NO. 96613-3

SUPREME COURT
OF THE STATE OF WASHINGTON

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

THE CHURCH OF THE DIVINE EARTH

Petitioner,

v.

CITY OF TACOMA,

Respondent.

PETITION FOR REVIEW BY WASHINGTON STATE SUPREME COURT

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I. IDENTITY OF PETITIONER

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

II. CITATION TO COURT OF APPEALS DECISION

The Church of the Divine Earth v. City of Tacoma, ___Wn. App.___, 426 P.3d 268 (Div. II, September 5, 2018), Motion for Reconsideration denied November 6, 2018 (attached, App. 5)

III. ISSUES PRESENTED FOR REVIEW

A. Is a prevailing party collaterally estopped by an interlineation of an immaterial evidentiary fact induced by fraud of the opposing party on a judgment rendered on the written record?

B. Is an unconstitutional condition imposed by the City on a building permit arbitrary?

C. Does the City have lawful authority to impose an unconstitutional condition on a building permit?

D. Does the City know or should know an unconstitutional condition on a building permit is without lawful authority or unlawful?

E. Is a timely amendment to add a claim that a building permit unconstitutional condition warrants relief under 42 USC 1983 properly denied as "futile"?

F. For the purpose of RCW 64.40.010 (4) and (6), is the "final decision" of the City one which is subject to an administrative appeal rather than the result of that appeal?

G. Where the City silently withholds requested notes and a video tape because of human error, is the search "adequate" to justify withholding relief under the PRA?

H. Is a Court of Appeals award of reasonable attorney fees improper when the trial court lawfully exercised its discretion to deny such an award?

IV. STATEMENT OF THE CASE

The Church originally filed this action in the Pierce County Superior Court to obtain Land Use Petition Act (LUPA) and RCW 64.40 relief against the City of Tacoma for improperly conditioning a building permit. The permit was for a replacement[1] single family residential parsonage conditioned upon an uncompensated dedication of thirty feet of Church land adjacent to "B" street to make the adjacent right of way "uniform" with property to the south. P 46, 50[2]

While it is true the right of way was not "uniform," that condition arose over a century before at the time of original platting and had no nexus to constructing the proposed parsonage. Moreover, the City had no plan to widen the existing road in any event. RP 782, P142 p.25

After filing its Land Use Petition the Church amended its complaint to assert a claim against the City for violating the Public Records Act, RCW 42.56. A year after the City was served with the request, and finalized its response, the Church discovered the City had

[1] The parsonage was simply a replacement for 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

[2] Exhibits introduced by plaintiff Church begin with "P," those from the City begin with "A." P135-43 are deposition excerpts received into evidence.

silently withheld two documents: notes prepared by Shanta Frantz regarding initial contacts with the Church; and a video tape of the property taken by City personnel. Eventually the City claimed same were not disclosed because failure of communication between City employees and lack of knowledge on the part of one employee how to print the notes for the PRA response. Nevertheless, the City claimed it was not liable under the PRA because its search was "adequate" and because the documents were not produced by "mistake."

Pastor Terry Kuehn, on behalf of the Church, filed a request that the City's Director of Planning and Development (Peter Huffman) waive the proposed permit conditions P57, as suggested by a City employee. Only the Director could grant a waiver under the Tacoma Municipal Code (TMC). Pastor Kuehn followed that up with eleven supplements e.g. P58 p.6, P66 p.3, P77 p.5 citing chapter and verse of various land use decisions of the United States Supreme Court and state appellate courts holding a permit condition is an invalid "unconstitutional condition" if the government fails to carry its burden to prove the proposed condition was necessary to correct a problem caused by the proposed development (nexus) and the condition is proportional. Neither the staff nor Director Huffman bothered to read what the Church had submitted. P141 p.19 Of course, here there was no nexus because the right of way had been

established more than a century earlier. A permit to construct a parsonage to which the Church was otherwise entitled simply invited an attempt by the City to extort[3] land from the Church.

On March 7, 2014 a City staffer, without authority to change the condition P190p.14 suggested by memo that the exaction be reduced to eight feet. P75 However, Director Huffman never saw the memo prior to his "final decision" of April 28 which denied all waiver requests P141p.72 and informed the Church it had two weeks to file an administrative appeal or be bound by his final decision. P84, P141p.31 The Church timely filed an administrative appeal.

The matter proceeded on administrative appeal to the City's Hearing Examiner who invited cross motions for summary judgment, which the parties filed. The City's original motion stated it needed eight feet[4] to make the right of way uniform (which of course it wouldn't.) Simultaneously, the City sent Pastor Kuehn a legal description for thirty feet, not eight. Pastor Kuehn responded to Deputy City Attorney Jeff Capell asking the legal be corrected to conform to the motion. P97, P100 Capell responded by email that it was "my error" P100 and filed an

[3] Without an essential nexus "the building restriction is not a valid regulation of land use but 'an out and out plan of extortion.'" *Nollan v. California Coastal Commission*, 483 U.S. 825, 837, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987)

[4] Or equivalent square feet, i.e. 82.4 feet length x 8 feet width = 659.2 sq. ft.; 82.4 feet length x 30 feet width = 2,472 sq. ft; CP 142, Huffman Dec. of 7/3/14 P96

Amended Motion and Amended Declaration of Peter Huffman P98, **App. 2,** emphatically correcting the prior motion and declaration to call for thirty feet or its area equivalent to make the right of way uniform.[5]

The Hearing Examiner granted the City's motion P105, CP 9, 17, **App.1** (p.9), and imposed the thirty-foot exaction by express reference to the July 9, 2015 Amended Declaration of Huffman. P98, **App. 2** This is all in writing and cannot be disputed.

Later, during CR 30(b)(6) discovery depositions, Mr. Huffman and Mr. Capell each testified under oath *but for* the Church's successful LUPA appeal they would have enforced the thirty-foot exaction against the Church. RP 582

The Church filed a LUPA appeal from the Hearing Examiner decision. CP 1 This appeal was ultimately determined on the administrative record by Judge Elizbeth Martin on February 19, 2014. **App. 3**, CP 275 Prior to that the City filed a responsive brief CP 230 and, on the day before oral argument, filed a further response. CP 272 Both of the City's briefs referenced the decision as thirty feet or the square foot equivalent, including the one filed the day before the oral hearing which relied on the amended Huffman declaration. CP 272

[5] "…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)."

As the record shows, oral argument was going against the deputy city attorney: there was no nexus between a 30 foot right of way dedication requirement (which the City had no plan to buildout in any event RP 782, P142 p.25) to make the right of way uniform and building a parsonage. Capell responded three times on the record RP 14,26,32 to the court's questions that the exaction "is only 8 feet now *now*" RP 14, arguing the smaller width was "proportional." The Church's attorney, without any prior notice or even hint the City would misrepresent the Hearing Examiner decision, stated it was indeed thirty feet; however, whatever the size, there was no nexus between a century old right of way and building a parsonage so as to justify the dedication condition. RP 15 The court agreed, found the exaction condition was an unconstitutional condition and consequent due process violation; however, crossed out the reference to thirty feet and interlineated eight. RP 32, **App. 3** The Church won the LUPA appeal and therefore was not an "aggrieved party" entitled to appeal. RAP 3.1.

