

65624-4

65624-4

**COURT OF APPEALS
DIVISION 1
OF THE STATE OF WASHINGTON**

COA Cause No. 65624-4-1
King County Superior Court NO. 09-2-09440-3 KNT

CHARLES ROBERT GARNER, an individual,

Appellant,

vs.

THE CITY OF FEDERAL WAY, a municipality,

Respondent.

FILED
SUPERIOR COURT
2010 DEC 16 AM 10:47

BRIEF OF RESPONDENT

PATRICK R. MOBERG
WSBA No. 41323
Attorney for Respondent
451 Diamond Drive
Ephrata, WA 98823
(509) 754 2356

 ORIGINAL

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. RESPONSE TO ASSIGNMENTS OF ERROR.....1-2

III. COUNTER STATEMENT OF THE CASE.....2-6

IV. ARGUMENT.....7

A. Mr. Garner Failed To Follow The Procedural Rules
On Appeal When Drafting His Brief and Those Portions
Of His Brief That Fail to Comply With Appellate Rules
Should Be Stricken.....7, 8

B. The Lower Court Reviewed The Record..... 9

C. The Lower Court Considered All Necessary Facts in
The Most Favorable Light to Mr. Garner When it
Granted the City’s Motion for Summary Judgment 9-13

D. The Doctrine’s of *Res Judicata* and Claim Preclusion Barred
Mr. Garner’s Lawsuit and Mr. Garner’s Arguments Against
the Application of *Res Judicata* Should Be Stricken From
His Appellate Brief13-17

E. Mr. Garner’s remaining Arguments Were Not Raised in
His Assignments of Error to The Lower Court, Do Not
Have Any Legal Merit, and Should Be Stricken.....18-21

V. ATTORNEY FEES AND MOTION TO STRIKE.....21-23

VI. CONCLUSION..... 23

VII. APPENDIX

Chapter 1.15 Federal Way Revised Code.....25-37

TABLE OF AUTHORITIES

<u>Federal Cases</u>	<u>Page(s)</u>
<i>Collins v. Youngblood</i> , 497 U.S. 37, 42-43, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990).....	20
<i>Kansas v. Hendricks</i> , 521 U.S. 346, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997).....	20
<i>Weaver v. Graham</i> , 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17(1981).....	19
 <u>State Cases</u>	
<i>1525 Lakeview Blvd. Condominium Ass'n v. Apartment Sales Corp</i> , 101 Wn.App. 923, 932 P.3d 74.....	14
<i>Boyle v. King County</i> , 46 Wn.2d 428, 282 P.2d 261 (1955).....	7
<i>Boyles v. Dep't of Ret. Sys.</i> , 105 Wn.2d 499, 509, 716 P.2d 869 (1983).....	21
<i>Calder v. Bull</i> , 3 (3 Dall.) U.S. 386, 390-391, 1 L.Ed. 648 (1798).....	19
<i>Cornish College of the Arts v. 1000 Virginia Limited Partnership</i> , _P.3d_, 2010 WL 4159298, 4 (2010 Div.I).....	10
<i>Douglas v. Jepson</i> , 88 Wn.App. 342, 945 P.2d 244, 247 (Div. 1, 1997).....	14
<i>Fay v. Nw. Airlines, Inc.</i> , 115 Wn.2d 194, 200-01, 796 P.2d 412 (1990).....	21
<i>Forster v. Pierce County</i> , 99 Wn.App. 168, 991 P.2d 687, 693 (Div. 2, 2000).....	19, 20

<i>Green River Cmty. Coll. Dist. No. 10 v. Higher Educ. Pers. Bd.,</i> 107 Wn.2d 427, 442-43, 730 P.2d 653 (1986).....	21
<i>Hafer v. Marsh,</i> 16 Wn.2d 175, 181, 132 P.2d 1024 (1943).....	7
<i>Hizey v. Carpenter,</i> 119 Wn.2d 251, 830 P.2d 646 (1992).....	10
<i>Hodge v. Raab,</i> 151 Wn.2d 351, 354, 88 P.3d 959 (2004).....	14
<i>In re Guardianship of Wells,</i> 150 Wn.App. 491, 504, 208 P.3d 1126, 1133 (Div. 1, 2009).....	21
<i>In re Property Located at 14255 53rd Ave., S., Tukwila, King County,</i> <i>Washington,</i> 120 Wn.App. 737, 86 P.3d 222 (Div. 1, 2004).....	13
<i>In re Whittier's Estate,</i> 26 Wn.2d 833, 843, 176 P.2d 281, (1947).....	7
<i>Lamon v. McDonnell Douglas Corp.,</i> 91 Wn.2d 345, 349, 588 P.2d 1346 (1979).....	11
<i>Morris v. McNicol,</i> 83 Wn.2d 491, 519 P.2d 7 (1974).....	11
<i>Pearson v. Schubach,</i> 52 Wn.App. 716, 725-26, 763 P.2d 834 (1988).....	21
<i>State v. Grinier,</i> 34 Wn.App. 164, 167, 659 P.2d 550, 551 (Div. 2, 1983).....	7
<i>State v. Inglis,</i> 32 Wn.App. 700, P.2d 136 (Div. 1, 1982).....	17
<i>State v. Johnson,</i> 119 Wn.2d 167, 829 P.2d 1082, (1992).....	8

State v. Ward,
123 Wn.2d 488, 497, 869 P.2d 1062, 1067 (1994).....20

Statutes and Regulations

RCW 35.80.....5, 18

RCW 19.27.180.....5, 17

FWRC 1.15.....3, 5

Other Authorities

AMJUR APPELLATE § 618.....14

I. INTRODUCTION

Appellant (herein after “Mr. Garner”) has a long history of suing respondent (herein after “the City”) over the same piece of property. He has lost all previous lawsuits, but continues to use the court system to advance a litigious agenda even though his claims, as the court will see, have no legal merit.

II. RESPONSE TO ASSIGNMENTS OF ERROR

Mr. Garner set forth five assignments of error to the lower court; however, Mr. Garner’s assignments of error are completely improper and fail to identify any legal issues pertaining to his assignments of error.

The lower court clearly ruled Mr. Garner’s summary judgment response was untimely and was to be stricken from the record. (RP p. 17, ll. 20-21) RAP 9.12 requires that on review of an order granting summary judgment, the appellate court can only consider the documents (and evidence) the lower court considered as identified in the summary judgment order. Since the lower court did not consider his response brief, Mr. Garner did not preserve any of the arguments it contained.

For only the sake of argument, the lower court ruminated that even if Mr. Garner’s response were to be considered, it would have granted the City’s motion for summary judgment because the doctrines of claim

preclusion¹ and *res judicata* barred Mr. Garner's lawsuit as a matter of law. Thus, the City asserts that the only assignment of error to the lower court can be whether Mr. Garner's response brief was properly stricken from the record. Assuming *arguendo* the appellate court decides Mr. Garner's brief should not have been stricken², the only remaining assignments of error would be whether the court properly applied the doctrines of claim preclusion and *res judicata* as a matter of law.

Issues the City Proposes that are Properly before the Court

1. Whether it is proper for the lower court to strike a party's response to a summary judgment motion when it was filed with the court five days before the summary judgment hearing.
2. Whether the doctrines of claim preclusion and *res judicata* bar a litigant's second lawsuit after a valid and final judgment extinguished the initial lawsuit involving the same transactional nucleus of facts, the same parties, the same claims and the same subject matter.

