SUPREME COURT NO. 84115-2

COURT OF APPEALS NO. 62563-2

WILLIAM CONNER and MARILYN CONNER, husband and wife,

Petitioners

v.

CITY OF SEATTLE, a Washington Municipal Corporation,

Respondent.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

This case involves Petitioner Conner's desire to redevelop a parcel of property as he sees fit, untrammeled by the fact that the property is a designated historical landmark, a status that Conner was well aware of the property's landmark status when he purchased the property. Conner alleges his fundamental constitutional right of due process is violated because he cannot tell exactly what he can build on the property just by reading the City's land use regulations; instead, those regulations require that he obtain a certificate of approval for alteration of a landmark from the City's Landmarks Preservation Board. In this matter, the Board's decision to deny the application (and the Hearing Examiner's decision affirming the Board) was not based on "whether the City likes the development or not" (Petition at 1) but on the determination, based on ascertainable, objective criteria, that Conner's specific proposal adversely affected or destroyed protected features of the landmark. This as-applied challenge does not provide the Court with a legitimate basis to fulfill Conner's quest to extinguish the ability of "municipalities across the state of Washington" (*Id.)* to protect sites and improvements of historical, architectural or geographic significance to their citizens.

The Court of Appeal's decision does not conflict with decisions of this Court or the Court of Appeals, and raises no significant public issues. The Petition should be denied.

II. IDENTITY OF RESPONDENT

The City of Seattle asks this Court to deny the Petition for Review of the Court of Appeals' decision terminating review designated in Part III below.

III. COURT OF APPEALS' DECISION

The decision of the Court of Appeals Division I that Petitioner wants reviewed was published on December 21, 2009 and can be found at 2009 WL 4931791.

IV. COUNTER-STATEMENT OF ISSUES PRESENTED FOR REVIEW

In the Introduction section of the Petition, Conner invokes all four grounds for review set forth in RAP 13.4(b). The statement of Issues Presented for Review, however, states only two issues, conflict with Supreme Court and Court of Appeal precedents (the due process issue is inherent in any void-for-vagueness claim, including this one). Thus, Conner has waived any issue under RAP 13.4(b)(4). Conner's statement

of the issues misstates the import of the Court of Appeals decision: it does not hold that land use regulations need not contain standards, nor does it hold that any unconstitutional vagueness in the Landmarks Preservation Ordinance was cured by an *ad hoc* process. If the Court decides to grant the petition it will decide the following questions:

1. Is a land use regulation unconstitutionally vague because a property owner cannot determine exactly what can be built on his property just by reading the regulation?

2. Does an ordinance create an impermissibly vague *ad hoc* approval process for alteration of landmarks by delegating the approval to a board of experts using their expertise according to ascertainable, objective standards tailored for individual landmarks?

3. Is a court required to construe a landmark designation ordinance to favor the owner's interpretation of the ordinance despite the fact that the meaning of the ordinance is clear and unambiguous?

V. COUNTER-STATEMENT OF THE CASE

In West Seattle, there is a large three-story house, built in approximately 1906, in the "Seattle classic box" style. The house is at the top of a gentle rise overlooking Puget Sound, with a sweeping front lawn that includes a gazebo, a pond, and other landscaping features. Approximately one acre in size, the property originally consisted of two lots, bounded on the east by a wooded hillside and on the west by Beach Drive.

In 1981, at the instigation of its then owner, David Satterlee, the exterior of the house and the entire site were designated as an historical landmark by the Landmarks Preservation Board ("Board") pursuant to the Landmarks Preservation Ordinance .[1] The property merited designation because it satisfied two of the designation criteria (now codified at SMC 25.12.350):

> It embodies the distinctive visible characteristics of an architectural style, or period, or of a method of construction;

and

> Because of its prominence of spatial location, contrasts of siting, age, or scale, it is an easily identifiable visual feature of its neighborhood or the City and contributes to the distinctive quality or identity of such neighborhood or the City.

CP 925, Report on Designation. As to the latter criterion, the Report states:

> The property is in significant contrast to the surrounding, rather crowded (albeit atmospheric) area with its long "front yard" extending back and up the slope, climaxed by location of the house near the top of the slope. Much of the design of the grounds dates from the building of the house, ca. 1906.