Nevertheless, your undersigned called Jeff Capell and asked him to agree to correct the eight feet interlineation (based on his oral argument) to thirty for the sake of accuracy. He returned the call on a speaker phone with Margaret Elofson present. Your undersigned asked Mr. Capell to agree to correct the order. He said it did not affect the result of the LUPA

hearing.[6] Ms. Elofson was then overheard telling him to be silent. She said put it in writing, which was done in the form of a letter to City Attorney (now city manager) Elizabeth Pauli who belatedly responded she was familiar with the facts and refused to correct anything. CP 2469-75

After the Church filed its appeal to the Hearing Examiner but before the Examiner ruled, the City dropped all conditions except the thirty-foot road dedication, i.e. it dropped the sidewalk condition that it had imposed contrary to TMC requirements. **App. 2**, CP 126

About a year before trial the Church moved to amend its complaint to add a 42 USC 1983 cause of action for the Due Process unconstitutional condition violation previously found by Judge Martin. However, Judge Martin denied the timely motion for this amendment based on the City claim it was a "futile" claim for a regulatory taking. CP 573, 639 But obviously it wasn't to anyone who actually read the proposed amendment **App. 4** and supporting brief.[7] Similarly, Judge Martin denied a timely

[6] It *should not* have mattered based on Judge Martin's ruling that the width of the unconstitutional condition was not determinative as *any* width lacked nexus between widening the right of way and building a parsonage, nor did the City intend to widen the street in any event.

[7] "However the claims in *Williamson* and those here are very different. *Williamson* involved a regulatory taking claim that the government regulation had gone "too far." But here, the claim is that a condition on the development violated the doctrine of unconstitutional conditions, i. e. the government demanded the applicant give up his constitutional right to his land to get a permit even though the condition had no nexus to the proposed development. Unlike *Williamson*, the remedy here is not compensation for a taking but invalidation…*Nollan's* doctrine of unconstitutional conditions is a due process concept…" CP 578

motion to add a claim for sidewalks because the City had withdrawn the claim prior the Hearing Examiner decision in August 2014 but after the "final decision" of Director Huffman on April 27, 2014 subject to administrative appeal. CP 573 This was because she believed only the Hearing Examiner decision could be the subject of an RCW 64.40 damage claim and there was no right to damages for anything which occurred before that.

The matter proceeded to trial on the 64.40 and PRA claim in May 2017. The trial judge (now Judge Vicky Hogan) concluded the eight-foot interlineation in the LUPA judgment collaterally estopped the Church and the Court RP 297, 345, and precluded the Church from even offering evidence the Hearing Examiner decision called for thirty feet, not eight, entering an order in limine to that effect. CP 1927 During the trial the *City* claimed the "initial" thirty-foot decision was excessive, unreasonable and mistaken RP 772, exclusively defending an eight-foot condition while expressly *rejecting* the actual 30-foot condition. Director Huffman explained his written Letter Decision of April 2014 affirming the thirty-foot condition as a mistake and testified he was misled by a female staffer into signing his Amended Declaration of July 9 calling for thirty feet to make the right of way uniform because he signed it without reading it. RP 569-70, **App. 2** However, the record shows the amended declaration was

prepared and presented for signature by Jeff Capell, who is neither a staffer nor a female. RP 644 Moreover, neither Huffman nor Capell ever withdrew it in the administrative appeal. RP 645

As to the PRA claim, the City essentially claimed it had not produced the two silently withheld items by "mistake" RP 1180 and that it acted in good faith and preformed an "adequate" search even though the City knew the electronic file containing the video could only be searched by date and the City didn't search by date. The record shows many City employees had actually viewed the video, knew it existed and the date it was taken. RP 807, 808, 829, 998, 999, P143 p.8, 13, 14, 17, 20, 21 Nevertheless, the Decision affirmed dismissal of the PRA claim, concluding the use of the wrong search terms and negligent failure to print the notes didn't mean the search was "inadequate."

The Court of Appeals affirmed all around in a partially published opinion. That Decision expressly held:

> Because the TMC provides for an administrative appeals process, the city's permit decision was not final until that administrative appeals process concluded. Accordingly, the hearing examiner's decision was the final decision by the City that is actionable under RCW 64.40.020.

Decision para. 65

However, if the "final decision" of the City is the Hearing Examiner's decision of August 19, 2014, what was that decision and why?

That is the most fundamental fact upon which this petition is premised; however, the 32 page Decision never discloses the nature of that decision much less its rationale.[8] Simply put, the "final decision" of the City is inconsistent with nearly everything in the Decision's treatment of the real property exaction, RCW 64.40, the Order in Limine, and the relevant Findings and Conclusions because the City sought to defend a mythical eight foot exaction while expressly rejecting the actual final decision of the City which was thirty feet.

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.

[8] Isn't it sad the Court of Appeals would rather cover up than callout dishonesty in the courtroom?

A. This Court should grant review of the Decision affirming the Church is collaterally estopped to deny the City and its Hearing Examiner imposed an eight rather than thirty feet right of way exaction as a condition to obtaining a single family residential building permit.

The Decision para. 28-34 affirms Judge Martin's interlineation of eight feet while striking 30 feet is binding on the Church under the doctrine of collateral estoppel. This, the Decision says, justifies an order in limine barring the Church from offering evidence or argument that the exaction was 30 feet rather than 8.

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

First, the extent of the exaction is not an "issue" but a fact. The Decision para. 31 acknowledges collateral estoppel pertains to *issues* but then applies it to a fact contrary to *Schibel v. Eyman*, 189 Wn.2d 93, 98, 399 P.3d 1129 (2017) The "issue" in the LUPA appeal was whether a dedication condition on a permit to make a previously established road right of way uniform is a due process violation. Judge Martin concluded size didn't matter[9] because whatever size (1) it bore no nexus to the development and (2) the City had no plans to broaden the road in any event. Collateral estoppel does not apply to every superfluous and

[9] That is exactly what Ms. Elofson argued to the Court of Appeals: "Well, the truth is eight versus 30 would not have mattered in terms of the constitutional violation." Appellant's Supplemental Brief with Excerpt of Verbatim Report of Proceedings p. 19

unnecessary factual recitation in an order such as whether the exaction was 8 feet or 30. Id. at 99 Certainly if 8 feet is unconstitutional 30 feet would be no less so. The LUPA appeal was based entirely on the written record and, like a summary judgment order, factual findings are superfluous and will not be considered on appeal. *Dodd v. Gregory*, 34 Wn. App. 638, 641, 663 P.2d 161 (1983) The LUPA order needed no factual recitations to make it valid.