III. COUNTER STATEMENT OF THE CASE

Background

In 1976, Mr. Garner purchased a house near SeaTac Airport, partially disassembled it, and relocated it to another property he owned in

¹ The court reporter has inadvertently (albeit consistently) transcribed the phrase of claim preclusion as "claim~~ed~~ preclusion." This is a scrivener's error rather than a misphrasing by counsel and the judge.

un-incorporated King County where Mr. Garner intended to make the house a rental. However, Mr. Garner never reassembled the house, and it stood open to the elements and in a state of disrepair for many years. In 1991, the City incorporated the property on which Mr. Garner's house sat. From 1991 to 2003, suffering from lack of maintenance and vandalism, the house further deteriorated. After ample notice and due process, the City finally determined under its civil code and its power to regulate health, safety, morals and general welfare that, after 30 years of abandonment, the structure was a health and safety hazard and needed to be re-built as a habitable building or town down. (CP 22-23)

Administrative Proceedings

The City issued a Complaint of Unfit Building (file number 08-102099-00-VO) to Mr. Garner alleging violations of Federal Way Revised Code (FWRC) 1.15.170 contained in the City's nuisance code. The City posted the complaint on the property and also mailed it to Mr. Garner via certified mail. The City properly notified Mr. Garner of a hearing on the alleged violations to be held on July 16, 2008. The City and Mr. Garner presented evidence and made arguments before the hearing examiner. The hearing examiner issued an order finding the structure (1) unfinished,

² In his brief, appellant has not even raised the issue of whether his untimely filed response motion was properly stricken by the lower court.

unable to be occupied, and left in a prolonged deteriorating state; (2) without electricity, gas, or sewer service; (3) covered in moss, lacking sheet rock and insulation, missing and broken windows, interior not sheltered from the elements; (3) lacking ingress and egress to and from the front door on the upper story; (4) needing repairs costing more than half the assessed value of the property; (5) dangerous, not only to human habitation, but also the public; and (6) easy for a person to enter and be injured; as a result of no upkeep and utilities, vandalism, exposure to the elements for several years, the building has become dilapidated, unsafe, and unsanitary to the point that it no longer provides the amenities essential to decent living. The hearing examiner ordered Mr. Garner to restore the house into a fit, habitable structure or have it torn down within 45 days. (CP 23-24)

Mr. Garner appealed the hearing examiner's July 29, 2008 Order to the City's appeals commission, which held a hearing on September 18, 2008. On October 2, 2008, the appeals commission issued a ruling affirming the hearing examiners July 29, 2008 Order to make the house safe and habitable or demolish it. (CP 24)

Previous King County Superior Court Lawsuit

On October 31, 2008, Mr. Garner appealed the appeals commission's ruling to the King County Superior Court in a lawsuit

identified by Case No. 08-2-37690-7-KNT³ and presided over by the Honorable Richard F. McDermott. After review and trial de novo held on June 8, 2009, Judge McDermott entered an order on September 24, 2009 adopting the appeals commission's findings and upholding the City's order to demolish the hazardous structure. The court further found that there were no errors in fact or law; and the City followed proper procedure under RCW 35.80 and FWRC 1.15. In addition to its findings, the court issued the following conclusions in its order: The City did not violate any of Mr. Garner's rights under RCW 19.27.180, nor does RCW 19.27.180 invalidate the proceedings held by the City against Mr. Garner; and Mr. Garner made no showing that a taking of his property occurred, or will occur by the actions of the City. Mr. Garner moved Judge McDermott to reconsider his ruling, which was denied, and Mr. Garner appealed the King County Superior Court's ruling in Case No. 08-2-37690-7-KNT to the Court of Appeals of the State of Washington, Division 1, COA No. 64380-1-I; the appeal was dismissed by the commissioner on January 29, 2010 for appellant's lack of prosecution. (CP 24-25)

Current King County Superior Court Lawsuit

³ This was a separate lower court matter and is not the proceeding up for review.

On March 31, 2009, Mr. Garner filed a second lawsuit in King County Superior Court, Case NO. 09-2-09440-3 KNT presided over by Honorable Hollis Hill. In the lower court, the City filed a motion for summary judgment asking to dismiss Mr. Garner's complaint (CP 22-33) and scheduled a hearing for the motion to be held on May 18, 2010. (RP 1) On May 12, 2010, Mr. Garner filed a *late* response brief to the City's motion for summary judgment, just four (4) court days before the hearing held on May 18, 2010. (RP 5) Mr. Garner certified in his response brief that he mailed a copy of the brief to the City on May 12, 2010 (Opposition to Summary Judgment, CP 133; RP p. 5, ll. 16-24); however, the City did not receive a copy until May 17, 2010, the day before the hearing. (RP p. 5, ll. 9-13) The City made an *ore tenus* motion before the lower court to have Mr. Garner's response brief stricken from the record for failure to comply with filing requirements of CR 56. The lower court asked Mr. Garner the reason for filing a late response, and Mr. Garner said, "...it just took me longer than it should..." (RP p. 12, l. 7) The lower court granted the City's motion to strike appellant's response as untimely. (Order, CP 136-137; RP p. 17, l. 21) The lower court granted the City's summary judgment and dismissed Mr. Garner's lawsuit. (Order, CP 136-137) This summary judgment order is the basis for Mr. Garner's current appeal.

IV. ARGUMENT

A. MR. GARNER FAILED TO FOLLOW THE PROCEDURAL RULES ON APPEAL WHEN DRAFTING HIS BRIEF AND THOSE PORTIONS OF HIS BRIEF THAT FAIL TO COMPLY WITH APPELLATE RULES SHOULD BE STRICKEN.

The appellate court will only review “a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto.” RAP 10.3(g) An appellant must provide “concise statements of each error” he contends the lower court committed. RAP 10.3(a)(4). An appellant is required to designate any legal issues pertaining to the assignments of error. RAP 10.3(a)(6)

Generally, mere arguments in an appellant's brief do not take the place of proper assignments of error. *In re Whittier's Estate*, 26 Wn.2d 833, 843, 176 P.2d 281, 286 (1947). “In the absence of any assignment of error, plaintiff is not entitled to have the contentions on his appeal considered.” *Hafer v. Marsh*, 16 Wn.2d 175, 181, 132 P.2d 1024, 1026 (1943). Specifically, an assignment of error supported by neither argument nor authority will not be considered on appeal. *State v. Grinier*, 34 Wn.App. 164, 167, 659 P.2d 550, 551 (Div. 2, 1983). Inversely, a contention that is not supported by any assignment of error will not be considered. *Boyle v. King County*, 46 Wn.2d 428, 282 P.2d 261 (1955).

Moreover, blindly raising constitutional issues without any legal or factual support will not be reviewed on appeal. *State v. Johnson*, 119 Wn.2d 167, 171, 829 P.2d 1082, 1084 (1992) (“Parties raising constitutional issues must present considered arguments to this court....naked castings into the constitutional sea are not sufficient to command judicial consideration and discussion.”) (internal citations omitted).

Parsing Mr. Garner’s prose, logic, and argument has been frustrating to say the least. Mr. Garner clearly failed to assign precise assignments of error or any issues arising from his unformulated assignments of error. Further, from what the undersigned can tell, Mr. Garner’s arguments have only a tenuous and fleeting relationship to his nebulous assignments of error and do not support any issues for review. Mr. Garner also blindly raises additional constitutional issues, which are not supported by lucid legal arguments or evidence. To the extent Mr. Garner failed to support any of his assignments of error with argument, failed to make an assignment of error for any of his arguments, or raised additional unsupported arguments, such matters should not be considered on appeal.

The City further motions the court to strike any portion of Mr. Garner’s brief failing to comply with aforementioned rules of procedure.

B. THE LOWER COURT PROPERLY REVIEWED THE RECORD.

In his first assignment of error, Mr. Garner contends the lower court erred under RAP 9.12 by not considering the “Summons and Complaint.” (Appellant Brief at 30) The summary judgment order identifies the documents and evidence reviewed by the lower court pursuant to RAP 9.12. The order contains the catchall phrase “the records and files contained herein.” (CP 136-137) The City argues such a phrase indicates the court did consider the record including the pleadings. Further, it is difficult to understand how the lower court could not have considered Mr. Garner’s complaint considering those were the claims the City resisted in its summary judgment motion.

At any rate, Mr. Garner does not support his assignment of error with any legal argument, or evidence and, as discussed *supra*, the assignment of error should not be considered on review.

C. THE LOWER COURT CONSIDERED ALL NECESSARY FACTS IN THE MOST FAVORABLE LIGHT TO MR. GARNER WHEN IT GRANTED THE CITY’S MOTION FOR SUMMARY JUDGMENT.

In his second assignment of error, Mr. Garner argues the lower court erred by not considering facts in a light most favorable to him and asserts the lower court based its decision on “erroneous facts” presented by

the City⁴. (Appellant Brief at 31) However, Mr. Garner's brief is less than translucent on which facts failed to receive proper lighting.

At best guess, the City understands Mr. Garner's argument to be based on the City attorney's phrasing of Mr. Garner's governmental takings claim as "*per se*" during oral argument rather than "*de facto*" as listed in Mr. Garner's complaint. (RP 10; CP 5) In Mr. Garner's magical-legal land, this mislabeling is grave enough to constitute an error⁵ by the lower court. However, in reality it means nothing.

