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NO. 367932

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

CITY OF SELAH,

Respondent

STEVEN OWENS and JANET OWENS,

Appellants

APPELLANTS' REPLY BRIEF

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I. INTRODUCTION

City of Selah instructed the Owens to challenge the *Notice of Violation and Order of Correction* (“*Notice and Order*”), they must file an appeal pursuant to City’s administrative code enforcement procedure. If Owens did not adhere to City’s administrative procedure, they were by City’s decision and precluded from challenging City’s factual determinations.

City effectively asks the Court to hold that land owners are bound by City’s administrative procedures, but City is not. This conflicts with the principle that “an administrative body must follow its own rules and regulations when it conducts a proceeding which can deprive an individual of some benefit or entitlement.”

LUPA was enacted to eliminate multiple review mechanisms for land use decisions and to establish the “exclusive means” for review of such decisions.¹ City asks the court to ignore this statutory directive and revert to multiple inconsistent paths of review for code enforcement decisions.²

Further, City asks the Court to affirm summary judgment granting injunctive relief based on conflicting evidence (including contravening

¹ RCW 36.70C.030.

² *Asche v. Bloomquist*, 132 Wn. App. 784, 133 P.3d 475 (2006) (holding that LUPA precludes a public nuisance claim); and *Grandmaster Sheng-Yen Lu v. King County*, 110 Wn. App. 92, 38 P.3d 1040 (2002) (holding that interlocutory declaratory judgment action is precluded until there is a final determination through the local administrative land use review process).

expert opinions), failures of proof as to essential elements, and ignoring both an adequate remedy at law and the parties' settlement.

II. STATEMENT OF CASE

City of Selah, which is prone to hyperbole, characterized the apartments as "ramshackle tenements."³ While there are many factual disputes about code violations, one fact that is not disputed is that the residents of the Owens Apartments found the units to be clean, maintained, and affordable. The owner made all repairs in a timely and appropriate manner.⁴ And the on-site manager, a twenty year resident testified, "I have never had any concerns about cleanliness or condition of the units I have lived in at the Apartments."⁵ City's view was not shared by the residents. City's characterization is also inconsistent with historic records.⁶ The Owens Apartments had been operated for nearly 100 years without documented incident, problem or building code violation.⁷ As existing buildings, City acknowledged that the apartments were "grandfathered" and exempt from mandatory upgrades to current code requirements.⁸

³ *Brief of Respondent*, at 2.

⁴ CP 1-2, 4-5, and 7-25.

⁵ CP 8.

⁶ CP 9-10.

⁷ City attempts to characterize an allegation of failure to maintain the driveway/parking lot (which was dismissed prior to the initiation of the present case), as evidence of a history of code violations; however, City fails to acknowledge that (a) the allegation was dismissed, (b) the allegation related to the parking lot, and (c) there is no other evidence in the record to support their contention that the property had a history of code violations. *See* CP 135-37; *see also* *Brief of Respondent*, at 2 n. 4.

⁸ CP 240-241.

City also asserts that the investigation was triggered by a “life threatening event.”⁹ The facts are that the hole in the floor was “about 1x1 inch” and the tenant was “not injured” and “refused care.”¹⁰ It is also uncontroverted that the condition of the apartment was caused by the tenant.¹¹ The tenant removed doors, caused or allowed significant water damage to floors, damaged interior areas, and allowed the unit to fall into a very poor condition. After Owens learned of the damage, the tenant was evicted and Owens completed repairs within weeks of the occurrence.¹² Despite notification of repairs, City did not return to inspect the apartment.¹³

As a final factual point, City determined that there was no imminent threat to tenants.

However, as stated in the City’s consulting structural engineer’s report, *as the buildings are not in a state where complete collapse requiring immediate evacuation is likely,*

⁹ *Brief of Respondent 2-5,*

¹⁰ CP 1138-39, 1140. In a transparent attempt to mischaracterize the September 13, 2017 incident, City refers to the incident as “life threatening” and claims that the tenant “had suddenly fallen through the bathroom floor of Unit 18.” *Brief of Respondent*, at 3. To be clear, the tenant did not fall “through” the floor and get stuck; the tenant fell between the “toilet bathtub and door jamb” and required assistance to be extricated. CP 1140.

¹¹ CP 25-28.

¹² CP 25-29. City now contends that the conditions observed in September 2017 in Unit 18 still existed on December 14, 2017, which is plainly false and contradicted by the record (including photographs). *See* CP 9-18; CP 27-28. City cites to the *Notice and Order*, which does not specify the particular unit(s) in which any alleged conditions were observed. *See Brief of Respondent*, at 9-10 (*citing* CP 217-221). Further, although the *Notice and Order* alleges that all units were “infested with cockroaches,” that allegation is contradicted by the testimony of tenants. *See e.g.* CP 1 (“I have never had concerns about the cleanliness. Specifically, I have never had a problem with roaches/bugs or mice/rates.”).

¹³ CP 136-137.

*the City has chosen not to require the immediate condemnation of the subject buildings.*¹⁴

There was no immediate risk of building collapse or threat to the life or safety of residents.