Second, the doctrine bars relitigation only of substantial issues: it does not bar relitigation of tangential or inconsequential issues or evidentiary facts collateral to the original claim. *Barr v. Day*, 124 Wn.2d 318, 325, 879 P.2d 912 (1994)

Third, since the Church won the LUPA appeal it was not an "aggrieved party" and could not appeal. RAP 3.1 Inability to appeal forecloses issue preclusion. 1 Restatement (Second) of Judgments 273, Sec. 28 (1) and cmt. a (1982), *Olympic Tug & Barge v. Revenue*, 163 Wn. App. 298, 303-4, 259 P.3d 338 (2011), *State Farm Mut. Auto. Ins. Co. v. Avery*, 114 Wn. App. 299, 309, 57 P.3d 300 (2002), Philip A. Trautman, Claim and Issue Preclusion in Civil Litigation in Washington, 60 Wash. L. Rev. 805, 827(1985) Thus the Decision is contrary to published Court of Appeals precedent, further justifying review.

Fourth, there is no preclusion when it was not foreseeable that issue would arise in subsequent litigation. Restatement, Section 28(5) Collateral estoppel does not apply when it would be an injustice. *Schibel*, 189 Wn.2d at 99. But the Decision misapplies the injustice prong contrary to case law which requires the party to be precluded have an "unencumbered, full and fair opportunity to litigate his claim." *Rains v. State*, 100 Wn.2d 660, 666, 674 P.2d 165 (1983). The Church was denied fair (or any) notice of the eight-foot claim and was affirmatively mislead by the City's briefs.

Fifth, the conduct of the Church's adversary, the Deputy City Attorney, bars preclusion against the Church. Restatement (Second), Sec. 28(5) The Deputy City Attorney literally pulled this lie out of his hat at oral argument, misrepresenting the actual decision. The Church was denied an adequate opportunity to obtain a full and fair adjudication of the size of the dedication in that action. This violates the injustice prong of the doctrine as held in *Rains.*[10]

[10] The Decision states the Church had a full and fair opportunity to litigate the issue regarding the size of the right-of-way dedication at the LUPA appeal "and chose not to do so." Para. 33 No, the Church had no notice of the claim, no opportunity to brief it or otherwise prepare. With proper notice it could have briefed it to the court in advance. It told the court nevertheless the exaction was 30 feet. CP 1295 What does the Decision expect the Church to do under such circumstances?

B. This court should grant review of the Decision because it improperly affirms the trial court's conclusion an unconstitutional condition on a permit is not arbitrary.

RCW 64.40.020 imposes liability when the City's action is (1) arbitrary or capricious, (2) the City knew or should have known that the act exceeded its legal authority, or (3) the City knew or should have known that its act was unlawful. Decision para.42 The Decision's treatment of each prong justifies review by the court.

The Decision para. 43-45 posits imposition of an unconstitutional condition is not arbitrary. It claims an arbitrary decision is unconstitutional but not the other way around, citing *Mission Springs, Inc. v. City of Spokane*, 134 Wn.2d 947, 962, 954 P.2d 250 (1998). This claim is inconsistent with *Mission Springs* which concluded the City's disregard of the Developer's legal entitlements was arbitrary, justifying relief under RCW 64.40.020. It is also at odds with *Dore v. Kinnear*, 79 Wn.2d 755, 765, 489 P.2d 898 (1971) which holds it is "*inherently* arbitrary" [italics in original] to act in derogation of one's constitutional rights.

Even though a City may have legislative authority to act in the field, that action must comply with relevant legal standards or is arbitrary. *Hayes v. Seattle*, 131 Wn.2d 706, 716-17, 934 P.2d 1179 (1997) Here the Director may condition a project but only on a finding "the problem to be remedied by the condition arises, in whole or significant part, from the

development under consideration, the condition is reasonable, and is for a legitimate public purpose." TMC 15.05.040B(9) There was no such finding. P84

The Decision para. 44 concluded City employees did not act arbitrarily because the trial court found they conducted a *Nollan* analysis, without regard to what they did or what they concluded or why; but neglects to note according to testimony the so called "*Nollan* analysis" approved an eight foot exaction but disallowed a thirty foot exaction—which the City actually imposed on the Church through the Hearing Examiner decision. See **App. 1 and 2.**

The Decision holds the final decision of the City for 64.40 purposes was the hearing examiner decision. That decision incorporates the Amended Declaration of Huffman (**App. 2**) which states the rational for a thirty-foot, not 8 foot, dedication as:

> …the City is now merely requiring Appellant to dedicate an area of approximately 2,472 sq. feet at the front of the Subject property in order for the Subject Property and surrounding area to have a uniform right-of-way ("ROW") width for street frontage…

On its face this is not a dedication to mitigate anything caused by construction of a single-family residence, it is to alter a right of way established a century before without regard to any present improvement to land bank. It disregards the requirements of *Nollan* in a willful and unreasoning manner. Moreover, it conflicts with *Burton v. Clark County*,

91 Wn. App. 505, 526-9, 958 P.2d 343 (1998) that a condition for a right of way dedication is invalid when there is no plan to build it out in a reasonable time, which the City admitted. The "final decision" of the City of 30 feet is documented. It cannot be justified, and even the city disowned it in the LUPA appeal and at trial. What could be more arbitrary? Review is justified because the Decision departed from established law that unreasoning departure from lawful requirements is arbitrary under RCW 64.40.020.

C. Review should be granted because the city has no lawful authority to unconstitutionally condition a building permit.

The Decision's holding that *only* an ultra vires act may be in excess of "lawful authority" also merits review. Decision para. 47 Apparently the Decision claims a City has the "lawful authority" to violate a person's constitutional rights if it has general legislative or executive authority to act on the subject matter, citing *Ferlin v. Chuckanut Cmty. Forst Park Dist.*, 1 Wn. App. 2d 102, 108, 404 P.3d 90 (2017). However, that opinion defines ultra-vires, not "lawful authority". The Decision makes the *unprecedented* claim that an agency has the "lawful authority" to act in a manner inconsistent with the constitution from which all its powers are derived. Precedent supports the view that "lawful authority"

requires a search for "identifiable sources of law" to support the action. See e.g. *State v. Lee*, 82 Wn. App. 298, 311, 917 P.2d 159 (1996).

Moreover, there is a notable line of cases that find a municipality acting inconsistently with the constitution *is* ultra-vires. See e.g. *State Ex Rel O'Connell v. Pub. Util Dist.*, 79 Wn.2d 237, 239, 484 P.2d 393, 395 (1971) (gifts in violation of Const. Art. 8, Sec. 7 ultra-vires); *Biggers v. Bainbridg*e, 162 Wn.2d 683, 699, 169 P.3d 14 (2007) (shoreline moratorium in violation of Const. Art. 17 Sec. 1 ultra-vires) Would not violation of any other constitutional prohibition such as Due Process be ultra-vires as well?

Review should be granted because the decision is without precedent, is contrary to precedent, and raises an issue of public importance.