In order to rise to the level of reversible error, Mr. Garner must show that the failure to call his government takings claim "*de facto*" was a

⁴ Appellant also accuses the undersigned of ethical misconduct, a violation of RPC 3.3 "Candor toward the Tribunal." (Appellant Brief at 5-6) While personally offensive, the undersigned will not respond to this accusation as it is patently false and would only distract from the proceedings.

⁵ Mr. Garner does not list the standard of review for his assignment of error, but the City provides:

The de novo standard of review is used by an appellate court when reviewing all trial court rulings made in conjunction with a summary judgment motion. In reviewing an order for summary judgment, we engage in the same inquiry as the trial court. *Cornish College of the Arts v. 1000 Virginia Limited Partnership*, P.3d_, 2010 WL 4159298, 4 (2010 Div.I) (internal citations omitted).

However when considering the lower court's admittance of evidence, the standard of review would be abuse of discretion. See *Hizey v. Carpenter*, 119 Wn.2d 251, 830 P.2d 646 (1992) (Admissibility of evidence is reviewed for abuse of discretion with few exceptions.)

disputed material fact; for summary judgment is properly granted where the pleadings, affidavits, depositions, and admissions on file demonstrate “there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c). A material fact ““is a fact upon which the outcome of the litigation depends, in whole or in part.”“ *Lamon v. McDonnell Douglas Corp.*, 91 Wn.2d 345, 349, 588 P.2d 1346 (1979) (quoting *Morris v. McNicol*, 83 Wn.2d 491, 494-95, 519 P.2d 7 (1974)). All evidence must be considered in the light most favorable to the nonmoving party. *Lamon*, 91 Wn.2d at 349-50, 588 P.2d 1346. The motion for summary judgment should be granted only if, from all the evidence, reasonable persons could reach but one conclusion. *Morris v. McNicol*, 83 Wn.2d 491, 494-95, 519 P.2d 7 (1974).

Mr. Garner claims the City’s actions constitute a governmental taking of private property. Whether one calls it a regulatory taking, inverse condemnation, *per se* taking, *de facto* taking or a hardboiled egg, it would not matter because it is not a fact upon which the outcome of the litigation lies and, thus, would not (even if considered as an error) change the lower court’s ruling that Mr. Garner failed to timely file his summary judgment response brief (failing to preserve any of his arguments for review), or that his governmental takings claims is precluded under the

doctrine of *res judicata*. Additionally, Mr. Garner presents no evidence or legal precedent to support his argument that the phrasing of his governmental taking as *per se* rather than *de facto* constitutes an issue of material fact requiring reversal of the lower court's order granting summary judgment.

Further, takings claims arise from land use regulations and have nothing to do with the City's attempt to protect its community from Mr. Garner's hazardous structure by enforcing its civil code against dangerous and unfit buildings. The fact is municipalities have a right to regulate nuisances and promote the health and safety of its communities, and this court made it clear that regulating nuisances are not governmental takings of private property:

The power that the State has to prohibit such uses of property as may be injurious to the health, morals, or safety of the public is not, and cannot be, burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community. Property owners do not have a right to use and enjoy their property so as to create a nuisance or interfere with the general welfare of the community. For this reason, the State has not "taken" anything when it asserts its power to enjoin the nuisance-like activity.

In re Property Located at 14255 53rd Ave., S., Tukwila, King County, Washington, 120 Wn.App. 737, 747-748, 86 P.3d 222 (Div. 1, 2004) (internal citations and quotations omitted).

The uncontested fact is Mr. Garner allowed the structure on his property to deteriorate into a hazard unfit for human dwelling, which threatened the health, safety, and welfare of the general public. As a matter of law, any action taken by the City to enforce its civil code against dangerous and unfit structures cannot be considered a taking, and Mr. Garner has not offered any legal precedent or evidence in opposition of this clear legal precedent.

D. THE DOCTRINES OF *RES JUDICATA* AND CLAIM PRECLUSION BARRED MR. GARNER'S LAWSUIT AND MR. GARNER'S ARGUMENTS AGAINST THE APPLICATION OF *RES JUDICATA* SHOULD BE STRICKEN FROM HIS APPELLATE BRIEF.

In his third, fourth, and fifth assignments of error, appellant tenuously argues that the lower court improperly applied the doctrines of *res judicata* and claim preclusion⁶.

“It is axiomatic that an appellate court will generally not review any issue not raised in the court below. This rule is based on the principle that it is fundamentally unfair to fault the trial court for failing to rule correctly on an issue it was never given the opportunity to consider.”

AMJUR APPELLATE § 618 In accord with this axiom, RAP 9.12 controls what the appellate court will review after a trial court grants an order for summary judgment:

On review of an order granting...a motion for summary judgment the appellate court will consider *only* evidence and issues called to the attention of the trial court. The order granting...the motion for summary judgment shall designate the documents and other evidence called to the attention of the trial court before the order on summary judgment was entered. Documents or other evidence called to the attention of the trial court but not designated in the order shall be made a part of the record by supplemental order of the trial court or by stipulation of counsel.

(Emphasis added). Citing to RAP 9.12, the Washington Supreme Court ruled “[o]n appeal, the [reviewing court] engage[s] in the same inquiry as the trial court.” *Hodge v. Raab*, 151 Wn.2d 351, 354, 88 P.3d 959 (2004). The appellate court, when reviewing a summary judgment order, will not consider an argument that was not made to the trial court. *1519-1525 Lakeview Blvd. Condominium Ass’n v. Apartment Sales Corp*, 101 Wn.App. 923, 932 6 P.3d 74, *review granted* 143 Wn.2d 1001, 20 P.3d 944, *affirmed* 144 Wn.2d 570, 29 P.3d 1249 (2000). “When reviewing a summary judgment order, this court engages in the same inquiry as the trial court and only considers evidence and issues raised below.” *Douglas v. Jepson*, 88 Wn.App. 342, 347, 945 P.2d 244, 247 (Div. 1, 1997) (citing to RAP 9.12)

Mr. Garner's arguments against the application of *res judicata* were raised in his summary judgment response. (CP 17 at 6)⁷ Since Mr. Garner's summary judgment response was stricken from the record, the lower court did not consider his arguments upon its ruling granting summary judgment, and his arguments are not up for review on appeal. Thus, to the extent such arguments were included in his summary judgment response brief, Mr. Garner's opposition to the application of *res judicata* should not be considered on review and should be stricken from his brief. (CP 120)

Second, Mr. Garner does not support these assignments of error with any legal argument or evidence. As argued in the City's summary judgment memorandum, *res judicata* applies equally to all claims actually litigated and those that ***could have been raised*** when a prior judgment has a harmony of identity in (1) subject matter, (2) cause of action, (3) persons and parties, and (4) the quality of the persons for or against whom the claim is made. (CP 26) Mr. Garner does not argue that the previous final judgment he received lacked any such harmonious identity with the case

⁷ Appellant designated his summary judgment response brief as part of the clerk's papers. Respondent does not believe it was proper to identify appellant's summary judgment response as part of the record and uses the clerk's paper designation for purposes of reference only.

under review⁸. (Appellant Brief at 31-33) Rather, he seems to argue that his governmental takings claim was not ripe until there was a final judgment in his previous lawsuit, so the doctrine of *res judicata* does not apply. However, Mr. Garner offers no legal precedent supporting his ripeness contention. (Appellant Brief at 32-33)

Despite Mr. Garner's claims to the contrary, he did raise the issue of a governmental taking in his previous lawsuit, and the previous judge ruled there was no such taking (CP 24-25); Mr. Garner offers no evidence to the contrary.

Finally, as argued on summary judgment, takings law applies to land use regulation, not code enforcement. (CP 30-33) The ordinances and actions taken by the City of which Mr. Garner complains have nothing to do with regulating the *use* of his property as Mr. Garner does not have the right to use his property in a manner that puts the rest of the community at risk or interferes with its general welfare.

Mr. Garner counters (although he does not raise the issue under an assignment of error) that the City's sanitary regulations, allowed under XI

⁸ Appellant does not raise the harmony issue in his assignments of error, but seems to argue that the subject matter and cause of action are not in harmony with his previous lawsuit under the section of his brief labeled "Statement of the Case." However, even if the court considers the issue properly before it, appellant does not support it with any argument, evidence or precedent. (Appellant Brief at 35).

§ 11 of the Washington State Constitution, impermissibly conflict with the general laws (Revised Code of Washington) citing to *State v. Inglis*, 32 Wn.App. 700, 649 P.2d 136 (Div. 1, 1982).