III. ARGUMENT

A. City of Selah Failed to Follow Established Code Enforcement Procedures and Unilaterally Terminated Pending Administrative Land Use Review Process.

City of Selah chose the method and manner of code enforcement through issuance of the *Notice of Violation and Order of Correction* (“*Notice and Order*”). The *Notice and Order* was issued in compliance with SMC 6.75.020 which provides that “[t]he procedures set forth in this chapter shall be utilized to enforce violations of this code...” City did not elect to utilize the emergency or condemnation procedures authorized under SMC 6.75.080. And significantly, City did not return to the Superior Court.¹⁵ City does not dispute any of these facts.

The second undisputed fact is that City arbitrarily terminated the administrative code enforcement proceedings. The termination occurred prior to final hearing and decision by Selah City Council, and after Owens commenced work on the appeal, engaged a structural engineer, conducted

¹⁴ CP 225.

¹⁵ CP 213-226. City had previously filed a Motion for Preliminary Injunction in the Superior Court. On December 1, 2018, the court heard argument and denied the preliminary injunction. CP 145-148. Upon stipulation by Owens, the court did order an inspection of the apartments. *Id.* The inspection was conducted on December 14, 2017.

extensive review of alleged code violations, commenced structural and repair design analysis, developed a repair plan, and entered into an Agreed Order setting forth timelines, options and procedures to be followed by the parties. No substantive factual or legal basis was offered for the sudden “change of heart.” There was neither an emergency nor life threatening condition. City simply and arbitrarily decided to move to a different forum.

1. City of Selah elected to follow adopted administrative code enforcement procedures and elected to follow those procedures. A fundamental tenant of administrative law is that “an administrative body must follow its own rules and regulations when it conducts a proceeding which can deprive an individual of some benefit or entitlement.”¹⁶ Agencies are bound to follow their own rules.¹⁷ City did not follow its own rules. City terminated the very administrative code enforcement process that it instituted. Its actions were contrary to law.

To begin, City adopted mandatory administrative processes governing code enforcement.¹⁸ The code enforcement officer has authority

¹⁶ *Ritter v. Bd. Of Comm’rs*, 96 Wn.2d 503, 507, 637 P.2d 940 (1981); and *Lange v. Washington State Department of Health*, 138 Wn. App. 235, 252, 156 P.3d 919 (2007). Administrative agencies are bound by their own rules. *Skamania County v. Woodall*, 104 Wn. App. 529, 539, 16 P.3d 701 (2001).

¹⁷ *Skamania County*, 104 Wn. App. at 539 (holding that Columbia River Gorge Commission failed to follow its own rules in refusing to apply state law).

¹⁸ “The procedures set forth in this chapter [SMC Ch. 6.75] shall be utilized to enforce violations of this code...” SMC 6.75.020. The specific enforcement options are set forth in SMC 6.75.050 and SMC 6.75.080.

to issue infraction citations, criminal penalties, emergency orders or notices of violation and correction orders.¹⁹ The code enforcement procedure culminates with an open record hearing and final decision issued by Selah City Council.²⁰ In this case, City elected to proceed with code enforcement through the issuance of a *Notice and Order*. Owens filed a timely appeal and complied with all process requirements. City terminated the elected process; denied the right to administrative hearing before the city council; and breached the terms of the *Agreed Order of Continuance*. No legal authority was offered in support of this arbitrary decision.

City's argues that SMC 6.75.100(3)(b) provides that "[t]he code enforcement officer *may seek* legal or equitable relief to enjoin any acts or practices and abate any condition that constitutes or will constitute a violation of this code."²¹ City contends that it can choose between "alternative tracks."

The City can sue if it chooses. Additionally and/or alternatively, the City can pursue the code enforcement administrative procedure track, if it chooses. But the two tracks are separate.²²

¹⁹ SMC 7.67.050, SMC 6.75.080 and SMC 6.75.100.

²⁰ SMC 6.75.095.

²¹ SMC 6.75.100 sets forth the "Penalties" provision for code violations. The penalties include infraction citation and criminal penalties. The final component is request for legal or equitable relief to enjoin any acts or practices and abate any condition that constitutes or will constitute a violation of this code. That remedy is clearly invoked only after determinations have been made through the administrative enforcement process.

²² *Brief of Respondent* – 44.

The tracks are separate and City chose the “code enforcement administrative procedure track.” The ordinance does not allow City to “change its mind” or to terminate its selected “track.”

City next argues that SMC 6.58.280 provides authority to institute a *nuisance* action. In its argument, City fails to provide the court with the full text of the referenced ordinance.

The City may seek to enforce the provisions of this chapter, and enjoin or abate any nuisance identified in this chapter, and impose monetary penalties against agents and property owners maintaining nuisances identified in this chapter *consistent with Chapter 6.75 of this code, Code Enforcement.*²³

Any action to “enjoin or abate any nuisance” may be imposed only in a manner “*consistent to Chapter 6.75 of this code...*” City chose the administrative procedures set forth in SMC 6.75.050(d). SMC 6.58.280 channels all code enforcement proceedings through SMC CH. 6.75.

