NO. 89993-2

THE SUPREME COURT
STATE OF WASHINGTON

GARY WIVAG and SHERRY TRUMBALL,
d/b/a S&G LAND LTD.,

Appellants,

v.

CITY OF CLE ELUM,

Respondent.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Appellants Gary Wivag and Sherry Trumball (collectively "Wivag"), with the advice of counsel, voluntarily entered into a Stipulated Judgment that authorized the City of Cle Elum ("City") to proceed with abatement if Wivag violated the trial court's injunction.[1] Wivag did violate the injunction, but now argues that the Court should create and enforce a new public policy – one that would prohibit parties from voluntarily fashioning enforcement procedures that differ in any way from those found in RCW Chapters 6.17 and 7.48 - even though the Legislature did not include any such policy within these statutes.

Nearly six years ago, in April 2008, the Cle Elum Hearing Examiner adjudicated the existence of numerous public nuisances on Wivag's property.[2] The City patiently awaited compliance by Wivag. When compliance did not occur, the City sought to enforce the Hearing Examiner's order in Superior Court. Recognizing the relative weakness of his case, Wivag – with the advice of able and experienced counsel – stipulated to the very process and the very remedy that the City subsequently pursued when Wivag failed to comply with the terms of the injunction included within the Stipulated Judgment and Injunction

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[1] CP 6, ¶ 3.
[2] CP 64-65.

("Stipulated Judgment") entered by the trial court.[3] In May 2012, after having provided Wivag with four years to solve his own problem, the City carefully followed the express terms of the Stipulated Judgment to abate the multiple public nuisances agreed by the parties to exist on Wivag's property.

With the advice of experienced counsel, Wivag voluntarily executed the Stipulated Judgment, and the Stipulated Judgment was enforced according to its negotiated terms. The "substantial public interest" articulated in Wivag's Petition for Review ("Petition") – enforcing a legislative prohibition of any deviation from statutory procedures – does not exist, and Wivag's Petition should therefore be denied.

II. RE- STATEMENT OF ISSUES PRESENTED FOR REVIEW

Has Wivag presented an issue of substantial public interest under RAP 13.4(b) where the City and Wivag knowingly and voluntarily entered into a Stipulated Judgment, including abatement terms, and the Legislature has not prohibited parties from agreeing to deviate from the enforcement procedures in RCW Chapters 6.17 and 7.48? Answer: No.

III. RE-STATEMENT OF THE CASE

This appeal arises from a nuisance abatement case involving

[3] CP 3, ¶¶ 2-3.

property owned by Wivag located in the City of Cle Elum ("Property"). In February 2009, the City filed its Complaint for Nuisance Abatement to, in part, authorize the City to abate Wivag's code violations described in the April 16, 2008 Hearing Examiner's Order, which included using the Property as a junkyard, keeping manure on the Property, and storing items on the right-of-way. CP 64, ¶ 1.A – 1.C. A Stipulated Judgment was executed both by Wivag's counsel, and by Wivag himself. CP 4, 7 and 8.

In the Stipulated Judgment, Wivag concedes that he was not in compliance with the Hearing Examiner's order attached to the Stipulated Judgment as Exhibit A. CP 3, ¶ 3; CP 25 - 27. In particular, ¶ 2.B of the "Order and Injunction" contained in the Stipulated Judgment enjoined Wivag from, among other things:

> [F]ailing to remedy in a manner consistent with and pursuant to applicable provisions of the City code . . . within 30 days from the Effective Date . . . all code violations or other deficiencies at the Property noted in the Order attached hereto as Exhibit A. [Emphasis added.]

CP 5 and 25 - 27. Under ¶ 2.E, the "Effective Date" is specifically defined as "the earliest of Defendants' failure, if any, to timely satisfy the Payment Date, Fencing Date, or CUP Application Date." CP 4, ¶ 2.E. The Stipulated Judgment defines the Fencing Date as "not later than March 31, 2012," the CUP Date as "not later than February 29, 2012," and the

Payment Date as "within three calendar days of entry of this Stipulated Judgment and Injunction."[4] CP 4-5.

Continuing his pattern of non-compliance with the Hearing Examiner's Order, Wivag failed to comply with both the Fencing Date and the CUP Date. CP 36. Wivag admitted both of these failures. CP 120-21. Abatement of the long-standing public nuisances on Wivag's Property was a high priority of the City, and the stated purpose of the City filing its Complaint. To this end, the Stipulated Judgment expressly authorized the City to abate the nuisances (as those violations were set forth in the Hearing Examiner's order, attached to the Stipulated Judgment) beginning 30 days after the defined "Effective Date." CP 5, ¶ 2.B and 3; *see* CP 25 - 27. This right to abate the nuisances in the Stipulated Judgment was expressed separately and distinctly from the right the City also retained to proceed with enforcement of the Stipulated Judgment under RCW Chapters 6.17 and 7.48. CP 6, ¶ 4.

