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Court of Appeals
Division III
State of Washington
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NO. 367932

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

CITY OF SELAH,

Respondent

v

STEVEN OWENS and JANET OWENS,

Appellants

APPELLANTS' OPENING BRIEF

James C. Carmody, WSBA 5205
Sean M. Worley, WSBA 46734
Meyer, Fluegge & Tenney, P.S.
230 South Second Street
Yakima, WA 98901
509-575-8500

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I. Introduction

Steve and Janet Owens ("Appellants" or "Owens") have appealed the trial court's summary judgment declaring an small apartment complex to be a public nuisance and ordering abatement. The trial court improperly assumed jurisdiction following City's unilateral termination of administrative enforcement and appeal proceedings. City failed to follow prescribed procedures, exhaust administrative remedies or respect Land Use Petition Act (LUPA) as the "exclusive means for review of land use decisions." And as a final point, the Superior Court granted summary judgment on a record replete with genuine issues of material fact. Owens requests this court's review.

II. Assignments of Errors

1. Trial court erroneously granted summary judgment on declaratory judgment and permanent injunction requiring demolition of the Owens Apartments.

2. Trial court erroneously assumed and exercised jurisdiction prior to completion and exhaustion of administrative processes and in conflict with exclusive jurisdiction procedures and requirements of Land Use Petition Act (LUPA).

3. Trial court erroneously concluded that continuance agreement between Owens and City was not binding with respect to review and processing of timely filed administrative appeal of notice of code violation.

4. Trial court erroneously terminated Owens administrative appeal rights in violation of property owners constitutionally protected due process of rights to challenge alleged violations of municipal building code.

III. Statement of Case

A. Overview of Owens Apartments, Historic Construction and Tenants.

Steve and Janet Owens own residential apartment building structures at 519 South 1st Street, Selah, Washington. ("Owens Apartments') *CP 26.*[1] The apartments and rental units are contained in five (5) separate but integrated building structures. There are twenty (20) total rental units: 18 apartments (numbered 1-18), a small house (number 19), and a larger house (number 21).[2] The original structures were built in the 1920s with additions added to the units over the course of time. *CP 234.* The buildings were all constructed before the adoption of either Uniform Building Code (UBC) or International Building Code (IBC). *CP 240.* As

[1] References to Clerk's Papers shall be to "CP" together with the page number(s).
[2] The units are grouped as follows: 1-4, 5-6, 7-9, 10-13, 14-18, 19, and 21. *CP 234.* The original structures were likely individual 12' x 18' cabins that were placed together to form the multifamily apartment buildings, together with additions added over time. *CP 235.* Because the structures originated with individual buildings, the manner of construction and foundations varied from building to building. *Id.*

existing buildings, the City has acknowledged that the apartments were "grandfathered" and subject to the International Existing Building Code. *CP 240-241.*

> The multifamily units area governed by the 2015 International Building Code (IBC), and the 2015 International Existing Building Code (IEBC). Chapter 5 Repairs of the IEBC, grant certain exemptions to existing buildings or structures. *They are exempt from mandatory upgrades to current code requirements, provided the original occupancy classification is not changed, the original building is not substantially structurally damaged, and the building is maintained in a safe and sanitary condition*. (Emphasis added).

The apartments have provided an affordable option for low income residents of the community. The monthly rent was $450.00, which included water, sewer, electricity and gas. The apartments had been operated for nearly 100 years without documented incident, problem or building code violation. The uncontroverted testimony from residents was that the units were clean, there were no structural or building concerns, and the owner made all repairs in a timely and appropriate manner. *CP 1-2, 4-5* and *7-25.* The on-site manage, a 20-year resident testified "...I have never had any concerns about cleanliness or condition of any of the units I have lived in at the Apartments." *CP 8.* And most units had been inspected and approved by a nonprofit organization providing assistance to low income tenants. *CP 8.* The issues in this case did not come from existing tenants.

B. City of Selah Code Enforcement Procedures and Actions.

1. City's Initial Contact and Inspection of Apartment 18.

City first contacted Owens regarding the apartments on September 13, 2017. The request for inspection involved a single-unit – Apartment 18 – with the inspection request originated by a complaint filed by disgruntled tenant. *CP 27.*[3] Following contact from City, Owens personally inspected Apartment 18 and found it to be in deplorable condition. The tenants had removed doors, caused or allowed significant water damage to floors and allowed the unit to fall into a very poor condition. Once Owens learned of the damage, the tenants were evicted and Owens began repairs to the floors, door jams and ceiling areas. *CP 25-28.* Repairs were completed within weeks and the apartment rented following inspection by Northwest Community Action Center. *CP 29.* Despite notification of repairs, City did not return to inspect the apartment. *CP 136-137.*

2. City Commences Litigation and Moves for Preliminary Injunction.

Seven weeks after the September 2017 incident, City filed a lawsuit against Owens requesting issuance of a preliminary injunction. The

