showing the Church's lot that was filmed on January 13, 2014 by an intern, Ben Wells; and 2) portions of computer notes created by Senior Planner Shanta Frantz in the fall of 2013.**

Issues:

A. If there was a "complete and detailed" search search why weren't the video and notes disclosed and produced?

B. Is there substantial evidence that there was "a complete and detailed search" when two items were missed for whatever reason, including human error?

C.. If "a complete and detailed search" locates items that are not produced to the Church because of mistake or operator error or lack of training is the City liable to the Church under the PRA?

8. The court erred by adopting Finding 34, CP 2407:

> **The Public Records Coordinator from Planning and Development Services that was handling this request believed that Ms. Frantz's computer notes had printed out along with other computer records, but the notes had not printed.**

Issues:

A. Is this Finding relevant to the City's duty to promptly fulfill public record requests under the PRA?
B. If relevant was her belief reasonable if she did not read line for line what actually printed?
C. Did this person fail to push the proper keys on her computer to print these notes?
D. Is human error a defense to a PRA claim against the City for silent withholding?

9. The Court erred by entering Conclusion of Law 1, CP 2407:

> **The Hearing Examiner's decision was the "final decision" of the City for purposes of RCW 64.40.**

Issues:
A. Was the appealable Letter Decision of Director Huffman of April 28, 2014, although identical in substance to the Hearing Examiner decision on the 30 foot right-of-way exaction, the actual "final decision" pursuant to RCW 64.40 criteria?

10. The Court erred when it entered Conclusion of Law 2, CP 2408:

> **The City acted within its lawful authority in applying development conditions to the Church of the Divine Earth's permit to build a parsonage at 6605 East B Street in Tacoma.**

Issues:
A. Does the City have "lawful authority" to impose development conditions which violate its own code, state statute and the United States constitution?

11. The court erred when it adopted Conclusion of Law 3, CP2408:

> **The City of Tacoma did not act arbitrarily or capriciously in attaching development conditions, including a dedication of right of way on East B Street, whether 8' or thirty feet in width, to Permit Number 40000209742.**

Issues:
A. Is it arbitrary or capricious to adopt conditions in disregard of the facts and the law, including the City code, state statute and the US Constitution?

12. The court erred by adopting Conclusion of Law 4, CP 2408:

> **The City reasonably believed that the development conditions it attached to the permit had a nexus to the project and were proportional to the Church's project.**

Issues:

A. Does this Conclusion pertain to the mythical 8 foot exaction rather than the 30 foot actual exaction?

B. Is "reasonably believed" the objective 64.40statutory standard measured by applying legal criteria to known facts?

13. The court erred by adopting Conclusion of Law 5, CP2408:

> **The City of Tacoma did not know and should not have reasonably known that its requirement for a dedication of right of way would be considered violative (sic) of *Nollan/Dolan* by the superior court.**

Issues:

A. Is this a legal conclusion regarding the mythical 8 foot exaction rather than the actual 30 foot exaction?

B. Is this conclusion relevant to the RCW 64.40 standard that the agency knew or should have known it was acting unlawfully?

C. Is an agency excused from liability under RCW 64.40 for its unlawful acts because it *didn't accurately predict what a judge might rule?*

D. Did the City believe it was above the law or that the judiciary was so biased in its favor that the court would rule in its favor no matter the facts or Law?

14. The court erred by adopting Conclusion of Law 6, CP 2408:

> **The City conducted an adequate search in responding to the Church's request for records submitted on October 15, 2014.**

Issues:

A. Is a search adequate which fails to follow leads from employees who have actual knowledge of the existence of the video not produced, fails to follow documentary evidence of the existence of the non- produced video, fails to search for the video by date in a drive that is only indexed by date, and fails to search for the video by dates immediately prior to review panel meetings where it is the common practice of the City to video prior to review panel meetings?

B. Is a search adequate which fails to print and produce minutes stored under the Church's permit number due to miscommunication between

staff who are responsible to produce the minutes, the individual conducting the search does not know the proper computer keys to print out the minutes, and that individual doesn't read what she prints?

15. The court erred by entering Conclusion of Law 8, CP 2408:

The city searched in all places reasonable likely to contain responsive materials.

Issues:

A. Was the drive which held all site videos searched for all dates prior to review Panel meetings?

B. If the September video was located why not the January video?

C. If the SAP operating system was searched, why were not the Frantz notes produced for the Church? See issues under error 14.

16. The court erred by entering Conclusion of Law 9, CP 2408:

There was no silent withholding by the City.

Issues:

A. Is not "silent withholding" by definition an agency's failure to identify to the requestor the existence of a document falling within the scope of the request at or prior to its final response?

B. If so, did the City silently withhold the video and notes for a year after the request and long after it made its final response?

17. The court erred by entering Conclusion of Law 10, CP 2408:

The City of Tacoma did not violate the Public Records Act by not providing the Frantz notes and the Wells' video until October 2015.

Issues:

Of course it did.

18. The trial court erred when it denied the Church's timely motion to amend its complaint and its motion to reconsider to assert a cause of action under 42 USC 1983 for violating the Church's federal constitution rights and add language regarding sidewalks to its RCW 64.40 claim. CP 573, 639

Issues:

A. Was an amendment to add a 1983 claim barred as a matter of law because it was futile?

B. Was an amendment to the Church's 64.40 claim to reference the sidewalk condition actionable under RCW 64.40 barred as a matter of law because the City dropped the sidewalk condition after the final Letter Decision of April 28, 2014 but before Hearing Examiner Decision of August 19, 2014?
C. What was the "final decision" of the City for purposes of 64.40: the Letter Decision of the director of April 28 or the Hearing Examiner decision of August 19?
D. Did the trial court abuse its discretion under CR 15(a) which provides leave to amend "shall be freely given when justice so requires," the proposed amendment relates to the same core facts already at issue, there is plenty of time for additional discovery and the trial is nearly one year away?

19. The trial court erred when, after in camera review; it refused to strike one or more claims of exemption, wholly or partially, based on the attorney client privilege and/or work product. CP 640, 843

Issues:
A. Did the City carry its burden to prove an exemption to public disclosure applies? RCW 42.56.550(1)
B. Does the attorney-client exemption apply to all communications between attorney and client or just to those seeking and giving legal advice?
C. Are emails neither directed to nor authorized by anyone in the legal department, or simply cc'd there, exempt work product under the PRA?

20. The court erred when it granted the City's pretrial motion in limine to exclude evidence offered for the purpose of disputing that the right of way condition at issue was 8 feet. CP 1927, RP 318, 345

Issues:
A. Is the February 19, 2015 LUPA judgment the "law of the case" when there has been no prior appeal?
B. Does collateral estoppel or issue preclusion apply to a reference in the prior judgment to the width of a proposed dedication when that reference was mere surplusage unnecessary to the holding of the judgment, nor binding on the prevailing party which had no right to appeal as an "aggrieved party" under RAP 3.1?
C. Should the City be estopped to claim the dedication "really" 8 feet when it represented to the Hearing Examiner and the Church it was 30 feet

and the Hearing Examiner based his ruling on the City's representation of 30 feet?
D. Would preclusion of the Church's right to present facts of a 30 foot exaction contrary to the City's claim of an 8 foot dedication be unjust because the 8 foot claim was first advanced by the City Attorney at oral argument in a LUPA hearing without prior notice and contrary to the administrative record?

21. The court abused its discretion when it erroneously sustained multiple objections to cross examination questions to Deputy Capell and Director Huffman regarding representations to the Hearing examiner and LUPA judge at oral hearing regarding 30 feet v. 8 feet right-of-way exaction conditions. Capell: RP 672—676; Huffman: CP 1045--1047

Issues:
A. Was it proper to sustain these objections in cross examination of the Deputy City Attorney based on the Court's prior Order in Limine (assigned err #20) and or the LUPA judgment of February 19, 2015 which referenced an 8 foot dedication? CP 674
B. Considering the offer of proof by the church's attorney should the objections have been sustained? CP 675—676
C. How can the Church present its 64.40 case regarding the nature of the "final decision" at issue if it isn't allowed to prove the extent of the exaction called for in the Letter Decision of April 28, 2014 or the decision of the Hearing Examiner?

IV. STANDARD OF REVIEW

This was a bench trial which ultimately resulted in entry of Findings of Fact and Conclusions of Law. True Factual Findings are reviewed to determine if they are supported by substantial evidence. *Govett v. First Pac. Inv. Co.*, 68 Wn.2d 973, 973, 413 P.2d 972 (1966). Substantial evidence is such evidence that would persuade a fair minded person the facts were actually proven. *Holland v. Boeing Co.*, 90 Wn.2d 384, 390-91, 583 P.2d 621 (1978). Conclusions of Law are

reviewed de novo. *Morello v. Vonda*, 167 Wn.App. 843, 848, 277 P.3d 693 (Div. 2, 2012). Legal conclusions couched as factual findings are reviewed de novo. *In re Welfare of L.N.B.-L.*, 157 Wash. App. 215, 243, 237 P.3d 944 (Div. 2, 2010); *citing In re Disciplinary Proceeding Against VanDerbeek*, 153 Wash.2d 64, 73 n. 5, 101 P.3d 88 (2004). Conclusions not supported by findings are erroneous. *Endicott v. Saul*, 142 Wn. App. 899, 909, 176 P.3d 560 (2008)

Evidentiary rulings, motions in limine, motions to amend, and application of judicial estoppel are reviewed for abuse of discretion. When a trial court's exercise of discretion is manifestly unreasonable or exercised for untenable grounds or reasons, an abuse of discretion exists. *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997), *Tex Enters. v. Brockway Standard,* 110 Wn. App. 197, 204, 39 P.3d 362 (2002), *Miller v. Campbell*, 164 Wn.2d 529, 536, 192 P.3d 352 (2008)

"Generally, the failure of the trial court to make an express finding on a material fact requires that the fact be deemed to have been found against the party having the burden of proof." *Crites v. Koch*, 49 Wn. App. 171, 176, 741 P.2d 1005 (1987) Here the City has the burden to prove a permit condition complies with *Nollan* and also has the burden to prove compliance with the PRA.

V. ARGUMENT

A. The City is liable to the Church under RCW 64.40 because requiring a right of way dedication as a permit condition was arbitrary, or capricious, or unlawful and/or exceeded lawful authority and the City knew or should have known it was unlawful or exceeded lawful authority.

In pertinent part RCW 64.40.020 provides:

> Owners of a property interest who have filed an application for a permit have an action for damages to obtain relief from acts of an agency which are arbitrary, capricious, unlawful, or exceed lawful authority, or relief from a failure to act within time limits established by law: PROVIDED, 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...

RCW 64.40.010(6) provides "'Act' means a final decision by an agency which places requirements, limitations, or conditions upon the use of real property in excess of those allowed by applicable regulations in effect on the date an application for a permit is filed..."

The trial Court *concluded* "The Hearing Examiner's decision, P105, was the 'final decision' of the City for the purposes of RCW 64.40." Conclusion of Law 1.

The Church believes this was an error of law because the true "final decision" was the April 28,2014 Letter Decision[9] P84; however for the

[9] This assignment of error is discussed infra in the context of error assigned to the trial court refusal to allow an amendment regarding sidewalks

purpose of establishing liability both decisions imposed a 30 foot dedication to achieve right-of-way uniformity.[10]

The Hearing Examiner decision, P 105, by City of Tacoma Hearing Examiner Wick Dufford on August 19, 2014 held:

> Summary Judgment is granted to the City. A building permit, subject to the conditions set forth in the Amended Declaration of Peter Huffman, dated July 9, 2014, may be issued.

Order on Motion for Summary Judgment p. 9, P 105.

The July 9, 2014 Amended Declaration of Huffman incorporated into the Hearing Examiner decision by reference states: "...the City is now merely requiring Appellant to dedicate an area of approximately 2,472 sq. ft. at the front of the Subject Property *in order for the Subject property and surrounding area to have uniform right-of-way ("ROW")* width for street frontage (see map attached as Exhibit A showing current configuration of the Subject Property)." (Italics added) P 98

RCW 64.40.020 is in the disjunctive therefore the act is actionable if the action is *either* arbitrary *or* capricious *or* unlawful *or* exceeds lawful

[10] Excerpts from Director Huffman's CR 30(b)(6) April 22, 2015 deposition were accepted into the record as exhibit P141. Therein the Director testified his Letter decision of April 28, 2014 was the "final denial" of the Church's waiver request of the conditions imposed by the Review Panel minutes of September 25, 2013 (p.33); he specifically denied the request to waive the 30 foot dedication requirement (p. 49); the City did no traffic studies of the property (p. 57); and there was no discussion of 8 feet until after the Letter Decision (p. 73)

authority and the City knew or should have known it was unlawful. *Lutheran Day Care v. Snohomish County*, 119 wn.2d 91, 112, 829 P.2d 746 (1992)

The liability question should have been answered when Judge Elizabeth Martin entered final judgment on February 19, 2015 holding the City's dedication condition was an unconstitutional condition under *Nollan* and related cases.[11] The City failed to carry *its burden* to prove *Nollan* had been satisfied. *Dolan*, 114 S. Ct.at 2320 n. 8 ("in this situation the burden properly rests with the city. See *Nollan,* 483 U.S. at 836") That judgment was not revisited by the trial court and collaterally estops the City from denying its action was unconstitutional. *Lutheran*, 119 Wn.2d at 115-116 Judge Martin's conclusion the City violated Nollan was based on two independent considerations: (1) there was no nexus to any problem caused by construction of the single family residence which replaced a previous single family residence recently demolished; and (2) if there was a problem created by the development, the exaction of additional right-of-way was no solution because there was no current plan to build out the right-of-way in any event. *Burton*, 91 Wn. App. at 525-529, *Unlimited*, supra. As illustrated by the LUPA decision, whether the exaction was 8 feet *or* 30 the legal result is a constitutional violation.

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

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

The doctrine is designed to avoid government extortion:

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

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

RCW 64.40 recognizes causes of action for arbitrary *or* capricious government actions *or* actions that are unlawful *or* deprive a property owner of

his or her constitutional rights. RCW 64.40.020; *see also*; *Mission Springs,* 134 Wn.2d at 961-62 (arbitrary and capricious acts actionable under RCW 64.40); *Sintra v. Seattle,* 119 Wn.2d 1, 22, 829 P.2d 765 (1992) (deprivation of due process actionable under RCW 64.40).

Local government's imposition of a permit condition which violates RCW 82.02.020[12] will also support a claim for damages and attorneys' fees under RCW 64.40. *See, e.g., Sintra*; *Isla Verde Int'l Holdings, Ltd. v. City of Camas*, 147 Wn. App. 454, 460-61, 464-65 (2008) (*Isla Verde II)*; *Cobb v. Snohomish County*, 64 Wn. App. 451, 459-60, 829 P.2d 169 (1992) rev' denied 119 Wn.2d 1212; *Ivy Club Investors Ltd. P'ship v. City of Kennewick*, 40 Wn. App. 524, 531, 699 P.2d 782 (1985). In all these cases local government acted under authority of a regulation, the application of which was later determined to be invalid (either facially or as-applied).