D. Review should be granted because the City is charged as a matter of law with knowledge of the law.

Review is also justified because the Decision disregarded precedent holding the City knew or should have known the law. Published precedent of this court and the court of appeals holds 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]") Review could clarify this issue raises a question of law, not fact. How could anyone with knowledge of the applicable law conclude the City was not acting unlawfully when it conditioned a permit on granting the City additional right of way to alter a lot line platted more than a century before having nothing to do with the proposed development? See Amended Huffman Declaration, **App.2**

E. Denial of an amendment to add a claim that a land use unconstitutional condition violation warrants relief under 42 USC 1983 is not "futile" and justifies review

About a year before the trial date the Church moved to amend its complaint to assert a claim under 42 USC 1983 for violating its due process rights by unconstitutionally conditioning its building permit with a right of way exaction. No prejudice to the City was claimed. Contrary to CR 15 which states "leave [to amend] shall be freely given when justice so requires"[11] the trial court denied the amendment as "futile", and the Decision para. 61-63 affirmed. That this amendment alleges violation of a

[11] "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 should, as the rules require, be 'freely given.'" (quoting *Foman v. Davis*, 371 U.S. 178, 182, 9 L.Ed.2d222, 83 S.Ct. 227 (1962*)) Walla 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)

federal right under color of law is beyond dispute (if one reads it.) **App. 4** The Decision para 61-63 is inconsistent with unconstitutional condition cases from the US Supreme Court, this court and the Washington Court of Appeals, justifying review.[12]

LUPA appeals, RCW 64.40 and 42 USC 1983 claims are routinely joined. See e.g. *Lutheran Day Care v. Snohomish County*, 119 Wn.2d 91, 829 P.2d 746 (1992), *Mission Springs v. Spokane*, 134 Wn.2d 947, 954 P.2d 250 (1998), *Sintra v. Seattle*, 119 Wn.2d 1, 829 P.2d 765 (1992), 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.

The Decision para. 61 states: "The Church filed a motion to amend its complaint to add a 42 USC 1983 claim based on its claim that the LUPA court found that the City's action constituted an unconstitutional taking."

[12]*Koontz v. River Water Management District*, 133 S. Ct. 2586, 2594-96, 186 L. Ed. 697 (2013); *Lingle v. Chevron USA, Inc.*, 544 U.S. 528, 125 S. Ct. 2074, 2087, 161 L. Ed. 2d 876 (2005); *Dolan v. Tigard*, 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed. 2d 304 (1994); *Nollan* v. *California Coastal Commission*, 483 U.S. 825, 107 S. Ct. 3141, 97 L.Ed. 2d 677 (1987); *Burton v. Clark County*, 91 Wn. App. 505, 526-9, 958 P.2d 343 (1998); *Unlimited v. Kitsap County*, 50 Wn. App. 723, 750 P.2d 651 (1988), rev. denied, 111 Wn.2d at 634

This is simply false. The proposed amendment, CP 502-3, **Appendix 4**, speaks for itself. The 1983 civil rights claim was for a Due Process violation, not a taking. The Order Granting LUPA Appeal, **Appendix 3,** P116, states "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…" (italics added) Note the order does *not* say there was a taking but rather a violation of the Takings *Clause*. The reference to the Takings *Clause* is based on *Koontz*, 133 S. Ct. at 2594-96 which points out the Taking *Clause* has a just compensation requirement and it is an unconstitutional due process violation to force a property owner to give up his right to just compensation to get a land use permit.

> 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 voluntarily 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 government benefit is a constitutionally cognizable injury." Id. 2596 *Lingle*, 125 S. Ct. at 2087 (2005) (distinguishes a *Nollan/Dolan* due process violation from a taking.)

The Church argued this is *not* a regulatory taking claim (see note 7) subject to any ripeness requirement and "*Nollan's* doctrine of unconstitutional conditions is as due process concept, and due process claims are ripe immediately. *Mission Springs*, 134 Wn.2d at 964-5" CP 578

Any alleged constitutional violation under color of law would appear to state the elements of a 1983 claim. See e.g. *Lutheran Day Care* 119 Wn.2d at 117 The proposed amendment alleged exactly that. Your undersigned submits the proper procedure is to "freely" allow the amendment and *then* litigate the claim on the merits, CR 15 (a), but the Church was denied its day in court due to an error of law. Review is merited as this Decision which affirms denial of an amendment to assert one's 14th Amendment rights is contrary to authority at every level of the court system and raises a significant issue under the U.S. Constitution.

F. Review should be granted to determine if the "final decision" or "act" referenced in RCW 64.40.010 (4) and (6) is the final act of the agency potentially subject to administrative review, or the result of that review.

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, **App. 2** before the Hearing Examiner made his decision on August 19. **App. 1** 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).

The Decision, papa. 64-6, agreed with the City, holding the Hearing Examiner decision was the final decision for the purpose of 64.40, citing *Durland v. San Juan County*, 182 Wn.2d 55, 64-65, 340 P.3d 191 (2014). This in itself justifies review because *Durland* determined the Hearing Examiner decision was the "land use decision" subject to a LUPA appeal and had nothing to do with RCW 64.40.010.

RCW 64.40.010 (4) provides damages may be awarded "between the time a cause of action arises and the time a holder of an interest" is granted relief. Therefor the issue worthy of review is whether the cause of action arises when the agency "acts" with or without the prospect of administrative review or whether it only "acts" upon the termination of that review. The Decision conflicts with *Smoke v. Seattle*, 132 Wn.2d 214, 222, 937 P.2d 186 (1997) and *Birnbaum v. Pierce County*, 167 Wn. App. 728, 732, 274 P.3d 1070 (2012).

The Decision concluded the cause of action only arose upon the Hearing Examiner decision of August 19 rather than the Director's Letter Decision of

April 28. However according to the TMC the *Director's decision* is *final* and appealable to the hearing examiner. TMC 13.05.040 A[13] Only the Director has authority to act upon interpretation, enforcement, administration or waiver of the City's land use regulatory codes. TMC 13.05.030 A[14] 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[15] No building permit shall issue without the Director's approval. TMC 13.05.090[16]

RCW 64.40.010 defines "Damages"[17] and "Act"[18]. RCW 64.40.030 provides any action under this chapter shall be commenced within 30 days of the exhaustion of administrative remedies[19] (which the Church did.)

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[13] "The Director's decision shall be final; provided…an appeal may be taken to the Hearing Examiner…"

[14] "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…"

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

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

[17] (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…[1717]

[18] (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….[18]

[19] "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.

According to *Birnbaum*, 167 Wn. App. at 732 "a cause of action arises only when there is a 'act' 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" potentially 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 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 v. Redmond*, 107 Wn.2d 621, 634, 733 P.2d 182 (1987) 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.

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 in conflict with *Birnbaun* and *Smoke* which justifies review.

G. This Court should grant review of the Decision to affirm dismissal of the Church's claim under the Public Records Act (PRA) for the one-year silent withholding of requested notes and video tape based on human error which Decision equated to an "adequate" search.

Even assuming the Decision is correct that the City had a reasonable system to respond to public record requests, the question arises whether the City is exempt from liability when its employees fail to properly execute their duties under that system. This merits review as the Decision conflicts with *Neighborhood Alliance v. Spokane County,* 172 Wn.2d 702, 720, 261 P.3d 119 (2011); *Nissen v. Pierce County*, 183 Wn.2d 863, 357 P.3d 45, 54 (2015); *PAWS v. UW,* 125 Wn.2d 243, 269, 884 P.2d 592 (1994) and other authority.