As a final point, code enforcement procedures directly implicate important property rights and interests.²⁴ City acknowledged that it “agreed to proceed through the administrative appeal process...in order to assure that due process was fully afforded to defendants.”²⁵ The failure to follow

²³ SMC 6.58.280.

²⁴ See *Post v. City of Tacoma*, 167 Wn.2d 300, 217 P.3d 1179 (2009) (holding that impositions of penalties under code enforcement ordinance provision violated due process). See also *Ritter*, 96 Wn.2d at 507; and *Christensen v. Terrell*, 51 Wn. App. 621, 627, 754 P.2d 1009 (1988) (recognizing that failure to follow agency rules may constitute due process violation).

²⁵ CP 167.

adopted rules and regulations can give rise to a due process violation where there are protected interests in “life, liberty or property.”²⁶

2. City elected its remedy and chose to proceed under the administrative processes of SMC Ch. 6.75. City elected its remedy. It chose the “administrative procedure track” through issuance of the *Notice and Order*, and is bound by its election of remedies and equitably estopped from taking an action inconsistent with its earlier elected option.

To begin, “[t]he election of remedies doctrine provides that if two or more remedies exist which are repugnant and inconsistent with one another, a party will be bound if he has chosen one of them.”²⁷ City had available two “tracks” to address code enforcement violations - code enforcement procedures under SMC 6.75.050 or filing a lawsuit. City elected to pursue the “code enforcement administrative procedure track”. The court in *Lange v. Woodway*²⁸ set forth the well-established requirements governing election of remedies as follows:

²⁶ *Ritter v. Board of Comm'rs*, 96 Wn.2d at 508; *Danielson v. Seattle*, 108 Wn.2d 788, 797, 742 P.2d 717 (1987) (holding that agency's failure to follow its own rules is a *per se* due process violation where the rules represent the minimal due process requirements).

²⁷ *Melby v. Hawkins Pontiac, Inc.*, 13 Wn. App. 745, 749, 537 P.2d 807 (1975); and *Lange v. Woodway*, 79 Wn.2d 45, 483 P.2d 116 (1971).

²⁸ *Lange v. Woodway*, 79 Wn.2d 45; *McKown v. Driver*, 54 Wn.2d 46, 55, 337 P.2d 1068 (1959). In *Lange*, a property owner challenged a zoning ordinance establishing minimum area for residential building lots. The superior court declared the ordinances to be invalid and the Town appealed. The Supreme Court reversed the trial court decision and held that the property owner must first pursue administrative remedies provided for variance of land use regulations. The court in *Lange* recognized that administrative processes must be exhausted before there can be resort to alternative remedies.

Our cases make it clear that three elements must be present before a party will be held bound by an election of remedies. Two or more remedies must exist at the time of the election; the remedies must be repugnant and inconsistent with each other; and the party to be bound must have chosen one of them.²⁹

The doctrine of election of remedies applies in this case. City had two available remedies at the time of election – administrative code enforcement or separate nuisance abatement proceeding; the remedies were repugnant to and inconsistent with each other; City chose one of the remedies – i.e. administrative code enforcement. City is bound by its election under the doctrine of election of remedies.

In a manner similar to election of remedies, the courts have also applied the doctrine of equitable estoppel to governmental agencies.³⁰

Equitable estoppel is based on the fundamental principle that:

A party should be held to a representation made or a position assumed where inequitable consequences would otherwise result to another party who has justifiably and in good faith relied thereon.³¹

²⁹ *Lange v. Woodway*, 79 Wn.2d at 49. *Lange* presented a situation where two remedies were available – administrative land use procedures before the municipality and a separate judicial action. The court held that administrative remedies must first be pursued. “The concept of election of remedies is a rule of narrow scope, having the sole purpose of preventing double redress for a single wrong.”

³⁰ See e.g. *Beggs v. City of Pasco*, 93 Wn.2d 682, 689, 611 P.2d 1252 (1980); *Chemical Bank v. Washington Public Power Supply System*, 102 Wn.2d 874, 901-902 (1984); *Federal Way Disposal Co. v. City of Tacoma*, 11 Wn. App. 894, 896-97 (1974).

³¹ *Kramarevcky v. Department of Social and Health Services*, 122 Wn.2d 738, 743, 863 P.2d 535 (1993) (holding that DSHS was equitably estopped from recouping public assistance overpayments) (citing *Wilson v. Westinghouse Elec. Corp.*, 85 Wn.2d 78, 81, 530 P.2d 298 (1975)).

The elements of equitable estoppel, as applied to cities, were set forth by the court in *Beggs v. City of Pasco* as follows:

The requisites for equitable estoppel are: (1) an admission, statement or *act inconsistent with the claim thereafter asserted*; (2) action by the other party on the faith of such admission, statement or act; and (3) injury to such other party arising from admission, statement or act.³²

The application of the doctrine against governmental entities includes two additional requirements: equitable estoppel must be necessary to prevent a manifest injustice, and the exercise of governmental functions must not be impaired as a result of the estoppel.³³

Each element of equitable estoppel is established in this case: (1) City's election to proceed with administrative code enforcement processes was inconsistent with the later termination of the selected process; (2) Owens relied upon the election of administrative code enforcement processes and acted in accordance with those procedures; (3) Owens was damaged by termination of the administrative review process; (4) the termination of the mandatory administrative code enforcement process is a manifest injustice; and (5) governmental functions were not impaired by enforcing the administrative code enforcement review procedures.