Given Wivag's failure to satisfy the February 29, 2012 CUP Date, the Effective Date was March 30, 2012. Even if Wivag had satisfied the CUP Date, however, he likewise failed to satisfy the March 31, 2012 Fencing Date, which set an Effective Date of April 30, 2012. The City commenced the abatement authorized by the Stipulated Judgment on May

[4] Wivag did satisfy the Payment Date. CP 36, ¶ 4.

1, 2012. CP 36, ¶ 4; CP 121.

As agreed by Wivag in the Stipulated Judgment, the City presented a supplemental judgment assessing the costs incurred in taking the corrective action authorized by the Stipulated Judgment. CP 6, 36 and 130. On September 24, 2012, and over the objection of Wivag, the trial court granted the City's Motion for Supplemental Judgment and entered the Supplemental Judgment in the amount of $13,519.49. CP 97 – 118, 129 - 131.

This appeal followed, and the Court of Appeals affirmed the trial court finding that "there was no need to request execution of a judgment that was not being challenged and where relief was agreed upon and provided in the judgment." Petition, Appendix A at 8.

IV. ARGUMENT

A. No Substantial Public Interest Is Impacted by Simply Applying the Plain Terms of the Enforcement Provisions of the Stipulated Judgment Negotiated by Wivag and the City.

Wivag fails to assert the substantial public interest needed for the Court to accept review of his Petition. An enforcement term in the Stipulated Judgment negotiated between these two parties, specific to nuisances on this particular Property, is not of substantial public interest. It is unique to these parties, these negotiations, and these facts.

1. There is no legislative policy prohibiting the enforcement terms in the Stipulated Judgment.

Wivag attempts to broaden the appeal of his argument by claiming that he and the City were prohibited from agreeing to enforcement provisions in a Civil Rule ("CR") 2A Stipulated Judgment that deviate from the writ/contempt/Sheriff/warrant procedures set out in RCW Chapters 6.17 and 7.48. Wivag voluntarily negotiated away his right to insist on adherence to these procedures, but he is now asking the Court to decree that the statutes prohibit him from contractually agreeing to such terms.

The statutes in question, however, do not include any language or even implicit direction from the Legislature supporting Wivag's asserted public policy. The Legislature is certainly capable of declaring such a public policy when it intends to do so. For example, RCW 59.18.230(1) provides that "[a]ny provision of a lease . . . whereby . . . any section or subsection of this chapter is waived . . . shall be against public policy and shall be unenforceable." The Legislature did not include any such prohibition within the language of the cited statutes. Parties are free to enter into CR 2A Stipulated Judgments that include enforcement provisions applicable to the facts and needs of a particular negotiated CR 2A agreement, even when they voluntarily deviate from the processes

described in RCW Chapters 6.17 and 7.48.

2. The Stipulated Judgment received judicial scrutiny.

Wivag argues that the Legislature intended judicial oversight and intervention in the enforcement of judgments and therefore the parties cannot alter the statutory enforcement procedures. This argument fails to recognize the judicial participation of the trial court in the entry and enforcement of the Stipulated Judgment. The trial court ordered the injunction that Wivag failed to obey, ordered the enforcement provisions to be used in the event the injunction was not obeyed, and ruled on the City's Motion to Supplement the Judgment. There was full judicial participation in this CR 2A Stipulated Judgment and the Supplemental Judgment that followed.

3. Wivag erroneously asserts that statutory procedures are the exclusive process for nuisance abatement.

As a matter of contract, the Stipulated Judgment does not require the City to abate nuisances initially or exclusively pursuant to any statutory provision. More fundamentally, however, Article XI, Section 11 of the Washington Constitution grants municipalities the authority "to make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws." Art. XI, Sec. 11, Wash. Const. Municipal regulations designed to combat public nuisances

are common, and reflect the goals and values of individual communities (e.g., Seattle takes a different approach to public nuisance abatement than does, say, Pateros). Accordingly, a State statute regarding public nuisances was not intended to and does not preempt the field of public nuisance regulation. Heesan Corp. v. City of Lakewood, 118 Wn. App. 341, 354, 75 P.3d 1003 (Div. 2 2003).