Neighborhood Alliance, 172 Wn.2d at 720, sets the standard for an adequate search:

> "…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 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." (italics added)

According to City testimony the adequacy of its search method "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 "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,* 125 Wn.2d at 269

Video

According to City testimony (1) City personnel had actual knowledge of the filming, (2) filming immediately prior to review panel meetings was routine, (3) those films were routinely filed in the same electronic location by date, (4) other City documents released to the Church after City review disclosed the existence of the film; (5) absolutely no effort was made to retrieve the video even though it was the subject of several depositions of City employees.

Failure to discover and produce this video was due to human error. This was a failure to follow obvious leads and is inconsistent with *Neighborhood Alliance.* The Decision seemed to confuse good faith with adequacy. Good faith is no defense to a PRA action but may affect the penalty. *Zink v. Mesa*, 140 Wash. App. 328, 340, 166 P.3d 738 (2004)

The electronic file which held videos could not be searched by any term except date, but the City did not search this file by date. The City admits it was a "mistake." RP 1238 (Elofson: "she made a mistake") How can this be adequate?

The City's approach to this, as well as the Decision which affirmed, was to hold the search was adequate because the search method (assuming each employee did their job to locate documents they knew or thought existed) was adequate, notwithstanding some employees didn't perform as required to properly execute the system. That approach prefers form over substance and violates *Neighborhood Alliance.*

The Decision para. 74 seems to follow the approach described above as well because "the search included requests to all relevant employees to search their records, servers and emails." But what if the employee made a mistake and didn't do it? Is the search still adequate? If so, this blows a hole in the PRA through which every agency could fit. Holding agencies accountable for their mistakes is what the PRA is all about, not that it is an "insurance" policy; although the possibility of human error is the usual reason to get an insurance policy. This also justifies review as an issue of substantial public interest and should be determined by the Supreme Court because it must construe its own case, *Neighborhood.*

Notes

According to the City's CR 30(b)(6) witness, the notes were not produced because of "miscommunication between staff." P143 p. 22 These notes were specifically identified to the coordinator. RP 881

Coordinator Heather Croston testified she thought she printed them out but due to operator error she did not. RP 1006 After she discovered what she did wrong she testified "I know now" how to do it. RP 1006-8 This was not an adequate search because this employee had not been adequately trained how to execute this aspect of her duties. Once again, the method might be reasonable, but the execution was not.

The Court is requested to review Decision affirmance of dismissal of the PRA claim by characterizing this as an "adequate search" inconsistent with *Neighborhood Alliance.*

H. Review should be granted because the Decision awarded the City reasonable attorney fees which the trial court in a proper exercise of its discretion denied.

RCW 64.40.020 (2) provides the prevailing party in a 64.40 action "may" be awarded reasonable attorney fees. Here the trial court exercised its discretion not to make such an award. CP 2282 See *Coy v. City of Duvall*, 174 Wn. App. 272, 280, 298 P.3d 134 (2013), rev. denied 178 Wn.2d 1007 If the City was not entitled to such an award at the trial court, why on appeal? This is an issue of public importance, apparently of first impression, also justifying review.

VI. CONCLUSION

Review should be granted.

DATED this 5th day of December 2018.

GOODSTEIN LAW GROUP PLLC

s/Richard B. Sanders
Richard B. Sanders, WSBA #2813
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 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 5th day of December, 2018, at Tacoma, Washington.

s/Deena Pinckney
Deena Pinckney

APPENDIX 1

OFFICE OF THE HEARING EXAMINER

CITY OF TACOMA

THE CHURCH OF THE DIVINE EARTH, Appellant, v. CITY OF TACOMA, Respondent.	FILE NO. HEX 2014-016 (CMB2013-40000209742) ORDER ON MOTION FOR SUMMARY JUDGMENT

THIS CASE involves an appeal by The Church of the Divine Earth (Appellant) of dedication and improvement requirements imposed by the City of Tacoma (Respondent) in connection with a building permit for a residential structure at 6605 East B Street within the City.

In this proceeding the Appellant is represented by Terry Kuehn who is a spokesman for The Church of the Divine Earth but who is not a lawyer. The Respondent is represented by Jeff Capell, Deputy City Attorney.

Procedure:

Tacoma, through its Director of Planning and Development Services, affirmed the City's requirements for dedication and improvements in connection with the proposed construction at 6605 East B Street by letter on April 28, 2014. Appellant filed a Notice of

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Appeal on May 12, 2014, asserting that the requirements violated its rights under the Constitution of Washington State.

After a telephone conference, a Prehearing Order was issued on May 23, 2014, providing, among other things, for the submission of dispositive motions by July 3, 2014. Pursuant thereto, Appellant filed a Motion for Summary Judgment on June 9, 2014.

The Respondent filed a response on July 3, 2014, amended on July 9, 2014. Appellant replied to Tacoma's Response on July 14, 2014. The City replied further on July 16, 2014. Appellant filed an additional reply on July 21, 2014.

Along with the motions and briefs, the following exhibits were submitted. With the pleadings and briefs, these items constitute the record considered on the Motion for Summary Judgment:

1. Tacoma Planning and Development Services Review Panel Minutes, Wednesday, September 25, 2013, regarding File No: CMB2013-40000209742, containing requirements for development on new one story single-family dwelling at 6605 East B Street, Parcel No. 5860000030.

2. Tacoma Planning and Development Services's letter decision of April 28, 2014.

3. Affidavit of Steven Weinman, dated June 9, 2014.

4. Assessor's Parcel Summary for 6605 E, B Street.

5. Corporations Division's registration data for Church of Divine Earth.

6. Declaration of Peter Huffman in Support of City's Response to Motion, dated July 3, 2014.

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7. WSBA Lawyer Search showing no listing for Terry Kuehn.

8. Aerial photograph and drawing of lots in subject neighborhood.

9. Amended Declaration of Peter Huffman in Support of City's Response to Motion, dated July 9, 2014.

10. Tacoma Public Works Department Memorandum (Kuntz to Kammerzell), dated March 5, 2014 regarding improvements specific to East B street, dated March 5, 2014.

11. Tacoma Planning and Development Services's letter (Craig Kuntz), to Terry Kuehn, dated March 7, 2014.

12. Various scenarios put forward by City, through July 9, 2014, for development at 6605 East B Street. (Exhibit E to Appellant's Amended Reply dated July 14, 2014)

Uncontested Facts:

1. The Appellant's proposal is to build a single-family residence at 6605 East B Street in Tacoma. The property is owned by The Church of the Divine Earth. The proposed residence is to be used as a "parsonage" for the church and not to conduct religious services.

2. The Appellant church describes itself as "a non-denominational solemn spiritualistic earth-centered Baltic-influenced Pagan church," and as "a religion that focuses on the sanctity of trees, rivers, stones and other outpourings of the gods and the veneration of ancestors." It is a non-profit corporation registered with the State of Washington.