A local government's imposition of unlawful fees or conditions on a permit application constitutes an unlawful act under RCW 64.40, regardless of whether the act was authorized by a local regulation in force when the act occurred. *See Isla Verde II*, 147 Wn. App. at 464-65; *View Ridge Park Assocs. v. Mountlake Terrace*, 67 Wn. App. 588, 603, 839 P.2d 343 (1992), rev' denied

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

121 Wn.2d 1016; *Ivy Club*, 40 Wn. App. at 531 Enforcement of a regulation that is oppressive or unlawful constitutes an unlawful act under RCW 64.40, regardless of whether the regulation is determined unlawful after the act is complete. *See, e.g.*, *Mission Springs*, 134 Wn.2d at 961-62; *Sintra*, 119 Wn.2d at 22; *West Main*, 106 Wn.2d at 50-53. Same also violates RCW 82.02.020 and TMC 13.05.040, both of which incorporate the *Nollan* nexus standard into statute and code.

1. An Unconstitutional Exaction is Arbitrary or Capricious as a matter of Law

Administrative or quasi-judicial decisions in violation of the United States Constitution's due process clause are variously arbitrary and capricious, inherently arbitrary and capricious, and manifestly arbitrary and capricious. A decision resulting from administrative and or quasi-judicial procedures may also be "so arbitrary and capricious that it amounts to a violation of substantive due process". *Nieshe v. Concrete Sch. Dist.*, 129 Wn. App. 632, 641, 127 P.3d 713, 718 (2005). Here, the Court already found by final Judgment the City violated the Church's due process rights by imposing an unconstitutional dedication condition on the building permit. P116 Therefore, the City necessarily as a matter of law committed arbitrary and capricious action, or manifestly arbitrary and capricious action.

In *Dore v. Kinnear* the Supreme Court of Washington found that arbitrary and capricious acts violated the federal and state constitution. 79 Wn.2d 755, 757, 489 P.2d 898, 899-900 (1971). *Dore* further holds constitutionally untenable action by municipal government is "*inherently* arbitrary and capricious". *Id.* at 765. Emphasis in original.

A due process violation is "manifestly arbitrary and capricious." *Zehring v. Bellevue*, 99 Wn.2d 488, 493, 663 P.2d 823 (1983) Parties aggrieved by an invalid land use decision have grounds to pursue a writ of certiorari to remedy municipal acts that are "manifestly arbitrary and capricious acts". *Bridle Trails Cmty. Club v. Bellevue*, 45 Wn. App. 248, 251, 724 P.2d 1110, 1112 (1986). A due process violation is "manifestly arbitrary and capricious".

As a matter of law imposition of an unconstitutional condition on a building permit is arbitrary and capricious. The rule was applied in *Mission Springs* when the City of Spokane refused to issue a grading permit:

> The City of Spokane, acting through its City Council and/or its City Manager, arbitrarily refused to process Mission Springs' grading permit application and unlawfully withheld the permit as well. Its action was "'willful and unreasoning action, taken without regard to or consideration of the facts and circumstances surrounding the action,' "id. at 718 (quoting *Kendall v. Douglas, Grant, Lincoln & Okanogan Counties Pub. Hosp. Dist. No. 6*, 118 Wn.2d 1, 14, 820 P.2d 497 (1991) (citations omitted), because it acted without lawful authority in unreasoning and willful disregard of the permit applicant's lawful entitlements.

Mission Springs, 134 Wn.2d at 962. Likewise The City of Tacoma as a matter of law arbitrarily conditioned the Church's building permit on a 30 foot exaction (or even an 8 foot exaction) "because it acted without lawful authority in unreasoning and willful disregard of the permit applicant's lawful entitlements."

Whether or not the City knew or should have known its arbitrary action violated the rights of the Church is irrelevant to establish the City's liability under RCW 64.40.020, as the statute only requires the City knew or should have known illegality of acts which are "unlawful or in excess of lawful authority", in contrast to arbitrary acts. *Lutheran*, 119 Wn.2d at 112. A party basing its RCW 64.40 action on arbitrary acts need show nothing more to establish liability. Id.

2. The City knew or reasonably should have known it acts were unlawful and/or beyond lawful authority

Whether the final decision of the agency was made with knowledge of its unlawfulness or in excess of lawful authority, or should reasonably have been known to be such, should be determined in the affirmative as a matter of law because the City is *presumed* to know the law. See, e.g., *State ex rel Dungan v. Sup'r Ct.*, 46 Wn.2d 219, 279 P.2d 918 (1955) (City officials are presumed to know the law); *Hutson v. Savings and Loan,* 22 Wn. App. 91, 98, 588 P.2d 1192 (1978) ("The presumption that people know the

law...In the civil area, most cases wherein the presumption is applied concern dealings with a governmental entity such as a municipal corporation [citing cases]")

Obviously the exaction reversed by the LUPA judge for unconstitutionality was, by definition, "unlawful" (assuming the US Constitution applies to the City, which may be disputed here.) The test in the statute is objective not subjective. Where the law is clearly established as are the facts the City *should* have known.

Simply put, *Nollan* requires that any permitting condition be justified by some problem caused by the proposed improvement and *Dolan* adds if there is any nexus, the condition must also be proportional. But here the "final decision" is that of the hearing examiner, so concluded the Court, and there was *nothing* in the record before the examiner which justified the dedication condition for any reason other than the City's stated reason--uniformity of right-of-way—a preexisting condition which obviously had nothing to do with any proposed construction of a parsonage. And the court entered an order in limine foreclosing any justification other than uniformity of right of way. CP 1929 Moreover, the City also violated TMC 13.05.040 B (9)[13] which closely tracks *Nollan.*

[13] In regard to the conditions requiring the dedication of land or granting of easements for public use and the actual construction of other provisions for public facilities and utilities, the Director shall find that the problem to be remedied by the condition arises,

The Director made no finding of nexus and proportionality required by this ordinance nor could he under these facts. It is critical to note this prong of the statute pertains to the "final decision" of the agency, not some other recommendation such as the March 7, 2014 letter from Craig Kuntz. Nor is the Kammerzell memo based on any nexus to a development created problem in any event. At trial staffers were probably coached to talk about "nexus" but their testimony belies understanding much less proper application of the principle.

Beyond that, if this were not an objective test the Church communicated in writing to the City on several occasions in "supplements" explaining in a lawyer like fashion precisely why the right of way dedication condition violated established legal precedent, citing published decisions directly on point, federal and state, as well as legal commentary. There was no evidence these documents were even read. Nor was there was any substantive response from the City other than a simple and absolute denial of the waiver request from Director Huffman.

Of course an unconstitutional act, or one in violation of the municipal code, is one that is unlawful as well as beyond lawful authority. Liability for

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in whole or significant part, from the development under consideration, the condition is reasonable, and is for a legitimate public purpose.

damages under RCW 64.40 should be determined as a matter of law under RCW 64.40 and the trial court must be reversed.

3. Findings 5 and 16 as well as Conclusions 2, 3, 4, and 5 are not relevant and/or not supported by substantial evidence or are legally erroneous

Finding 5, CP 2401, states Review Panel meetings conducted a *Nollan/Dolan* analysis. This is not a fact but a legal conclusion. In fact the minutes of the first meeting, P 46, state "The proponent shall dedicate area abutting the site along to provide *consistent right-of-way widths* along East B Street...in order to *stay consistent* and provide safe street and sidewalk area, a dedication of 30 feet is required." (italics added) No nexus is claimed. Pretrial the Court granted the Church's motion in limine that "the City is ordered not to produce evidence that the right of way dedication was imposed for any reason other than uniformity of right of way on East B Street in the area." CP 1929 The only way to reconcile this order in limine with the claim that the City conducted a proper *Nollan* analysis is to conclude a right of way not uniform for over one hundred years justifies a condition on new development, which was apparently the court's position.[14] If so, the Church would contend same is *clearly* a violation of *Nollan.* The proposed project did not alter the right-of-way and there is no proof this replacement single family residence impacted vehicle or pedestrian traffic. Nor was there a traffic study to

[14] "I'm not willing and not making the finding that the City should have known the dedication requirement with regard to uniformity was unlawful." RP 1204

compare existing traffic with what if anything this residence would add. The Finding goes on to say this was a "vacant" lot which is only true in the sense that one single family residence was demolished to allow for construction of another. There can be no impact on preexisting public facilities when one house merely replaces another. Nor were there plans to build out the new right of way, which is also an independent *Nollan* violation, because the exaction solves no problem. See *Burton*, 91 Wn. App. at 528-9 This finding should be set aside as not supported by substantial evidence.

Finding 16, CP 2403, states staffer Kuntz on March 7, 2014 denied the waiver request but "did modify the right of way dedication." Once again this is a conclusion of law. Under the municipal code only the Director had the authority to modify the condition. This March 7 memo was not the "final decision" of the City, was not read by the Director, who on April 28, 2014 rendered his final appealable decision which denied the waiver request in every respect and modified nothing. The Hearing Examiner Summary Judgment order states this March memo was later "revised" by the Amended Huffman Declaration to 30 feet. P 105 p. 5, para. 10 The finding is an erroneous conclusion of law if read to mean the March 7 memo was the "final decision" of the City. At most it was Mr. Kuntz's and Ms. Kammerzell's recommendation.

Conclusion 1, CP 2407, states the "final decision" of the City for RCW 64.40 purposes was the Hearing Examiner decision. P 105 The Church argued the "final decision" was Huffman's Letter Decision of April 28. P84 The reasons to support that view are set forth under denial of the Church's motion to amend although it is important to note ***both*** decisions set the dedication at 30 feet *to make the right of way uniform.* This conclusion is erroneous as a matter of law but helpful to highlight the required dedication was 30 feet from any perspective.

Conclusion 2, CP 2408, claims the City acted within lawful authority imposing development conditions. This is an error of law. The City has no "lawful authority" to violate its own code, state statute and the U.S. Constitution.

Conclusion 3, stating the City did not act arbitrarily to require the dedication is an error of law for the reasons set forth above. The conclusion references 8 feet *or* 30 feet however the court prohibited the Church from offering evidence on 30 feet and specifically refused to make a conclusion *one way or the other* on a 30 foot dedication. RP 1241-42 "Arbitrary" is discussed above. This was.

Conclusion 4, CP 2408, claiming the City "reasonably believed" the exaction had a nexus to the project, is irrelevant and legally wrong. RCW 64.40.020 sets the standard as "it should reasonably have been known" not

"reasonably believed." The latter is subjective, the former is objective. As set forth above, the law was clear, the City is presumed to know the law, and requiring a 30 foot dedication for the sake of uniform right of way, or any other consideration not caused by the project, is an obvious violation of *Nollan.*

Conclusion 5, CP 2408, is similar to Conclusion 4 but uses the statutory wording that should not have "reasonably known that the requirement for a dedication of right of way would be considered violative (sic.) of *Nollan/Dola*n by the superior court." First, what dedication? Throughout the trial the City argued the decision of the city to be reviewed was for an 8 foot dedication, not 30. All of the City's "reasonableness" testimony related to 8 feet. E.g. RP770, 772, 914, 931, 1034, 1090 If this conclusion relates to 8 feet it is irrelevant to 64.40 which only relates to the "final decision "of the agency. Second, what the City might predict a court might do is also irrelevant. It is not the 64.40 standard. Who knows what courts might do? Certainly not your undersigned.

B. The trial court abused its discretion when it denied the Church's Motions to Amend

1. Denial of Church's Motion to Amend to add a 1983 claim was an abuse of discretion

LUPA appeals, RCW 64.40 and 42 USC 1983 claims are routinely joined. See e.g. *Lutheran Day Care*, *Mission Springs*, *Sintra,* and *Hayes v.*

Seattle, 131 Wn.2d 706, 934 P.2d 1179 (1997) In fact the government has argued they *must* be joined to avoid res judicata. *Hayes*, 131 Wn.2d at 711 No doubt that would be Tacoma's argument if the Church filed a separate 1983 action.

In May 2015, a full year before trial and before the City had even filed an answer to the Church's complaint, the Church moved to amend to add a cause of action under 42 USC 1983 for violation of the unconstitutional conditions doctrine previously discussed. CP 492 There were no special circumstances prompting denial, no prejudice to the City, it was timely and merely alleged an additional cause of action relating to the same common core of facts.

CR 15(a) provides:

> [A] party may amend the party's pleading only by leave of court or by written consent of the adverse party; and *leave shall be freely given when justice so requires.* [italics added]

The purpose of Rule 15 is to "facilitate a proper decision on the merits." *Caruso v. Local Union No. 690 of Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am.*, 100 Wn.2d 343, 349, 670 P.2d 240 (1983). CR 15 facilitates the amendment of pleadings unless the amendment would prejudice the opposing party.

Washington's liberal rule regarding amendments "declares that leave to amend 'shall be freely given when justice so requires'; this mandate is to be

heeded.... If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason-such as undue delay, bad faith or dilatory motive on the part of the movant....the leave sought should, as the rules require, be 'freely given.'" (quoting *Foman v. Davis*, 371 U.S. 178, 182, 9 L. Ed. 2d 222, 83 S. Ct. 227 (1962)) *Walla v. Johnson*, 50 Wn. App. 879, 883, 751 P.2d 334 (Div. 1, 1988) (reversing denial of leave to amend as an abuse of discretion)

The Church's prompt request to amend the Petition to conform to the evidence and subsequent events should have been granted as a matter of course. It was an abuse of discretion to deny it.

Only allowing 24 hours for reply, the City filed a lengthy response claiming the motion to amend should be denied because "the claim is contrary to law under the facts of this case, and is futile," CP 522, citing *Doyle v. Planned Parenthood*, 31 Wn. App. 879, 883, 751 P.2d 334 (1988) for the proposition futility is a ground to deny a motion to amend. However in *Doyle* the motion to amend came after the case had been dismissed on summary judgment based on the statute of limitations. The case at bar is far different. The City characterized the claim as one for "taking" which wasn't ripe, citing a mishmash of inapposite regulatory takings cases, rather than unconstitutional condition cases where no taking had occurred, such as this. Such are ripe

immediately because they are based on due process principles. Based on a claim of "futility" the court denied this motion to amend. CP 573 This was an abuse of discretion because it was exercised on untenable grounds for untenable reasons, an error of law.

The Church moved to reconsider, CP 577, setting forth the elements of a 1983 claim: violation of a federal right while acting under color of law. See e.g. *Lutheran, Sintra, Mission Springs.*

Here, as Judge Martin found with preclusive effect in the final LUPA judgment, the City acting under color of law deprived the Church of its constitutional rights. Therefore the Church is entitled to prevail against the City in a 1983 action as a matter of law, not the other way around. The analysis need go no further. This however need not be determined on the merits to grant leave to amend. The court plainly abused its discretion when it denied this motion to amend and reconsider. CP 639

2. The Motion to Amend to add reference to sidewalks was erroneously denied because the trial court made an error of law by concluding (Conclusion of Law 1) that the "final decision" of the City was the Hearing Examiner Decision of August 19 rather than the Director's Letter Decision of April 28

In the same motion to amend the Church sought a technical amendment to its previous 64.40 claim to reference the building permit condition of "offsite improvements such as sidewalks and curbs" as arbitrary and contrary to law.

CP 501, para. 1 The City responded this was improper (or futile) because the sidewalk condition referenced in the final Letter Decision of April 28, 2014 had been dropped by Huffman in his Amended Declaration of July 9, before the Hearing Examiner made his decision on August 19. The City argued the Hearing Examiner decision was the "final decision" or "act" of the City for purposes of 64.40 and therefore anything before that wasn't compensable in damages. See RCW 64.40.010 (4) and (6). [This is also important for remand.] The Church requested the opportunity to make its case that the "final decision" was the Letter Decision of April 28, 2014 and prove recoverable damages from that date rather than August 19. Once again, the court abused its discretion by denying the motion to amend preventing the sidewalk claim from being determined later on the merits CP 573 based on untenable grounds, i.e.an erroneous interpretation of law.