However, the ruling in *Inglis* is inapposite as it has nothing to do with a civil code addressing unfit dwellings. Rather it involves the crime of promoting prostitution, which both the Seattle Municipal Code and the Washington Criminal Code declared to be crimes. *Inglis*, 32 Wn.App. at 701-702. The state law made promoting prostitution a felony while the municipal ordinance made it a misdemeanor. *Id.* Because the suspect committed the crime in Seattle, he claimed he could have been charged under either statute and was denied equal protection under the law because he was charged with a felony rather than a misdemeanor. *Id.* The court ruled that while a municipality may enforce its own police regulations its laws cannot conflict with state laws where the state has exercised its jurisdiction. *Id.* The court determined that the state did in fact exercise its jurisdiction and the Seattle's law must yield. *Id.*

Mr. Garner merely speculates that the City's civil code regulating unfit structures conflicts with RCW 19.27.180; however, Mr. Garner did not provide any support that the City's civil code addressing hazardous and unfit dwellings is in conflict with RCW 19.27.180 (or any other RCW), or that the state has exercised its jurisdiction over the area of

regulating hazardous buildings unfit for human dwellings. (Appellant Brief at 39) In fact, state law specifically grants municipalities the power to regulate dwellings unfit for human habitation along the guidelines expressed in RCW 35.80. (CP 30-33) In section 1.15.150, under Chapter 1.15 of the Federal Way Revised Code, the City clearly adopted RCW 35.80 allowing it to regulate structures unfit for human dwelling, and Mr. Garner does not dispute this fact. Rather, Mr. Garner argues that the City possesses only powers given by the state. Well, it is clear that the state provided the City the necessary power to regulate unfit structures like his.

E. MR. GARNER'S REMAINING ARGUMENTS WERE NOT RAISED IN HIS ASSIGNMENTS OF ERROR TO THE LOWER COURT, DO NOT HAVE ANY LEGAL MERIT, AND SHOULD BE STRICKEN FROM HIS BRIEF.

In the "Argument" section of his brief, Mr. Garner raises additional arguments outside of his assignments of error to the lower court and, as discussed *supra*, should not be considered on review. To the extent Mr. Garner's additional arguments are considered, the City argues that they possess no legal merit.

Boiling down Mr. Garner's leftover stew of remaining arguments, i.e. those not expressed within an assignment of error, provides the following reduction: The City's incorporation (and presumably passing of the ordinance regulating unfit structures) is an ex post facto law because

prior to the incorporation of the City, Mr. Garner was innocent and after the incorporation of the City, Mr. Garner's actions were made criminal. (Appellant Brief at 40-41) Mr. Garner also argues that the City changed the legal rules of evidence "by refusing to allow or order a rule on evidence so submitted to the [City's] improvement officer and the appeals commission." (Appellant Brief at 42)

An *ex post facto* law is one which imposes a punishment for an act which was not punishable when it was committed, or imposes additional punishment, or changes the rules of evidence, by which less or different testimony is sufficient to convict. *Calder v. Bull*, 3 (3 Dall.) U.S. 386, 390-391, 1 L.Ed. 648 (1798) A prohibition in the constitution against the passage of *ex post facto* laws applies exclusively to penal or criminal cases. *Id.*

Whether a law violates the prohibition against *ex post facto* turns on two basic questions: (1) Is the law "criminal" or "punitive," rather than "civil" or "non-punitive"? (2) If the law is "criminal" or "punitive," does it punish past or future conduct? *Forster v. Pierce County*, 99 Wn.App. 168, 178, 991 P.2d 687, 693 (Div. 2, 2000) (citing *Weaver v. Graham*, 450 U.S. 24, 28-29, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981) ("two critical elements must be present for a criminal or penal law to be *ex post facto*: it must be

retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender’’)).

If a law is not “criminal” or “punitive,” it can be applied to any conduct, either past or future, without violating the *ex post facto* clause. *Forster v. Pierce County*, 99 Wn.App. 168, 178, 991 P.2d 687, 693-694 (Div. 2, 2000) (citing to *Kansas v. Hendricks*, 521 U.S. 346, 370, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997) (“The *Ex Post Facto Clause*, which forbids the application of any new punitive measure to a crime already consummated, has been interpreted to pertain exclusively to penal statutes’’)).

The Washington Supreme Court accepted the following *Calder* categories to define violations of the *ex post facto* clause: if the law (1) punishes as a crime an act previously committed, which was innocent when done; (2) makes more burdensome the punishment for a crime, after its commission; or (3) deprives one charged with a crime of any defense available according to the law at the time the act was committed.. *State v. Ward*, 123 Wn.2d 488, 497, 869 P.2d 1062, 1067 (1994) (citing *Collins v. Youngblood*, 497 U.S. 37, 42-43, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990).

Mr. Garner failed to offer any evidence showing that the City’s enforcement of its civil code against appellant’s unfit structure involved a crime or a punishment. Even if the civil code was criminal (or punitive) in

nature, which it is not, appellant did not provide any support that the City's civil code regulating dangerous and unfit structures criminalizes or punishes past conduct. The structure on appellant's property was *presently* unfit for human dwelling at the time the City enforced its civil code. Finally, appellant's has not shown that his purported *ex post facto* violations fit into any of the three categories recognized under Washington law.

V. ATTORNEYS' FEES AND MOTION TO STRIKE

RAP 18.9(a) permits an appellate court, to require a party to pay the fees of another party for defending a frivolous appeal. *Fay v. Nw. Airlines, Inc.*, 115 Wn.2d 194, 200-01, 796 P.2d 412 (1990). "Pursuing a frivolous appeal justifies the imposition of terms and compensatory damages." *Green River Cmty. Coll. Dist. No. 10 v. Higher Educ. Pers. Bd.*, 107 Wn.2d 427, 442-43, 730 P.2d 653 (1986) (quoting *Boyles v. Dep't of Ret. Sys.*, 105 Wn.2d 499, 509, 716 P.2d 869 (1983) (Utter, J., concurring in part, dissenting in part)); *Pearson v. Schubach*, 52 Wn.App. 716, 725-26, 763 P.2d 834 (1988). "An appeal is deemed frivolous if, considering the entire record, no debatable issues are presented upon which reasonable minds might differ and it is so devoid of merit that there is no reasonable possibility of reversal." *In re Guardianship of Wells*, 150 Wn.App. 491, 504, 208 P.3d 1126, 1133 (Div. 1, 2009).

As described *supra*, it is axiomatic that an appellate court will not review any issue not raised in the trial court as it is fundamentally unfair to fault a trial court for failing to rule correctly on an issue that the court was never given an opportunity to consider. Because the lower court struck his summary judgment response brief, Mr. Garner did not preserve for appeal any of the arguments it contained. Therefore, Mr. Garner's arguments as expressed in his response brief fail to raise any disputable issues.

Furthermore, as cited *supra*, Mr. Garner's assignments of error and argument in support do not meet the standards under the Rules of Appellate Procedure and, thus, cannot be considered on review or to have raised any disputable issues. The appellate court will "...ordinarily impose sanctions on a party who files a brief that fails to comply with [the RAPs]." RAP 10.7

Therefore, Mr. Garner has not preserved any issues for appellate review; a fact he was fully aware before filing his appeal when his summary judgment response brief was stricken from the record by the lower court. It is clear, considering the entire record, that Mr. Garner's appeal presents no debatable issues upon which reasonable minds can differ and is completely devoid of any merit. As a result, the City should be awarded fees and costs for having to defend Mr. Garner's frivolous appeal.

Additionally, the City moves to strike any portion of Mr. Garner's brief, which does not comply with procedural rules including:

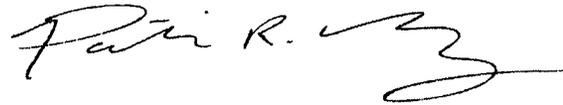
1. The arguments opposing the application, which were part of Mr. Garner's summary judgment response brief.
2. All assignments of error that do not raise reviewable issues and/or not supported by legal argument or evidence.
3. Any portion of Mr. Garner's argument not raised in an assignment of error.
4. Any constitutional basis for review raised without legal or factual support.

VI. CONCLUSION

Appellant failed to follow the appellate rules of procedure when drafting his brief and his arguments should be stricken and not considered. Even if the court does accept Mr. Garner's arguments, it is clear that (1) the lower court properly reviewed the record and did abuse its discretion by striking Mr. Garner's summary judgment response brief; (2) the lower court considered all necessary facts in the most favorable light to Mr. Garner when it granted the city's motion for summary judgment; and (3) The doctrines of *res judicata* and claim preclusion barred Mr. Garner's lawsuit. Finally, Mr. Garner's remaining arguments were not raised in his assignments of error to the lower court and do not have any legal merit.