As a code city, the City of Cle Elum:

> [S]hall have all powers possible for a city or town to have under the Constitution of this state, and not specifically denied to code cities by law. By way of illustration and not in limitation, such powers may be exercised in regard to . . . real property of all kinds, . . . structures, or any other improvement or use of real or personal property, ...

RCW 35A.11.020; *see* also, RCW 35A.21.160, which states:

> A code city organized or reorganized under this title shall have all of the powers which any city of any class may have and shall be governed in matters of state concern by statutes applicable to such cities in connection with such powers to the extent to which such laws are appropriate and are not in conflict with the provisions specifically applicable to code cities.

State law explicitly grants a first class city the power to "declare what shall be a nuisance, and to abate the same . . . ." RCW 35.22.280(30). As a code city, Cle Elum is likewise vested with this grant of authority to regulate public nuisances apart from the procedures in chapter 7.48 RCW, by virtue of the grant of authority set forth in RCW

35A.21.160.

Moreover, the Washington Supreme Court has made clear that a court's equitable powers include the enjoining of public nuisances, and injunctions of that type need not be tied to specific statutory procedures. State v. Lew, 25 Wn. 2d 854, 865, 172 P.2d 289 (1946). In Lew, the Court considered the validity of a stipulated judgment and injunction which enjoined the defendant from committing the public nuisance of gambling on his property for a period of one year. Id. at 859-60. In affirming the injunction, the Court considered the defendant's own consent to the stipulated judgment and injunction. Id. at 868. The Court further determined that the existence of statutory remedies for nuisance abatement did not preclude a court from exercising its equitable powers to issue injunctive relief. Id. at 865-67. In its analysis, the Court noted that statutory remedies may prove "inadequate because the judgment cannot be made continuing in its operation." Id. at 866. The described inadequacy of the remedy supports injunctive relief to abate public nuisances in broad form. Id. at 867; *see* CP 6, ¶ 4 (trial court retained jurisdiction in order for City to "bring motions for contempt and to seek any other remedy . . . ."). A trial court's authority to do so exists separate and apart from the statutory authority of RCW Chapter 7.48.

The terms of the Stipulated Judgment Wivag voluntarily agreed to are not of substantial public interest. The Legislature did not prohibit waiver or deviation from statutory enforcement terms and the trial court provided judicial oversight to the Stipulated Judgment. The statutory enforcement terms in RCW Chapters 6.17 and 7.48 are also not exclusive. Exclusivity is not asserted in their plain language, and the City has authority under the Washington State Constitution and by statute to regulate nuisances and their abatement. Courts also have equitable powers to order injunctive relief and enforcement. For these reasons, Wivag's Petition should be denied for failure to satisfy any of the considerations set forth in RAP 13.4(b).

B. Wivag's Interpretation of the Stipulated Judgment Leaves Its Other Terms Meaningless.

The remaining arguments in Wivag's Petition focus not on a substantial public interest, but on his interpretation of the Stipulated Judgment's terms. The Stipulated Judgment signed by both Wivag and his counsel and entered by the trial court constitutes a binding agreement under CR 2A. Such a written stipulation, signed by either the parties or their counsel, is binding on the parties and on the court. CR 2A; State v. Nation, 110 Wn. App. 651, 41 P.3d 1204 (Div. 3 2002) (binding party to agreed stipulation regarding witness's inability to testify); *see also* Reilly

v. State, 18 Wn. App. 245, 253 and n. 17, 566 P.2d 1283 (Div. 3 1977) (binding parties to stipulation of one issue before court); Riordan v. Commercial Travelers Mutual Insurance Company, 11 Wn. App. 707, 715, 525 P.2d 804 (Div. 2 1974) (binding insurance company to signed stipulation regarding timeliness of notice). Stipulations are favored, and will be enforced if they are reasonable, not against sound public policy, are within the general scope of the case, and conform to form requirements of the applicable rule. Smyth Worldwide Movers, Inc. v. Whitney, 6 Wn. App. 176, 178, 491 P.2d 1356 (Div. 1 1971).

Wivag concedes that he failed to satisfy both the Stipulated Judgment's CUP Date and the Fencing Date. CP 36 and 120-21. His argument essentially constitutes a request for this Court to re-write the contract between the parties and to forgive his non-performance. Wivag wants the Court to create and enforce new terms that allow "substantial compliance,"[5] enforce nonexistent notice requirements[6], and allow for compliance after the agreed upon due dates[7].