The court abused its discretion denying this motion based upon an erroneous legal conclusion that the "final decision" of the City was the Hearing Examiner decision of August 19 rather than the Director's Letter Decision of April 28. According to the Tacoma code, the *Director's decision* is *final* and appealable to the hearing examiner. TMC 13.05.040 A[15] Only the Director has authority to act upon interpretation, enforcement, administration or waiver of

[15] "The Director's decision shall be final; provided...an appeal may be taken to the Hearing examiner..."

the City's land use regulatory codes. TMC 13.05.030 A[16] The hearing examiner only has authority to hear an administrative appeal of a *final decision* of the Director, and did so here. TMC 13.05.050[17] No building permit shall issue without the Director's approval. TMC 13.05.090[18]

RCW 64.40.010 defines "Damages"[19] and "Act"[20]. RCW 64.40.030 provides any action under this chapter shall be commenced within 30 days of the exhaustion of administrative remedies[21] (which the Church did.)

"Damages" are recoverable after a "cause of action arises" and must be caused by the "act" of the agency. 010(4) An "act" is the "final decision" of an agency. 010(6) According to *Birnbaum v. Pierce County*, 167 Wn. App. 728, 732, 274 P.3d 1070 (2012) "a cause of action arises only when there is a 'act'

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[16] "The Director shall have the authority to act upon the following matters...(1). Interpretation, enforcement and administration of the City's land use regulatory codes...;(5) applications for waivers..."

[17] "D....Any final decision or ruling of the Director may be appealed..."

[18] "No building or development permit shall be issued without prior approval of the Director..."

[19] (4) "Damages" means reasonable expenses and losses, other than speculative losses or profits, incurred between the time a cause of action arises and the time a holder of an interest in real property is granted relief as provided in RCW 64.40.020. Damages must be caused by an act, necessarily incurred, and actually suffered, realized, or expended, but are not based upon diminution in value of or damage to real property, or litigation expenses...[1919]

[20] (6) "Act" means a final decision by an agency which places requirements, limitations, or conditions upon the use of real property in excess of those allowed by applicable regulations in effect on the date the application is filed....[20]

[21] "RCW 64.40.030 was not intended to serve simply as a limitations provision but that it also required exhaustion before a claim could be filed...No exhaustion requirement arises, however, without the issuance of a final appealable order." *Smoke v. Seattle*, 132 Wn.2d 214, 222, 937 P.2d 186 (1997) Smoke found there was no adequate administrative remedy and therefor there was no applicable administrative remedy to be exhausted. Here the final appealable order was the Huffman letter of April 28, 2014.

that ...is 'a final decision by an agency which places requirements, limitations, or conditions upon the use of real property...'" Under the statute only an "act" subject to an adequate administrative remedy requires exhaustion of that remedy, but the administrative remedy cannot be the "act" by definition. Even an informal agency letter from the agency may be a "final decision" if it "is clearly understandable as a final determination of rights...[D]oubts as to the finality of such communications must be resolved in favor of the citizen." *Smoke,* 132 Wn. 2d at 222, quoting *Valley View*, 107 Wn.2d at 634 The commission of the "act" by the agency is when the cause of action arises, not when the Hearing Examiner rules on an administrative appeal of the act. *Birnbaum* continues:

> The statutory language is unambiguous. An act occurs when there is either a final decision or a failure to act within established time limits. RCW 64.40.010(6).

Ibid. 167 Wn. App. at 733-4 The appealable "final decision" was the Huffman letter of April 28, 2014 and that is when the "cause of action" arose. The City even argued in its LUPA brief "the Letter Decision [of 4/28] was a final decision as to the Church's requested waiver." CP 233 Refusal to allow the amendment was an abuse of discretion based on an error of law.

C. The trial court erred when it granted the City's pre-trial motion in limine to exclude evidence offered for the purpose of disputing that the right-of-way condition at issue was 8 feet.

This is perhaps the most fundamental error of the case which goes to the very heart of the RCW 64.40 claim.

Prior to trial, Judge Hogan entered the City's proposed Order "to exclude evidence offered for the purpose of disputing that the right of way condition at issue was 8 feet." CP 1927 This was based solely on the interlineated 8 feet LUPA judgment. RP 318 But the same trial Judge later Concluded the "final decision" for the purposes of 64.40 was the Hearing Examiner decision, which also called for 30 feet. CP 2407 Thus the Church was precluded from offering evidence the dedication sought was 30 feet for the purpose of uniform right of way and arguing the City "should have known" the 30 foot exaction violated *Nollan*. Not only that, but by entry of this order the court literally announced before she heard the first word of testimony she had made up her mind that the exaction was 8 feet. RP345 During the course of the trial the court repeatedly sustained City objections to direct or cross examination of City witnesses on this basis.[22]

This turned judicial estoppel, a doctrine which precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position, on its head. *Miller*, 164 Wn.2d at 539

[22] See e.g. RP 666-676 where the court repeatedly sustained objections to cross examination of their witness, Jeff Capell, dealing with 30 feet vs. 8 feet. She based her ruling on the order in limine. RP 674 Counsel for the Church made an offer of proof. RP 675-676

The only possible legal basis for this order in limine based on the "8 feet" interlineation was "the law of the case", or collaterally estoppel.

The City argued "the law of the case" doctrine was a proper basis to exclude Church evidence. CP 1693, 1932 However this doctrine only pertains to subsequent review of a previously appealed decision or jury instructions to which there is no objection. *Roberson v. Perez*, 156 Wn.2d 848-859, 123 P.3d 844 (2005), see also RAP 2.5 But this case had no previous appeal and there were no jury instructions.

"[C]ollateral estoppel, or issue preclusion, seeks to prevent relitigation of previously determined issues between the same parties." *Malland v. Dep't of Ret. Sys.*, 103 Wn.2d 484, 489, 694 P.2d 16 (1985) The party asserting it has the burden to prove it. *Bradley v. State*, 73 Wn.2d 914, 917, 442 P.2d 1009 (1968) It applies to *issues* determined, i.e. the unconstitutionality of the exaction, not every superfluous and unnecessary factual recitation in the order such as whether the exaction was 8 feet or 30, which didn't matter.[23] The City did not appeal the LUPA judgment and the Church couldn't because it was not an "aggrieved party." RAP 3.1[24]

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[23] The doctrine of collateral estoppel bars relitigation only of substantial issues; it does not bar relitigation of tangential or inconsequential issues. *Barr v. Day*, 69 Wn. App. 833, 843, 854 P.2d 642 (1993), aff'd in part, rev'd in part, 124 Wn2d 318, 879 P.2d 912(1994)

[24] "Only an aggrieved party may seek review by the appellate court." In the LUPA hearing the court determined the condition was unconstitutional regardless of its width because any right-of-way exaction lacked nexus to the project. Inability to appeal forecloses issue preclusion. 1 Restatement of Judgments (Second) 273, Sec. 28 (1)

Finally, even if collateral estoppel arguably could apply in some fashion to the interlineation, it would be unjust to do so here because the Church was not given "an unencumbered, full and fair opportunity to litigate" the City's new found claim, literally pulled out of a hat, that the decision of the hearing examiner was "now"[25] 8 feet rather than 30. See *Rains v. State,* 100 Wn.2d 660, 666, 674 P.2d 165 (1983) This was an unmitigated and unanticipated lie from the opposing lawyer which is also a basis to avoid preclusion. See Restatement of Judgments (Second) at Sec. 28 (5) 274 The trial court must be reversed because it abused its discretion when it entered the order in limine based upon untenable grounds and reasons contrary to law. See e.g. *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997); *Miller*, 164 Wn.2d at 539

D. The trial court erred when it dismissed the Church's PRA claim

At issue are assigned errors to Findings 29, 30, 31, 33, 34, Conclusion 6, 8, 9, 10 as well as the court's refusal to strike one or more claims of exemption based on in camera review. The essential facts are the Church made a PRA request to the city in October, 2014 for documents relating to the subject property's building permit application. The city closed its request in January, 2015 claiming it had disclosed all documents within the request. However in

[25]Jeff Capell: "It's only 8 feet now." RP 14 Is Mr. Capell trying to change the City's decision to require 30 feet to 8 feet for tactical reasons during an oral argument he was apparently losing? Capell was later to admit on the stand that the only reason for a LUPA hearing was review of the hearing examiner decision. RP 671-2

October, 2015 the City produced and disclosed for the first time Frantz notes from October 10, 2013 and a video of a site visit in January 2014. The City "defense" was it performed an "adequate" and "reasonable" search but missed these documents by honest "mistake,[26]" or human error. However good faith, or "mistake," or human error is no defense to a PRA suit as a matter of law (although that might affect the penalty.)

The other assigned errors pertain to the court's orders after in camera review which upheld claims of work product and attorney client communications, even for documents which did not originate from or to the attorney and did not contain legal advice. The Church submits the trial court erred as a matter of law when it denied the Church relief under the PRA.

1. The PRA is to be liberally construed in favor of the requestor; its exemptions are to be strictly construed against the agency; and strict compliance is required, and mistakes or human error are no defense.

In general, the legislature commands the PRA be "liberally" construed to promote the goals of open government. RCW 42.56.030 The PRA is "a strongly worded mandate for open government." *Federal Way v. Koenig*, 167 Wn. 2d 341, 344, 217 P.3d 1172 (2009), quoting *Rental Housing Ass'n of Puget Sound v. Des Moines*, 165 Wn. 2d 525, 527, 199 P.3d 393 2009).

[26] RP 1238 Elofson: "she made a mistake."

The statutory requirements of the PRA are clear-prompt production of documents is required: "...agencies shall, upon request for identifiable public records, make them *promptly* available..."(italics added) RCW 42.56.080 Rules of agencies "shall provide for the fullest assistance to inquirers and *the most timely possible action on requests for information.*" RCW 42.56.100 (italics added) "*Responses to requests for public records shall be made promptly by agencies...*" RCW 42.56.520 (italics added) The burden is on the agency to demonstrate timely compliance. RCW 42.56.550(2) "Administrative inconvenience or difficulty does not excuse strict compliance' with the PRA." *Zink v. Mesa,* 140 Wash. App.328, 337, 166 P.3d 738 (2004) Inadvertent loss of the document, such as losing it in the copying machine, is no defense to a PRA action. *Tobin v. Worden,* 156 Wn. App. 507, 233 P.3d 906 (2010)

Strict enforcement of the PRA discourages improper denial of access to public records and adherence to the goals and procedures dictated by the statute. *Zink*, 140 Wash. App. at 338, citing *Hearst Corp. v. Hoppe,* 90 Wn. 2d 123, 140, 580 P.2d 246 (1978) The City's good faith or reasonableness does not determine whether it complied with the PRA. Id. at 340

"Agencies can act only through their employee-agents. With respect to an agency's obligations under the PRA, the acts of an employee

in the scope of employment are necessarily acts of the 'state and local agenc[ies]' under RCW 42.56.010(3)." *Nissen v. Pierce County*, 183 Wn.2d 863, 357 P.3d 45, 54 (2015)

> An agency's compliance with the Public Records Act is only as reliable as the weakest link in the chain. If any agency employee along the line fails to comply, the agency's response will be incomplete, if not illegal.

PAWS v. UW, 125 Wn.2d 243, 269, 884 P.2d 592 (1994)

2. City's search for video and notes was not "adequate"

Neighborhood Alliance v. Spokane County, 172 Wn.2d 702, 720, 261 P.3d 119 (2011) holds "the search must be reasonably calculated to uncover all relevant documents...Additionally, agencies are required to make more than a perfunctory search and to follow obvious leads as they are uncovered. The search should not be limited to one or more places if there are additional sources for the information requested." The burden is on the agency to show compliance, and each case is to be decided on its particular facts. But here there is plenty of evidence why the City search was unreasonable regarding the three videos and the notes. "Obvious leads" such as personal knowledge of the existence of the document or video, routine, and existing known documents referencing those not

produced were not followed up. If mistakes and human error were a defense, what agency would fail to assert it?

a. The video was not produced because the search was inadequate

Generally speaking the City's search system, according to the City, "depends upon the accuracy of those individual employees and/or the coordinator to make sure the production is in response to the request and is full and complete." RP 997 However the record shows those charged with responsibility to identify and produce this video failed to act on their personal knowledge of the video, failed to follow up on routine procedure which calls for filming site visits before Review Panel meetings where those films are downloaded to the same drive indexed by date, and failed to follow up on documents reviewed and produced to the Church which referenced the video. Moreover the September video was produced which was kept in the same file as the January video, indicating human error in a system which depended on humans to do their job by conducting a thorough search of a known drive.

The facts *presented by the city* show (1) City personnel had actual knowledge of the filming[27], (2) filming immediately prior to Review Panel

[27] RP 808 Staffer Kuntz asked staffer Wells to do the filming. That was part of Wells' assigned duties. RP 831 By email Kuntz directed Wells to do the filming and Wells reserved a City car. RP832, A16 Email produced to Church by City identifies filming. RP 984 Film was reviewed by Review Panel. P141 p. 9

meetings was routine[28], (3) those films were routinely filed in the same electronic file location[29] by date[30], (4) city documents reviewed in the contest of the Church's PRA request disclosed an e-mail "Re: Filming" of this property which the City reviewed prior to disclosure;[31], (5) absolutely no effort was expended to retrieve the video even though it was the subject of several depositions and the possible existence of the film *was disclosed* in the deposition of the city employee, Craig Kuntz. P135 p.10 The Kuntz video was stored in the same file as Wells, as was the custom. The Kuntz video was produced, but the city can't explain why the Wells video wasn't other than miscommunication between staff, i.e. each staffer thought another staffer was going to produce it.[32]

These were not only obvious leads but actual knowledge that reasonably should have been followed up by the City, but wasn't. This was a breakdown of the City's system and unreasonable. City PRA staff negligently failed to follow up on the Kuntz email of January 13, 2014. A16 Jennifer Ward was specifically aware that filming site visits prior the Review Panel meetings was routine yet negligently failed to follow up. P143 p.8 City PRA personnel were specifically aware that the City filed

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[28] RP 807, 829, P143 p. 8, 17
[29] RP 829, P143 p.13
[30] P 143 p. 21
[31] RP 998, A16 But city personnel didn't follow up as they should have. City witness Anderson testified she didn't know why video not produced. RP 999
[32] P143 p.13, 14, 20-21

these films electronically under date, P143 p.21, yet they negligently didn't search the dates immediately prior to the review hearing. The City has the obligation to make and follow reasonable procedures to comply with PRA requests. All of this is unreasonable; recall the City has the burden to prove it *isn't* unreasonable.

b. The Frantz notes were not produced because the search was inadequate

Much as above, facts presented by City witnesses demonstrate the Frantz notes of October 10, 2013, P54, were not produced because of human error in a system which relies on each individual doing their job. These notes were stored by permit number in a program called SAP. P143 p. 22 According to the City's CR 30(b)(6) witness Jennifer Ward they were not produced because of "miscommunication between staff." P143 p. 22 Shanta Frantz sent an email to the coordinator specifically identifying the notes and their location. RP 881 The coordinator typically pulls the notes. RP 885 Heather Croston (the coordinator) testified she thought she printed them out but due to operator error she did not. RP 1006 But later she discovered what she did wrong and testified "I know now" how to do it. RP 1006-1008 As a result she has now revised the system so it doesn't happen again. RP 1012 She could have recognized the problem at the time if she read what she printed out, but didn't. RP 1014 Human error is no defense.

