No. 42873-0-1

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

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THE CITY OF SEATTLE and the SEATTLE POLICE DEPARTMENT,

Respondents,

v.

OSCAR MCCOY and BARBARA MCCOY d/b/a OSCAR'S II; WILMER P. MORGAN a/k/a MAAGNUS MORGAN; GWEN D. DIXON and REAL PROPERTY LOCATED AT 2051 E. MADISON STREET, SEATTLE, WASHINGTON, COUNTY OF KING,

Appellants.

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# BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

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## I. IDENTITY AND INTEREST OF AMICUS

The American Civil Liberties Union of Washington ("ACLU-W") is a nonprofit, nonpartisan organization dedicated to the principles of individual liberty embodied in the state and federal constitutions. It has participated as amicus curiae in numerous cases, sometimes on its own motion and sometimes upon invitation of the court. ACLU-W hopes to add a useful perspective to the Court's consideration of this case, by addressing the broad civil liberties implications raised by the City's actions here.

## II. STATEMENT OF THE CASE

ACLU-W relies primarily on the McCoys' statement of the case. For purposes of ACLU-W's arguments, the critical fact is that the drug activity on the McCoys' property was not their fault. Officer Zerr, for example, testified that Oscar McCoy would bar any known drug dealers from his club. Defendant-Appellant's ("McCoys'") Opening Brief at 6-7. Sergeant Derezes testified as follows:

> I don't feel that Oscar was the cause of the situation. He and several other business owners were literally being held hostage by the gang people that were coming into the area, they were asking for relief from that.

Id. at 7.

After hearing all the evidence, Judge Wesley found that "the McCoy's have responsibly if not successfully combated the ongoing problem for many years." Id. at 11, quoting Memorandum Decision. In fact, "[t]he McCoy's have not in any sense 'permitted' the existence of the

nuisance in the sense of having allowed it, furthered it, or condoned it." Id. at 12. The trial court found that the McCoy's employed all reasonable efforts to combat drugs at Oscar's. Id. at 11-12. Judge Wesley concluded that the current drug problem at Oscar's was the result of the City's "policy decision" to switch its emphasis from fighting drug dealing at Oscar's to documenting it. Id. Judge Wesley's memorandum decision is attached as App. A.[1]

In its statement of facts, the City appears unwilling to accept the trial court's view of the evidence. In fact, the City complains at one point that the trial court was too "forgiving" of the McCoy's conduct. Brief of Respondent City of Seattle at 21. The City, however, has not assigned error to the trial court's findings. Nor has it suggested any good reason that this Court should disregard the testimony of the City's own police officers.

## III. ARGUMENT

### A. STANDARD OF REVIEW

As the City concedes, the standard of review on the legal issues discussed in this brief is de novo. See Brief of Respondent City of Seattle

[1] As appellant has noted, when a trial court's written decision is consistent with its formal Findings of Fact and Conclusions of Law, it may be used to interpret them. See McCoys' Reply Brief at 1-2. That is particularly appropriate here, because the trial court expressly referred to the memorandum decision in its Findings of Fact. Id. The trial judge's memorandum decision, written in his own words, gives this Court a better flavor of his view of the relative culpability of the parties than do the Findings and Conclusions, which were drafted by the City.

("City's Brief") at 12, citing In re Electric Lighthouse, 123 Wn.2d 530, 536, 869 P.2d 1045 (1994).

B. RCW 7.43, AS APPLIED TO A FAULTLESS DEFENDANT, EFFECTS A "TAKING" OF PROPERTY.

1. The McCoys' Claim Should be Analyzed as a "Total Takings" as in *Lucas*.

The Fifth Amendment to the United States Constitution prohibits the taking of property without just compensation. The United States Supreme Court's current interpretation of that provision is set out in Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992). Under Lucas, two categories of regulatory actions are compensable regardless of the public interest served by the restraint: 1) those involving "physical invasion" of property; and 2) those denying "all economically beneficial or productive use of land." Id. 505 U.S. at 1015-16. The second type of deprivation is sometimes called a "total taking." Id. at 1030. The Washington Supreme Court more broadly looks to "whether the regulation destroys or derogates any fundamental attribute of property ownership: including the right to possess; to exclude others; or to dispose of property." Guimont v. Clarke, 121 Wn.2d 586, 602, 854 P.2d 1 (1993). Physical invasions and total takings are not the exclusive ways of satisfying this standard. Id. at 602.[2]