1. Wivag's interpretation would lead to substantial additional litigation **after** entry of the Stipulated Judgment.

As agreed by the parties, ¶ 3 of the Stipulated Judgment's "Order and Injunction" authorizes the City "to take corrective action reasonably

[5] Petition at 15 - 16.
[6] Petition at 5 and 15.
[7] Petition at 5 and 13.

necessary to abate public nuisances at the Property consistent with the Cle Elum Municipal Code and state law." CP 6. Wivag's proffered interpretation of "corrective action" "to abate" would deprive the City of the "benefit of its bargain" in agreeing with Wivag to the terms of the Stipulated Injunction. It would also require the City to engage in even more litigation by having to: move for a writ under RCW 6.17.070 and have the same carried out by the Sheriff under RCW 6.17.110(d); move for an order of contempt under RCW 6.17.070; provide notice and request a hearing for remedial sanctions for contempt under RCW 7.21.030; and move for an order and warrant for abatement under RCW 7.48.260.

Wivag argues that his interpretation is consistent with the City benefitting from "avoiding further litigation." Petition at 10. This plainly is not the case if the City must initiate the writs, warrants, and orders contemplated by RCW Chapters 6.17 and 7.48. Likewise, this is not a "speedy resolution" as argued by Wivag. Petition at 10.

As the Court of Appeals provided:

> Requiring following RCW 6.17.070 would violate the purpose behind the stipulated judgment and violate contract principles. Stipulated Judgments avert the need for trial. Under contract principles, if a writ was needed to enforce this stipulated judgment and injunction, the provisions allowing the City to take corrective action would be meaningless.

Petition, Appendix A at 8. A stipulated judgment that did not abate the nuisances would be meaningless for the City. In exchange for Wivag's agreement on the enforcement mechanisms, the City agreed to provide Wivag with still more time to comply with the Stipulated Judgment's terms, and if he failed to do so, the City then would be awarded the agreed upon relief described in the Stipulated Judgment – abatement. CP 2 - 7. Both parties avoided the uncertainly of trial, Wivag received more time, and the City received its requested relief in the event Wivag failed to live up to his end of the bargain and comply with the injunction.

2. The right to abate without further court intervention is consistent with the Cle Elum Municipal Code.

Wivag relies on the phrase in ¶ 3 of the Order and Injunction "consistent with the Cle Elum Municipal Code and state law" to support his argument that under the terms of the Stipulated Judgment, the City was required to comply with all procedures in RCW Chapters 6.17 and 7.48. The Cle Elum Municipal Code ("CEMC"), however, does not support Wivag's position because it consistently and repeatedly allows the City to seek out such judicial processes as it deems necessary to effect the removal or correction of the nuisance condition. CEMC §§ 8.60.110(A), (D), and (F), 8.60.130(A), and 8.60.140(B). It does not require compliance specifically with RCW Chapters 6.17 and 7.48. The City's

filing of its Complaint and execution of the Stipulated Judgment was consistent with the CEMC.

3. The right to abate without further court intervention is also consistent with state law.

Wivag is asking the Court to re-write the terms of ¶ 3 of the "Order and Injunction" from "consistent with . . . state law" to "comply with and fulfill all procedures and obtain all additional court orders required by RCW Chapters 6.17 and 7.48". This interpretation renders nonsensical the remainder of ¶ 3[8], which provides that "[i]n that event, the City is authorized to present a supplemental judgment assessing the associated costs, including City employee costs, contractor fees, and attorney's fees against Defendants and in favor of the City." (Emphasis added.) The use of the phrase "in that event" refers to the event of abating the nuisance. If Wivag is correct that abatement may only take place under RCW Chapter 7.48, which requires the court to be provided an estimate of the cost to abate prior to the warrant for abatement being issued[9], then ¶ 3 authorizing the City to present a supplemental judgment to recover costs expended for completing the abatement would be rendered superfluous.

[8] Cambridge Townhomes, LLC v. Pac. Star Roofing, Inc., 166 Wn.2d 475, 487, 209 P.3d 863 (2009) (terms of a contract are to be read together so that no term is rendered ineffectual or meaningless.)
[9] RCW 7.48.260.

The same is true for ¶ 4 of the "Order and Injunction," which, separately from ¶ 3, expresses the parties' agreement that the City may "bring a motion for contempt and to seek any other remedy available at law or in equity." CP 6. This is where the parties refer to the use of RCW Chapters 6.17 and 7.48. Use of these Chapters is a right retained; a right in addition to the contractual right to abate in ¶ 3. Wivag's interpretation of the Stipulated Judgment does away with the agreed terms of ¶ 3 and leaves the City only with ¶ 4: "other remedies available at law or equity."