3. Challenged PRA Findings and Conclusions are not supported by substantial evidence or are contrary to law

Finding 29 states the City "searched in all places reasonably likely to contain responsive documents." The evidence shows that the drive which held the video was not searched for the Wells video; otherwise it would have been produced. The SAP drive was searched for the notes but due to operator error they were not printed.

Finding 30 says all drives were searched but doesn't say they were thoroughly searched or that located notes were produced.

Finding 31 Search terms did not include date, the term needed in the City system to locate videos.

Finding 33 If the search was indeed "complete and detailed" of the SAP drive and the drive which held the videos they would have been located and produced.

Finding 34 The coordinator *assumed* the notes had been printed but did not print them because of operator error and inadequate training and didn't read what was printed to verify they did.

Conclusions of Law 6-9 are adequately addressed above. Conclusion 10 (there was no silent withholding) is obviously erroneous by definition since the video and notes were neither produced nor disclosed at the close of the City's

response. See *PAWS*, 125 Wn.2d at 270-271; *Zink v. Mesa*, 162 Wn. App. 688, 711, 256 P.3d 384 (2011)

4. Trial Court erred when, after in camera review; it refused to strike one or more claims of exemption, wholly or partially, based on attorney client privilege and/or work product.

The City redacted or completely withheld various documents under claim of work product or attorney client privilege. The Church requested and the court granted in camera review; however affirmed all claimed exemptions. The Church requests this court conduct an in camera review to determine if the exemptions were properly applied.

The court issued two letter decisions, the first on June 17, 2015, CP 640; the second on July 21, 2015. CP 843 The first letter identified a document which only partially sought legal advice although the court held the fact that it was a communication between client and attorney was enough to put it all within the privilege. In the latter letter decision the court questionably held emails neither written to or by the attorney were exempt work product.

The attorney client privilege is statutory:

> An attorney or counselor shall not, without the consent of his or her client, be examined as to any communication made by the client to him or her, or his or her advice given thereon in the course of professional employment.

RCW 5.60.060(2)(a)

The statute is facially inapplicable to documents. Especially since under the PRA exceptions to disclosure are to be viewed narrowly, enlarging the privilege to include all attorney client communications, even those not involving legal advice, appears to be error. "The attorney client privilege is a narrow privilege and protects only 'communications and advice between attorney and client'; it does not protect documents that are prepared for some other purpose than communicating with an attorney." *Hangartner v. Seattle*, 151 Wn.2d 439, 452, 90 P.3d 26 (2004) The burden is upon the party asserting the privilege to prove the attorney client relationship existed and that relevant documents contain privileged communications. *Soter v. Cowles Publishing*, 162 Wn.2d 716, 745, 174 P.3d 60 (2007) But under the trial court's construction an attorney email to a client about a Seahawk game (or visa versa) would be exempt from public disclosure. The issue was raised in *Sanders v. State,* 169 Wn.2d 827, 852, 240 P.3d 120 (2010) where the court assumed only legal advice was privileged.

The work product privilege is also discussed in *Sanders*, 169 Wn.2d 854-857. Judge Martin questioned whether several documents withheld fit the definition. CP 642-643 Ultimately the court held, CP 843, emails or portions thereof were exempt work product even though they were neither authored by or directed to the city attorney. On one the attorney is merely copied. The court is asked to conduct an independent review applying appropriate legal criteria.

VI. CONCLUSION AND REQUEST FOR REASONABLE ATTORNEY FEES

The court is asked to reverse the trial court, determine the City has violated RCW 64.40 and RCW 42.56 as a matter of law, direct that requested amendments be allowed, conduct an in camera review, direct that nonexempt documents be produced, award reasonable attorney fees to the Church pursuant to RCW 42.56.550 and RCW 64.40.020, and remand for further appropriate proceedings.

RESPECTFULLY SUBMITTED this 26th day of May, 2017.

GOODSTEIN LAW GROUP PLLC

By: _____
Richard B. Sanders, WSBA #2813
Attorneys for Appellant

CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below, I caused to be served the foregoing document on the following persons and in the manner listed below:

Jeff H. Capell, Deputy City Attorney Margaret Elofson, Deputy City Attorney City of Tacoma, Office of the City Attorney 747 Market Street, Room 1120 Tacoma, WA 98402 Email: jcapell@ci.tacoma.wa.us margaret.elofson@ci.tacoma.wa.us	☐ U.S. First Class Mail, postage prepaid ☐ Via Legal Messenger ☐ Overnight Courier ☑ Electronically via email ☐ Facsimile

DATED this 10th day of May 2017, at Tacoma, Washington.

Deena Pinckney

NO. 49854-5-II

DIVISION II OF THE COURT OF APPEALS FOR
THE STATE OF WASHINGTON

CHURCH OF THE DIVINE EARTH

APPELLANT

V.

CITY OF TACOMA,

RESPONDENT.

ERRATA TO APPELLANT'S OPENING BRIEF

Richard B. Sanders, WSBA No. 2813
Attorney for Appellant
Goodstein Law Group PLLC
501 South G Street
Tacoma, WA 98405
(253) 779-4000

The Church of the Divine Earth ("Church") submits this Errata to Appellant's Opening Brief. The Church herewith revises assignment of error 21, p. 23 by correcting "CP" references to "RP". Said revised page is attached. The Church also updated the table of contents error number 21 p. ii to reflect the updated assignment of error 21. The revised table of contents page is attached as well.

RESPECTFULLY SUBMITTED this 20th day of June, 2017.

GOODSTEIN LAW GROUP PLLC

By: s/Richard B. Sanders
Richard B. Sanders, WSBA #2813
Attorneys for Appellant

CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below, I caused to be served the foregoing document on the following persons and in the manner listed below:

Margaret Elofson, Deputy City Attorney City of Tacoma, Office of the City Attorney 747 Market Street, Room 1120 Tacoma, WA 98402 Email: margaret.elofson@ci.tacoma.wa.us	☐ U.S. First Class Mail, postage prepaid ☐ Via Legal Messenger ☐ Overnight Courier ☑ Electronically via email ☐ Facsimile

DATED this 20th day of June 2017, at Tacoma, Washington.

s/Deena Pinckney
Deena Pinckney

and the Hearing Examiner based his ruling on the City's representation of 30 feet?
D. Would preclusion of the Church's right to present facts of a 30 foot exaction contrary to the City's claim of an 8 foot dedication be unjust because the 8 foot claim was first advanced by the City Attorney at oral argument in a LUPA hearing without prior notice and contrary to the administrative record?

21. The court abused its discretion when it erroneously sustained multiple objections to cross examination questions to Deputy Capell and Director Huffman regarding representations to the Hearing examiner and LUPA judge at oral hearing regarding 30 feet v. 8 feet right-of-way exaction conditions. Capell: RP 672—676; Huffman: RP 1045--1047

Issues:
A. Was it proper to sustain these objections in cross examination of the Deputy City Attorney based on the Court's prior Order in Limine (assigned err #20) and or the LUPA judgment of February 19, 2015 which referenced an 8 foot dedication? RP 674
B. Considering the offer of proof by the church's attorney should the objections have been sustained? RP 675—676
C. How can the Church present its 64.40 case regarding the nature of the "final decision" at issue if it isn't allowed to prove the extent of the exaction called for in the Letter Decision of April 28, 2014 or the decision of the Hearing Examiner?

IV. STANDARD OF REVIEW

This was a bench trial which ultimately resulted in entry of Findings of Fact and Conclusions of Law. True Factual Findings are reviewed to determine if they are supported by substantial evidence. *Govett v. First Pac. Inv. Co.*, 68 Wn.2d 973, 973, 413 P.2d 972 (1966). Substantial evidence is such evidence that would persuade a fair minded person the facts were actually proven. *Holland v. Boeing Co.*, 90 Wn.2d 384, 390-91, 583 P.2d 621 (1978). Conclusions of Law are

449 P.3d 269 (Wash. 2019)
194 Wn.2d 132
194 Wn.2d 132
The CHURCH OF the DIVINE EARTH, Petitioner,
v.
CITY OF TACOMA, Respondent.
No. 96613-3
Supreme Court of Washington
September 19, 2019
Argued June 13, 2019

Appeal from Pierce County Superior Court, Hon. Vicki Hogan, Judge (No. 14-2-13006-1).

[194 Wn.2d 133] Richard B. Sanders, Carolyn A. Lake, Goodstein Law Group, for Petitioner.

Margaret A. Elofson, City of Tacoma, for Respondent.

Hannah Sarah Sells Marcley, Attorney at Law, Jackson Wilder Maynard, Jr., Building Industry Association of Washington, for Amicus Curiae (Building Industry Association of Washington).

Brian Trevor Hodges, Pacific Legal Foundation, for Amicus Curiae (Pacific Legal Foundation).

OPINION

JOHNSON, J.

[194 Wn.2d 134] **[?1]** This case concerns whether the city of Tacoma (City) can be held liable for damages for imposing an unlawful condition on a building permit. In an appeal brought under the Land Use Petition Act (LUPA), chapter 36.70C RCW, the superior court ruled that the City acted unlawfully when it placed a condition on the Church of the Divine Earth?s (Church) building permit, requiring an uncompensated-for dedication of land for right-of-way improvements. However, the court denied the Church?s action for damages under RCW 64.40.020, and the Court of Appeals affirmed. We reverse and remand for a new trial.

FACTS

[?2] On September 20, 2013, the Church submitted an application to the City to build a parsonage on property it owned. A single-family residence had previously been located on the property, but it had been demolished in 2012. City staff reviewed the permit application and placed a number of conditions on it, including, at issue here, a requirement [194 Wn.2d 135] that the Church dedicate a 30-foot-wide strip of land for right-of-way improvements to a street abutting the property. While the existing street was generally 60 feet wide in other areas, it was 30 feet wide next to the Church?s property. This lack of uniformity had existed for around 100 years.

[?3] The Church challenged the permit conditions, and the City eventually removed most of them but kept the requirement for a dedication. The Church appealed the decision to the City?s hearing examiner, and the hearing examiner granted summary judgment in favor of the City.

[?4] The Church filed a timely appeal under LUPA, in which it challenged the hearing examiner?s decision and also sought damages under RCW 64.40.020. In addressing the propriety of the dedication, the court confined its review to the administrative record that had been before the hearing examiner and acknowledged that, in that record, the stated purpose by the City for imposing the dedication requirement was to create a uniform street. The court held that this reason was insufficient to justify the requirement and reversed the hearing examiner, invalidating the condition.

[?5] The case then proceeded to trial on the issue of damages. The court issued an order prohibiting the City from entering evidence to show the dedication was imposed for any reason

other than uniformity. However, during trial, City officials testified that the dedication was intended to address a variety of issues, including to alleviate impacts to traffic, visibility, parking, and pedestrian safety, as well as to bring the street into compliance with city codes and industry best practices. The trial court apparently considered the evidence and found that the City imposed the dedication to address increased vehicular and pedestrian traffic and related safety impacts, and to ensure adequate visibility. It then concluded (a) "[t]he City reasonably believed that the development conditions it attached to the permit had a nexus to the project and were proportional" [194 Wn.2d 136] and (b) 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* [1] ." Clerk?s Papers (CP) at 2408. The court denied the Church?s request for damages, and the Church appealed.

[?6] The Court of Appeals affirmed the trial court, holding that "[b]ecause the City reasonably believed that it satisfied the requirements of *Nollan / Dolan ,* it did not know and should not have known that its action was unlawful." *Church of Divine Earth v. City of Tacoma,* 5 Wn.App.2d 471, 494, 426 P.3d 268 (2018). The Court of Appeals also awarded attorney fees to the City. The Church petitioned this court, and we granted limited review.[2] *Church of Divine Earth v. City of Tacoma,* 192 Wn.2d 1022, 435 P.3d 285 (2019).

ISSUE

?7 1. Whether the City knew or should reasonably have known its requirement for a dedication of land was unlawful.

ANALYSIS

[?8] We should first settle what this case is not about. This is not a case challenging the constitutionality of a land use decision; the propriety of the permit condition was already resolved by the lower court and is not before us on appeal. And because the superior court invalidated the permit condition, this is not a claim for just compensation for a taking. Instead, what we have before us is a claim for damages under RCW 64.40.020 for an attempted exaction of land through an unlawful permit condition.

[194 Wn.2d 137] **[?9]** RCW 64.40.020(1) allows a property owner who files an application for a permit to bring an action for damages

> to obtain relief from acts of an agency which are arbitrary, capricious, unlawful, or exceed lawful authority, or relief from a failure to act within time limits established by law: PROVIDED, 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.

This statute does overlap to some degree with LUPA insofar as, to obtain damages under RCW 64.40.020, the land use decision must, necessarily, be invalid. But not every successful LUPA appeal will justify damages, as is expressly acknowledged in RCW 36.70C.130(2) (stating that "[a] grant of relief

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by itself may not be deemed to establish liability for monetary damages"). To establish liability for such damages under RCW 64.40.020, a plaintiff must meet a higher burden than is required in LUPA, establishing actual or constructive knowledge, or that the government entity acted in an arbitrary or capricious manner.

[?10] Our review here is limited to the question of whether the Church may obtain damages for the City?s unlawful action. As the statute indicates, the City incurs liability for an unlawful action "only if the *final decision* of the agency was made with knowledge of its unlawfulness ... or it should reasonably have been known to have been unlawful." RCW 64.40.020(1) (emphasis added). The City argued,

and the trial court held, that the final decision was that of the hearing examiner. Therefore, the issue in this case is whether the City knew or should reasonably have known the hearing examiner?s decision to allow the permit condition was unlawful. The trial court appears to have based its findings of fact and conclusions of law on arguably improper, irrelevant evidence, and the Court of Appeals, in turn, applied the wrong standard in its review.

[194 Wn.2d 138] **[?11]** Whether the City should reasonably have known the final decision was unlawful is an issue involving related questions of both law and fact. *Isla Verde Int?l Holdings, Ltd. v. City of Camas,* 147 Wn.App. 454, 467, 196 P.3d 719 (2008). It requires an examination of the law, which the City is presumed to have known, *see, e.g., State ex rel. Dungan v. Superior Court,* 46 Wn.2d 219, 222, 279 P.2d 918 (1955), and the material facts underlying the final decision. The statute creates an objective standard, asking whether a reasonable person looking at the facts utilized in the final decision would be expected to know the decision violated established law. *See, e.g.*, *In re Forfeiture of One 1970 Chevrolet Chevelle*, 166 Wn.2d 834, 841, 215 P.3d 166 (2009) (holding that while "actual knowledge" is a subjective standard, having "reason to know" is an objective standard); *Cloud v. Summers,* 98 Wn.App. 724, 731, 991 P.2d 1169 (1999) (recognizing the objective nature of whether a plaintiff should have known of an injury).