RESPECTFULLY SUBMITTED December 1, 2010.

JERRY MOBERG & ASSOCIATES

A handwritten signature in black ink, appearing to read "Patrick R. Moberg". The signature is fluid and cursive, with a long horizontal stroke at the end.

PATRICK R. MOBERG, WSBA No. 41323
Attorney for CITY OF FEDERAL WAY

VII. APPENDIX

permit or approval issued pursuant to this Code shall be governed by this chapter unless other more specific provisions apply. This chapter may be used to address or enforce the code against any violation. Each day or portion of a day during which a violation occurs or exists is a separate violation. Aiding or abetting a violation of another is also a violation. Notwithstanding any provision to the contrary, any civil enforcement of the provisions of this Code or the terms and conditions of any permit or approval issued pursuant to this Code is in addition to, and does not preclude or limit, any other forms of enforcement available to the City including, but not limited to, criminal proceedings or sanctions, nuisance and injunction actions, or other civil or equitable actions to abate, discontinue, correct, or discourage unlawful acts in violation of this chapter. Code enforcement officers are authorized to enforce the Code using the provisions and procedures of this chapter.

(Ord. No. 09-597, §§ 4, 6, 1-6-09. Code 2001 § 1-14.5.)

1.15.030 Order to cease activity.

(1) *Issuance.* Whenever the enforcement officer determines a violation exists, he or she may issue an order to cease activity directing any person causing, allowing, or participating in the offending conduct to cease such activity or conduct immediately.

(2) *Service of order.* The enforcement official shall serve the order upon the person to whom it is directed, either by delivering it personally or by mailing a copy of it by registered or certified mail to such person at his or her last known address and by posting a copy of the order to cease activity conspicuously on the affected property or structure, or as near to the affected property or structure as feasible.

If service is not accomplished by personal service and if an address for mailed service cannot be ascertained, service shall be accomplished by posting a copy of the order conspicuously on the affected property or structure. If service is by personal service, service shall be deemed complete immediately. If service is made by mail, service shall be deemed complete upon the third day following the day upon which the order is placed in the mail, unless the third day falls on a Saturday, Sunday, or legal holiday, in which event service shall be deemed complete on the first day other than a Saturday, Sunday, or legal holiday following the third day. If service is made by posting, service shall be deemed complete on the third day following the day the order is posted.

Proof of service shall be made at the time of service by a written declaration under penalty of perjury executed by the person effecting the service, declaring the date and the manner of service. Any failure of the person to whom the order to cease activity is directed to observe the posted order or to actually receive the mailed order shall not invalidate service made in compliance with this section, nor shall it invalidate the order to cease activity.

(3) *Appeal of order to cease activity.* An order to cease activity may be appealed under the procedures set forth in FWRC 1.15.060. During any such appeal, the order to cease activity shall remain in effect.

(4) *Effect of order to cease activity.* When an order to cease activity has been issued, posted and/or served pursuant to this section, it is unlawful for any person to whom the order is directed or any person with actual or constructive knowledge of the order to conduct the activity or perform the work covered by the order, even if the order to cease activity has been appealed, until the enforcement officer has removed the copy of the order, if posted, and issued written authorization for the activity or work to be resumed. Violation of an order to cease activity constitutes a misdemeanor. In addition, a monetary penalty shall accrue for each day or portion thereof that a violation of an order to cease activity occurs, in the same amounts as under FWRC 1.15.040(5). In addition to such criminal or monetary penalties, the city may enforce the order to cease activity in accordance with FWRC 1.15.080, and enforce it in superior court.

(Ord. No. 09-597, § 7, 1-6-09; Ord. No. 07-560, § 1, 9-18-07; Ord. No. 99-342, § 3, 5-4-99. Code 2001 § 1-16.)

1.15.040 Notice of violation and order to correct.

(1) *Issuance.* Whenever the enforcement official determines that a violation has occurred or is occurring, he or she may issue a notice of violation and an order to correct ("notice and order") to any person causing, allowing or participating in the violation, including the property owner. The notice and order issued pursuant to this section represents a determination that a violation of this Code has been committed. This determination is final and conclusive unless appealed as provided herein.

(2) *Content.* The enforcement official shall include the following in the notice and order:

(a) The name and address of the property owner and/or other person to whom the notice and order is directed;

(b) The street address or description sufficient for identification of the building, structure, premises, or land upon or within which the violation has occurred or is occurring;

(c) A description of the violation and a reference to that provision of a city development regulation which has been violated;

(d) A statement of the action required to be taken to correct the violation as determined by the enforcement official and a date or time, not less than three days after service of the notice and order, by which correction is to be completed;

(e) A statement that the person to whom the notice and order is directed must:

(i) Complete correction of the violation by the date stated in the notice;

(ii) Appeal the notice and order as provided in FWRC 1.15.060; or

(iii) Enter and comply with a voluntary correction agreement with the city;

and

(f) A statement that, if the violation is not corrected, the notice and order is not appealed, a voluntary correction agreement is not entered or complied with, or a hearing examiner so orders or the person does not comply with a hearing examiner's order, a monetary penalty in an amount per day for each violation as specified by subsection (5) of this section shall accrue against the person to whom the notice and order is directed for each and every day, or portion of a day, on which the violation continues following the date set for correction, and that the violation may be abated by the city under FWRC 1.15.080 with costs assessed against the person.

(3) *Service of notice and order.* The enforcement official shall serve the notice and order upon the person to whom it is directed, either by delivering it personally or by mailing a copy of it by registered or certified mail to such person at his or her last known address and by posting a copy of the notice and order conspicuously on the affected property or structure.

If service is not accomplished by personal service and if an address for mailed service cannot be ascertained, service shall be accomplished by posting a copy of the notice and order conspicuously on the affected property or structure. If service is by personal service, service shall be deemed complete immediately. If service is made by mail, service shall be deemed complete upon the third day following the day upon which the notice and order is placed in the mail, unless the third day falls on a Saturday, Sunday, or legal holiday, in which event service shall be deemed complete on the first day other than a Saturday, Sunday, or legal holiday following the third day. If service is made by posting, service shall be deemed complete on the third day following the day the notice and order is posted.

Proof of service shall be made at the time of service by a written declaration under penalty of perjury executed by the person effecting the service, declaring the date and the manner of service. Any failure of the person to whom the notice and order is directed to observe the posted notice and order or to actually receive the mailed notice and order shall not invalidate service made in compliance with this section, nor shall it invalidate the notice and order.

(4) *Extension.* Upon written request (received prior to the correction date or time, the enforcement official may extend the date set for correction for good cause or in order to

accommodate a violation correction agreement. The enforcement official may consider substantial completion of the necessary correction or unforeseeable circumstances which render completion impossible by the date established as a good cause.

(5) *Monetary penalty.* A monetary penalty shall accrue for each day or portion thereof that each violation continues beyond the date set in a notice and order. The maximum penalty and the default amount shall be \$100.00 for the first violation, \$200.00 for a second violation of the same nature or a continuing violation, \$300.00 for a third violation of the same nature or a continuing violation, and \$500.00 for each additional violation of the same nature or a continuing violation in excess of three not including fees, costs, and assessments.

(6) *Continued duty to correct.* Payment of a monetary penalty pursuant to this chapter does not relieve a person of the duty to correct the violation as ordered by the enforcement official.

(7) *Declaration of compliance.* When the violation has been corrected and the penalty paid, the enforcement officer shall issue a letter which shall so state, and shall also record the date upon which the violation was fully corrected, beyond which no further penalty shall accrue.

(8) *Effect of unappealed notice and order.* If a notice and order is not appealed, each day which the violation continues beyond the date set in order to correct shall constitute a misdemeanor.

(Ord. No. 09-597, § 8, 1-6-09; Ord. No. 07-560, § 2, 9-18-07; Ord. No. 99-342, § 3, 5-4-99. Code 2001 § 1-17.)

1.15.050 Voluntary correction agreement.

(1) *General.* When the city determines that a violation has occurred, the city may enter into a voluntary correction agreement with any person causing, allowing, or participating in the violation, including the property owner. A voluntary correction agreement may be instead of, in lieu of, or in conjunction with a notice and order under FWRC 1.15.040.

