



CASE REPORT

LAND USE PETITION ACT - PROCEDURAL DUE PROCESS. Enforcement of ordinance governing imposition of building code violation fines violated substantive due process, and LUPA's 21-day statute of limitations did not apply. *Post v. City of Tacoma*, ___ Wn.2d ____ (Oct. 15, 2009).

I. Facts. The City of Tacoma's building code enforcement department found that many of Post's properties were in violation of Tacoma's building codes and assessed hundreds of thousands of dollars in civil penalties. Under Tacoma's Minimum Building and Structures Code (MBSC), a property owner must receive notification by letter that his property has been classified as substandard or derelict. The owner is given 30 days to respond to the notice and negotiate a schedule to correct the violations. The owner may also seek administrative review of the initial notice. However, if an owner does not respond to the initial notice or if violations are not corrected, the owner is subject to civil penalties. The MBSC fines are structured as follows: \$125 per property for the first violation; and \$250 per property for the second, third, and fourth fines. After the fourth fine, land use officials have the discretion to assess fines every calendar day. The owner may seek administrative review after the first fine is assessed, but the MBSC makes no provision for review of any subsequent fines. Accordingly, Post received notices for each fine imposed, but none included information on appeal rights. Post failed to comply with the negotiated repair schedules for 17 properties and failed to respond to at least 2 notices of violation. Post occasionally attempted to seek administrative review of the fines imposed, but his appeals were almost always untimely.

II. Applicable Law and Analysis. Post appealed the Court of Appeals' decision that Tacoma's notices of violation and penalties were final land use decisions under the Land Use Petition Act (LUPA). The Supreme Court reversed the Court of Appeals and held that the notices of violation and assessments of penalties were not subject to LUPA. A "land use decision," as it is defined under LUPA at RCW 36.70C.020, includes the enforcement by a local jurisdiction of ordinances regulating the improvement, development, modification, maintenance, or use of real property. However, LUPA expressly provides that when a local jurisdiction is required by law to enforce the ordinances in a court of limited jurisdiction, *i.e.*, a municipal or district court, a petition may not be brought under LUPA. The Court concluded that the MBSC is such an ordinance that must be enforced in a court of limited jurisdiction.

Municipal authority to issue civil infraction notices and impose and enforce civil penalties is governed by Chapter 7.80 RCW. This statute provides municipalities with the option to either administer and supervise the civil infraction system entirely through the court system or create their own system to be established by ordinance. The Court held that because Tacoma's civil infraction system provided no process for hearing and determining infractions subsequent to the

first infraction, it was not “its own system” in the sense intended by the legislature in RCW 7.80.010(5). Because Tacoma did not properly establish their own complete system, the MBSC infractions were required to be enforced in courts of limited jurisdiction. Therefore, the Court determined that LUPA’s 21-day statute of limitations did not apply to Post’s complaint.

Second, the Court concluded that the MBSC’s failure to provide for administrative review of each and every fine assessment violated Post’s procedural due process rights. Tacoma argued that providing administrative review for each separate infraction would allow owners like Post to relitigate the same violations. However, the Court determined that the risk of error was apparent and that Post had no opportunity to bring potential errors to Tacoma’s attention with regard to any penalties imposed subsequent to the first. The Court opined that providing an opportunity for a hearing on each separate infraction would not be an overwhelming administrative burden in light of the risk of error. The Court stated, however, that nothing would prevent Tacoma from limiting the scope of a hearing on additional infractions to the conditions of the property at the time the violation was found, barring relitigation of fines previously imposed.

The concurring justices reached the same result, finding the MBSC unlawful, on different grounds. The concurrence concluded that the MBSC ran afoul of article XI, section 11 of the state constitution, which permits a city to make and enforce only such “regulations as are not in conflict with general laws.” The concurrence reasoned that because the MBSC lacked key procedural protection that would otherwise be available to an individual charged with an infraction in a judicial setting, the City’s infraction system conflicted with a general law.

Finally, three justices dissented, arguing that the case presented a straightforward application of LUPA and that Post’s claims should have been barred by the 21-day statute of limitations. The dissent argued that RCW 7.80.010(5) permits a city to establish a system for the enforcement of civil infractions and that the majority’s view usurped the City’s legislative authority to establish such a system.

III. Conclusion. To comply with the reasoning in both the majority and concurring opinions, cities should ensure that their civil infraction system, if not enforced in municipal court, provides an opportunity for administrative review for each and every infraction or penalty imposed. If your city currently has a separate system to enforce civil infractions and it provides opportunities for review, LUPA’s 21-day statute of limitations will still apply.