[?12] A permit condition for an uncompensated dedication of land is unlawful where it fails to fulfill the requirements laid out in two formative cases on unconstitutional conditions, *Nollan v. California Coastal Commission,* 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987), and *Dolan v. City of Tigard,* 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994). Taken together, the *Nollan* and *Dolan* cases create a framework for analyzing the constitutionality of a permit condition involving an uncompensated land dedication. First, the government must show the development will create or exacerbate an identified public problem. Second, the government must show the proposed condition will tend to solve or alleviate the public problem. Finally, the government must show that the condition is roughly proportional to the development?s anticipated impact. In fulfilling these requirements, the government must, to some degree, quantify its findings, and cannot rely on speculation regarding the impacts or mitigation of them.

[?13] The City provided little documentation to the hearing examiner to justify its requirement for a dedication.[194 Wn.2d 139] The record contained minutes from a September 25, 2013 review panel where the Church?s permit was discussed, and a declaration from the director of planning and development services, Peter Huffman. The review panel minutes state that the Church was being required to dedicate the land "to provide consistent right-of-way widths" along the street, and 30 feet was being required "to stay consistent and provide adequate street and sidewalk area." CP at 598. Huffman?s declaration summarized the City?s reason for the dedication as "It is important to the City that the [right of way] in all City streets be uniform." CP at 127. Thus, the City?s stated reason for the dedication was to create a consistent, uniform street.

[?14] The hearing examiner?s ruling was the "final decision," and the City provided the hearing examiner only with documentation evidencing consistency and uniformity as justifications for the dedication requirement. Therefore, under RCW 64.40.020(1) the question for the superior court was whether the Church proved the City knew or should reasonably

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have known that its goal for a consistent, uniform street did not justify the permit condition under *Nollan* and *Dolan.* As noted above, despite an order from the trial court properly limiting evidence to the reasoning presented to the hearing examiner for the final decision, the court permitted City officials to testify extensively regarding other reasons the City imposed the condition. The City asserted that the dedication was imposed to address increased vehicular and

pedestrian traffic from the development, and concerns about visibility and obstructions to pedestrians, as well as to meet general standards for roads. None of these reasons had been presented to the hearing examiner. Nevertheless, the court apparently considered this additional reasoning and, in its findings of fact, asserted that the Church?s parsonage would both increase and impair safety for vehicular and pedestrian traffic and that the dedication was necessary to ensure adequate visibility.

[194 Wn.2d 140] **[?15]** The trial court erred in permitting testimony of reasons for the dedication that had not informed the City?s final decision to impose the permit condition. Since these additional reasons did not inform the City?s final decision, the City could not use them as justification for having imposed the condition. Evidence of these other justifications was not relevant to the issue before the court, which was whether the Church proved the City knew or should reasonably have known the hearing examiner?s decision did not satisfy a *Nollan* and *Dolan* analysis. The court?s findings of fact leave no doubt that the additional evidence led the court to conclude damages were not warranted. Because the court?s findings were based on evidence not considered by the hearing examiner, they lack the necessary support and cannot justify the court?s conclusions of law. *Hegwine v. Longview Fibre Co.,* 162 Wn.2d 340, 352-53, 172 P.3d 688 (2007) (holding that findings of fact must be supported by substantial evidence and must, in turn, justify a court?s conclusions of law).

[?16] The Court of Appeals then erred on review by applying the wrong legal standard under the statute. The court held that because the City "reasonably believed" its requirement for a dedication was lawful, "it did not know and should not have known that its action was unlawful." *Church of Divine Earth*, 5 Wn.App.2d at 494, 426 P.3d 268. But whether the City believed in the lawfulness of its actions is a subjective question and conflicts with the statutory standard of RCW 64.40.020. As discussed above, the statute requires an objective standard, asking whether the City?s final decision "should reasonably have been known to have been unlawful." Thus, damages are not available if reasonable minds with the necessary knowledge and expertise could have concluded that the City?s decision was lawful. The City?s subjective belief that the dedication was lawful does not determine what it objectively should reasonably have known. The Court of Appeals erred in reasoning otherwise.

[194 Wn.2d 141] CONCLUSION

[?17] We reverse the Court of Appeals and remand for a new trial. On remand, the trial court should confine its review addressing the propriety of the dedication to evidence relevant to the hearing examiner?s final decision. In deciding whether damages are justified, the court must determine whether the Church proved the City knew or should reasonably have known its permit condition for a dedication of land was unlawful.

WE CONCUR: Madsen, J., Owens, J., Stephens, J., Wiggins, J., Gonzalez, J., Gordon McCloud, J.

YU, J. (dissenting)

[?18] In this case, we granted review as to whether a city should be held liable for damages in accordance with RCW 64.40.020 for initially imposing a condition on a building permit that was later deemed unlawful in an appeal brought pursuant to the Land Use Petition Act (LUPA), chapter 36.70C RCW. Because the majority omits key facts, misinterprets

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the trial court?s preliminary pretrial evidentiary ruling, and misreads the Court of Appeals opinion regarding the standard for imposing damages pursuant to RCW 64.40.020, it incorrectly declines to address the sole issue presented, and instead reverses and remands for a new trial that is entirely unnecessary.

[?19] I would hold the trial court did not err when it considered additional evidence in the

damages proceeding beyond that presented in the separate LUPA appeal to determine whether the city reasonably should have known that its actions were unlawful. I would also hold that the Court of Appeals applied the correct legal standard for assessing liability pursuant to RCW 64.40.020, and I would affirm its holding that the city is not liable for damages in this case. I therefore respectfully dissent.

[194 Wn.2d 142] FACTUAL BACKGROUND AND PROCEDURAL HISTORY

[?20] In September 2013, the Church of the Divine Earth (Church) applied for a building permit to construct a parsonage on a vacant lot that the Church had recently acquired. Clerk?s Papers (CP) at 782. After the initial review, the city of Tacoma (City) imposed a number of conditions on the building permit. *Id.* at 106. Viewed as a whole, these development conditions sought to create a safe and accessible roadway for pedestrians and visitors to the parsonage. The City also cited multiple deficiencies in the permit application that would need to be cured before the application review could continue. *Id.* at 869.

[?21] The Church did not attempt to cure the deficiencies in its application until after litigation had begun, *id.* at 879-880, opposed all the City?s conditions, and submitted a waiver request. *Id.* at 600. Despite the incomplete application, the City removed all of the conditions except for a 30-foot right-of-way dedication. *Id.* at 13. This dedication requirement was eventually reduced from 30 feet to 8 feet. *Id.* at 105. The main purpose for the right-of-way dedication was to create a uniform street, but in context, the dedication was simply one of many conditions imposed to generally improve safety and bring the neighborhood into compliance with the Tacoma Municipal Code.[1]

[?22] The Church and the City continued to negotiate the permit application due to some confusion over whether the building would be used solely as a parsonage or would also be used for religious assembly.[2] *See id.* at 108. Finally, [194 Wn.2d 143] in April 2014, the director of planning and development services sent a letter to the Church clarifying the status of the application and advising the Church of its right to seek review. *Id.* at 155-57. Shortly thereafter, the Church appealed the City?s actions to a hearing examiner, raising primarily constitutional challenges to the City?s development conditions. *Id.* at 603. After determining that the constitutional issues raised by the Church were beyond its jurisdiction, the hearing examiner granted summary judgment in favor of the City, allowing the City to impose the right-of-way dedication as a development condition. *Id.* at 9-17.

[?23] The Church then appealed the hearing examiner?s decision to the Pierce County Superior Court pursuant to LUPA. Meanwhile, in a separate proceeding, the Church alleged the City violated the Public Records Act (PRA), chapter 42.56 RCW, and brought a claim for damages pursuant to RCW 64.40.020. *See id.* at 220 (Stipulated Order Bifurcating LUPA Appeal from PRA & Damages Claims).

[?24] In the LUPA appeal, Judge Martin found that the City had failed to "carry its burden to prove the condition complied with the requirements" of the *Nollan / Dolan* analysis[3] and invalidated the right-of-way dedication

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requirement. *Id.* at 275. The case before us concerns only the separate damages claim, and as noted below, the sole issue was whether the City knew or reasonably should have known the dedication was unlawful. RCW 64.40.020(1).

[194 Wn.2d 144] **[?25]** In the damages proceeding, a different judge, Judge Hogan, found that the City had, in fact, conducted a *Nollan / Dolan* analysis, cited several reasons for imposing the conditions beyond street uniformity, and concluded that the City was not liable for damages pursuant to RCW 64.40.020. CP at 2400-09.

[?26] The Court of Appeals affirmed, holding that there was substantial evidence to

support the trial court?s findings of fact and that the trial court correctly concluded "that the City did not know and should not have known that the dedication requirement would later be found to violate *Nollan / Dolan* and, therefore, was unlawful." *Church of Divine Earth v. City of Tacoma,* 5 Wn.App.2d 471, 495, 426 P.3d 268 (2018). We granted review of one issue: "whether the City of Tacoma is liable for damages because it knew or should have known its action was unlawful." Order, *Church of Divine Earth v. City of Tacoma,* No. 96613-3, 192 Wn.2d 1022, 435 P.3d 285 (Wash. Mar. 6, 2019).

ANALYSIS

[?27] The only claim before us is the Church?s claim for damages pursuant to RCW 64.40.020(1), which provides,

> Owners of a property interest who have filed an application for a permit have an action for damages to obtain relief from acts of an agency which are arbitrary, capricious, unlawful, or exceed lawful authority, or relief from a failure to act within time limits established by law: PROVIDED, 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.

(Emphasis added.) The only issue relevant to this claim on which we granted review is whether the City knew or should have known that the 8-foot right-of-way dedication would ultimately be determined to be an unlawful development [194 Wn.2d 145] condition. Yet the majority does not reach this issue and instead reverses and remands for a new trial based on perceived errors regarding the trial court?s evidentiary rulings and the Court of Appeals? alleged reliance on an incorrect legal standard. I would hold the trial court?s evidentiary rulings in the damages proceedings were within its discretion and the Court of Appeals applied the correct legal standard to reach the correct conclusion. I would therefore affirm.

[?28] First, I agree with the majority that the hearing examiner?s decision is the final agency decision and thus the relevant point in time for reviewing whether the City knew or reasonably should have known the right-of-way dedication was unlawful. However, the majority is incorrect to hold that the trial court in the damages proceeding relied on "arguably improper, irrelevant evidence." Majority at __ - __.

[?29] While the trial court in the damages proceeding did preliminarily grant a motion to exclude evidence of reasons justifying the conditions other than street uniformity, the court ultimately allowed extensive testimony on this topic because it was relevant to determine whether the City?s actions were arbitrary or capricious. *See* Verbatim Report of Proceedings (Apr. 27, 2016) at 50. When City staff testified as to reasons for the conditions other than uniformity, the Church?s counsel properly did not object because allowing this testimony was entirely within the trial court?s discretion. The trial court in the *LUPA appeal* may have been limited to the evidence before the hearing examiner, RCW 36.70C.

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120(1), but the trial court in the separate *claim for damages* was bound only by the ordinary Rules of Evidence, and therefore had the discretion to consider relevant evidence as to whether the City reasonably should have known that the hearing examiner?s decision was unlawful.

[194 Wn.2d 146]**[?30]** Moreover, while the hearing examiner?s record was limited,[4] it in fact contains evidence that the City had discussed reasons for the conditions other than street uniformity. CP at 106 (citing a need to provide an adequate street sidewalk area and compliance with the Americans with Disabilities Act and "Public Right of Way Accessibility Guidelines"). Although the City did not expressly state that the reason for the right-of-way dedication was safety,

the reasoning for the other conditions initially imposed was tied to safety. Taken as a whole, it is reasonable to infer that the reason for imposing all of the conditions was to improve safety.

[?31] Ultimately, the trial court in the damages proceeding and the Court of Appeals both recognized that the City had performed a *Nollan / Dolan* analysis by discussing nexus and proportionality in the City?s initial review of the permit application. *Id.* at 2401. This finding is supported by the testimony of City staff members and the documents considered in the record, which were properly admitted in the damages proceeding at the trial court?s discretion and without objection. I would therefore not hold that the trial court in the damages proceeding considered improper and irrelevant evidence, nor would I hold that this alleged, unpreserved error requires a new trial.

[?32] Second, the majority claims that the Court of Appeals applied the wrong standard in determining whether the City was liable for damages. Majority at __. It did not. The Court of Appeals? opinion contains a single, arguably [194 Wn.2d 147] unartful recitation of the standard as asking whether the City "reasonably believed that it satisfied the requirements of *Nollan / Dolan* ," which may suggest an improper, subjective standard. *Church of Divine Earth*, 5 Wn.App.2d at 494, 426 P.3d 268. However, throughout the rest of the opinion, the Court of Appeals clearly applies the proper objective standard in its analysis and correctly states that standard multiple times. *Id*. at 485, 426 P.3d 268 ("the City did not know and should not have known that the dedication was unlawful"), 490, 426 P.3d 268 (quoting RCW 64.40.020(1)), 493, 426 P.3d 268 ("The relevant question is whether the City knew or should have known that the right-of-way dedication requirement was unlawful."), 494, 426 P.3d 268 (quoting RCW 64.40.020(1)), 495, 426 P.3d 268 ("the City did not know and should not have known that the dedication requirement would later be found to violate *Nollan / Dolan* and, therefore, was unlawful"). A single, arguably unartful statement in the context of an otherwise proper analysis does not constitute reversible error.

CONCLUSION

[?33] Without objection, the trial court in the damages proceeding properly considered relevant evidence as to whether the City should have known that the hearing examiner?s decision would ultimately be held unlawful. Based on this evidence, the court determined the City could not be held liable for damages pursuant to RCW 64.40.020 and the Court of Appeals, applying the correct legal standard, properly affirmed. Because the majority fails to address the sole issue on which we granted review and reverses for an unnecessary new trial based on an incorrect reading of the record and the Court of Appeals? decision, I respectfully dissent.

Fairhurst, C.J.

Notes:

[1] *Nollan v. Cal. Coastal Comm?n,* 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987); *Dolan v. City of Tigard,* 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994).

[2] Amicus briefs in support of the Church were filed by Pacific Legal Foundation and the Building Industry Association of Washington.

[1] Other purposes included improving visibility, achieving compliance with the Americans with Disabilities Act of 1990, 42 U.S.C. ? 12101, and mitigating the potential increase in vehicular traffic due to the construction of the parsonage on the vacant lot. *See* CP at 106; Verbatim Report of Proceedings (VRP) (May 9, 2016) at 801.

[2] Additionally, the Church had constructed a garage in advance of the permit application. CP at 106. City attorney Jeff Capell explained that the City wanted the Church to "tie ... up" the loose ends with regards to the permit application. VRP (Feb. 19, 2015) at 20.

[3] *Nollan v. Cal. Coastal Comm?n,* 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987); *Dolan v. City of Tigard,* 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994). A *Nollan / Dolan* analysis must be conducted when "government demands that a landowner dedicate an easement allowing public access to her property as a condition of obtaining a development permit." *Lingle v. Chevron U.S.A., Inc.,* 544 U.S. 528, 546, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005). Such conditions will be deemed unconstitutional takings of private property without just compensation unless the

government shows that the conditions are proportionate and that they have a nexus to the problem created by the development.