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[1] A copy of the current version of the Landmarks Preservation Ordinance is attached as Appendix A, as the copy attached to the Petition for review contains about half of the ordinance, omitting those sections related to the certificate of approval process.

Id. On the Board's recommendation, in 1983 the City Council enacted ordinance 111022 designating the property as a landmark and imposing as a control the requirement that a certificate of approval be obtained before any alterations were made to the house, "as well as the entire site." A recital in the ordinance notes that the Board and the owners of property agreed to controls and incentives. CP 323-24.

In 2000, William Conner, then the president of Conner Homes, a residential construction company, saw a development opportunity in the designated property. Conner knew when he purchased it that the house and its grounds were designated as a Seattle landmark. CP 364-365, 368. Nevertheless, he proceeded to short-plat the front lawn into three lots[2] and in 2005 filed an application for a certificate of approval from the City's Landmarks Preservation Board ("Board") to alter the landmark by building three virtually identical contemporary houses on the front lawn, each larger than the landmark house.

An owner of a landmark must apply for a certificate of approval from the Board before making alterations or significant changes to a

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[2] Thus allowing Conner the rhetorical device of calling the front lawn the "neighboring vacant residential lots" in the Petition (at 2).

landmark. SMC 25.12.670. The owner may request that the application be phased, beginning with an application for a certificate of approval for a preliminary design of a project. The preliminary design phase relates only to massing, size, scale and placement. Issues of style, color and materials are addressed at a later phase. CP Tr. 1640.

Conner was permitted to apply for approval of preliminary design; prior to filing the application, on June 15, 2007 Conner's architects took sketches to the Board's Architectural Review Committee (ARC). The ARC is an informal committee, made up of volunteers from the Board's design professionals.[3] It makes no decisions, and applicants are not required to bring their project to it. The ARC exists solely for the purpose of helping applicants and potential applicants for certificates of approval to get proposals for alterations to landmarks to a point where the full Board is likely to approve the alterations. CP Tr. 1771. Conner's architect took preliminary designs to the ARC, where she was advised on several occasions to change the design to make the proposal less intrusive by reducing the mass and scale; design changes were not forthcoming. CP 135. The

[3] The Board is made up of people with expertise in various fields of endeavors that are helpful in understanding issues related to historical preservation. SMC 25.12.270 requires the Board to consist of at least two architects, two historians, a City Planning Commission member, a structural engineer, a realtor or real property manager, and a representative from the field of finance.

application was referred to the full Board, which, after discussing the merits of the proposal at its December 5, 2007 meeting, voted unanimously to deny the application, because the Conner proposal satisfied none of the applicable criteria for granting a certificate of approval. CP 404-407, 410-412, 423-439, 442-451; CP 1554-1555; CP 136-137.

Conner immediately appeals to the Hearing Examiner, who concluded, based on the evidence, that the height, scale and massing of Conner's proposal was incompatible with the landmark, adversely affecting its designated features and destroying the qualities that gave it prominence in the neighborhood.[4] CP 143.

VI. ARGUMENT WHY REVIEW SHOULD NOT BE ACCEPTED

Throughout this case, whether before the Hearing Examiner, the Superior Court judge or the Court of Appeals, and now on petition for review, Conner has consistently included long quotes from city employees to try to show that an owner of a landmark cannot read the Landmarks Preservation Ordinance and know exactly what development on a

[4] The Hearing Examiner's Findings, Conclusions and Decisions is attached as Appendix B.

landmark site is permitted. Conner takes these quotes out of the context in which they were spoken while describing the landmark processes, and morphed them into a claim that the City's position is that property owners have no right to know what can be built on a landmark site until the Landmarks Preservation Board decrees what it will allow. These out-of-context quotes are meant to convince this court that the Court of Appeal's failure to find that the City deprived Conner of his constitutional rights means that an injustice has occurred. It has not. The Court of Appeals correctly determined that Washington case law on vagueness does not require the Landmarks Preservation Ordinance to meet the impossible standards of specificity that Conner demands. The only thing Conner has been deprived of is the ability to destroy the features of Satterlee House that made it worthy of designation almost 30 years ago.