(2) *Contents.* A voluntary correction agreement shall be in writing, signed by the person responsible for the violation and an enforcement official, and shall contain substantially the following information:

- (a) The name and address of the person responsible for the violation;
- (b) The street address or a description sufficient for identification of the building, structure, premises, or land upon or within which the violation has occurred or is occurring;
- (c) A description of the violation and a reference to the regulation violated;
- (d) The necessary corrective action to be taken, and a date or time by which the correction must be completed;
- (e) An agreement by the person responsible for the violation that the city may inspect the premises as may be necessary to determine compliance with the voluntary correction agreement;
- (f) An agreement by the person responsible for the violation and/or the owner(s) of property on which the violation has occurred or is occurring that, if the terms of the voluntary correction agreement are not met, the city may enter the property, abate the violation, and recover its costs and expenses as provided in this chapter;
- (g) An agreement that by entering into the voluntary correction agreement, the person responsible for the violation waives the right to a hearing before the examiner under this chapter regarding the violation, any penalty, and required corrective action; and
- (h) A statement that failure to comply with the terms of the agreement shall constitute a misdemeanor.

(3) *Modification and time extension.* An extension of the time limit for correction or a modification of the required corrective action may be granted by the enforcement official if the person responsible for the violation has shown due diligence in correcting the violation but unforeseen circumstances render correction under the original conditions

unattainable. All modifications or time extensions shall be in writing, signed by the person responsible for the violation and an enforcement official.

(4) *Penalty for noncompliance.* Violation of the terms of a voluntary correction agreement is a misdemeanor. Further, the city may enter the property, abate the violation, and recover all costs and expenses of abatement in accordance with the provisions of this chapter.

(Ord. No. 09-597, § 9, 1-6-09; Ord. No. 07-560, § 3, 9-18-07; Ord. No. 99-342, § 3, 5-4-99. Code 2001 § 1-18.)

1.15.060 Appeal to hearing examiner.

(1) *General.* A person may appeal an order to cease activity or notice and order to the hearing examiner by filing a written notice of appeal with the city clerk within 14 calendar days from the date of service of the order to cease activity or notice and order, specifying what issue is being appealed. The person appealing may appeal either the determination that a violation exists, the amount of any monetary penalty imposed, the corrective action ordered, or any combination thereof. The city may also request a hearing before the hearing examiner to assess costs, modify previous orders, or to enter other orders as needed. The appeal must be accompanied by cash or a check, payable to the city of Federal Way, in the amount of \$100.00, which is refundable in the event the appellant prevails on the appeal. The filing fee is waived in cases where the city requests the hearing.

(2) *Effect of appeal.* The timely filing of an appeal in compliance with this section shall stay the requirement for action specified in the notice and order that is the subject of the appeal. The monetary penalty for a continuing violation does not continue to accrue during the pendency of the appeal; however, the hearing examiner may impose a daily monetary penalty from the date of service of the order to cease activity or notice and order if the hearing examiner finds that the appeal is frivolous or intended solely to delay compliance. An appeal does not lift or stay an order to cease activity.

(3) Hearing.

(a) *Date of hearing.* Within 10 days of the clerk's receipt of the appeal, the hearing examiner shall set a public hearing for a date within 30 days of the clerk's receipt of the appeal.

(b) *Notice of hearing.* The notice shall contain the following:

- (i) The file number and a brief description of the matter being appealed.
- (ii) A statement of the scope of the appeal, including a summary of the errors alleged and the findings and/or legal conclusions disputed in the appeal.
- (iii) The date, term and place of the public hearing on the appeal.
- (iv) A statement of who may participate in the appeal.
- (v) A statement of how to participate in the appeal.

(c) *Distribution.* The clerk shall cause a notice of the appeal hearing to be posted on the property that is the subject of the order to cease activity or notice and order, and mailed to the appellant and, in cases involving any ordinance regulating the improvement, development, modification, maintenance, or use of real property, to all property owners located within 300 feet of the property that is the subject of the violation. The notice shall be mailed and posted at least 10 calendar days before the hearing on the appeal.

(d) *Participation in the appeal.* The city and the appellant may participate as parties in the hearing and each may call witnesses. Any person may participate in the public hearing in either or both of the following ways:

(i) By submitting written comments to the hearing examiner, either by delivering these comments to the clerk prior to the hearing or by giving these directly to the hearing examiner at the hearing.

(ii) By appearing in person, or through a representative, at the hearing and making oral comments directly to the hearing. The hearing examiner may reasonably limit the extent of oral comments to facilitate the orderly and timely conduct of the

hearing.

(e) *Conduct of hearing.* The hearing examiner shall conduct the hearing on the appeal pursuant to the rules of procedure of the hearing examiner. The appellant shall have the burden of proof by a preponderance of the evidence that a violation has not occurred, that the amount of monetary penalty assessed was not in compliance with the Code, or that the corrective action ordered is unnecessary to cure the violation. The hearing examiner shall make a complete electronic sound recording of the public hearing.

(f) *Continuation of the hearing.* The hearing examiner may continue the hearing if he or she is unable to hear all of the public comments on the matter or if the hearing examiner determines that he or she needs more information on the matter. If, during the hearing, the hearing examiner announces the time and place of the next hearing on the matter, no further notice of that hearing need be given.

(4) *Decision of hearing examiner.*

(a) *Vacation.* If the hearing examiner determines that the appellant has proven by a preponderance of the evidence that no violation substantially as stated in the order to cease activity or notice and order has occurred, the hearing examiner shall vacate the order to cease activity or notice and order, and order the appeal fee refunded.

(b) *Affirmance.* If the hearing examiner determines that the appellant has not so proven by a preponderance of the evidence, the hearing examiner shall affirm the order to cease activity or notice and order.

(c) *Modification.* If the hearing examiner determines that the corrective action ordered was unnecessary to cure the violation, the examiner may modify the corrective action required depending on the determinations of the examiner. The hearing examiner may also modify the assessment of penalties and costs if good cause is found. In so ordering, the hearing examiner shall consider the following:

- (i) Whether the intent of the appeal was to delay compliance;
- (ii) Whether the appeal was frivolous;
- (iii) Whether there was a written contract or agreement with another party which specified the securing by the other party of the applicable permit or approval from the city;
- (iv) Whether the applicant exercised reasonable, timely, and good faith effort to comply with the applicable development regulations; or
- (v) Any other relevant factors.

The monetary penalty shall not be modified without assuring the violation is corrected, unless the penalty is legally erroneous. In modifying the corrective action ordered, the hearing examiner shall require, at a minimum, any action necessary to ensure actual compliance within 14 days of the date of the examiner's decision.

(5) *Issuance of decision.* The hearing examiner shall issue an oral decision at the time of the hearing unless good cause exists to delay the decision. The hearing examiner shall issue a written decision, including findings of fact, conclusions, and order within 14 days of the hearing. The appellant is required to comply with any decision of the hearing examiner whether oral or written upon issuance.

(6) *Judicial review.* Judicial review of a decision by the hearing examiner relating to any ordinance regulating the improvement, development, modification, maintenance, or use of real property may be sought by any person aggrieved or adversely affected by the decision, pursuant to the provisions of the Land Use Petition Act, Chapter 36.70C RCW, if applicable, or other applicable authority, if any, if the petition or complaint seeking review is filed and served on all parties within 21 days of the date of the decision. For purposes of this section, "aggrieved or adversely affected" shall have the meaning set forth in RCW 36.70C.060(2). Judicial review of all other decisions may only occur subject to the procedures of Chapter 7.16 RCW.

(7) *Effect of decision.* If judicial review is not obtained, the decision of the hearing examiner shall constitute the final decision of the city, and the failure to comply with the decision of the hearing examiner shall constitute a misdemeanor.

(Ord. No. 09-597, § 10, 1-6-09; Ord. No. 07-560, § 4, 9-18-07; Ord. No. 99-342, § 3, 5-4-99. Code 2001 § 1-19.)

1.15.070 Collection of monetary penalty.

(1) Any monetary penalty imposed under this Code constitutes a personal obligation of the person in violation. Any monetary penalty assessed must be paid to the city clerk within 14 calendar days from the date of service of the notice and order or, if an appeal was filed pursuant to FWRC 1.15.060, within 14 calendar days of the hearing examiner's decision.

(2) The city attorney is authorized to collect the monetary penalty by use of appropriate legal remedies, the seeking a granting of which shall neither stay nor terminate the accrual of additional per diem monetary penalties so long as the violation continues.