3. On September 20, 2013, the Appellant, through its representative Terry Kuehn, applied for a single-family residential building permit for 6605 East B Street. Mr. Kuehn is not an attorney. In its review, the City proposed a number of permit conditions pursuant to

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Tacoma Municipal Code (TMC) Section 2.19, including dedication of right-of-way and construction of frontage improvements.

4. Discussions ensued, eventuating in the issuance of a letter decision dated April 28, 2014, from the City. In it, the City declined to issue the permit without the imposition of the conditions, stating that it was treating the development application like that for "any similarly situated residential real property."

5. In its Notice of Appeal, dated May 12, 2014, the Appellant church asserted that the requirements the City seeks to impose will "subject the church to substantial burdens in having to destroy and decimate the sanctity of an unspecified amount of lineal footage of its coveted and sacred tree line."

6. There are no sidewalks, curbs and gutters, or wedge curbing along East B Street on either side of the street from East 64th Street to within approximately 100 feet of the southwest corner of East 72nd Street (approximately 2,600 feet). This street segment includes the frontage at 6605 East B Street, as well as the frontage area at 6453 East B Street.

7. In connection with the subject building proposal, the City initially specified the following conditions of approval (Review Panel Minutes, September 25, 2013, File No. CMB2013 - 40000209742):

a) Dedication of approximately 30 feet right-of-way along East B Street to provide consistent right-of-way widths along East B Street.

b) Construction of cement sidewalk along B Street and East 66th Street abutting the site.

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c) An asphalt wedge curb constructed along East B Street and East 66th Street abutting the site.

d) Removal and replacement of any damage or cuts to the City right-of-way abutting the site. Restoration of paving abutting the site must also accommodate required asphalt curbing.

e) Driveway access from East 66th Street, not East B Street.

f) Submittal of street plans by a licensed professional civil engineer for review and approval following the City's work order process.

8. The residence at 6453 East B Street, approximately 480 feet north of 6605 East B Street, was permitted and constructed during the time period in which Appellant submitted its building permit application, without requirements like those required of Appellant

9. By letter dated March 7, 2014, the City denied Appellant's request for waiver of all required frontage improvements, but amended the right-of-way dedication required to that stated in the Public Works Memo of March 5, 2014. The latter reads (in part):

> "After consideration of the applicant's proposed and existing improvements, the City will allow a modification of the City of Tacoma Design Manual Standards for off-site improvements on East B Street. An 8 ft dedication along East B Street would be acceptable. . . . A 5 ft pedestrian pathway adjacent to the roadway would be required within the 8 ft dedication. "

10. Subsequently, the City further revised its requirements for off-site improvements at 6605 East B Street, stating:

> "[T]he City is now merely requiring Appellant to dedicate an area of approximately 2,472 square feet at the front of the Subject Property in order for the Subject Property and surrounding area to have a uniform right-of-way ('ROW') width for street frontage. . . .

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> Appellant will access the Subject Property off of East B Street, as will all City services. . . .Based on a cost assessment of recent property transactions and values in the area, the requested ROW area for dedication is valued at approximately $4,770.96." (Huffman Amended Declaration of July 9, 2014.)

11. Through its Amended Reply to the City's Amended Response to Appellant's Motion for Summary Judgment and Cross Motion, dated July 14, 2014, Appellant declined to accept the City's revised requirements.

Discussion

1. Standing

The City argues that Appellant lacks standing to bring this appeal, citing Ahmad v. Town of Springdale, 178 Wn. App 333 (2013) and Cottinger v. Employment Security Department, 162 Wn. App. 782 (2011) for the proposition that a corporation must be represented in court by an attorney. However, that limitation does not apply in these administrative proceedings, which are governed by the *Rules of Procedure for Hearings, Office of Hearing Examiner, City of Tacoma.* Under Section 2.09(b) of the *Rules*, any authorized person designated as a representative may speak for an association, corporation or other collective entity.

The Examiner takes notice that laymen often speak for groups in matters of this kind at this level. He concludes that Appellant has no problem with standing here.

2. Issues

After reviewing all the pleadings and briefing, the Examiner has concluded that the only issues raised in this case are Constitutional issues. The Appellant principally relies on

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Article I, Section II of the Washington State Constitution which states that "no one shall be molested or disturbed in person, or property, on account of religion." The argument is simply that the proposed requirements for the dedication of property and frontage improvements constitute an unconstitutional molestation or disturbance of religious "property."

Tacoma's proposed imposition of conditions is based on *TMC 2.19.040* which addresses development standards requiring off-site improvements. Appellant argues that the ordinance, as applied to the Church's project, is impermissibly in conflict with the State Constitution and therefore cannot validly be used as the basis for the conditions.

Reference is also made to the allowance of another residence nearby along the same street front without conditions similar to those being proposed for Appellant. This appears to be a form of equal protection argument, also constitutional in nature.

Appellant contends that the Tacoma's building permit system represents "a system of individual exemptions" which it may not refuse to apply to cases of religious hardship without compelling reason, relying principally on First Covenant Church v. City of Seattle, 114 Wn.2d, 392 (1990) and 120 Wn.2d 203 (1992).

Further, Appellant asserts that the requirement for dedication of property constitutes an unconstitutional taking of private property contrary to the holdings in Nollan v. California Coastal Commission, 483 U. S. 825 (1987) and Dolan v. City of Tigard, 512 U.S. 374 (1994).

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3. Jurisdiction

Administrative tribunals have jurisdiction only over matters expressly granted by legislative authority or necessarily implied. Human Rights Commission v. Cheney School District, 98 Wn.2d 118 (1982); Kaiser Aluminum v. Department of Labor and Industries, 121 Wn.2d 776 (1993). This means that unless authorized by statute or ordinance, a hearing officer may not even apply principals of common law or equity. Chausee v. Snohomish County Council, 38 Wn. App. 630 (1984). *See also,* Skagit Surveyors v. Friends of Skagit County, 135 Wn.2d 542 (1998).

The limitations on administrative jurisdiction apply specifically to deny jurisdiction over matters of substantive constitutional law. Yakima County Clean Air Authority, 85 Wn.2d 255 (1975); Grader v. Lynnwood, 45 Wn. App. 876 (1986).

4. Instant Case

No authority has been cited and the Examiner knows of none which would confer jurisdiction upon him to decide the constitutional issues raised in this case.

On the other hand, no question has been raised concerning whether the City would be acting beyond its authority in imposing the proposed conditions under the governing ordinances.

Therefore, the Examiner concludes that he is without power to decide the issues raised by Appellant. Yet, there is no contest as to whether the City's proposed conditions are consistent with the relevant City legislation. Thus, as to matters over which the Examiner does

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have jurisdiction, there are no issues of material fact and the City is entitled to judgment as a matter of law.

Conclusion:

The Appellant's Motion for Summary Judgment is denied. 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.

The Examiner notes that the issues on which he has declined to rule may be raised before the Superior Court.

DONE this 19th day of August, 2014.