B. Trial Court Improperly Assumed Interlocutory Jurisdiction of Land Use Processes in Violation of the Land Use Petition Act (LUPA).

³² *Beggs*, 93 Wn.2d at 689.

³³ *Kramarevcky*, 122 Wn.2d at 743.

City's termination of the administrative appeal proceeding is inconsistent with the purpose, intent and directives set forth in the Land Use Petition Act (LUPA). There is no dispute that the *Notice and Order* was a "land use decision."³⁴ Judicial review is not authorized until there is "a final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination, including those with authority to hear appeals."³⁵ "And where a local jurisdiction sets forth a process for making a land use decision, the land use decision is not final unless the jurisdiction has complied with the process and the entire process is complete."³⁶ City did not complete the entire administrative appeal process.

1. The predicate code enforcement action was a land use decision and LUPA provides the "exclusive means" for judicial review.

The Legislature established LUPA as the "exclusive means for judicial review of land use decisions" made by a local jurisdiction.³⁷ LUPA's stated purpose was "to reform the processes for judicial review of land use

³⁴ City does not dispute the fact that a notice of violation of building code requirements is a land use decision. RCW 36.70C.020(2)(c) specifically includes within the statutory definition "... (c) the enforcement by a local jurisdiction regulating the improvement, development, modification, maintenance, or use of real property." Judicial review may be invoked only when the local jurisdiction has issued a "final decision."

³⁵ RCW 36.70C.020(2).

³⁶ *Durland v. San Juan County*, 174 Wn. App. 1, 14, 298 P.3d 757 (2012); and *WCHS, Inc. v. City of Lynnwood*, 120 Wn. App. 668, 679-80, 86 P.3d 1169 (2004) (letters from city to land owner not final land use decisions because, among other reasons, they did not comply with City's own code requirements for distributing notice of decisions).

³⁷ RCW 36.70C.030. *Chelan County v. Nykreim*, 146 Wn.2d 904, 917, 52 P.3d 1 (2002).

decisions made by local jurisdictions, by establishing uniform, expedited appeal procedures and uniform criteria for reviewing such decisions, in order to provide consistent, predictable, and timely judicial review.”³⁸ City of Selah adopted complaint regulations.³⁹

City argues without authority that “LUPA does not apply to City’s lawsuit because the lawsuit is not an appeal of a prior land use decision.”⁴⁰ This simple argument ignores LUPA’s integration of administrative and judicial roles in land use decisionmaking. Land use decisions are made at the local level. LUPA requires exhaustion of administrative remedies; final decisions by body with highest level of authority, including authority on administrative appeals; and development of the record for judicial review.⁴¹

The integration of the administrative component in the land use processes (including code enforcement) is recognized by the unyielding requirement that parties to the proceeding exhaust administrative

³⁸ RCW 36.70C.010.

³⁹ City of Selah adopted “Regulatory Reform” regulations with the adoption of SMC Ch. 21.01.

⁴⁰ *Brief of Respondent* – 36.

⁴¹ Judicial review of a code enforcement decision is not authorized until there is a “final decision” issued “by a local jurisdiction’s body or officer with the highest level of authority to make the determination, including those with authority to hear appeals.” RCW 36.70C.020(2). The parties to a local quasi-judicial proceeding must have “had an opportunity consistent with due process to make a record on the factual issues” and the review of factual issues is confined to the record created by the quasi-judicial body or officer. RCW 36.70C.120. The court’s review of land use determinations and processes is not a *de novo* determination but rather one that defers to the local jurisdictional process.

remedies.⁴² The court in *Durland v. San Juan County* recognized that “...the exhaustion requirement furthers LUPA’s stated purposes of promoting finality, predictability, and efficiency.”⁴³ The exhaustion doctrine:

(1) *insures against premature interruption of the administrative process*; (2) allows the agency to *develop the necessary factual record* on which to base a decision; (3) allows exercise of agency expertise in its area; (4) provides a *more efficient process*; and (5) protects the administrative agency’s autonomy by allowing it to correct its own errors and insuring that individuals are not encouraged to ignore its procedures by resorting to the courts.⁴⁴

City’s premature termination of the administrative process is in direct conflict with LUPA’s stated purposes.

2. The courts have specifically rejected efforts to interpose interlocutory review of land use issues prior to conclusion of local administrative processes. Under LUPA, the superior court does not have authority to conduct interlocutory review of issues or claims that are subject of a pending administrative land use proceedings.⁴⁵ The courts have specifically held that interlocutory declaratory judgment actions are barred

⁴² See *Durland v. San Juan County*, 182 Wn.2d at 68-69. *Durland* cited with approval the well-established principles regarding exhaustion of administrative remedies as set for in *South Hollywood Hills Citizens Ass’n v. King County*, 101 Wn.2d 68, 73-74, (1984).