[4] The hearing examiner?s record includes (1) review panel minutes, September 25, 2013, (2) Tacoma Planning and Development Services? letter decision, April 28, 2014, (3) affidavit of Steven Weinman, June 9, 2014, (4) assessor?s parcel summary for 6605 East B Street, (5) corporation?s division registration data for Church of the Divine Earth, (6) declaration of Peter Huffman, July 3, 2014, (7) WSBA lawyer search showing no listing for Terry Kuehn, (8) aerial photograph and drawing of lots in neighborhood, (9) amended declaration of Peter Huffman, July 9, 2014, (10) Tacoma Public Works Department memorandum (Kuntz to Kammerzell), March 5, 2014, (11) Tacoma Planning and Development Services? letter (Kuntz to Kuehn), March 7, 2014, (12) various scenarios put forward by City for development at 6605 East B Street. CP at 10-11.

Filed
Washington State
Court of Appeals
Division Two

January 24, 2023

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

THE CHURCH OF THE DIVINE EARTH, Appellant/Cross-Respondent, v. CITY OF TACOMA, Respondent/Cross-Appellant.	No. 55737-1-II UNPUBLISHED OPINION

LEE. J. — The Church of the Divine Earth (Church) appeals the superior court's judgment and findings of fact (FOF) and conclusions of law (COL) relating to an award of attorney fees. The Church challenges the superior court's reduction of hours reasonably expended, reduction of the reasonable hourly rate, denial of a multiplier, and denial of legal assistant fees in calculating the attorney fees award. The Church requests that we reverse the superior court and make our own determination of attorney fees. The City of Tacoma (City) cross-appeals, challenging the superior court's determination of hours reasonably expended and arguing that remand is required for the superior court to better articulate its reasoning for the attorney fees award.

We hold that the superior 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. Accordingly, we affirm.

FACTS

Terence Kuehn is the pastor of the Church of the Divine Earth. In September 2013, the Church submitted a permit application to the City of Tacoma to build a single-family "parsonage"

on a lot the Church owned. Clerk's Papers (CP) at 3. The City reviewed the Church's application and requested the Church resubmit an updated application incorporating several conditions, including a right-of-way. The Church objected to the conditions. The City eventually dropped all conditions except for the dedication of a right-of-way.[1] The Church appealed the remaining condition to the Hearing Examiner. In August 2014, the Hearing Examiner granted summary judgment in favor of the City.

The Church appealed to the Pierce County Superior Court, filing a petition under the Land Use Petition Act (LUPA), chapter 36.70C RCW, and seeking damages under RCW 64.40.020. The Church retained Goodstein Law Group (Goodstein) to assist with the LUPA action. Goodstein's attorney fee agreement with the Church provided that the Church would be billed for services on an hourly basis. The attorneys at Goodstein who at various points assisted with the case included: Richard Sanders, who billed at $395/hour; Carolyn Lake, who billed at $295/hour; Seth Goodstein, who billed at $200/hour; and Conor McCarthy, who billed at $280/hour.[2] The attorney fee agreement also included a "legal assistant" billing rate at $80/hour. CP at 217.

[1] The City's stated reasoning for the dedication of the right-of-way was to promote uniformity of city streets. The street adjacent to the Church's parcel, East B Street, was a "60 foot wide right-of-way. In order to stay consistent and provide adequate street and sidewalk area, a dedication of approximately 30 feet [was] required." CP at 88.

[2] McCarthy was not mentioned in Goodstein's initial fee arrangement. There appears to be a discrepancy in McCarthy's listed billing rate. In Goodstein's itemized invoice to the Church, McCarthy has a billing rate of $280/hour. However, in Goodstein's "Attorney Fees & Costs Calculations" breakdown, it lists McCarthy's rate as $200/hour. CP at 266. The superior court's FOF also state that McCarthy's billing rate was $200/hour. However, because McCarthy's rate is both listed as and calculated at $280/hour in Goodstein's itemized invoice, it is listed as $280/hour here.

In October 2014, the Church amended its petition to include a Public Records Act (PRA), chapter 42.56 RCW, claim for which it sought damages. In February 2015, the Pierce County Superior Court granted the Church's LUPA action and invalidated the right-of-way condition.

In May 2015, the Church moved to amend its petition to add another cause of action under 42 U.S.C. § 1983. The superior court denied the Church's motion to amend its petition to bring a § 1983 claim, but allowed two amendments regarding the Church's PRA claim. The Church moved for reconsideration of the superior court's denial of its claim under 42 U.S.C. § 1983. The superior court denied the Church's motion for reconsideration. The case proceeded to trial on August 12, 2016 on the issue of damages under chapter 64.40 RCW and the PRA claim.

The superior court entered judgment against the City on the Church's PRA claim in the amount of $24,665.50. However, the superior court dismissed the Church's cause of action under chapter 64.40 RCW, denying damages because the City reasonably believed its right-of-way attachment to the permit was lawful.

The Court of Appeals affirmed.[3] The Supreme Court granted limited review on the issue of whether "the City knew or should reasonably have known its requirement for a dedication of land was unlawful," making the City liable for damages under RCW 64.40.020. *Church of Divine Earth v. City of Tacoma*, 194 Wn.2d 132, 136, 449 P.3d 269 (2019). The Supreme Court reversed the Court of Appeals, holding that the standard for damages under RCW 64.40.020 is an objective standard and remanding the case to the trial court to "determine whether the Church proved the

[3] *Church of the Divine Earth v. City of Tacoma*, 5 Wn. App. 2d 471, 495, 426 P.3d 268 (2018), *rev'd and remanded*, 194 Wn.2d 132 (2019).

City knew or should reasonably have known its permit condition for a dedication of land was unlawful." *Id.* at 141.

On remand, the trial court determined that the City was liable under chapter 64.40 RCW, and in January 2021, awarded damages to the Church in the amount of $8,640. The Church then moved for attorney fees, costs, and expenses totaling $636,165.24, based on 1,104.6 claimed hours of attorney work. The total amount requested by the Church included a lodestar of $416,817.63[4] with a multiplier of 1.5. The Church had deducted from its request $12,164.36 in prior payments made by the City. Sanders billed the great majority of the hours. Within its attorney fees request, the Church included $5,887.50 of legal assistant fees for work performed by Kuehn. . No Goodstein legal assistant or non-attorney staff member worked on the case.

In March 2021, the superior court heard arguments on the Church's attorney fees motion to determine the award of reasonable attorney fees. During the hearing, the superior court stated:

> I don't know that it is reasonable, to be honest with you, to expect the Court to go through six or seven years worth of billings on an oral record . . . .
>
> I broke [the hours] into some detail . . . as to each of the, I guess, seven phases of litigation. I broke it down by that. That was enough detail for you to have some understanding as to what the Court was doing and its basis for it. It wasn't in any way arbitrary.

Verbatim Report of Proceedings (VRP) (Mar. 19, 2021) at 13-14.

The superior court awarded the Church $253,543.66 based on 658.6 hours "reasonably expended at a blended rate of $385.03." CP at 588. The court denied the Church's request for the

[4] According to the Church, Goodstein deducted $14,322.37 from the initial lodestar calculation for attorney fees related to the PRA claim.

lodestar multiplier and the fees for time claimed by Kuehn as a "legal assistant." CP at 589. The superior court made, in part, the following FOFs:

> 16. The Church's lawyers claimed 1,104.6 hours of attorney time representing the Church in the portion of this case relating to the permit dedication. The vast majority of the time requested is for one lawyer. While this case did proceed over several years, the actual trial was approximately 8 court days. To put this request another way, assuming a 40 hour, 5-day week, 1,104.6 hours approximates: 138 full days; 27.6 weeks; or nearly 6.4 months (still assuming 5-day weeks) for one lawyer exclusively dedicated to this case.
>
> 17. In addition to this time, the Church's lawyers asserted work done by the Church's representative (an additional 196.25 hours) should be compensated as "legal assistant" fees.
>
> 18. The Church's request of 1,104.6 hours is exclusive of hours and expenses for claims associated with the Public Records Act.
>
> 19. Of the hours claimed for attorney services this court finds 658.5 hours were reasonably expended at a blended hourly rate of $385.03 for a total reasonable attorney fee of $253,543.66. "Blended" meaning combining the relative contributions of lawyers providing services at various hourly rates. See, for example, the much lower hourly rates for attorneys Lake, [Seth[5]] Goodstein and McCarthy who also worked on this matter for Petitioner. A multiple of 1.5 requested by the Church should be denied. First, the allowed blended rate of $385.03/hour is somewhat high for this case. While Petitioner's lawyers did good work, the case was not complicated factually nor did the case present novel legal issues. In addition, many hours for which compensation is being awarded is for time that could have been done by legal staff and/or associate attorneys at far lower rates of compensation. Other than the legal assistant claim of $5,887.50 by the lawyer's client's representative, Pastor Kuehn, no other staff time was requested. The court finds not all the time claimed was reasonably spent.
>
> 20. Attorney hours claimed and allowed for various phases of the litigation are as follows:

Phase of Litigation	Hours claimed	Hours awarded
Pretrial	453.7	285.0

[5] Seth Goodstein's full name is used to distinguish between him and the firm, Goodstein.

Trial	76.5	76.5
Post-trial	67.2	25.0
Court of Appeals	244.3	102.0
Supreme Court	101.3	40.0
Remand	104.1	90.0
Post-judgment	57.5	40.0

CP at 588-89 (footnote omitted).

The superior court also entered, in part, the following COLs:

3. The Church's request for reimbursement of "legal assistant" fees for time claimed by the Church's representative is denied.

4. The Church's request for a lodestar multiplier is denied.

5. Judgment for reasonable attorney fees in the amount of $253,543.66 should be entered against the City of Tacoma.

CP at 589.

The Church appeals, and the City cross-appeals.

ANALYSIS

The Church appeals the superior court's calculation of reasonable attorney fees and reasonable hours worked, arguing that the superior court erred in its reduction of the hours expended, reduction to the actual hourly rate, denial of legal assistant fees, and denial of any fee multiplier. The Church requests that we reverse the superior court and, instead of remanding, "directly award the appropriate fees" based on the record. Br. of Appellant at 53.

The City cross-appeals the superior court's award of attorney fees to the Church, arguing that the superior court did "not identify which of the hours sought by the Church were ultimately awarded" and that remand is appropriate. Br. of Resp't at 15.

We disagree with both the Church and the City, and we affirm the superior court.

A. LEGAL PRINCIPLES

An award of attorney fees is discretionary. *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 65, 738 P.2d 665 (1987). "[T]he relevant inquiry is first, whether the prevailing party was entitled to attorney fees, and second, whether the award of fees is reasonable." *Ethridge v. Hwang*, 105 Wn. App. 447, 459, 20 P.3d 958 (2001).

Here, the parties do not dispute that the Church is entitled to attorney fees under RCW 64.40.020(2). RCW 64.40.020(2) provides: "The prevailing party in an action brought pursuant to this chapter may be entitled to reasonable costs and attorney's fees." The Church was successful in its action against the City under LUPA and RCW 64.40.020. Therefore, the Church may be awarded reasonable attorney fees.

The party seeking fees bears the burden of proving the reasonableness of those fees. *Mahler v. Szucs*, 135 Wn.2d 398, 434, 957 P.2d 632 (1998). Judges have broad discretion in determining the reasonableness of an award. *Ethridge*, 105 Wn. App. at 460. Appellate courts review attorney fee awards for abuse of discretion. *Rettkowski v. Dep't of Ecology*, 128 Wn.2d 508, 519, 910 P.2d 462 (1996). "In order to reverse an attorney fee award, an appellate court must find the trial court . . . exercised its discretion on untenable grounds or for untenable reasons." *Chuong Van Pham v. Seattle City Light*, 159 Wn.2d 527, 538, 151 P.3d 976 (2007).

Furthermore, "[f]ee requests may be adjusted upward or downward, and deference is awarded the trial court's decision." *Boeing Co.*, 108 Wn.2d at 65.

Courts need to make an adequate record upon which they base fee awards. *Mahler*, 135 Wn.2d at 435; *Taliesen Corp. v. Razore Land Co.*, 135 Wn. App. 106, 146-47, 144 P.3d 1185 (2006) ("The trial court must provide articulable grounds for its fee award."). Specifically, courts need to enter findings of fact and conclusions of law to establish a proper record. *Mahler*, 135 Wn.2d at 435. Findings do not require detailed, hour-by-hour analyses of each lawyer's timesheets. *Taliesen Corp.*, 135 Wn. App. at 143. Furthermore, trial courts should not rely solely on the billing records of the prevailing party's attorney. *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 744, 733 P.2d 208 (1987).

As long as a court provides insight into its exercise of discretion, generally the record will be sufficient. *See Steele v. Lundgren*, 96 Wn. App. 773, 779-82, 982 P.2d 619 (1999), *review denied*, 139 Wn.2d 1026 (2000). However, "an award of substantially less than the amount requested should indicate at least approximately how the court arrived at the final numbers and explain why discounts were applied." *Taliesen Corp.*, 135 Wn. App. at 146. A court's failure to make an adequate record will result in a remand. *Mahler*, 135 Wn.2d at 435.

When calculating fee awards, Washington courts employ the lodestar method. *Id.* at 433-34. First, a court must determine that "counsel expended a reasonable number of hours in securing a successful recovery for the client." *Id.* at 434. This means courts should exclude wasteful or duplicative hours or time spent on unsuccessful claims. *Id.*; *accord Bowers v. Transamerica Title Ins.*, 100 Wn.2d 581, 597, 675 P.2d 193 (1983) ("The court must limit the lodestar to hours

reasonably expended, and should therefore discount hours spent on unsuccessful claims, duplicated effort, or otherwise unproductive time.").

The reasonable number of hours are then multiplied by each lawyer's reasonable hourly rate of compensation. *Steele*, 96 Wn. App. at 780. An attorney's usual hourly rate is not conclusively a reasonable rate and other factors may necessitate adjustment. *Bowers*, 100 Wn.2d at 597. Factors include the "level of skill required by the litigation, time limitations imposed on the litigation, the amount of the potential recovery, the attorney's reputation, and the undesirability of the case." *Id.*

Parties may also recover legal assistant fees as part of the attorney fee award. *Absher Constr. Co. v. Kent Sch. Dist. No. 415*, 79 Wn. App. 841, 849, 917 P.2d 1086 (1995). When assessing whether legal assistant services should be compensated, courts consider the following criteria:

> (1) the services performed by the non-lawyer personnel must be legal in nature; (2) the performance of these services must be supervised by an attorney; (3) the qualifications of the person performing the services must be specified in the request for fees in sufficient detail to demonstrate that the person is qualified by virtue of education, training, or work experience to perform substantive legal work; (4) the nature of the services performed must be specified in the request for fees in order to allow the reviewing court to determine that the services performed were legal rather than clerical; (5) as with attorney time, the amount of time expended must be set forth and must be reasonable; and (6) the amount charged must reflect reasonable community standards for charges by that category of personnel.

Absher Constr. Co., 79 Wn. App. at 845.

We review findings of fact for substantial evidence and conclusions of law de novo. *State v. Gatewood*, 163 Wn.2d 534, 539, 182 P.3d 426 (2008). "A conclusion of law erroneously described as a finding of fact is reviewed as a conclusion of law." *Willener v. Sweeting*, 107 Wn.2d

388, 394, 730 P.2d 45 (1986). Likewise, a "finding of fact erroneously described as a conclusion of law is reviewed as a finding of fact." *Id*. Unchallenged findings of fact are treated as verities on appeal. *State v. Homan*, 181 Wn.2d 102, 106, 330 P.3d 182 (2014).