(a) The city may authorize the use of collection agencies to recover monetary penalties, in which case the cost of the collection process shall be assessed in addition to the monetary penalty.

(b) The city may incorporate any outstanding penalty into an assessment lien when the city incurs costs of abating the violation pursuant to FWRC 1.15.080.
(Ord. No. 09-597, § 11, 1-6-09; Ord. No. 99-342, § 3, 5-4-99. Code 2001 § 1-20.)

1.15.080 Abatement and additional enforcement procedures.

(1) *Abatement by city.* The city may perform the abatement required upon noncompliance with the terms of an unappealed notice and order, a voluntary correction agreement, or a final order of the hearing examiner. The city may utilize city employees or a private contractor under city direction to accomplish the abatement. The city, its employees and agents using lawful means are expressly authorized to enter upon the property of the violator for such purposes.

(2) *Recovery of costs.* The city shall bill its costs, including incidental expenses, of abating the violation to the person obligated to perform the work under the notice and order, voluntary correction agreement or the hearing examiner's decision, which costs shall become due and payable 30 days after the date of the bill. The term "*incidental expenses*" shall include, but not be limited to, personnel costs, both direct and indirect, including attorneys' fees incurred by the city; costs incurred in documenting the violation; the actual expenses and costs to the city in the preparation of notices, specifications and contracts, and in inspecting the work; and the cost of any required printing and mailing. The city manager or designee, or the hearing examiner, may in his or her discretion waive in whole or part the assessment of any costs of abatement upon a showing that abatement has occurred or is no longer necessary, or that the costs would cause a significant financial hardship for the responsible party. The city may authorize the use of collection agencies to recover costs. The city attorney is authorized to collect the costs by use of appropriate legal remedies.

(3) *Obstruction with work prohibited.* No person shall obstruct, impede or interfere with the city, its employees or agents, or any person who owns or holds any interest or estate in any property in the performance of any necessary act, preliminary or incidental to carrying out the requirements of a notice and order to correct, voluntary correction agreement, or order of the hearing examiner issued pursuant to this chapter. A violation of this provision shall constitute a misdemeanor.

(4) *Report to city council and hearing on cost of abatement.* Where costs are assessed under this section and the person responsible fails to pay within the 30-day period, the enforcement official shall prepare a written itemized report to the city council showing the cost of abatement, including rehabilitation, demolition, restoration or repair of such property, including such salvage value relating thereto plus the amount of any outstanding penalties.

(a) A copy of the report and a notice of the time and date when the report shall be heard by the city council shall be served on the person responsible for payment at least five days prior to the hearing before the city council.

(b) The city council shall review the report and such other information on the matter as it receives and deems relevant at the hearing. The city council shall confirm or revise the amounts in the report, authorize collection of that amount or, in the case of a debt owed by a property owner, authorize placement of an assessment lien on the property as provided herein.

(5) *Assessment lien.* Following the hearing and authorization by the city council, the city clerk shall certify to the county treasurer the confirmed amount. The county treasurer shall enter the amount of such assessment upon the tax rolls against the property for the current year and the same shall become a part of the general taxes for that year to be collected at the same time and with interest at such rates as provided in RCW 84.56.020, as now or hereafter amended, for delinquent taxes, and when collected to be deposited to the credit of the general fund of the city. The lien shall be of equal rank with the state, county and municipal taxes. The validity of any assessment made under the provisions of this chapter shall not be contested in any action or proceeding unless the same is commenced within 15 calendar days after the assessment is placed upon the assessment roll.

(6) *Additional remedies.* Unless otherwise precluded by law, the provisions of this chapter may be used in lieu of or in addition to other enforcement provisions, including, but not limited to, other provisions in this Code, the use of collection agencies, or other civil actions including injunctions.

(Ord. No. 09-597, § 12, 1-6-09; Ord. No. 07-560, § 5, 9-18-07; Ord. No. 99-342, § 3, 5-4-99. Code 2001 § 1-21.)

1.15.090 Conflicts.

In the event of a conflict between this chapter and any other provision of this Code or city ordinance providing for a civil penalty, the more specific provision shall control.

(Ord. No. 09-597, § 13, 1-6-09; Ord. No. 99-342, § 3, 5-4-99. Code 2001 § 1-22.)

1.15.100 Meaning of terms.

Whenever the term "*civil penalty*" is used in any code, ordinance or regulation of the city, this term shall be deemed to have the same meaning as the term "monetary penalty," as used in this chapter.

(Ord. No. 09-597, § 14, 1-6-09; Ord. No. 07-564, § 3, 10-16-07; Ord. No. 99-342, § 3, 5-4-99. Code 2001 § 1-23.)

1.15.110 Infractions authorized and statutes adopted.

(1) Enforcement officers and officials are authorized to issue civil infractions to enforce the provisions of the Federal Way Revised Code except those provisions that are either specifically designated as crimes, specifically indicated as not being infractions, or designated as traffic infractions.

(2) Unless otherwise provided, enforcement officers or officials shall follow the provisions of Chapter 7.80 RCW in issuing civil infractions. Unless otherwise provided, the maximum penalty and the default amount shall be \$100.00 for the first violation, \$200.00 for a second violation of the same nature or a continuing violation, and \$300.00 for a third or subsequent violation of the same nature or a continuing violation, not including fees, costs, and assessments.

(3) Unless otherwise provided, civil infractions under this section shall be governed by Chapter 7.80 RCW, except that, to the extent allowed by law, the rules of evidence shall not apply in any hearing held regarding civil infractions.

(4) The following state statutes are adopted by reference to the extent that they are not inconsistent with explicit provisions of the Federal Way Revised Code: Chapter 7.80 RCW et seq.

(Ord. No. 09-597, § 15, 1-6-09; Ord. No. 07-550, § 1, 3-20-07. Code 2001 § 1-24.)

1.15.130 Additional enforcement mechanism.

In addition to, and in combination with, the enforcement methods set forth in this

chapter and elsewhere in the Federal Way Revised Code, violations of the Federal Way Revised Code may be enforced under the provisions set forth in FWRC 1.15.130 through 1.15.270.

(Ord. No. 07-566, § 1, 11-6-07. Code 2001 § 1-26.)

1.15.140 Findings.

It is found that there exist, in the city of Federal Way, dwellings and other buildings, structures, and premises which are unfit for human habitation and which are unfit for other uses due to dilapidation, disrepair, structural defects, defects increasing the hazards of fire, accidents, or other calamities, inadequate drainage, overcrowding, or due to other conditions which are detrimental to the health and welfare of the residents of the city. Dangerous or unfit buildings or structures as defined by FWRC 1.15.170 are declared to be public nuisances.

(Ord. No. 07-566, § 1, 11-6-07. Code 2001 § 1-27.)

1.15.150 Chapter 35.80 RCW adopted.

Chapter 35.80 RCW, Unfit Dwellings, Buildings, and Structures, as it currently exists or is hereinafter amended, is hereby adopted.

(Ord. No. 07-566, § 1, 11-6-07. Code 2001 § 1-28.)

1.15.160 Improvement officer and appeals commission designated.

(1) The city of Federal Way hearing examiner is designated as the city's improvement officer, and shall have the full scope of authority granted to that official under Chapter 35.80 RCW except that the city building official, or his or her designee, shall provide all administrative functions such as the inspection of buildings, or portions thereof, for the purpose of determining whether any conditions exist which render such buildings dangerous or unfit pursuant to FWRC 1.15.170.

(2) The city of Federal Way city manager, or his or her designee, is designated as the city's appeals commission, and shall have the full scope of authority granted to that commission under Chapter 35.80 RCW.

(Ord. No. 07-566, § 1, 11-6-07. Code 2001 § 1-29.)