⁴³ *Durland*, 182 Wn.2d at 67.

⁴⁴ *Durland*, 182 Wn.2d at 68.

⁴⁵ A land use decision is “final” for purposes of LUPA when it “leaves nothing open to further dispute” and “sets at rest [the] cause of action between parties.” *Samuel’s Furniture, Inc. v. Dep’t of Ecology*, 147 Wn.2d 440, 452, 54 P.3d 1194 (2002). “In contrast, an interlocutory decision intervenes between the commencement and the end of a suit and decides some point or matter, but is not a final decision of the whole controversy.” *Durland*, 174 Wn. App. at 14.

where the local jurisdiction has not completed its administrative land use process.⁴⁶ The court in *Grandmaster Sheng-Yen Lu* recognized that the legislature was clear on its mandate.

In reviewing the statutory framework of LUPA, we note that the Legislature carefully defined “land use decision” in terms of a *final* determination by the relevant body or officer with the highest level of authority to make the determination. *This legislative choice of words must mean something. We conclude that the most reasonable meaning to give to this legislative choice is to conclude that courts should generally defer review of decision involving the use of land until such decision are final – that is when the highest body or officer has finally acted.*⁴⁷

The court considered this statutory purpose of LUPA and stated:

In view of the above expressed statutory language and the relevant case law, *we conclude that courts should generally defer to local jurisdictions until a final determination on the use of land is made by the highest body or officer. Once made, that decision is subject to judicial review according to the procedures outlined in the purpose section of the statute. To hold otherwise would risk premature judicial intrusion into land use decisions.*⁴⁸

⁴⁶ *Grandmaster Sheng-Yen Lu v. King County*, 110 Wn. App. 92, 38 P.3d 1040 (2002). In *Grandmaster Sheng-Yen Lu*, the court dismissed a declaratory judgment action filed prior to issuance of a final decision by the local jurisdiction on a conditional use permit application. The factual setting is virtually identical to the present case. There was a pending but uncompleted administrative land use process pending before the local jurisdiction. One of the parties sought to challenge aspects of the administrative process through an independent declaratory judgment action. The court found that LUPA provided the “exclusive means” for review of such land use applications and dismissed the interlocutory declaratory judgment action.

⁴⁷ *Grandmaster Sheng-Yen Lu*, 110 Wn. App. at 100 (italics original).

⁴⁸ *Grandmaster Sheng-Yen Lu*, 110 Wn. App. at 101. The court recognized that this interpretation was consistent with (1) the well-established principle that administrative remedies must be exhausted prior to the Superior Court’s assumption of subject matter jurisdiction; and (2) the matter must be ripe for judicial review. *Id.* at 98-99.

City seeks to distinguish *Grandmaster Sheng-Yen Lu* by saying that “no permit is at-issue in the instant case.” LUPA applies to all “land use decisions,” not just permits.⁴⁹ *Grandmaster Seng-Yen Lu* is binding.

3. Nuisance abatement actions are specifically preempted by LUPA. City filed an interlocutory public nuisance action. As established in *Asche v. Bloomquist*,⁵⁰ LUPA precludes public nuisance actions. The straight forward holding in *Asche* was as follows:

The Asches’ argument raises a preliminary issue as to whether LUPA preempts public nuisance actions. Because their particular claim depends on whether the building permit violated the zoning ordinance, *we hold that LUPA precludes this public nuisance claim.*⁵¹

This conclusion is both logical and practical. Each action is based on the same facts and predicated on alleged violations of city ordinances. LUPA requires exhaustion of remedies and a final land use decision. Owens has no right to disregard the administrative order and process in search of a more favorable form. The same should apply to City. The fact is that LUPA is the *exclusive means* for review of a land use decision.

City argues that LUPA does not preclude all nuisance abatement lawsuits but rather only applies to “lawsuits that are a ‘collateral attack’ on

⁴⁹ RCW 36.70C.020(2).

⁵⁰ *Asche v. Bloomquist*, 132 Wn. App. 784, 133 P.3d 475 (2006).

⁵¹ *Id.* at 799, and 802.

a prior land use decision.”⁵² The court in *Asche* did not so limit its decision. The court considered the *preliminary issue* of “whether LUPA preempts public nuisance actions” and held that “LUPA precludes this public nuisance action” when the “public nuisance claim depends entirely upon finding the building permit violates the zoning ordinance.”⁵³

City next argues that the nuisance action is not a “collateral attack” on a prior land use decision. That is correct. It is worse. It is a “collateral attack” on the very procedure that would yield a *final land use decision*. It is incongruous to argue that a final decision cannot be collaterally attacked but it is fine to arbitrarily terminate the legal process established to make the final decision.

City offers an interesting final argument based on *Asche* that “[b]ecause the *Asches* failed to utilize LUPA, they could not seek to invalidate the permit via a lawsuit.”⁵⁴ City then argues:

If that were allowed, then the supposedly “exclusive” LUPA process would be rendered merely optional because parties could disregard LUPA and still pursue equivalent relief via a lawsuit.⁵⁵

⁵² *Brief of Respondent*, at 37.