B. THE CHURCH'S APPEAL

1. Hours Reasonably Expended

The Church assigns error to the superior court's FOF 16 and FOF 20, arguing that the superior court erred when it reduced the Church's reasonable hours expended from 1,104.6 hours to 658.5 hours because the superior court did not sufficiently explain its reasoning. We affirm the superior court's reduction of hours.

a. Finding of Fact 16

FOF 16 states:

> The Church's lawyers claimed 1,104.6 hours of attorney time representing the Church in the portion of this case relating to the permit dedication. The vast majority of the time requested is for one lawyer. While this case did proceed over several years, the actual trial was approximately 8 court days. To put this request another way, assuming a 40 hour, 5-day week, 1,104.6 hours approximates: 138 full days; 27.6 weeks; or nearly 6.4 months (still assuming 5-day weeks) for one lawyer exclusively dedicated to this case.

CP at 587-88. The Church argues there is not substantial evidence to support the superior court's "characterization" of the hours spent. Br. of Appellant at ix. Specifically, the Church claims the superior court failed to acknowledge that the hours spent were over the course of seven years, which amounts to "12.99 hours" per month over "85 months." Br. of Appellant at ix. Additionally, the Church questions whether FOF 16 should be reviewed as a legal conclusion.

The first sentence of FOF 16 states a fact—that the Church's attorneys claimed 1,104.6 hours of work relating to the permit dedication. The superior court reviewed declarations from the

Church's attorneys regarding hours spent, which included an itemized invoice of services rendered that totaled 1,104.6 hours. The second sentence, that the vast majority of time requested is for one lawyer, is also supported by the Church's own documentation and in the Church's brief.

As to the Church's assignment of error to the final two sentences of FOF 16, the superior court *does* acknowledge that the case "proceed[ed] over several years"; therefore, the court's "characterization" of hours spent is not inaccurate and is supported by substantial evidence. CP at 587. The Church appears to contest the superior court's breakdown of time spent into hours, weeks, and days, but provides no argument as to why the breakdown is erroneous. Again, the superior court merely states a fact. Because FOF 16 merely recites facts, we do not review FOF 16 as a legal conclusion. Therefore, the superior court did not err when it entered FOF 16.

b. Finding of Fact 20

FOF 20 states:

> Attorney hours claimed and allowed for various phases of the litigation are as follows:
>
> | Phase of Litigation | Hours claimed | Hours awarded |
> |---|---|---|
> | Pretrial | 453.7 | 285.0 |
> | Trial | 76.5 | 76.5 |
> | Post-trial | 67.2 | 25.0 |
> | Court of Appeals | 244.3 | 102.0 |
> | Supreme Court | 101.3 | 40.0 |
> | Remand | 104.1 | 90.0 |
> | Post-judgment | 57.5 | 40.0 |

CP at 589. The Church raises seven issues with FOF 20: it claims (1) FOF 20 should be reviewed as a legal conclusion; (2) the superior court erred in "rejecting Church's substantiated, reasonable lodestar rates"; (3) the superior court erred in denying a multiplier; (4) the superior court erred in reducing hours expended and the fee award; (5) the superior court improperly speculated on allocation of work; (6) the superior court erred when it did not "show[] its work"; and (7) the superior court erred "in not explaining its fee reductions." Br. of Appellant at xii (capitalization omitted). The Church does not argue, however, that FOF 20 is not supported substantial evidence.

To the extent the Church assigns error to FOF 20 based on the superior court's reduction of the reasonable hourly rate and denial of a multiplier, those issues will be discussed in the analysis below. Because FOF 20 is a breakdown of hours spent and it does not articulate legal principles, we do not review FOF 20 as a legal conclusion.

The Church characterizes the superior court's hour reduction as a "40% reduction from the actual hours billed." Br. of Appellant at 34. The Church cites to *Stanger v. China Elec. Motor, Inc.*, where the Ninth Circuit Court of Appeals held the district court did not adequately explain a 30% reduction of compensable hours. 812 F.3d 734, 739 (9th Cir. 2016). In *Stanger*, the district court "noted one or two considerations that *might* have supported its decision [but] failed to explain how it weighed those considerations when calculating the final award." *Id.* (emphasis added).

Here, while a more thorough explanation of the hours awarded is generally desired, it is clear from the record that the superior court did more than note one or two considerations that "might" have supported its decision—the court here addressed outright that it believed many hours were not reasonably expended. Furthermore, while litigation has extended over several years, the record shows that throughout that time, the Church pursued various unsuccessful claims. Courts

must discount "wasteful or duplicative hours" or time spent on "unsuccessful theories or claims." *Mahler*, 135 Wn.2d at 434.

During the March 19 hearing, the superior court adopted the Church's category breakdown of the phases of litigation and divided the 1,104.6 hours requested into seven phases. The record shows that the superior court considered each phase and made selective reductions. For instance, in the "Supreme Court" phase, the Church requested 101.3 hours, but the superior court awarded only 40 hours, which is approximately a 60% reduction. CP at 589. However, in other phases, the superior court either did not deduct hours or deducted relatively few. For example, the superior court allowed all hours claimed for the "Trial" phase and deducted only 14 hours (or 13%) in the "Remand" phase. CP at 589. While, again, the superior might have been more thorough in its explanations, the record shows the superior court considered each phase and made a deliberate decision as to the number of hours it reduced; the court did not wholesale reduce hours arbitrarily or apply blanket percentage cuts. The superior court even stated, "It wasn't in any way arbitrary" with the hope that the parties would "have some understanding as to what the Court was doing and its basis for it." VRP (Mar. 19, 2021) at 14. The record shows that the superior court considered 1,104.6 hours spent on a single issue, even with an eight-day trial and even over the course of several years, to be unreasonable.

The Church additionally argues that the superior court "erred *if* it disregarded the Church's PRA fee segregation." Br. of Appellant at 48 (emphasis added). The Church asserts that it is impossible to know if the superior court truly disregarded the PRA fee segregation because the superior court failed to provide a "reasoned explanation" that it did not. Br. of Appellant at 49.

With regard to the PRA fee segregation, the superior court stated in FOF 18, "The Church's request of 1,104.6 hours is exclusive of hours and expenses for claims associated with the Public Records Act." CP at 588. The superior court's finding demonstrates that it properly considered the PRA fee segregation and still believed not all of the 1,104.6 hours claimed by the Church were reasonably expended. FOF 18 is a verity on appeal as the Church does not challenge FOF 18 nor does it point to any evidence in the record that the superior court improperly disregarded the PRA fee segregation.

The record provides sufficient insight into the superior court's exercise of discretion. Reviewing courts give deference to the lower courts in fee award decisions. *Boeing Co.*, 108 Wn.2d at 65. Because the superior court has articulated some reasoning that provides insight into its exercise of discretion in reducing the number of hours reasonably expended, the superior court did not manifestly abuse its discretion.

2. "Blended" Rate

The Church argues that the superior court erred when it used the "blended" hourly rate of $385.03 as the reasonable hourly fee in its lodestar calculation. Br. of Appellant at 33. The Church alleges that the superior court did not clearly explain that Sanders' normal rate is $395 per hour, and because Sanders spent the vast majority of the time working on the case, the imposition of the $385.03 rate was actually a fee reduction for most of the work performed. Additionally, the Church asserts the superior court impermissibly speculated as to how other law firms should have staffed the Church's case because the superior court stated, "[M]any hours were 'time that could have been done by legal staff or associate attorneys at far lower rates.'" Br. of Appellant at 36. We disagree.

An attorney's usual hourly rate is not conclusively reasonable, and other factors, such as skill, case complexity, and amount of potential recovery, may affect a court's determination of the reasonable rate. *Bowers*, 100 Wn.2d at 597. Moreover, even though the City did not object to Sanders' hourly rate, the superior court is not obligated to adopt Sanders' billing records. *See Nordstrom, Inc.*, 107 Wn.2d at 744.

As part of its challenge to the hourly rate, the Church assigns error to FOF 19. FOF 19 states:

> Of the hours claimed for attorney services this court finds 658.5 hours were reasonably expended at a blended hourly rate of $385.03 for a total reasonable attorney fee of $253,543.66. "Blended" meaning combining the relative contributions of lawyers providing services at various hourly rates. See, for example, the much lower hourly rates for attorneys Lake, [Seth] Goodstein and McCarthy who also worked on this matter for Petitioner. A multiple of 1.5 requested by the Church should be denied. First, the allowed blended rate of $385.03/hour is somewhat high for this case. While Petitioner's lawyers did good work, the case was not complicated factually nor did the case present novel legal issues. In addition, many hours for which compensation is being awarded is for time that could have been done by legal staff and/or associate attorneys at far lower rates of compensation. Other than the legal assistant claim of $5,887.50 by the lawyer's client's representative, Pastor Kuehn, no other staff time was requested. The court finds not all the time claimed was reasonably spent.

CP at 588. The Church raises several issues with FOF 19, including asserting that the superior court erred in rejecting the Church's "substantiated, reasonable lodestar rates," erred in its actual rate reduction, erred when it failed to adequately explain the rate reduction, and that FOF 19 should be reviewed as a legal conclusion. Br. of Appellant at x (capitalization omitted).

The superior court's statement, "A multiple of 1.5 requested by the Church should be denied," could be construed as a legal conclusion. CP at 588. To the extent that it is a legal conclusion, we review it de novo. The superior court's denial of a multiplier, along with the

accompanying legal principles pertaining to multipliers, is addressed in subsection 4 below. The remaining statements within FOF 19 are comprised of facts and reviewed for substantial evidence.

Here, the Church requested a rate of $395 for Sanders for 1,026.7 hours of work, $295 for Lake for 44 hours, $200 for Seth Goodstein for 33 hours, and $280[6] for McCarthy for 0.9 hours. In its findings of fact, the superior court acknowledged that Sanders' normal billing rate is $395 per hour. But the superior court explained that it combined "the relative contributions of lawyers providing services at various hourly rates. See, for example, the much lower hourly rates of Lake, [Seth] Goodstein and McCarthy." CP at 588. Lake, an attorney with nearly 40 years of experience, and an owner and managing attorney of Goodstein, bills $100 less per hour than Sanders. Seth Goodstein, who bills at just over half of what Sanders bills, has over 10 years of experience and is licensed in both Washington and Florida. The superior court stated in its FOF 4 that "the blended hourly rate of $385.03 is reasonable based on the three lawyers' experience and expertise for the community in which they practice." CP at 586. The Church did not assign error to FOF 4. Unchallenged findings of fact are treated as verities on appeal. *Homan*, 181 Wn.2d at 106.

The record shows that the superior court landed on $385.03 per hour based on the declarations of Sanders, Lake, and Seth Goodstein, and the fact that Sanders billed the vast majority of hours. In acknowledging Sanders' time, the superior court allowed the "somewhat high" rate of $385.03 even though "the case was not complicated factually nor did [it] present novel legal issues." CP at 588. $385.03 is only a 3% discount of Sanders' normal rate. Furthermore, while the superior court questioned whether or not work might have been done by

[6] McCarthy's rate is listed as $280/hour, as noted in footnote 2 above, despite the fact that the Church's briefing lists his rate at $200/hour.

associate attorneys at a lower rate, this comment speaks to consideration of the level of skill and expertise needed in the litigation. *See Bowers*, 100 Wn.2d at 597.

While typically courts should calculate the reasonable rate for each attorney, Sanders was functionally the sole attorney on this case given that he performed the "vast majority of the work." Here, it is clear that the superior court considered the attorneys' experience and the community in which they practiced. The superior court found the rate too high because some of the legal work did not require the expertise reflected in Sanders' $395 per hour rate. "[A] trial court has the inherent knowledge and experience to evaluate the reasonableness of an hourly rate." *State v. Numrich*, 197 Wn.2d 1, 31, 480 P.3d 376 (2021); *accord Brown v. State Farm Fire & Cas. Co.*, 66 Wn. App. 273, 283, 831 P.2d 1122 (1992) ("The court . . . is itself an expert on the question of the value of legal services, and may consider its own knowledge and experience concerning reasonable and proper fees, and may form an independent judgment either with or without the aid of testimony of witnesses as to value" (quoting STUART M. SPEISER, ATTORNEY'S FEES § 18:14 at 478 (1973)). Therefore, the superior court did not manifestly abuse its discretion when it applied a blended hourly rate of $385.03.

The Church also assigns error to COL 5, which states, "Judgment for reasonable attorney fees in the amount of $253,543.66 should be entered against the City of Tacoma." CP at 589. However, this conclusion is supported by the superior court's findings relating to the reasonable number of hours expended and the reasonable hourly rate in FOF 19 and FOF 20.

Additionally, the Church argues that the superior court erred in its fee award because "damages award[ed] in [a] civil right[s] case are not determinative of [an] attorney fee award."

Br. of Appellant at 44. The Church describes in detail courts that have upheld attorney fee awards despite smaller damage awards.

Here, the superior court allowed an attorney fee award of $253,543.66 when the damages award was only $8,640. A court may consider the potential recovery in an award of attorney fees, but it is not determinative. *See Bowers*, 100 Wn.2d at 597. There is nothing in the record—and importantly, the Church does not identify anything in the record—to suggest that the superior court improperly considered the Church's $8,640 damages award in its determination of the attorney fee award.

3. Legal Assistant Fees

The Church argues that the superior court erred in denying "paralegal" or legal assistant fees to the Church for Kuehn's services throughout the litigation. Br. of Appellant at 50. Specifically, the Church assigns error to FOF 17 and COL 3.

FOF 17 states:

> In addition to this time, the Church's lawyers asserted work done by the Church's representative (an additional 196.25 hours) should be compensated as "legal assistant" fees.

CP at 588. FOF 17 includes a footnote, which states, "Counsel's claimed legal assistant is Petitioner's Pastor, Terence Kuehn. Pastor Kuehn was not and is not an employee of Petitioner's counsel's law firm, Goodstein Law Group." CP at 588.

COL 3 states, "The Church's request for reimbursement of 'legal assistant' fees for time claimed by the Church's representative is denied." CP at 589. The Church asserts that Kuehn's services meet the standard for recovery of non-lawyer personnel fees as articulated in *Absher Constr. Co*. We disagree.

The Church's challenge to FOF 17 is that it should be reviewed as a conclusion of law, and whether, as a matter of law, a legal assistant must be an employee at the same firm as the supervising attorney in order to qualify for fees. FOF 17 states facts—that the Church asserted Kuehn should be compensated as a "legal assistant" and that Kuehn is not a Goodstein employee. Therefore, we review FOF 17 as a finding of fact.

The Church does not assert that FOF 17 is not supported by substantial evidence. Indeed, neither Kuehn nor Sanders declare that Kuehn was a Goodstein employee, so it is accurate for the superior court to state that Kuehn was not and is not an employee of Goodstein. Furthermore, the Church's assertion that it should recover for Kuehn's work as a legal assistant is evidenced in the record by its submission of Kuehn's "Case Net Hour Breakdown." CP at 300. Accordingly, FOF 17 is supported by substantial evidence.

The Church seeks to recover $5,887 for 196.25 hours spent by Kuehn as a legal assistant. The Church states: "Mr. Kuehn has formal paralegal training, specific real estate training and critical knowledge of the issues, worked under the supervision of attorney Sanders, and his time records are detailed and set forth in the application. Entries which may not meet the legal assistant standard were deleted." Br. of Appellant at 51.