A. The Court of Appeals Decision Does Not Conflict with Decisions of the Supreme Court and the Court of Appeals Interpreting The Due Process Clause of the Constitution.

Conner's assertion that the Court of Appeals decision conflicts with case law of both the Supreme Court and the Court of Appeals is not correct. The Court of Appeals relied on Washington case law for its definition of unconstitutional vagueness and for its application to the case

at hand, and it also appropriately distinguishes the cases on which Conner primarily relies. A claim that a statute or ordinance is unconstitutionally vague as applied is necessarily fact-dependent. This case is extraordinarily dependent on the particular facts involved – the first 18 pages of the Court of Appeals decision is spent laying out the facts and applying the vagueness doctrine to them. On these facts, the decisions that Conner primarily relies on are easily distinguished. A decision is not in conflict with Supreme Court or other Court of Appeals precedent if that precedent is distinguishable.

1. Due Process Does Not Require that an Owner Be Able to Determine Exactly What Can Be Built on a Landmark Property Just by Reading the Landmarks Preservation Ordinance.

The cases Conner primarily relies on for his claim that application of the Landmarks Preservation Ordinance deprives him of due process are *Burien Bark Supply v. King County,* 106 Wn.2d 868, 725 P.2d 994 (1986) and *Anderson v. Issaquah*, 70 Wn. App. 64, 851 P.2d 744 (1993). Both are distinguishable.

In *Burien Bark,* King County zoning officials had issued a Notice of Violation and order to quit using a noisy bark sorter. Previously, County officials had investigated on two occasions and found no zoning violation, and one county employee had even concluded that the sorting

process was a permitted accessory use. At issue was a section of the King County Code that described the purpose of the General Commercial Zone as providing for the location of certain uses, "*including manufacturing and processing in limited degree.*" The trial court held that the italicized words were unconstitutionally vague, and the Supreme Court agreed, because the Code did not include language describing how a process is to be deemed "limited."

In contrast, in deciding whether to grant a certificate of approval for an alteration to a landmark, the Landmarks Preservation Ordinance (at SMC 25.12.750) requires the Board to take into account , *inter alia*, the extent to which the proposed alteration would significantly change the specific features specified in the designating ordinance. The designated features of the Satterlee House property are vividly detailed in the designating documents. In addition, the Board must also apply the relevant standards contained in the Secretary of the Interior's *Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings*, including Standard 9, which requires new work to be "compatible with the massing, size, scale and architectural features to protect the historic integrity of the property and its environment." CP 757; 1555. There is nothing vague about this standard, particularly when it is applied by a

board of experts in the context of the designation criteria for the particular landmark at issue. It is a general standard that becomes specific in the application to a specific proposal to alter a specific landmark : Conner conflates "general" with "vague."

The real problem in *Burien Bark* was that the King County Code contained no development standards for the use, and neither the applicant nor the County had "availed itself of the codified procedure for clarifying ambiguous aspects of the code." 106 Wn.2d at 872-73. In this case, not only does the Board use the standard of the Ordinance and the Secretary of the Interior's Guidelines, the certificate of approval process itself provides every opportunity for clarifying any ambiguity that may exist in the mind of the applicant. The ARC gave Conner very specific, unambiguous advice on how to meet the standards. Conner understood what changes in his proposal needed to be made to get it approved; he just refused to do it.

Conner faults the Court of Appeals for relying on *State ex rel. Standard Mining & Development Corp. v. Auburn*, 82 Wn.2d 321510 P.2d 647 (1973) for its statement that the Ordinance and the Guideline are not rendered vague by the fact that they are to be applied in the context of a given proposal. Conner argues that the case is about imposing conditions

rather than denying an application, and concerns improper delegation of authority, rather than the vagueness doctrine. The first argument poses a distinction without a difference, the second, very little difference. As the Court of Appeal's footnote 49 discusses, cases discussing delegation and vagueness issues are closely related, since they both deal with whether standards in a statute or an ordinance are sufficiently specific.