⁵³ *Asche*, 132 Wn. App. at 801.

⁵⁴ *Brief of Respondent*, at 39. City relies upon language from Justice Sanders’ separate opinion in *Grundy v. Thurston County*, 155 Wn.2d 1, 15, 117 P.3d 1089 (2005). Justice Sanders *concurring* opinion simply recognized the arguments presented by Owens here:

By explicitly stating that LUPA is the “exclusive means of judicial review of land use decision,” RCW 36.70C.030(1), the legislature clearly did not intend for public nuisance actions premised on permit and invalidity to “end run” around Chapter 36.70C RCW.

⁵⁵ *Id.*

Isn't that exactly what City did in this case? City chose to disregard and terminate the LUPA process and pursue relief through the nuisance action.

4. The exercise of original jurisdiction under article IV Section 6 requires substantial compliance with procedural requirements. City argues that it invoked the superior court's original jurisdiction to review nuisance actions under article IV, Section 6 of the Washington Constitution.⁵⁶ It is well-established, however, that the exercise of such jurisdiction requires substantial compliance with or satisfaction of the procedural requirements related to the action, including compliance with LUPA processes. In *James v. County of Kitsap*, the court applied these principles in the context of LUPA.

Applying the procedural requirements of LUPA to challenges to the legality of impact fees imposed does not divest the power of the superior court to exercise its original jurisdiction under article IV, section 6. It is axiomatic that a judicial power vested in courts by the constitution may not be abrogated by statute. [Citation omitted]. *However, the Developers ignore the well-established rule that where statutes prescribe procedures for the resolution of a particular type of dispute, state courts have required substantial compliance or satisfaction of the spirit of*

⁵⁶ *Brief of Respondent 14 n. 16.* City argues that Washington's constitution explicitly establishes that "[t]he superior court shall have original jurisdiction ... of actions to prevent or abate a nuisance." This exact argument was raised by a developer challenging impact fees in *James v. County of Kitsap*, 154 Wn.2d 574, 587, 115 P.3d 286 (2005). In *James*, the developer did not challenge the imposition of impact fees in the context of a building permit determination. Rather, the developer argued that the superior court had original jurisdiction under article IV Section 6. *Id.* The court rejected this argument and held, that the grant of original jurisdiction "does not obviate procedural requirements established by the legislature." *Id.* 154 Wn. 2d at 588.

*the procedural requirements before they will exercise jurisdiction over the matter. [Citations omitted].*⁵⁷

City did not substantially comply with either the spirit or fact of its specific procedural requirements addressing building code violations. In fact it is worse, City elected its procedural process and subsequently terminated process without cause, reason or legal authority.

C. Genuine Issues of Material Fact Exist With Respect to Nuisance and Issuance of a Permanent Injunction.

Owens' Opening Brief clarified that the trial court's grant of Summary Judgment and Order of Abatement were improper because: (1) material issues of fact remain regarding the elements of City's claim for permanent injunction;⁵⁸ and (2) injunctive relief was improper because there was an adequate remedy at law.⁵⁹

City's response ignored the elements of proof for an injunction, and again asserted that City may make any code violation a "public nuisance."⁶⁰ Although a municipality may enact an ordinance purporting to make a code violation a nuisance, the court must analyze whether the alleged code

⁵⁷ *James*, 154 Wn.2d at 587-88. "Substantial compliance has been defined as actual compliance in respect to the substance essential to every reasonable objective of the statute. It means a court should determine whether the statute has been followed sufficiently so as to carry out the intent for which the statute was adopted."

⁵⁸ *Appellant's Opening Brief*, at 31-40.

⁵⁹ *Appellant's Opening Brief*, at 40-42.

⁶⁰ *See Brief of Respondent*.

violation is in fact a nuisance because “[a] municipal ordinance may not make a thing a nuisance, unless it is in fact a nuisance.”⁶¹

1. Material issues of fact remain regarding the elements of a claim for permanent injunction. To obtain permanent injunctive relief, a party must establish three elements: “(1) a clear legal or equitable right, (2) a well-grounded fear of immediate invasion of that right, and (3) that the act complained of will result in actual and substantial injury.”⁶² Failure to establish any one of the criteria results in a denial of the injunction.⁶³

a. Material issues of fact remain as to whether City had a clear legal or equitable right. Owens’ Opening Brief explained that City failed to establish a clear legal or equitable right because material issues of fact remain as to whether (i) the alleged conditions constitute code violations, (ii) the alleged nuisance is actionable, and (iii) the alleged nuisance is a “public nuisance.”⁶⁴

⁶¹ See *Appellant’s Opening Brief*, at 33-34. *Greenwood v. Olympic, Inc.*, 51 Wn.2d 18, 21, 315 P.2d 295 (1951). The court in *Greenwood* addressed a virtually identical situation. A hotel visitor fell on stairs where there were no handrails as required by recently adopted ordinance. The trial court instructed that the failure to have an intermediate handrail constituted an absolute nuisance. *Id.* 51 Wn.2d at 20. The appellate court reversed. The court noted that the hotel had been constructed prior to the existing building code; was not a nuisance at the time; and there had been no complaints over the years. The court stated that “A municipal ordinance may not make a thing a nuisance, unless it is in fact a nuisance.” *Id.* 51 Wn.2d at 21.

