

1 **OFFICE OF THE HEARING EXAMINER**
2 **CITY OF TACOMA**

3 **MARK THOMAS,**

4 **Appellant,**

5 **v.**

6 **CITY OF TACOMA**, a Washington
7 municipal corporation, through its
8 Planning and Development Services
9 Department,

Respondent.

FILE NO.: HEX 2023-010
(VIOL22-0805)

ORDER OF DISMISSAL

10 **THIS MATTER** came before JEFF H. CAPELL, the Hearing Examiner for the City
11 of Tacoma, Washington, for hearing on May 25, 2023.¹ Appellant Mark Thomas
12 (“Appellant” or “Thomas”) appeared *pro se* at the hearing. Respondent City of Tacoma
13 (“City”) was represented by Deputy City Attorney Steve Victor.

14 **FACTUAL BACKGROUND**

15
16 1. This appeal originated from a series of notices beginning with a Notice of
17 Violation, PDS case number VIOL22-0805, dated 12/30/2022 (“NOV1”). NOV1 was
18 posted at Appellant’s property by the City of Tacoma Permit Compliance Group and it
19 demanded that all work cease at 3536 Shorecliff Drive NE, Tacoma WA 98422-2306.
20 NOV1 was issued to property owners Mark and Diana Thomas. The description of the
21 violation therein is as follows:

¹ Per the agreement of the parties, this hearing was conducted over Zoom at no cost to any participant with video, internet audio, and telephonic access.

1 The sidewalk was removed from the public right-of-way abutting
2 3536 Shorecliff Drive NE and replaced with landscaping. A new
3 asphalt driveway approach was installed in the right-of-way without
4 a permit. Removal of the sidewalk and unpermitted paving work in
5 the right-of-way is a violation of Tacoma Municipal Code
6 10.22.050.A.

7 NOV1 further stated that the “VIOLATION MUST BE ADDRESSED WITH THE
8 CITY OF TACOMA WITHIN 7 DAYS OF VIOLATION OF POSTING DATE” and
9 provided the following required corrections:

10 The sidewalk must be replaced. A permit is required for restoration of the
11 sidewalk and driveway approach. Please contact the Planning and
12 Development Permit Office to apply for a right-of-way construction permit
13 before beginning restoration of the sidewalk. For more information, reference
14 www.tacomapermit.org/right-of-way-construction. *Ex. R-1*.

15 2. Subsequently, the City of Tacoma, Planning & Development Services, issued a
16 second Notice of Violation, dated 3/27/2023, to Mark Thomas (“NOV2” still referencing the
17 original number VIOL22-0805) that informed Thomas that his property, legally described as
18 tax parcel number 7585000360 and commonly known as 3536 Shorecliff Drive NE,
19 Tacoma, WA 98422, “is currently in violation of the Tacoma Municipal Code.” NOV2
20 further stated that, “The violations pertaining to the property are outlined in the attached
21 notice of violation that was originally posted at the property (NOV1), as well as sent via
USPS certified mail to the mailing address of 3536 SHORECLIFF DR NE TACOMA, WA
98422.”

3. NOV2 additionally encouraged voluntary compliance and noted “the property
will be reinspected for compliance on 4/6/2023.” Finally, the letter gave Thomas the

1 opportunity to appeal the City’s determination by stating “the property owner must do so
2 [appeal] within ten (10) days of receiving this notice.

3 4. On April 24, 2023, the Hearing Examiner’s office received an appeal notice
4 from Mark Thomas that was dated 4/19/2023, well beyond ten days after NOV2’s date of
5 issuance.

6 5. Thomas has stated that he was out of the country, and therefore could not file
7 his appeal within the ten-day appeal period.

8 ANALYSIS AND AUTHORITY

9 1. On the state level, the City’s Office of the Hearing Examiner is authorized, and
10 operates under state statutes RCW 35.63.130 and RCW 58.17.330. Pursuant to RCW
11 35.63.130, a local “[l]egislative body may vest in a hearing examiner the power to hear and
12 decide those issues it believes should be reviewed and decided by a hearing examiner,
13 including but not limited to: ...(b) Appeals of administrative decisions or
14 determinations;...”

15 2. At the local level the City has vested in the Hearing Examiner the authority to
16 hear and decide the various issues set forth in Tacoma Municipal Code 1.23.050.² Hearing
17 examiners are creatures of statute/ordinance, who only have the authority they are given by
18 those same statutes and/or ordinances.³

19 3. Courts and lesser administrative decision-making bodies in Washington State
20 generally have jurisdictional limits placed on them. The primary exception to these limits is
21 the state’s Superior Courts, which are courts of general jurisdiction, and are empowered to

² But also elsewhere in specific cases in the TMC, as it is referred to for short.