Wivag's argument incorrectly assumes that contractually agreeing to authorize the City to abate nuisances without additional court order is inconsistent with State law. As argued in Section IV.A above, Wivag wants this Court to decree that he was statutorily prohibited from contractually agreeing to allow the City to abate without further court intervention. The Legislature, however, did not include such public policy language when it adopted RCW Chapters 6.17 and 7.48. Parties are free to enter into CR 2A Stipulated Judgments that include enforcement provisions that apply to the facts and needs of a particular negotiated CR 2A agreement and to deviate from the processes found in RCW Chapters 6.17 and 7.48. ¶ 3 of the Order and Injunction is consistent with state law.

4. Wivag erroneously relies on RCW 6.17.070.

For the reasons described in Section IV.A.3 above, Wivag's reliance on the procedures found in RCW 6.17.070 is similarly misplaced. Additionally and independently, that statute is inapplicable here. The Court of Appeals held as follows:

> Contrary to Mr. Wivag's contention, the City was not required to enforce the stipulated injunction under RCW 6.17.070. The terms of the stipulated judgment and injunction did not require execution under the statute. Mr. Wivag agreed to other procedures when he reached a stipulated agreement with the City. The trial court authorized the agreed upon procedures.

Petition, Appendix A at 6. RCW Title 6, Enforcement of Judgments, generally provides for three different types of execution: (1) against the judgment debtor's property; (2) for delivery of the judgment debtor's property; or (3) "commanding enforcement of or obedience to any other order of the court." RCW 6.17.060. Here, Wivag appeals the Supplemental Judgment even though it awards costs for the City's abatement actions taken pursuant to the express terms of the Stipulated Judgment. CP 6, ¶ 3; CP 36, ¶ 5, and 130. Wivag stipulated to the very process and remedy about which he now complains, and his stipulation applies in addition to contempt sanctions and any other available remedy. CP 6, ¶ 4.

Execution on a judgment, the jurisdiction of RCW Chapter 6.17, is not at issue. Wivag himself correctly notes that he satisfied the money judgment portion of the Stipulated Judgment by the timely payment of $10,000. CP 120, ¶ 2. Rather than a judgment, Wivag complains about the terms of the injunction to which he agreed. As described above, however, a trial court has the discretion to exercise its equitable powers to fashion such relief (or, more precisely in this case, to enter such relief in the form of an agreed judgment put forth by the parties).

Even if the City's abatement actions constituted execution upon a judgment rather than enforcement of the terms of the agreed injunction set forth in the Stipulated Judgment, RCW 6.17.070 does not identify contempt proceedings as the exclusive remedy for executing upon a judgment. The broad language of this statute grants a court the authority to punish a party for contempt if it fails to abide by a judgment. RCW 6.17.070. Nowhere does the statute deprive a court of its equitable powers to fashion alternative remedies. Id. *See* CP 6, ¶ 4.

Here, after four years of failing to comply with the terms of the Hearing Examiner's order, Wivag also failed to comply with the terms of the Stipulated Judgment. CP 36 and 120-121. Accordingly, the City properly chose to abate the long-standing and numerous public nuisances on Wivag's Property, and to obtain the Supplemental Judgment under the

agreed terms of the Stipulated Judgment. CP 6, 35-36 and 130.

5. The Stipulated Judgment is a binding contract.

A stipulated judgment constitutes a contract that contains the terms of the judgment between the parties. Washington Asphalt Co. v. Harold Kaeser Co., 51 Wn. 2d 89, 91, 316 P.2d 126 (1957). A party's consent to a stipulated judgment "excuses all prior errors and operates to end all controversy between the parties, within the scope of the judgment." Id. Absent fraud, mistake, or want of jurisdiction, a stipulated judgment should not be reviewed on appeal. Id.

Here, Wivag claims no fraud, mutual mistake, or want of jurisdiction on appeal. While Wivag does admit that he mistakenly relied on a Fencing Date contained in an unexecuted draft of the Stipulated Judgment, his unilateral mistake of fact is wholly insufficient to void or reform the contract. *See* Haller v. Wallis, 89 Wn. 2d 539, 544, 573 P.2d 1302 (1978) (determining mutual mistake was necessary to set aside stipulated agreement); *see also* In re Estate of Hartford, 86 Wn. App. 259, 262-63, 936 P.2d 48 (Div. 1 1997) (refusing to set aside settlement agreement where court found only unilateral mistake).