Wick Dufford, Hearing Examiner Pro Tempore

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NOTICE

RECONSIDERATION/APPEAL OF EXAMINER'S DECISION

RECONSIDERATION TO THE OFFICE OF THE HEARING EXAMINER:

Any aggrieved person or entity having standing under the ordinance governing the matter, or as otherwise provided by law, may file a motion with the Office of the Hearing Examiner requesting reconsideration of a decision or recommendation entered by the Examiner. A motion for reconsideration must be in writing and must set forth the alleged errors of procedure, fact, or law and must be filed in the Office of the Hearing Examiner within 14 calendar days of the issuance of the Examiner's decision/recommendation, not counting the day of issuance of the decision/recommendation. If the last day for filing the motion for reconsideration falls on a weekend day or a holiday, the last day for filing shall be the next working day. The requirements set forth herein regarding the time limits for filing of motions for reconsideration and contents of such motions are jurisdictional. Accordingly, motions for reconsideration that are not timely filed with the Office of the Hearing Examiner or do not set forth the alleged errors shall be dismissed by the Examiner. It shall be within the sole discretion of the Examiner to determine whether an opportunity shall be given to other parties for response to a motion for reconsideration. The Examiner, after a review of the matter, shall take such further action as he/she deems appropriate, which may include the issuance of a revised decision/recommendation. (*Tacoma Municipal Code* 1.23.140)

NOTICE

APPEAL TO SUPERIOR COURT OF EXAMINER'S DECISION:

Pursuant to the Official Code of the City of Tacoma, Section 1.23.160, the Hearing Examiner's decision is appealable to the Superior Court for the State of Washington. Any court action to set aside, enjoin, review, or otherwise challenge the decision of the Hearing Examiner shall be commenced within 21 days of the entering of the decision by the Examiner, unless otherwise provided by statute.

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APPENDIX 2

11/21/2014 4250 0054

BEFORE THE HEARING EXAMINER
CITY OF TACOMA

THE CHURCH OF THE DIVINE EARTH, Appellant, v. CITY OF TACOMA, Respondent.	NO. HEX 2014-016 AMENDED DECLARATION OF PETER HUFFMAN IN SUPPORT OF THE CITY OF TACOMA'S RESPONSE TO MOTION FOR SUMMARY JUDGMENT AND CROSS MOTION

I, Peter Huffman, under the laws of the State of Washington and under penalty of perjury, declare and state as follows:

1. I am over the age of 18 and competent to testify in this matter.
2. I am currently employed as the Director of the Planning and Development Services Department of Respondent, City of Tacoma, and I have been employed in that position since January 1, 2013. I have worked for the City of Tacoma for the past 20 years approximately.
3. I have personal knowledge of the proceedings and interaction regarding Appellant's desire to build a parsonage on the real property located at 6605 East B Street in the City of Tacoma (the "Subject Property"). I personally issued the letter decision dated April 28, 2014 (the "Letter Decision") to Appellant's representative, Mr. Terry Kuehn, that is now the subject of this appeal.

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APPENDIX 2

ORIGINAL

Tacoma City Attorney
Civil Division
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Tacoma, WA 98402-37[illegible]
(253) 591-5885 / Fax 591-5[illegible]

4. Subsequent to issuing the Letter Decision, City staff has revised its position regarding this development and the previously required off-site improvements, and 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). This dedication will allow Appellant to proceed with its needed permit applications.
5. Appellant will access the Subject Property off of East B Street, as will all City services. It is important to the City that the ROW in all City streets be uniform.
6. Based on a cost assessment of recent property transactions and values in the area, the requested ROW area for dedication is valued at approximately $4,770.96.
7. Appellant has represented to the City that the Subject Property will be used only for a parsonage and not to conduct religious services. As a result, the City anticipates Appellant only needing a residential building permit and not a conditional use permit for a religious use as is required for churches, synagogues and the like.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed and dated at Tacoma, Washington this 17th day of July, 2014.

PETER HUFFMAN

000091

Tacoma City Attorney
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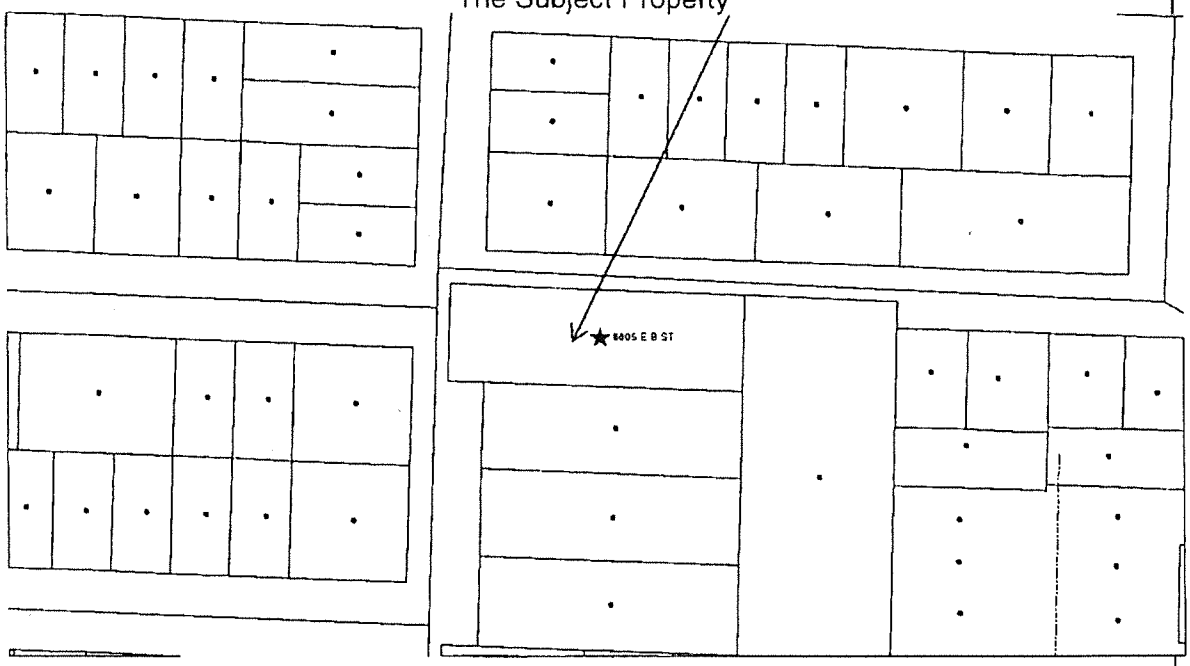
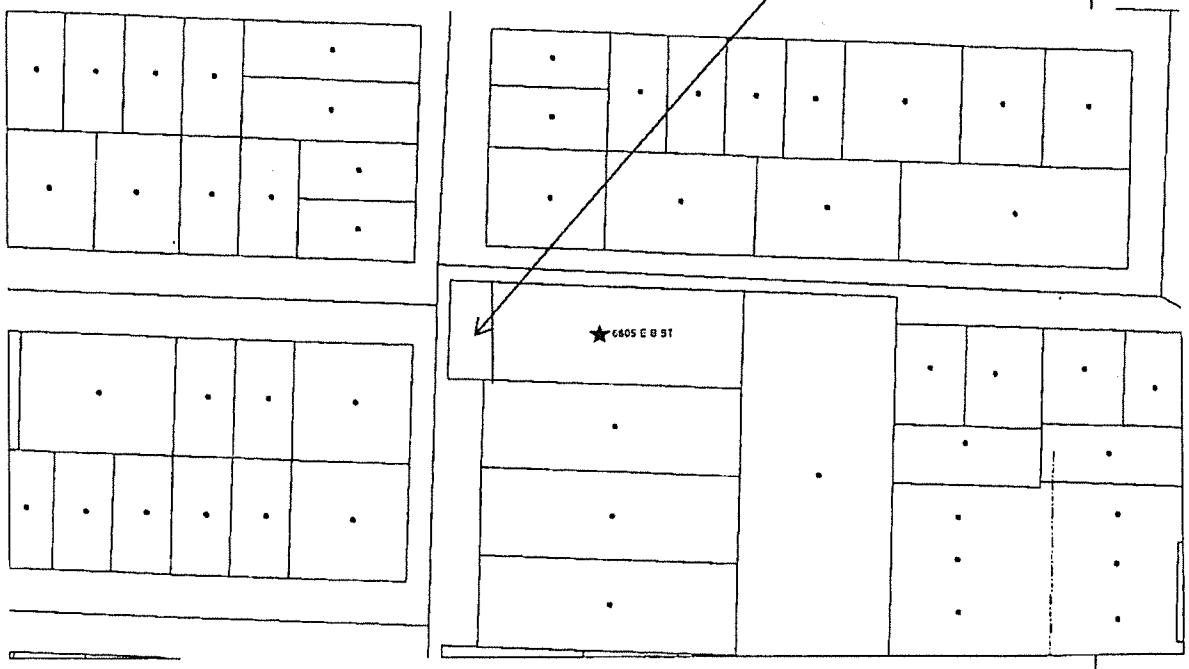
EXHIBIT A
The Subject Property