³ *Skagit Surveyors & Eng’rs, L.L.C. v. Friends of Skagit County*, 135 Wn.2d 542, 958 P.2d 962 (1998).

1 hear virtually all disputes.⁴ Hearing examiners’ jurisdictional authority is nowhere near as
2 encompassing as the Superior Courts.⁵

3 4. The timing requirements for appealing a notice of violation, as recited in both
4 NOV1 and NOV2 are set forth expressly in the TMC after being enacted by the City’s
5 legislative body, the City Council.⁶

6 5. Although Thomas put forth a reason for why he filed his appeal when he did,
7 his appeal was late.

8 6. “In order for courts acting in an appellate capacity to acquire jurisdiction, an
9 appellant must comply with the statutorily imposed time limit for filing an appeal.”⁷
10 Thomas did not do so. Although our state court decisions clearly favor hearing appeals on
11 their merits rather than having them precluded on procedural grounds,⁸ those same courts
12 have held that decision makers cannot rewrite or modify the language of a statute under the
13 guise of statutory interpretation or construction. Rather, the decision maker must give full
14 effect to the plain language of the statute, “[e]ven when its results may seem unduly harsh.”⁹
15 Although the Examiner has the authority to interpret the TMC in a variety of circumstances,
16 he cannot simply interpret away the timing requirement at issue here, or rewrite the appeal
17 requirements altogether. The timing requirement is plain on its face.

18 _____
19 ⁴ *State ex rel. Martin v. Superior Court*, 101 Wash. 81, 93-94, 172 P. 257, 261 (1918) (“The superior courts of
20 this state are courts of general jurisdiction. They have power to hear and determine all matters, legal and
equitable, and all special proceedings known to the common law, except in so far as these powers have been
expressly denied.”).

21 ⁵ *Skagit Surveyors & Eng’rs, L.L.C.*, 135 Wn.2d at 558, (The power of an administrative tribunal to fashion a
remedy is strictly limited by statute.); *see also, Exendine v. City of Sammamish*, 127 Wn. App. 574, 586-587, 113
P.3d 494, 500-501 (2005).

⁶ The 7-day limit in NOV1 is found in TMC 2.2.02.130 and the 10-day limit of NOV2 is found at TMC 1.84.020.

⁷ *Graham Thrift Group v. Pierce County*, 75 Wn. App. 263, 267, 877 P.2d 228 (1994), *citing North Street Ass’n
v. Olympia*, 96 Wn.2d 359, 364, 635 P.2d 721 (1981).

⁸ *See e.g., Goldendale v. Graves*, 88 Wn.2d 417, 424, 562 P.2d 1272, 1276 (1977) (“Doubts should be resolved
in favor of protecting the right of appeal; we should be slow to deprive a litigant of that right.”).

⁹ *Graham Thrift Group*, 75 Wn. App. at 267~268, internal cites omitted.

1 **NOTICE**

2 **RECONSIDERATION/APPEAL OF EXAMINER'S DECISION**

3 **RECONSIDERATION TO THE OFFICE OF THE HEARING EXAMINER:**

4 Any aggrieved person or entity having standing under the ordinance governing the matter,
5 or as otherwise provided by law, may file a motion with the Office of the Hearing Examiner
6 requesting reconsideration of a decision or recommendation entered by the Examiner. A
7 motion for reconsideration must be in writing and must set forth the alleged errors of
8 procedure, fact, or law and must be filed in the Office of the Hearing Examiner within 14
9 calendar days of the issuance of the Examiner's decision/recommendation, not counting the
10 day of issuance of the decision/recommendation. If the last day for filing the motion for
11 reconsideration falls on a weekend day or a holiday, the last day for filing shall be the next
12 working day. The requirements set forth herein regarding the time limits for filing of
13 motions for reconsideration and contents of such motions are jurisdictional. Accordingly,
14 motions for reconsideration that are not timely filed with the Office of the Hearing
15 Examiner or do not set forth the alleged errors shall be dismissed by the Examiner. It shall
16 be within the sole discretion of the Examiner to determine whether an opportunity shall be
17 given to other parties for response to a motion for reconsideration. The Examiner, after a
18 review of the matter, shall take such further action as he/she deems appropriate, which may
19 include the issuance of a revised decision/recommendation. (*Tacoma Municipal Code*
20 *1.23.140*)

13 **NOTICE**

14 **APPEAL TO SUPERIOR COURT OF EXAMINER'S DECISION:**

15 Pursuant to the Official Code of the City of Tacoma, Section 1.23.160, the Hearing
16 Examiner's decision may be appealable to the Superior Court for the State of Washington.
17 Any court action to set aside, enjoin, review, or otherwise challenge the decision of the
18 Hearing Examiner will likely need to be commenced within 21 days of the entering of the
19 decision by the Examiner, unless otherwise provided by statute.