[2] The City refers to the Lucas analysis as an "as applied" challenge to a statute. City's Brief at 18-22. In fact, the distinction between a facial and an as applied challenge is not always clear. See Guimont at 596-97 n.2 (noting that the U.S. Supreme Court was unclear on whether it was addressing a facial or an as applied challenge in Lucas). In ACLU-W's view, the labels are not particularly helpful. The real point is that the McCoys have the same type of claim that Mr. Lucas did. Lucas did not claim that the

RCW 7.43 requires a total taking. "*Any*" order of abatement "*shall* . . . provide for the immediate closure of the building or unit within a building against its use *for any purpose*," and require the property to "remain in the custody of the court." RCW 7.43.090 (emphasis added). Thus, the McCoys, like all possessors of property subject to an order of abatement under RCW 7.43, were necessarily deprived of a "fundamental attribute of property ownership," including the "right to possess" and to "exclude others." See Guimont. As in Lucas, they were also denied all "economically beneficial or productive use" of their property.[3] Obviously, one cannot make money from a building if it may not be used "for any purpose."

Once a total takings like this has been shown, the government must generally compensate the possessor of property. Lucas at 1019; Guimont at 602-03. The government may, however, rebut this presumption by showing that the proscribed use was never part of the possessor's title to begin with. Lucas at 1027; Guimont at 602. In other words, the challenged law must "do no more than duplicate the result that could have

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Beachfront Management Act was an improper use of South Carolina's police power, nor that every property owner affected by it necessarily suffered an unconstitutional taking of property. He argued only that the act effected a taking as to him, because his planned use of property was lawful before passage of the act. Similarly, ACLU-W does not contend that RCW 7.43 necessarily effects a taking as to all affected property owners, but only as to those who were not to blame for the drug activity.

[3] The City argues for the first time on appeal that the abatement order in this case merely prohibited the McCoys from operating "Oscars" at 2051 E. Madison, but permitted them to operate some other business there. Such an interpretation would be a peculiar one, since it would mean that the trial court entered an order in direct violation of the requirements of RCW 7.43.

been achieved in the courts . . . under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise." Lucas at 1029. To win its case, the government "must do more than proffer the legislature's declaration that the uses [the McCoys] desire[] are contrary to the public interest." Id. at 1031.[4]

The City notes that the McCoys never had the right to use their property for "drug trafficking," Brief of Respondent City of Seattle at 26. While that is a true statement, it misses the mark. The McCoys are not drug traffickers. In fact, they have put considerable effort into fighting drug traffickers. The real question is whether, under pre-existing law, the McCoys could have been enjoined from operating a lawful business simply because drug traffickers sometimes invaded their establishment. The answer is no, because under the common law of nuisance, the possessor of property could be liable only if he was at fault for causing the nuisance.

The Restatement (Second) of Torts is a valuable source for common law nuisance principles. In Lucas, the United States Supreme Court relied on the Restatement for guidance. Lucas, at 1031. The Washington Supreme Court has often done the same. See, e.g., DiBlasi v.

[4] The City contends that this "nuisance exception" is equivalent to pre-Lucas Washington law, which held that there is no taking when property is regulated to prevent a public harm, rather than appropriated for the public good. See City's Brief at 24-25. In fact, Lucas expressly rejected such an approach. See Lucas at 1026; Guimont at 600 ("Lucas makes clear that a 'total takings' claim . . . does not require analysis of whether the regulation goes beyond preventing a public harm to conferring a public benefit.")

City of Seattle, 136 Wn.2d 865, 888, 969 P.2d 10 (1998) (relying on Restatement for doctrine of "coming to the nuisance"); Certification from the United States Dist. Court for the Western District of Washington in Kitsap County v. Allstate Ins. Co., 136 Wn.2d 567, 592, --- P.2d --- (1998) (relying on Restatement for distinction between trespass and nuisance where pollution involved); Degel v. Majestic Mobile Manor, Inc., 129 Wn. 2d 43, 51, 914 P.2d 728 (1996) (relying on Restatement for doctrine of "attractive nuisance"); Bradley v. American Smelting & Ref. Co., 104 Wn.2d 677, 687-91 709 P.2d 782 (1985) (relying on Restatement for elements of nuisance claim); Peterson v. King County, 45 Wn.2d 860, 863, 278 P.2d 774 (1954) (same). It does not appear that the Washington Courts have ever broken with the Restatement in the area of nuisance law. The Restatement unequivocally rejects the sort of absolute liability that the City urges this Court to adopt. See City's Brief at 30 ("reasonable efforts are immaterial if the nuisance continues"). Rather, it notes that a possessor of property can be liable for failing to prevent a nuisance only if he consents to the activity, or fails to exercise reasonable care to prevent it. Generally, a protest, or call to the police, is sufficient to establish reasonable care. See, Brief of Amicus Curiae Northwest Legal Foundation at 14-16, discussing Restatement (Second) of Torts § 838. Here the trial court expressly found that the McCoys did not consent to the drug activity, that they took reasonable steps to combat it, and that they were "powerless" to prevent it.