⁶² *SEIU Healthcare v. DSHS*, 193 Wn. App. 377, 393, 377 P.3d 214 (2016).

⁶³ *Kucera v. Wash. State DOT*, 140 Wn.2d 200, 210, 995 P.2d 63 (2000).

⁶⁴ *Appellants’ Opening Brief*, at 33-38.

(i) **Material issues of fact remain as to whether the alleged conditions constitute code violations.** City continues to argue that the property was a nuisance “because the conditions violated several applicable ordinances.”⁶⁵ However, it is undisputed that no fact finder has ever determined whether the alleged conditions actually violate any code provision or ordinance. Owens were never afforded the opportunity to contest the alleged code violations, despite filing a timely appeal.

City implicitly admits the plethora of issues of fact by spending over 34 pages of its 50 page brief disputing the facts of the case and the condition of the property.⁶⁶

The trial court was presented with the testimony of two conflicting experts. To resolve the issue, a fact finder must make a credibility determination, which is not proper in a summary judgment proceeding.⁶⁷ City’s response failed to address this fundamental principle.⁶⁸

⁶⁵ *Brief of Respondent*, at 47 (citing *City of Mercer Island v. Steinman*, 9 Wn. App. 479, 513 P.2d 80 (1973)). To support this argument, City relies on *City of Mercer Island v. Steinmann*; however, the *Steinmann* case predates LUPA. See *James*, 154 Wn.2d at 582-83 (noting that LUPA was enacted in 1995). Thus, the case does not provide a basis for skipping the administrative process, determining whether any alleged code violations exist, or analyzing whether a code violation constitutes a public nuisance.

⁶⁶ *Brief of Respondent*, at 1-35.

⁶⁷ See *Appellants’ Opening Brief*, at 34-36. *Morse v. Antonellis*, 149 Wn.2d 572, 574, 70 P.3d 125 (2003) (“[C]redibility determinations are solely for the trier of fact.”); and *Howell v. Spokane Inland Empire Blood Bank*, 117 Wn.2d 619, 626, 818 P.2d 1056 (1991).

⁶⁸ See *Brief of Respondent*, at 46-49.

Instead, City argues that by recommending *any* repairs, Mr. Bardell, conceded that some unspecified code violations existed.⁶⁹ City ignores that Mr. Bardell disagreed with City’s engineer in several respects, and specifically disagreed with his contention that the buildings were unsafe.⁷⁰ Further, City incorrectly indicates that Mr. Bardell determined repairs were “necessary.” Mr. Bardell made no such determination.

(ii) **There are material issues of fact as to whether the alleged nuisance is actionable.** To be actionable, a “nuisance must either injure the property or unreasonably interfere with enjoyment of the property.”⁷¹ Appellants’ Opening Brief noted that City failed to present any evidence on this issue.⁷² City continues to ignore this requirement.

On the other hand, Owens provided uncontroverted tenant testimony establishing that the alleged conditions did not interfere with their enjoyment of the property.⁷³

(iii) **There are material issues of fact as to whether the alleged nuisance is a “public nuisance.”** To constitute a “public nuisance,” the nuisance must “affect[] equally the rights of an entire community or neighborhood.” RCW 7.48.130. Appellants’ Opening Brief

⁶⁹ *Brief of Respondent*, at 48.

⁷⁰ CP 782.

⁷¹ *Tiegs v. Watts*, 135 Wn.2d 1, 13, 954 P.2d 877 (1998).

⁷² *Appellants’ Opening Brief*, at 36-37.

⁷³ CP 1-2; CP 4-5; and CP 7-25.

noted City's complete failure of proof on this issue. City has repeatedly argued that it was not required to present such evidence because a municipality may enact an ordinance establishing that any code violation constitutes a public nuisance.⁷⁴ City's position ignores the established principle that "[a] municipal ordinance may not make a thing a nuisance, unless it is in fact a nuisance."⁷⁵ Perhaps recognizing their error, City now argues that Mrs. Redman was harmed and "[o]ther tenants and/or members of the public also faced risk."⁷⁶

The uncontroverted evidence established that Mrs. Redman caused the conditions in her apartment, those conditions were repaired prior to the initiation of this action, and City was notified of such repairs several weeks before the initiation of this action.⁷⁷ In addition, the uncontroverted tenant testimony established that the alleged code violations did not interfere with the tenants' enjoyment of the property.⁷⁸ Finally, City has never presented any evidence of the alleged harm to the community.⁷⁹

b. City lacked a well-grounded fear of immediate invasion of its right to enforce its ordinances. Appellants' Opening Brief noted City's

⁷⁴ *Appellants' Opening Brief*, at 37-38. *See also* CP 168-169; 839-840.

⁷⁵ *Greenwood*, 51 Wn.2d at 21.

⁷⁶ *Brief of Respondent*, at 49.

⁷⁷ CP 7-18; CP 27-29, 33-35.

⁷⁸ CP 1-2; CP 4-5; and CP 7-25.