Furthermore, to the extent Wivag could have relied on the statutory procedures of RCW 7.48.250 and RCW 6.17.070, Wivag waived that choice. "The doctrine of waiver ordinarily applies to all rights or

privileges to which a person is legally entitled." Schroeder v. Excelsior Management Group LLC, 177 Wn. 2d 94, 106, 297 P.3d 677, 683 (2013). Waiver occurs where a party voluntarily relinquishes a known right. Id. A party can waive most rights by agreement, absent legislative intent to the contrary. Id. As discussed in Section IV.A, the Legislature has not expressed an intent to prohibit waiver of the procedures in RCW Chapters 6.17 and 7.48.

Here, and with the advice of his counsel, Wivag voluntarily agreed to the procedures and remedies set forth in the Stipulated Judgment. Wivag is bound by his decision.

C. The City Is Entitled to an Award of Its Attorney Fees Expended to Answer the Petition.

The Stipulated Judgment authorizes the City to recover its attorney fees and other costs incurred in taking action "reasonably necessary" to abate the public nuisances. CP 6, ¶ 3. Answering Wivag's Petiton for Review constitutes such a "reasonably necessary" action.

The Stipulated Judgment is a contract between the parties and is subject to contract principles. Washington Asphalt, 51 Wn. 2d at 91; Wm. Dickson Co. v. Pierce County, 128 Wn. App. 488, 493, 116 P.3d 409 (Div. 2 2005). Where a contract allows an award of attorney fees at trial, an appellate court has authority to award attorney fees on appeal. Bloor v.

Fritz, 143 Wn. App. 718, 753, 180 P.3d 805 (Div. 2 2008). This Court should award the City's attorney fees incurred in answering Wivag's Petition.

V. CONCLUSION

Wivag's Petition should be denied for failure to satisfy any of the considerations set forth in RAP 13.4(b). The terms of the Stipulated Judgment are not of substantial public interest. The Legislature has not prohibited waiver or deviation from statutory enforcement terms, and the trial Court provided judicial oversight of the Stipulated Judgment. The statutory enforcement terms in RCW Chapters 6.17 and 7.48 are not exclusive. Exclusivity is not asserted in their plain language, and the City has constitutional and statutory authority to regulate nuisances and their abatement. Courts also have equitable powers to order injunctive relief and enforcement. Wivag's Petition should be denied for failure to satisfy any of the considerations set forth in RAP 13.4(b).

RESPECTFULLY SUBMITTED this 20th day of March, 2014.

KENYON DISEND, PLLC

By _____

Kim Adams Pratt
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APPENDIX

relieve the person responsible for the violation of the duty to correct the violation.
(Ord. 1255 § 1 (Exh. A (part)), 2006)

8.60.100 Subsequent repeat violation--Failure to abate--Misdemeanor.

The commission of a subsequent violation or the failure or refusal to abate a violation pursuant to an order of the administrative hearing examiner after receipt of written notice of such order shall constitute a misdemeanor punishable by imprisonment in jail for a maximum term fixed by the court of not more than ninety days or by a fine in an amount fixed by the court of not more than one thousand dollars or by both such imprisonment and fine. The city attorney, or his or her designee, shall, at his or her discretion, have authority to file a subsequent violation as either a civil violation pursuant to this chapter or a misdemeanor. All misdemeanor charges filed under this section shall be filed with the Cle Elum Municipal Court and shall bear the signature of the Cle Elum city attorney or his or her designee. When the city files a criminal offense pursuant to this subsection, it shall have the burden of proving, beyond a reasonable doubt, that the violation occurred.
(Ord. 1255 § 1 (Exh. A (part)), 2006)

8.60.110 Abatement.

A. In General. At the hearing before the administrative hearing examiner, the code enforcement officer or the city attorney or his or her designee may request that an order of abatement issue in the event that the administrative hearing examiner determines that a violation of a regulation exists. The order of abatement shall require the person responsible for the violation to abate the violation and permit the city to abate the violation using lawful means in the event that the person responsible for the violation fails to do so. The city may seek such judicial process as it deems necessary to effect the removal or correction of such condition causing the violation.