1.15.170 Dangerous or unfit buildings or structures defined.

Buildings or structures which have any or all of the following defects shall be deemed "dangerous or unfit buildings or structures":

(1) Those whose interior walls or other vertical structural members list, lean or buckle to such an extent that a plumb line passing through the center of gravity falls outside the middle third of its base;

(2) Those which, exclusive of the foundation, show 33 percent, or more, of damage or deterioration of the supporting member or members, or 50 percent of damage or deterioration of the nonsupporting enclosing or outside walls or covering;

(3) Those which have improperly distributed loads upon the floors or roofs or in which the same are overloaded, or which have insufficient strength to be reasonably safe for the purpose used;

(4) Those which have become damaged by fire, wind or other causes so as to have become dangerous to life, safety, morals or the general health and welfare of the occupants or the people of the city of Federal Way;

(5) Those which have become or are so dilapidated or decayed or unsafe or unsanitary, or which so utterly fail to provide the amenities essential to decent living, that they are unfit for human habitation, or are likely to cause sickness or disease, so as to work injury to the health, morals, safety or general welfare of those living therein;

(6) Those having light, air and sanitation facilities which are inadequate to protect the health, morals, safety or general welfare of human beings who live or may live therein;

(7) Those having inadequate facilities for egress in case of fire or panic or those having insufficient stairways, elevators, fire escapes or other means of communication;

(8) Those which have parts thereof which are so attached that they may fall and injure

members of the public or property;

(9) Those which because of their condition are unsafe or unsanitary, or dangerous to the health, morals, safety or general welfare of the people of this city;

(10) Those which have any exterior cantilever wall, or parapet, or appendage attached to or supported by an exterior wall of the building located adjacent to a public way or to a way set apart for exit from a building or passage of pedestrians, if such cantilever, parapet or appendage is not so constructed, anchored or braced as to remain wholly in its original position in event of an earthquake capable of producing a lateral force equal to gravity;

(11) Those which in whole or in part are erected, altered, remodeled or occupied contrary to the ordinances adopted by the city;

(12) Those which have any exterior wall located adjacent to a public way or to a way set apart for exit from a building or passage of pedestrians, if such wall is not so constructed, anchored or braced as to remain wholly in its original position in event of an earthquake capable of producing a lateral force equal of 0.2 of gravity.

(Ord. No. 07-566, § 1, 11-6-07. Code 2001 § 1-30.)

1.15.180 Standards for repair, vacation or demolition.

The following standards shall be followed in substance by the improvement officer and the appeals commission in ordering repair, vacation or demolition of buildings or structures:

(1) If the dangerous or unfit building or structure can reasonably be repaired so that it will no longer exist in violation of the terms of this chapter, it shall be ordered repaired by the improvement officer or by the appeals commission, on appeal.

(2) If the dangerous or unfit building or structure is 50 percent damaged or decayed or deteriorated in value, it shall be demolished. "Value" as used herein shall be the valuation placed upon the building or structure for purposes of general taxation.

(3) If the dangerous or unfit building or structure cannot be repaired so that it will no longer exist in violation of the terms of this chapter, it shall be demolished.

(4) If the dangerous or unfit building or structure is a fire hazard, existing or erected in violation of the terms of this chapter or any other ordinance of the city of Federal Way or the laws of the state of Washington, it shall be demolished, provided the fire hazard is not eliminated by the owner within a reasonable time.

(Ord. No. 07-566, § 1, 11-6-07. Code 2001 § 1-31.)

1.15.190 Issuance of complaint.

If, after a preliminary investigation of any dwelling, building, structure or premises, the city building official, or his or her designee, finds that it is unfit for human habitation or other use, the building official, or his or her designee, may issue a complaint conforming to the provisions of RCW 35.80.030, stating in what respects such dwelling, building, structure or premises is unfit for human habitation or other use. In determining whether a dwelling, building, structure or premises should be repaired or demolished, the building official shall be guided by the Federal Way Revised Code, specifically FWRC 1.15.170, and such other codes adopted pursuant to the Federal Way Revised Code as the building official deems applicable, in particular the most recent edition of the International Property Maintenance Code.

(Ord. No. 07-566, § 1, 11-6-07. Code 2001 § 1-32.)

1.15.200 Service of complaint.

A complaint issued under this chapter shall be served on the parties and posted on the subject property pursuant to RCW 35.80.030, and shall also be filed with the King County auditor. All complaints or other documents posted on the subject property shall remain in place until the complaint has been resolved. For purposes of service, such complaints or other documents are deemed effective on the day of posting.

(Ord. No. 07-566, § 1, 11-6-07. Code 2001 § 1-33.)

1.15.210 Complaint hearing.

Not less than 10 days nor more than 30 days after serving a complaint, the improvement officer shall hold a hearing conforming to the provisions of RCW 35.80.030, at which all parties in interest shall be given the right to appear in person, to bring witnesses, and to give testimony regarding the complaint. At any time prior to or at the time of the hearing, any party may file an answer to the complaint. Such a hearing shall be governed by the city of Federal Way hearing examiner's rules, which shall be available for public inspection at the Federal Way department of community development.

(Ord. No. 07-566, § 1, 11-6-07. Code 2001 § 1-34.)

1.15.220 Determination, findings of fact, and order.

Within 10 days of the complaint hearing, the improvement officer shall issue a determination, findings of fact, and order, conforming to the provisions of RCW 35.80.030 (f), stating the improvement officer's determination as to whether the subject dwelling, building, structure or premises is unfit for human habitation or other use; the findings of fact supporting the determination; and an order specifying the actions necessary to address any unfitness, and a deadline for completing the actions. In issuing the determination, findings of fact, and order, the improvement officer shall be guided by the Federal Way Revised Code, specifically FWRC 1.15.170 and 1.15.180, and such other codes adopted pursuant to the Federal Way Revised Code as the improvement officer deems applicable. The determination, findings of fact, and order shall be served and posted as set forth in FWRC 1.15.200, and if no appeal is filed within the deadline specified in FWRC 1.15.230, a copy of the determination, findings of fact, and order shall be filed with the King County auditor.

(Ord. No. 07-566, § 1, 11-6-07. Code 2001 § 1-35.)

1.15.230 Appeal to appeals commission.

Within 30 days of service of a determination, findings of fact, and order, any party may file an appeal to the appeals commission. The appeals commission shall conduct a hearing on the appeal and issue a ruling within 60 days from the date the appeal is filed; and if the appeals commission issues any oral findings of fact, the ruling shall contain a transcript of such findings in addition to any findings issued at the time of the ruling. The ruling shall be served and posted as set forth in FWRC 1.15.200, and if no appeal is filed within the deadline specified in FWRC 1.15.240, a copy of the ruling shall be filed with the King County auditor.

(Ord. No. 07-566, § 1, 11-6-07. Code 2001 § 1-36.)

1.15.240 Appeal to superior court.

Any person affected by a determination, findings of fact, and order issued by the improvement officer, who has brought an appeal before the appeals commission pursuant to FWRC 1.15.230 may, within 30 days after the appeals commission's ruling has been served and posted pursuant to FWRC 1.15.200, petition the King County superior court for an injunction restraining the building official, or his or her designee, from carrying out the provisions of the determination, findings of fact, and order. In all such proceedings, the court is authorized to affirm, reverse or modify the order, and such trial shall be heard de novo.

(Ord. No. 07-566, § 1, 11-6-07. Code 2001 § 1-37.)

1.15.250 Remediation – Penalties.

If a party, following exhaustion of the party's rights to appeal, fails to comply with the determination, findings of fact, and order, the building official, or his or her designee, may direct or cause the subject dwelling, building, structure or premises to be repaired, altered, improved, vacated, and closed, removed, or demolished pursuant to Chapter 35.80 RCW.

(Ord. No. 07-566, § 1, 11-6-07. Code 2001 § 1-38.)

1.15.260 Tax lien.

The cost of any action taken by the building official, or his or her designee, under FWRC 1.15.250 shall be assessed against the subject property pursuant to Chapter 35.80 RCW. Upon certification by the city of Federal Way finance director, or his or her designee, that the assessment amount is due and owing, the King County treasurer shall enter the amount of such assessment upon the tax rolls against the subject property pursuant to the provisions of RCW 35.80.030.

(Ord. No. 07-566, § 1, 11-6-07. Code 2001 § 1-39.)

1.15.270 Salvage.

Materials from any dwelling, building, structure, or premises removed or demolished by the building official, or his or her designee, shall, if possible, be salvaged and sold as if the materials were surplus property of the city of Federal Way, and the funds received from the sale shall be credited against the cost of the removal or demolition; and if there be any balance remaining, it shall be paid to the parties entitled thereto, as determined by the building official, or his or her designee, after deducting the costs incident thereto.

(Ord. No. 07-566, § 1, 11-6-07. Code 2001 § 1-40.)

This page of the Federal Way Revised Code is current through Ordinance 10-662, passed June 1, 2010.

Disclaimer: The City Clerk's Office has the official version of the Federal Way Revised Code. Users should contact the City Clerk's Office for ordinances passed subsequent to the ordinance cited above.

City Website: <http://cityoffederalway.com>

City Telephone: (253) 835-2540

Code Publishing Company