Area to be dedicated (approximately)



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APPENDIX 3

Hon. Elizabeth Martin
Hearing Date: Thursday, January 19, 2015
Time: 9:00 a.m.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR PIERCE COUNTY

THE CHURCH OF THE DIVINE EARTH Petitioner, vs. CITY OF TACOMA, Respondent.	NO. 14-2-13006-1 ORDER GRANTING LUPA APPEAL

The undersigned judge of the above entitled Court conducted a hearing on the Petitioner's LUPA appeal, considered the administrative record, and the arguments of counsel. Wherefore this Court does now:

ORDER, ADJUDGE, and DECREE as follows:

1. This Court has jurisdiction to consider Petitioner's LUPA appeal;

2. 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 ~~30~~ 8 foot dedication of land to the City as a condition to issuance of a single family residential building permit for property located at 6605 East B Street, Tacoma, Washington and by failing to carry its burden to prove the condition complied with the requirements of *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S. Ct. 3141 (1987) and related authority;

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3. Petitioner's appeal is GRANTED.

4. The decision of the Hearing Examiner is reversed.

5. The City of Tacoma is ordered to process Petitioner's building permit application without imposing the subject dedication condition;

6. The Petitioner is awarded its taxable costs, including those costs incurred in the administrative proceeding and before this Court, in an amount to be determined; and

7. This Court finds that the entry of this judgment as a final judgment pursuant to CR 54 (b) is justified because the LUPA portion of the proceeding has been bifurcated from other pending claims by prior orders of this Court, there is no just reason to delay entry of the judgment, and this Court does now expressly direct entry of the judgment as a final appealable judgment.

Done in Open Court this 19th day of February, 2015.

Judge Elizabeth Martin

FILED
DEPARTMENT 16
IN OPEN COURT
FEB 19 2015
PIERCE COUNTY, Clerk
By DEPUTY

PRESENTED BY:

GOODSTEIN LAW GROUP PLLC

Richard B. Sanders, WSBA # 2813
Attorney for Petitioner

Approved as to form:

CITY OF TACOMA

By:
Jeff Capell, WSBA # 25207
Attorney for Respondent City of Tacoma

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APPENDIX 4

2. On October 22, 2014, the City responded by denying disclosure until November 12, 2014. A copy of same is attached. On the same date, the Church through its attorney requested immediate production of the requested documents, without further response from the City. See attached.

3. The petitioner believes the City's estimate of delay until November 12 is unreasonable and requests the court pursuant to RCW 42.56.550(2) to order the City to show that the delay is reasonable and to award petitioner further relief under the statute including ordering production of the requested documents, awarding all reasonable attorney fees and expenses of litigation as well as statutory penalties in an amount to be determined.

4. The City's delay of full document production until January 8, 2015 was not prompt and violated RCW 42.56.080, .100,.520, and .550.

5. The City refused inspection or did redact documents without providing a brief explanation of how the exemption applies to the record withheld contrary to RCW 42.56.210(3).

6. The Church is entitled to judgment against the City for penalties and reasonable attorney fees and expenses.

K. Civil Rights claim

1. The City of Tacoma acting under color of law, subjected, or caused to be subjected, the Petitioner herein to deprivation of rights under the Federal Constitution and laws by conditioning his request single family residential building permit on the dedication of a 30 foot strip of land to the City without compensation and without nexus to any problem caused by the proposed development.

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APPENDIX 4

2. This constitutional deprivation was done as the City's official act and through its official policy and custom.

3. On February 19, 2015, Judge Elizabeth Martin of the Pierce County Superior Court in this action entered a final judgment finding: "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 for property located at 6605 East B Street, Tacoma, Washington and by failing to carry its burden to prove the condition complied with the requirements of *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S. Ct. 3141 (1987) and related authority..." The Final Judgment is attached.

4. That final judgment has not been appealed by the City and is binding on the City as a matter of law.

5. Petitioner has been damaged by this civil rights violation as shall be proved at the time of trial which includes economic and general damages as well as reasonable attorney fees and costs of litigation.

L. Conclusion and request for relief

Petitioner hereby requests the Court enter the following relief:

1. Grant this appeal.

2. Direct that all land use permits requested by Petitioner issue without being conditioned on issuance of a 30 foot dedication of land to the City.

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APPENDIX 5

Filed
Washington State
Court of Appeals
Division Two

November 6, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

CHURCH OF THE DIVINE EARTH, Appellant, v. CITY OF TACOMA, Respondent.	No. 49854-5-II ORDER DENYING MOTION FOR RECONSIDERATION

Appellant moves for reconsideration of the Court's opinion filed September 5, 2018. Upon consideration, the Court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. LEE, WORSWICK, SUTTON

FOR THE COURT:

Sutton, J.

SUTTON, J.

GOODSTEIN LAW GROUP PLLC

December 05, 2018 - 3:35 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	49854-5
Appellate Court Case Title:	Church of the Divine Earth, Appellant v. City of Tacoma, Respondent
Superior Court Case Number:	14-2-13006-1

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