B. Abatement by the City. The city may abate a condition which was caused by or continues to be a civil violation when:

1. The terms of voluntary correction agreement pursuant to CEMC Section 8.60.030 have not been met; or

2. A notice of civil violation has been issued pursuant to CEMC Section 8.60.040 and (a) a hearing has been held pursuant to CEMC Section 8.60.080 and the required correction has not been completed by the date specified in the administrative hearing examiner's order, or (b) a hearing has been held by a court of competent jurisdiction and the required correction has not been completed by the date specified in the court's order; or

3. The condition is subject to summary abatement as provided for in CEMC Section 8.60.110(C).

C. Summary Abatement. Whenever any nuisance causes a condition, the continued existence of which constitutes an immediate threat to the public health, safety or welfare or to the environment, the city may summarily and without prior notice abate the condition. Notice of such abatement, including the reason for it shall be given to the person responsible for the violation as soon as reasonably possible after the abatement. No right of action shall lie against the city or its agents, officers, or employees for actions reasonably taken to

prevent or cure any such immediate threats, but neither shall the city be entitled to recover any costs incurred for summary abatement, prior to the time that actual notice of same is provided to the person responsible for the violation.

D. Authorized Action by the City. Using any lawful means, the city may enter upon the subject property and may remove or correct the condition which is subject to abatement. The city may seek such judicial process as it deems necessary to effect the removal or correction of such condition.

E. Interference. Any person who knowingly obstructs, impedes, or interferes with the city or its agents, or with the person responsible for the violation in the performance of duties imposed by this chapter, shall be guilty of a misdemeanor punishable by imprisonment not exceeding ninety days and a fine not exceeding one thousand dollars.

F. Other Abatement Proceedings Not Precluded. Nothing in this section shall prohibit the city from pursuing abatement pursuant to any other laws of the state of Washington or the City of Cle Elum. (Ord. 1255 § 1 (Exh. A (part)), 2006)

8.60.120 Costs of abatement--Lien.

A. Costs of Abatement. The costs and incidental expenses of any abatement action taken by the city as defined in CEMC Section 8.60.020(G), including costs of enforcement set forth in CEMC Section 8.60.020(H), shall become a charge to the person responsible for the violation. These charges may be assessed against the person responsible for the violation or the property upon which the violation occurred. Costs of abatement must be paid to the city within ten calendar days from the date of mailing of notice from the city that the costs are due. The city may use any lawful means to collect charges, including but not limited to those set forth in CEMC Section 8.60.130. The city attorney, or his or her designee, is authorized to take legal action to collect the costs of any abatement. All such costs and expenses shall constitute a lien against the affected property, as set forth in CEMC Section 8.60.120(B).

B. Lien--Authorized.

1. Account of Expense. The code enforcement officer shall keep an itemized account of expense incurred for the cost of abatement of property. Upon completion of the work, the code enforcement officer shall prepare and file with the city clerk, a report specifying the work done, the itemized total cost of the work, including administrative charge, a description of the property abated, and the name and addresses of the owner or agent, and occupant or tenant if known.

2. Report Transmitted to Council. Upon receipt of the report, the city clerk shall present it to council for consideration. The council shall fix a time, date and place for hearing the report and any protests or objections thereto. The city clerk shall cause notice of said hearing to be posted upon the property involved, and served by certified mail, postage prepaid, addressed to the owner or agent of the owner, and occupant or tenant if known. If the tenant or occupant is not known, notice shall be sent by first class mail to the occupant of the residence subject to the abatement. Such notice will be given at least ten days prior to the date set for hearing and shall specify the date, hour and place when the council will hear and pass upon the code enforcement officer report, together with any objections or protests which may be filed as hereinafter

provided by any person interested in or affected by the proposed charge. Notice of the hearing shall also be published in a newspaper of general circulation in the City of Cle Elum when required by law.

3. Protests and Objections. Any person interested in or affected by the proposed charge may file written protests or objections with the city clerk prior to the hearing. Each protest must state the grounds of such protest or objection. The clerk shall present such protests and objections to the council at the time of the hearing and no other protests or objections will be considered.

4. Hearing. The council shall hear and pass upon the report of the code enforcement officer, together with objections and protests. The council may revise or modify the report as it may deem just. When the council is satisfied with the correctness of the charge, the report, together with the charge, shall be confirmed or rejected. The decision of the council on the report and the charge, and on all protests or objections, shall be final and conclusive.

C. Assessment Against Property. The city shall have a lien for the costs and incidental expenses of any abatement as defined in CEMC Section 8.60.080, for the cost of any abatement action taken by the city, under this chapter, against the real property on which the work of abatement was performed as follows:

1. Unfit Structures. Liens established as the result violations of the Building Code for the Abatement of Dangerous Buildings as adopted pursuant to CEMC Chapter 15.06 assessed pursuant to said code. Pursuant to RCW 35.80.030(1)(h) and as supplemented by CEMC authorized by RCW 35.80.030(5), both incorporated herein by reference, the lien shall be assessed upon the tax rolls of the subject property and shall be subordinate to all previously existing special assessment liens imposed on the same property and shall be superior to all other liens, except for state and county taxes, with which it shall be on a parity.