Conner relies heavily on *Anderson v. City of Issaquah*, 70 Wn. App. 64, 851 P.2d 744 (1993), a case that could just as easily have been brought as a delegation of standards case. The Court of Appeals decision cites *Anderson* in its description of the vagueness doctrine: " The vagueness test does not require a statute to meet impossible standards of specificity." 70 Wn.App. at 75. The Court of Appeals also held that *Anderson* is inapposite, because, unlike the process under the Landmarks Preservation Ordinance, Issaquah's building design requirements as set forth in its municipal code contained a host of subjective criteria with no procedure for clarification, giving neither the applicant nor the development commission a basis for evaluating a given proposal. Slip Opinion at 16.

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2. The Procedure for Granting a Certificate of Approval for Alteration of a Landmark is Not an Impermissibly Vague *Ad Hoc* Process.

Conner repeatedly decries the Landmarks Preservation Ordinance's certificate of approval process as "*ad hoc*," without really defining the term or explaining its constitutional infirmities. Apparently, to Conner it means that the Board unlawfully exercises discretion. Petition for Review at 15. The exercise of discretion, *per se*, is not a constitutional infirmity, and the precedent claimed to be in conflict with the Court of Appeals decision do not stand for that proposition. It is true that *Burien Bark* states: "[t]he code unconstitutionally leaves to the discretion of county official the substance of determining what activities are prohibited." 106 Wn.2d at 871. But the statement cannot be taken out of the context of those county officials having no definitions, standards or other guidance as to what the prohibition against "processing in limited degree" meant. They simply made it up as they went along and they could not even agree among themselves what it meant.

The situation in *Anderson* is perhaps the quintessential example of the vagueness doctrine. There, the development commissioners really did have to make it up as they went along, because the code's criteria for approval used words that are virtually meaningless such as "interesting"

and "harmonious," leaving them nothing but their subjection opinions, which were as vague and undefined as the terms used in the code. The code language simply provided no basis for the applicant or the commissioners to determine whether a proposal met the code requirements. The Court of Appeals correctly distinguished *Anderson*, and correctly determined that the Landmarks Preservation Ordinance and the designating ordinance did not suffer from the same constitutional infirmities.

B. The Decision's Holding that Ordinance 111022 Clearly Designated the Entire Site as a Landmark Does Not Conflict with Supreme Court Precedent.

Conner asserts that Ordinance 111022 designating the Satterlee property is ambiguous, and that the Court of Appeals decision erroneously construed the ordinance in favor of the City rather than Conner, the new owner of the property. Thus, Conner's argument goes, the Court of Appeals is in conflict with the Supreme Court "canon of construction" that zoning ordinances are in derogation of the common law and must be strictly construed in favor of property owners, citing *Sleasman v. Lacey*, 159 Wn.2d 639, 643 n. 4, 151 P.23d 990 (2007). Conner is relying on *dictum* for this claim of conflict: in *Sleasman,* the Court found the ordinance at issue to be unambiguous, but stated in a footnote that if the

ordinance *had* been ambiguous, it had to be interpreted in favor of the property owner "because land-use ordinances must be strictly construed in favor of the landowner," citing *Morin v. Johnson,* 49 Wn.2d 275, 279, 300 P.2d 569 (1956).

Here, using the usual rules of statutory construction to get to the ordinance's plain purpose and intent, the Court of Appeals held that Ordinance 111022 clearly designated the entire site as a landmark. The "canon of construction" appropriate here, if the analogy to zoning ordinances is relevant at all, is stated in *Development Services v. City of Seattle,* 138 Wn.2d 107, 117, 979 P.2d 387 (1999): "It is the general rule, recognized and adopted by this court, that zoning ordinances should be liberally construed to accomplish their plain purpose and intent," citing *Standard Mining, supra.* An ordinance designating a specific landmark is not a zoning ordinance, but it, too, should be interpreted according to its plain meaning.

VII. CONCLUSION

Conner has not demonstrated why this Court should accept review of the Court of Appeals decision. The Court of Appeals' decision does not meet the criteria set forth in RAP 13.4 (b)(1) and (2) for review by this Court, as it is not in conflict with any decision of the Supreme Court or

with any decision of the divisions of the Court of Appeal. The Petition for Review should be denied.

DATED this _____ day of February, 2010.

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CERTIFICATE OF SERVICE

I certify that on the 18th day of February, 2010, I caused a copy of **City of Seattle's Answer To Petition for Review** to be served on the following parties via U.S. First Class mail:

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