The principles set out in the Restatement are firmly established in the American and British common law. See e.g., Joseph A. Joyce, Treatise on the Law Governing Nuisances, at 683 (Matthew Bender & Co. 1906) (a renter is not liable for a nuisance in a tenement under his control unless the tenement was "let for the illegal use," or the renter permitted the use); Horace G. Woods, A Practical Treatise on the Law of Nuisances in their Various Forms, 951 (Bancroft-Whitney Co. 1883) (a landlord will be liable if the nuisance "necessarily arises from the use of the premises", but not liable "from the improper use of the premises by the tenant.").

> The mere fact, however, that a nuisance is created by a stranger on a man's land without his sanction or authority does not of itself render him liable in an action in respect of it, unless the nuisance be a natural consequence of the manner in which he has arranged the premises."

Edmund William Garrett, The Law of Nuisances, at 237 (Butterworth, 1908).

The Ohio Supreme Court recently applied these principles in a setting similar to that presented here. Pizza v. Rezcallah, 84 Ohio St. 3d 116, 702 N.E.2d 81 (1998). Pizza involved an Ohio statute that, like RCW 7.43, authorized the abatement of property on which drug activity had taken place. Id., 84 Ohio St. 3d at 121. The statute, like RCW 7.43, required the abatement order to "direct closure of the real property against use for any purpose for one year." Id. at 122. As here, some of the defendants "consented to some use of their property by the offending third party, though they did not acquiesce to or participate in the specific use that created the nuisance." Id. at 126. The Court found that an order to

close property "against its use for any purpose" necessarily deprived the owner of "all economically beneficial uses" within the meaning of Lucas. Id. at 124. "The fact that the order is of limited duration does not change this conclusion." Id. See also, Guimont v. Clarke, 121 Wn.2d at 586 n.3, citing First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 96 L. Ed. 2d 250, 107 S. Ct. 2378 (1987). The Pizza Court recognized Lucas's "nuisance exception," Id. at 129, but found that it did not apply when the defendant was not at fault for the illegal activity. Id. at 130-31. Therefore, the abatement provisions "violate the Takings Clause of the Fifth Amendment to the United States Constitution when imposed against an innocent owner." Id. at 130-31.

The City cites several cases in an effort to show that Washington courts have always permitted the abatement of nuisances. See City's Brief at 27-30. As the McCoy's correctly point out, however, each of these rulings was based on some degree of culpability of the property owner. See McCoys' Reply Brief at 12-14. In each case, the owner directly participated in illegal activity, or at least operated his business in a negligent manner which caused harm to others.

As noted above, the City has the burden of proving that the McCoys' use of their business was proscribed under background principles of common law. It has failed to do that.

2. Even if the McCoys did not Suffer a Total Taking, They are Entitled To Compensation.

When a governmental regulation does not fall within the "total takings" or "physical invasion" categories discussed in Lucas, it is not a taking if it "substantially advances a legitimate state interest." Guimont v. Clarke, 121 Wn.2d at 604. RCW 7.43 does not substantially advance the fight against drugs when it is applied to a faultless business owner. Closing a business like Oscar's does nothing to end the drug problem in the Central District of Seattle. Drug dealers who were selling at Oscar's did not magically vanish from the face of the earth after Oscar's was closed. Nor did their customers suddenly overcome their addictions. Rather, buyer and seller likely continue to seek each other out at some other location nearby. There is no assurance that the owner of this new location will be as cooperative as the McCoys in helping the police arrest drug dealers. Thus, the City most likely has increased – not decreased – the drug problem by shutting down Oscars. The situation would be different, of course, if the McCoys had actually participated in, encouraged, or even condoned drug dealing. In that case, the City might well be justified in believing that the War on Drugs could be better fought on some other battlefield.

C. RCW 7.43, AS APPLIED TO A FAULTLESS DEFENDANT, VIOLATES SUBSTANTIVE DUE PROCESS

To determine whether a law violates substantive due process, a court must ask: (1) whether the law is aimed at achieving a legitimate public purpose; (2) whether it uses means that are reasonably necessary to achieve that purpose; and (3) whether it is unduly oppressive on the

landowner. Presbytery of Seattle v. King County, 114 Wn.2d 320, 300, 787 P.2d 907, cert. denied, 498 U.S. 911, 111 S.Ct. 284, 112 L.Ed.2d 238 (1990). "The third inquiry will usually be the difficult and determinative one." Id. at 331.