2. Garbage. Liens for garbage and rubbish abatement shall be assessed against the subject property pursuant to RCW 35.21.140 and RCW 35.21.150 and shall be prior to all liens filed subsequent to the filing of the notice of lien with the county auditor, except liens of general taxes and local improvements.

3. Nuisance Vegetation. Liens for nuisance vegetation abatement, when initiated by city council resolution, whether or not enforced in conjunction with a hearing before the administrative hearing examiner pursuant to CEMC Section 8.60.080, shall be assessed against the subject property pursuant to RCW 35.21.310 and shall be enforced and foreclosed in the manner as provided by law for liens for labor and materials.

4. Other. Other liens shall be assessed against the subject property as authorized by law or court order.

(Ord. 1255 § 1 (Exh. A (part)), 2006)

8.60.130 Collection of penalties and costs.

A. Collection. In addition to, or in lieu of the provisions set forth in this chapter, the city may, at its option, turn the matter over to collection or commence a civil action in any court of competent jurisdiction to

collect costs and expenses of enforcement, costs of abatement incurred by the city to obtain compliance pursuant to this chapter and/or to collect any penalties that have been assessed. Further, the city administration, upon concurrence of the city attorney, may file for injunctive or other civil relief in superior court regarding code violations.

B. Use of Collection Agency. The city, at its discretion, may, pursuant to Chapter 19.16 RCW, use a collection agency for the purposes of collecting penalties assessed pursuant to this chapter. The city shall add a reasonable fee, payable by the person responsible for the debt, to the outstanding debt for the collection agency fee incurred or to be incurred as a result of the use of the collection agency. No debt may be assigned to a collection agency until at least thirty days have elapsed from the time that the city attempts to notify the person responsible for the debt of the existence of the debt and that the debt may be assigned to a collection agency for collection if the debt is not paid.
(Ord. 1255 § 1 (Exh. A (part)), 2006)

8.60.140 Additional enforcement procedures.

A. The provisions of this chapter are not exclusive, and may be used in addition to or in conjunction with other enforcement and penalty provisions authorized by the Cle Elum City Code or state law.

B. In lieu of and as an alternative to a hearing before the administrative hearing examiner pursuant to CEMC Section 8.60.080, the city may file an action in a court of competent jurisdiction to seek enforcement of a notice of violation issued pursuant to CEMC Section 8.60.040, abatement of the violation pursuant to CEMC Section 8.60.110 and assessment and collection of penalties, costs and abatement as provided for in this chapter.
(Ord. 1255 § 1 (Exh. A (part)), 2006)

8.60.150 Conflicting code provisions.

In the event a conflict exists between the enforcement provisions of this chapter and the enforcement provisions of any uniform code, statute, or regulation that is adopted in the Cle Elum City Code that are subject to the enforcement provisions of this chapter, the enforcement provisions of this chapter will prevail, unless the enforcement provisions of this chapter are preempted or specifically modified by said code, statute, or regulation.
(Ord. 1255 § 1 (Exh. A (part)), 2006)

8.60.160 Duty not creating liability.

No provision or term used in this title is intended to impose any duty upon the city or any of its officers or employees which would subject them to damages in a civil action.
(Ord. 1255 § 1 (Exh. A (part)), 2006)

OFFICE RECEPTIONIST, CLERK

To: Margaret Starkey
Cc: Richard Stephens (stephens@GSKLegal.pro); 'forrestfischer@gsklegal.pro'; Mike Kenyon; Kim Adams Pratt
Subject: RE: Wivag v. City of Cle Elum - Supreme Court No. 89993-2

Received 3/20/2014

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Margaret Starkey [mailto:Margaret@kenyondisend.com]
Sent: Thursday, March 20, 2014 1:12 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Richard Stephens (stephens@GSKLegal.pro); 'forrestfischer@gsklegal.pro'; Mike Kenyon; Kim Adams Pratt
Subject: Wivag v. City of Cle Elum - Supreme Court No. 89993-2

Good afternoon –

Please find attached for filing with the Washington State Supreme Court the City of Cle Elum's *Answer to Petition for Review*, with attached Appendix, in the matter of Gary Wivag, et al. v. City of Cle Elum, Supreme Court No. 89993-2.

Please do not hesitate to contact us if you have any questions or concerns regarding the attached *Answer*. Thank you.

Very truly yours,

Margaret Starkey

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