Both Sanders and Kuehn submitted declarations in support of the fee award for Kuehn's services. Sanders certified that Kuehn "rendered services as a legal assistant to [Goodstein] under [his] supervision." CP at 392. Kuehn declared that he is "a trained paralegal [who] completed the required course and received a certificate of completion from UPS Law School in the late 1980's," and he has worked with "attorneys Douglas Hales and William Stoddard as a paralegal." CP at

297, 298. Kuehn also attached to his declaration a detailed "Case Net Hour Breakdown" of his time spent. CP at 300.

While Kuehn may have been supervised by Sanders, the record is clear that Kuehn was not employed by the Goodstein law firm as a legal assistant. Kuehn was a representative of the Church, the law firm's client. Moreover, the record does not show that the superior court denied legal assistant fees *because* Kuehn was not an employee of Goodstein. And the record is not clear that Keuhn is qualified as a paralegal or legal assistant. While Kuehn completed a paralegal "course" at UPS Law School for which he received a "certificate of completion," he did so over 30 years ago. CP at 297. Further, while Kuehn stated that he worked with two attorneys, the record does not show when he worked for those attorneys, or for how long. Indeed, Kuehn stated in his declaration that he spent his career as a real estate broker, not a paralegal. More importantly, even taking Kuehn's paralegal qualifications at face value, his "Case Net Hour Breakdown" does not demonstrate that his time spent for which fees are requested was entirely legal in nature or that it was reasonable. For example, in many instances, Kuehn "billed" time for emails he sent to and received from Goodstein. There is no distinction between his receipt of and reply to emails as a "legal assistant" versus as a representative for the Church, Goodstein's client. As the City aptly put, "Kuehn was the plaintiff and [communicated with] his attorney about the facts on his lawsuit." Br. of Resp't at 53. Thus, the *Absher* factors are not met, and the superior court did not abuse its discretion in denying legal assistant fees related to work performed by Kuehn.

4. Multiplier

The Church argues that the superior court erred in denying the Church's requested multiplier. The Church asserts that the superior court failed to recognize the "civil rights nature"

of the claim, the "high risk of non-payment," and erred when it gave no "detailed explanation" for its denial of the multiplier. Br. of Appellant at 34. We disagree.

a. Legal Principles

There is a strong presumption that the lodestar represents a reasonable fee. *Chuong Van Pham*, 159 Wn.2d at 542. "[T]he lodestar analysis already contemplates a reasonable attorney rate based upon category of attorney, type of work performed, and other factors." *Deep Water Brewing, LLC v. Fairway Res., Ltd.*, 170 Wn. App. 1, 10, 282 P.3d 146 (2012). Therefore, any adjustments to the lodestar are "both discretionary and rare." *Id.*; *accord Gosney v. Fireman's Fund Ins.*, 3 Wn. App. 2d 828, 887, 419 P.3d 447, *review denied*, 191 Wn.2d 1017 (2018) ("Adjustments to the lodestar are reserved for rare occasions."), *Chambers v. Whirlpool Corp.*, 980 F.3d 645, 665 (9th Cir. 2020) ("[A] multiplier is warranted only in 'rare and exceptional circumstances.'" (quoting *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 546-52, 130 S. Ct. 1662, 176 L. Ed. 2d 494 (2010)).

Multipliers may be appropriate in contingency fee cases or for exceptionally good work. *Bowers*, 100 Wn.2d at 598. "'The contingency adjustment is designed solely to compensate for the risk that no fee would be recovered.'" *Travis v. Wash. Horse Breeders Ass'n*, 111 Wn.2d 396, 411, 759 P.2d 418 (1988) (quoting *Travis v. Wash. Horse Breeders Ass'n*, 47 Wn. App. 361, 369, 734 P.2d 956 (1987)). Accordingly, it applies when "there is no fee agreement that assures the attorney of fees regardless of the outcome of the case." *Bowers*, 100 Wn.2d at 599. Additionally, adjustments to reflect the quality of work are extremely limited because "in virtually every case the quality of work will be reflected in the reasonable hourly rate." *Id.*

b. Denial of Multiplier

The Church assigns error to COL 4. COL 4 states, "The Church's request for a lodestar multiplier is denied." CP at 589. Here, the Church had an hourly fee agreement with Goodstein in which the Church agreed to pay the listed hourly rates for Sanders and other Goodstein attorneys and staff. The Church and Goodstein never had a contingency fee agreement. In its briefing, the Church states, "The amount at issue was small so a contingency based on a percentage of the recovery was not viable." Br. of Appellant at 19. Regardless, this is not a contingency fee agreement case.

The Church cites to several cases where a multiplier was upheld due to the high risk of non-payment. However, each of those cases involved a contingency fee agreement. *See D'Emanuele v. Montgomery Ward & Co.*, 904 F.2d 1379, 1387 (9th Cir. 1990) ("D'Emanuele's fee agreement with attorney Guziak was a 'risky' contingent fee arrangement."); *Fadhl v. City & County of San Francisco*, 859 F.2d 649, 650 (9th Cir. 1988) ("Fadhl would have faced severe difficulties in obtaining an attorney without a contingency fee agreement that held out the possibility of substantial enhancement over the ordinary hourly rate."); *Clark v. City of Los Angeles*, 803 F.2d 987, 991 (9th Cir. 1986) ("[T]he district court exercised its discretion to increase the fee because of the contingent nature of the fee arrangement with the plaintiffs.").

Here, Goodstein and the Church contracted for Goodstein to be paid on an hourly basis. Goodstein and the Church did not have a contingency fee agreement. While Goodstein took on the risk of non-payment when it decided to continue its representation of the Church even though the Church stopped paying its attorney fees owed for work performed, it had grounds to pursue payment from the Church based on their attorney fee agreement, regardless of the case's outcome.

See Bowers, 100 Wn.2d at 599. This would not have been the case in a contingency fee arrangement, which is what the contingency adjustment is designed to compensate. *Travis*, 111 Wn.2d at 411.

The Church devotes considerable briefing to the "civil rights nature" of the case at issue in support of its contention that a multiplier is warranted. The Church states, "'[T]he possibility of a multiplier works to encourage civil rights attorneys to accept difficult cases'" because "'the lodestar figure [may] not adequately account for the high-risk nature of a case.'" Br. of Appellant at 28 (quoting *Chuong Van Pham*, 159 Wn.2d at 542). However, the cases that the Church cites to are, again, contingency fee cases. *See, e.g.*, *Chuong Van Pham*, 159 Wn.2d at 541 (plaintiffs sought lodestar adjustment based on contingent nature of their case); *Fisher Properties, Inc. v. Arden-Mayfair, Inc.*, 115 Wn.2d 364, 377, 798 P.2d 799 (1990) (affirming the trial court's award of attorney fees without an inflation adjustment because the case was not public interest litigation); *Martinez v. City of Tacoma*, 81 Wn. App. 228, 232, 914 P.2d 86 (contingent fee arrangement), *review denied*, 130 Wn.2d 1010 (1996); *Fadhl*, 859 F.2d at 651 (contingency fee enhancement).

The superior court stated, "A multiple of 1.5 requested by the Church should be denied. First, the allowed blended rate of $385.03/hour is somewhat high for this case. While Petitioner's lawyers did good work, the case was not complicated factually nor did the case present novel legal issues." CP at 588. Though brief in its explanation, it is clear that the superior court considered the multiplier. It was not a summary denial as argued by the Church. The superior court contemplated that the allowed lodestar rate was already high based on the nature of the case; therefore, a multiplier was not appropriate. A reviewing court only overturns fee awards, including the application of multipliers, for manifest abuse. *Hall v. Bolger*, 768 F.2d 1148, 1150 (9th Cir.

1985). Because there was an hourly fee agreement and the superior court articulated the reason for its decision, the superior court did not abuse its discretion in denying the request for a multiplier.

5. Remedy

The Church requests that this court independently review the record and make its own findings as to the Church's fee award. The Church cites to *Lobdell v. Sugar 'N Spice, Inc.*, 33 Wn. App. 881, 658 P.2d 1267, *review denied*, 99 Wn.2d 1016 (1983), and *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 829 P.2d 1099 (1992), in support of its claim that appellate courts may conduct such an independent review.

The issue in *Lobdell* was whether a statute applied to a particular factual situation, and a circumstance where the trial court's finding failed to support its conclusion. 33 Wn. App. at 892-93. In *Bryant*, the trial court had failed to enter any finding on the issue on appeal, and the Supreme Court stated, "[T]he appellate court could not exercise any degree of deference to a trial court's finding, *as no such finding even existed*. *In such situations,* instead of remanding a matter to the trial court for a factual finding, an appellate court may independently review evidence consisting of written documents and make the required findings." 119 Wn.2d at 222 (emphasis added). Neither circumstance applies here because the superior court entered findings and conclusions. Therefore, as a reviewing court, we decline the Church's request to independently determine the amount of attorney fees. *See Chuong Van Pham*, 159 Wn.2d at 540 ("The issue before us is not whether we would have awarded a different amount, but whether the trial court abused its discretion.").

C. THE CITY'S APPEAL

The City appeals the superior court's determination of hours reasonably spent. The City claims the superior court failed to provide sufficient explanation of its determination and claims the Church failed to prove the compensability of the hours it seeks. Within its appeal, the City challenges the superior court's FOF 18-20 and COL 5, and it argues that remand is required on the matter of hours spent. Because the superior court did not abuse its discretion when it determined the hours reasonably expended, the superior court did not err in either its entry of FOF 18-20 or COL 5.

1. Finding of Fact 18

FOF 18 states, "The Church's request of 1,104.6 hours is exclusive of hours and expenses for claims associated with the Public Records Act." CP at 588. The City argues that FOF 18 is not adequately supported by the record and that neither the superior court nor this court can "distinguish the tasks completed by the Church's counsel that related to the LUPA/64.40 RCW cause of action from the tasks completed by the Church's counsel related to the PRA cause of action or the Church's various unsuccessful causes of action and claims." Br. of Resp't at 4-5. The City further asserts that the Church has not met its burden of proving its fees, and accordingly, the superior court erred in its finding.

Here, with Sanders' declaration in support of the Church's attorney fee request, the Church submitted an itemized invoice of services rendered over the course of the litigation. Sanders declared that the invoice had been edited to "reflect services rendered" and the "[removed] costs associated with the PRA claim . . . are highlighted in yellow." CP at 190. The invoice contains numerous highlighted items. It is true that in some of the line items, Goodstein's description of its

attorney work is relatively general. However, in many others, work on the PRA claim is distinguished by descriptors such as, "Research on brief explanation requirement of PRA" and "Finalized PRA summary judgment, declaration, order and attachments." CP at 228. Such descriptions generally allow a reviewing court to identify the PRA-related work. *See Hensley v. Eckerhart*, 461 U.S. 424, 437 n.12, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983) ("We recognize that there is no certain method of determining when claims are 'related' or 'unrelated.' Plaintiff's counsel, of course, is not required to record in great detail how each minute of his time was expended. But at least counsel should identify the general subject matter of his time expenditures."). Accordingly, substantial evidence supports FOF 18 insofar as it is possible to distinguish between the time Goodstein spent on the PRA claim and the time spent on the LUPA/chapter 64.40 RCW claim sufficiently to determine that the 1,104.6 hours is exclusive of hours and expenses for claims associated with the Public Records Act. Therefore, the superior court did not err in its entry of FOF 18.

2. Finding of Fact 19

The City challenges FOF 19 in part. The City argues the superior court erred because "[i]t is unclear from the record below which of the 1,104.6 hours claimed by the Church were among the 658.5 hours deemed reasonably expended by the trial court." Br. of Resp't at 5.

The City asserts the superior court "did not offer any substantive articulation of its analysis regarding which of the Church's claimed hours and tasks were actually included in this lodestar award." Br. of Resp't at 1. The City appears to suggest that the superior court should go line by line through over 40 pages of invoice, in which attorneys billed in six-minute increments, to allocate the reasonable hours spent over several years of litigation. However, the superior court

"need not attempt to portray the discretionary analyses that leads to their numerical conclusions as elaborate mathematical equations" so long as there is insight into its exercise of discretion. *Cunningham v. County of Los Angeles*, 879 F.2d 481, 485 (9th Cir. 1988), *cert. denied*, 493 U.S. 1035 (1990); *accord Taliesen Corp.*, 135 Wn. App. at 143 ("But the findings needed for meaningful review do not ordinarily require such details as an explicit hour-by-hour analysis of each lawyer's time sheets.").

The superior court's determination of hours reasonably expended and the reasons for its determination are discussed above. For the reasons listed in the above, the superior court did not abuse its discretion when it determined that 658.5 hours of the 1,104.6 hours were reasonably expended. Accordingly, the superior court did not err in its entry of FOF 19.

3. Finding of Fact 20

The City also challenges FOF 20, arguing that the superior court erred "when it awarded the Church any portion of the hours allegedly spent at the various phases of this litigation" because the "Church did not meet its burden in establishing the compensability of these hours claimed and the trial court did not provide sufficient explanation of its analysis and justification of the hours awarded." Br. of Resp't at 6. The City does not argue that FOF 20 is not supported by substantial evidence. The issues raised by the City are addressed above. For the reasons stated above, the superior court did not err in its entry of FOF 20.

4. Conclusion of Law 5

COL 5 states, "Judgment for reasonable attorney fees in the amount of $253,543.66 should be entered against the City of Tacoma." CP at 589. The City argues that the "analysis behind the number of hours that factored into this lodestar award is not sufficiently documented in the record."

Br. of Resp't at 7. Again, as discussed in the above, while additional detail may have been desired, the record is clear that the superior court exercised discretion and provided reasons for its decision in FOF 3-4 and FOF 16-19. Therefore, the superior court did not abuse its discretion.

ATTORNEY FEES ON APPEAL

Both the Church and the City request attorney fees on appeal pursuant to RAP 18.1 and RCW 64.40.020(2).

RAP 18.1 provides a party the "right to recover reasonable attorney fees or expenses on review" before this court, so long as the party requests the fees and "applicable law" grants the right to recover. RAP 18.1(a). RCW 64.40.020(2) provides, "The prevailing party in an action brought pursuant to this chapter may be entitled to reasonable costs and attorney's fees."

As discussed above, neither party prevailed. Therefore, we do not award attorney fees to either party on this appeal.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Lee, J.

We concur:

Cruser, A.C.J.

Price, J.

Filed
Washington State
Court of Appeals
Division Two

April 28, 2023

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

CHURCH OF THE DIVINE EARTH, Appellant/Cross-Respondent, v. CITY OF TACOMA, Respondent/Cross-Appellant.	No. 55737-1-II ORDER DENYING MOTION FOR RECONSIDERATION

Appellant/Cross-Respondent, Church of the Divine Earth, filed a motion for reconsideration of this court's unpublished opinion filed on January 24, 2023. After consideration, it is hereby

ORDERED that the motion for reconsideration is denied.

FOR THE COURT: Jj. Lee, Cruser, Price

LEE, JUDGE

APPENDIX 5

GOODSTEIN LAW GROUP PLLC

May 30, 2023 - 4:12 PM

Filing Petition for Review

Transmittal Information

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Appellate Court Case Number:	Case Initiation
Appellate Court Case Title:	Church of the Divine Earth, Appellant/Cross Respondent v. City of Tacoma, Respondent/Cross Appellant (557371)

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