The Washington Supreme Court applied these standards in Rivett v. Tacoma, 123 Wn.2d 573, 870 P.2d 299 (1994). At issue in that case was a Tacoma ordinance requiring the owner of property abutting a defective sidewalk to indemnify the city for any damages it paid a person injured as a result of the defect. The ordinance satisfied the first two prongs of the due process test because its aim was to promote safe sidewalks, and it required the person in the best position to detect the problem to act to protect the public. Id. at 581. The ordinance failed the third prong, however, because it was unduly oppressive, in that it "purports to require indemnification without adjudication of fault against the abutting landowner." Id. at 583.

The statute at issue in Rivett was found to be unduly oppressive even though it absolved a landowner of liability if she gave written notice to the city of a sidewalk defect. Rivett, 123 Wn.2d at 580. RCW 7.43 is much worse because it imposes liability even if, as here, the defendant informs the city of drug activity. It is always possible for a property owner to report (or even to fix) a defective sidewalk, but – as Judge Wesley found here – a property owner may be "powerless" to stop all drug activity on his premises.

The circumstances of this case show just how oppressive RCW 7.43 could become. The City proved its case at trial by sending informants into Oscar's to make small drug buys. Given the pervasiveness of the drug problem in the Central District of Seattle, the police could undoubtedly make similar buys on almost any piece of property open to the public. Thus, the police could readily shut down almost any business it chose to target.

In this case, unlike Rivett, the City cannot even satisfy the second prong of the Presbytery test (that the law uses means reasonably necessary to achieve its purpose). As discussed above in section III(B)(2) of this brief, closing a business whose owner is cooperative with the police does nothing to further the war on drugs.

Using a similar analysis, the Ohio Supreme Court found that Ohio's drug nuisance abatement statute violated substantive due process. Pizza v. Rezcallah, 84 Ohio St. 3d 116, 702 N.E.2d 81 (1998). The Court noted that most property owners are "no match for the illegal drug trade." Id., 84 Ohio St. 3d at 130. Further, if the owners could be subject to abatement even after seeking assistance from the police, the statute "may actually discourage owners from reporting illegal activity." Id. Thus, the statute did little to further the State's legitimate interest in fighting drugs. Id. at 129. Further, the statute was "arbitrary and oppressive" because it applied to faultless defendants. Id. at 131. The statute therefore violated due process. Id.

## D. THIS COURT SHOULD CONSIDER ALL ISSUES RAISED BY THIS APPEAL, DESPITE THEIR POTENTIAL MOOTNESS.

On February 10, 1999, the City filed a motion to vacate the order of abatement in this case. By filing the motion now, the City appears to be seeking a ruling just before oral argument on this appeal. In its motion, the City notes that vacation could "raise an issue of mootness." The City maintains, however, that it would nevertheless ask this Court to resolve the "facial challenges," raised by the appeal, since they are likely to recur. It would appear that the issues addressed by ACLU-W are not – in the City's view – facial challenges. For example, the City will likely argue that vacation of the abatement order strengthens its position that the McCoys cannot raise a Lucas-type takings challenge, because the order of abatement will never have gone into effect.

This Court should address all issues raised in this case, despite the possibility of mootness. The issues raised in this brief – whether RCW 7.43 is unconstitutional as applied to a faultless business owner – will inevitably recur in numerous abatement actions. As the City explains in its brief, it views the culpability of the defendant as irrelevant. Undoubtedly, many more businesses will be targeted for abatement despite reasonable efforts by the owners to stop drug activity. The City could continue to shut down businesses based on its interpretation of RCW 7.43 – perhaps for long enough to put them out of business – and then move to vacate the orders before the appellate court ruled. Thus, the Court should hear this case, despite its possible mootness, because it raises

important public policy issues, and because the City could otherwise repeat its conduct yet evade review. See In re Harris, 98 Wn.2d 276, 278, 654 P. 2d 109 (1982); Hartman v. State Game Comm'n, 85 Wn.2d 176, 177-78, 532 P. 2d 614 (1975); State v. Hale, 1999 Wash App. LEXIS 204 (Div II, February 5, 1999).

## IV. CONCLUSION

This Court should find that RCW 7.43 violates substantive due process when applied to a defendant who is not at fault in permitting drug activity on his property, and that it therefore cannot be applied to him at all. In the alternative, the Court should find that the statute effects a taking of property that requires just compensation, when it is applied to a faultless defendant.

DATED this _____ day of _____, 1999.

Respectfully submitted,

_____
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