FOURTH JUDICIAL CIRCUIT OF VIRGINIA
CIRCUIT COURT OF THE CITY OF NORFOLK

JUNIUS P. FULTON III
JUDGE

100 ST. PAUL'S BOULEVARD
NORFOLK, VIRGINIA 23510

COPY

February 6, 2009

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SCP

RE: Joseph C. Lee v. City of Norfolk
Civil Docket No. CL08-393

Dear Counsel:

As you may recall, a hearing was held on January 29, 2009, on the City's Demurrer. At the conclusion of the hearing, having ruled on Count I (Equal Protection Claim) and II, the Court reserved its ruling on the Due Process Claim also contained in Count I.

Lee's Due Process claim is grounded in paragraph 30 the Amended Complaint, which alleges that the City caused his subject property to be "totally demolished and it's foundation to be ruined, prior to the expiration of the applicable appeal period under Section 15.2-906 of the Virginia Code and appropriate parts of the USBC, Section 119 of the Virginia Construction Code, thereby denying plaintiff due process under the Constitution of the United States and the Constitution of the Commonwealth of Virginia."

The City argues that this due process claim is demurrable due to the availability of the inverse condemnation cause of action reflected in Count II of the Amended Complaint.

Relying upon *Tri-County Paving, Inc. v. Ash County*, 281 F. 3rd 430 (2002), the City argues that in determining whether a procedural due process violation has occurred, this court must "consult the entire panoply of predeprivation and postdeprivation process provided by the state." *Id.* at 436. The City then points to the postdeprivation process reflected in Lee's Count II inverse condemnation claim as satisfaction of the due process requirements of the United States Constitution.

Lee argues that the Virginia Supreme Court decision in *Kitchen v. Newport News*, 275 Va. 378 (2008), allows the simultaneous pursuit of both federal and state claims. However, upon considering the posture of the plaintiff in *Kitchen* and the claims advanced by Lee in this litigation, the Court finds the *Kitchen* decision to be inapplicable in the determination of the due process issue.

Similarly to the plaintiff in *Kitchen*, Lee seeks relief based both on state and federal grounds in this litigation. The Demurrer filed by the City is not based on any claim that Lee's federal due process and equal protection claims are "not ripe" for consideration; but, that under the authority of Tri-County, he cannot, as a matter of law make a case for due process deprivation while he is entitled to postdeprivation relief under his Count II claim for relief for inverse condemnation.

Consequently, the Demurrer to Lee's due process claim will be sustained without leave to amend.

Counsel for the City will prepare an Order consistent with the foregoing.

Sincerely,

Junius P. Fulton, III

JPFIII/mls