⁷⁹ *See Brief of Respondent*, at 49 (merely alleging "the public also faced risk" without citing to any evidence in the record).

failure of proof regarding the second element to obtain an injunction: well-grounded fear.⁸⁰ City previously claimed it had a well-grounded fear of invasion of its “right to enforce its ordinances.”⁸¹ Appellants’ Opening Brief showed that City lacked such a fear because (1) the only impediments to City’s right to enforce its ordinances were (a) City’s decision not to follow its own established administrative procedures and (b) decision not to honor the terms of the Agreed Order, and (2) the undisputed facts in the record establish that Owens repeatedly attempted to begin repairing the property, but City prohibited the commencement of repairs.⁸²

City’s response failed to address this issue, and effectively concedes that City lacked a well-grounded fear.

2. Injunctive relief was improper because there was an adequate remedy at law. Appellants’ Opening Brief noted that injunctive relief was improper because there was an adequate remedy at law: the administrative review process established by City’s municipal code.⁸³ The Court of Appeals has specifically recognized that “LUPA provides an adequate and

⁸⁰ *Appellants’ Opening Brief*, at 38-39.

⁸¹ CP 169.

⁸² *Appellants’ Opening Brief*, at 38-39. *See also* CP 28-29; CP 188-89; CP 197; CP 730-31; CP 754; CP 777; CP 780; CP 887-88; CP 910; CP 913; CP 915-16.

⁸³ *Appellants’ Opening Brief*, at 40-41.

exclusive means for review of most land use decisions” particularly when City “is not required by law to enforce its zoning code in a court...”⁸⁴

City’s response failed to address this issue, and effectively concedes that the administrative process provided an adequate remedy at law.

D. Trial Court Erroneously Ignored the Terms and Conditions of The Agreed Order.

At the trial court, City did not dispute the existence of the settlement agreement.⁸⁵ City only disputed the enforceability of the agreement.

Now, City contorts the facts to argue both for enforcement of the order (arguing that the order constitutes a waiver of the Owens’ right to a hearing), and against enforcement for the Owens (arguing that the order is not a settlement). City cannot have it both ways.

City’s reliance on *Jones v. Wash. Dept. of Health*⁸⁶ is misplaced. In *Jones*, a pharmacist specifically “agreed to the revocation of his pharmacy location license and a five-year suspension of his professional license[,]” then attempted to sue the State of Washington and several others, alleging an improper investigation and hearing.⁸⁷ Unlike the Owens, Jones specifically stipulated “that the evidence is sufficient to justify the...

⁸⁴ *Richards v. City of Pullman*, 134 Wn. App. 876, 883, 142 P.3d 1121 (2006).

⁸⁵ *Transcript*, at 9:10-11.

⁸⁶ *Jones v. Wash. Dept. of Health*, 170 Wn.2d 338, 242 P.3d 825 (2010).

⁸⁷ *Id.* at 342.

findings,” and explicitly “waived his right to a full adjudicative hearing.”⁸⁸

The agreed order at issue in *Jones* was, in fact, a settlement.⁸⁹

The explicit waiver in *Jones* does not support City’s argument that Owens impliedly waived their right to a hearing. It is also confusing how City justifies taking the inconsistent positions that the Agreed Order is not a settlement, but does constitute a waiver of the Owens’ right to a hearing.⁹⁰

City effectively argues that it is entitled to the benefit of the Agreed Order, but the Owens are not. City cannot have it both ways; either the Agreed Order is enforceable, or it is not. If the Agreed Order is enforceable, Owens are entitled to repair the property under the guidance of their retained structural engineer. If it is not enforceable, Owens are entitled to contest the Notice and Order under the administrative process adopted by City.

⁸⁸ *Id.* at 348.

⁸⁹ *Id.*

⁹⁰ To add to the confusion, City argues that the Agreed Order is a final land use decision, but “did not resolve any factual matter...” *Brief of Respondent*, at 49-50. A final land use decision necessitates a factual determination. A “land use decision” is defined as “a final determination by a local jurisdiction’s body or officer with the highest level of authority to make the determination, including those with authority to hear appeals.” RCW 36.70C.020(1). Where a local jurisdiction creates an administrative review process, a land use decision is not “final” until the process is completed. *Durland*, 182 Wn.2d at 65.

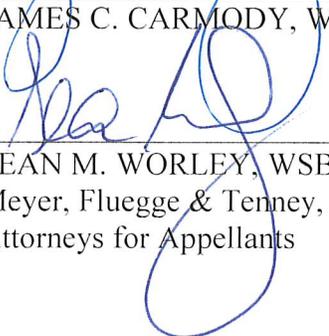
IV. CONCLUSION

Owens requests that the trial courts grant of summary judgment be reversed and the matter remanded to superior court for further consistent proceedings.

Respectfully submitted this 31st day of January, 2020.



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CERTIFICATE OF SERVICE

I hereby declare under penalty of perjury under the laws of the State of Washington that on the date stated below I served a copy of this document in the manner indicated:

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DATED at Yakima, Washington, this 31 day of January, 2020.



Deborah Girard, Legal Assistant

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