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[3] The tenant had been a resident since September 1, 2012. *CP 27.* There had been no prior complaints or problems involving the apartment. At the beginning of the tenancy, the unit was clean and in good shape; the floor was in good condition (including the bathroom floor), all of the windows functioned, there were no holes in the walls, or damage to cupboards." *CP 9.*

lawsuit was filed without complying with ordinance and building code enforcement processes, further inspection of the apartments or substantiated factual foundation. The sole basis for the requested injunction was a "concern" about condition of the apartments. *CP 150-152.*

On December 1, 2017, the Superior Court heard argument and denied injunctive relief. *CP 145-148.* The court did order, however, that the property be made available for inspection. *Id.* The court allowed continued occupancy of the apartments. Owens complied with the court order and cooperated with the City in scheduling and allowing an inspection of the apartments. The inspection was conducted on December 14, 2017.

3. City Issuance of Notice of Noncompliance and Order to Comply and Administrative Appeal.

On January 20, 2018, City issued a Notice of Noncompliance and Order to Comply under Selah Municipal Code (SMC) Chapter 6.75 ("Notice and Order'). *CP 213-226.* The Notice and Order followed prescribed code enforcement procedures set forth in Selah Municipal Code Chapter 6.75 *Attachment A.* The City elected not to utilize the emergency or condemnation procedures authorized under the ordinance.[4]

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[4] "Whenever any use or activity in violation of this code threatens the health and safety of the occupants of the premises or any member of the public, the code enforcement officer

> However as stated in the City's consulting structural engineers report, *as the buildings are not in a state where complete collapse requiring immediate evacuation is likely, the City has chosen to not require the immediate condemnation of the subject buildings.*

CP 225. There was no immediate risk of building collapse or threat of life or safety of residents.

The Notice and Order included the following directives:

> 1. In accordance with IPMC 107.2(4), within 30-days of the date of this notice, the property owner shall provide the City Community Development and Planning Division with either a letter of intent to repair the subject buildings (indicating that he/she has retained a licensed structural engineer licensed in Washington State), or submit a demolition permit to the City Community Development and Planning Division for the identified buildings.
>
> 2. In the event that the property owner chooses to repair the identified structures, a detailed structural repair plan, which includes structural calculations and plans, and addresses all identified deficiencies within the attached reports, shall be submitted to the City Community Development and Planning Division within 120-days of the date of this letter which shall be pier [sic] reviewed by the City's structural engineer.
>
> 3. Due to the fact that the subject buildings qualify as dangerous and are unfit for human occupancy, regardless of the above-chosen option the property owner shall prepare and submit either a temporary or permanent relocation plan

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may issue an emergency order directing that the use or activity be discontinued and the condition causing the threat to the public health and safety be corrected." SMC 6.75.080. The failure to correct the condition described in the emergency order within a specific time allows the code enforcement officer to declare that the condition is a "...public nuisance and the code enforcement officer is authorized to enjoin or abate such nuisance summarily by any legal or equitable means as may be available." *Id.*

> acceptable to the City for the relocation of the tenants of the subject buildings within 30-days of the date of this notice.
>
> 4. In the event that additional time to complete the structural repair report is necessary, the City Community Development and Planning Division will consider granting an extension of the 120-day compliance deadline upon receipt of a letter from the retained structural engineer requesting the extension and showing substantial progress towards completion of the plan.

The Notice and Order contemplated repair of the buildings and allowed a total of 120 days to develop a repair plan. The property owner was given the option of demolishing the structures but such option was not mandated.

City chose the method and manner of code enforcement. It chose to follow its adopted administrative procedures under SMC CH. 6.75. Ch. 6.75.010. ("The purpose of this chapter is to establish an efficient process for enforcement of code violations.") The procedures are mandatory – "...this chapter *shall* be utilized to enforce violations of this code." SMC 6.75.020 (Italics added). The ordinance mandates use of the adopted administrative process. *See e.g. City of Wenatchee v. Owens,* 145 Wn. App. 196, 204, 185 P.3d 1218 (2008) ("Washington courts have consistently held that the term 'shall' is synonymous with the term 'must.'"). Building code violations and nuisances are also governed by these procedures. SMC 11.04.050 and SMC 6.58.280. City followed adopted processes in the issuance of the Notice and Order . *CP 213.* The notice must include a

concise description of alleged violations, identification of applicable code provisions and notice of appeal. SMC 6.75.050(d).

(a) Owens Appeal of the Notice and Order: Any notice of violation or order issued by the code enforcement officer pursuant to the applicable ordinance provisions "...shall become a final order unless, no later than 10 calendar days after the order is served, any person aggrieved by the order files an appeal with the code enforcement officer in accordance with Section 6.75.090 and 6.75.095." SMC 6.75.050(h); *CP 214*. Owens filed a timely appeal of the Notice and Order. *CP 177-180*. Upon the receipt of the appeal and filing fee, the municipality is required to "...schedule an appeal hearing before the city council and give due notice thereof to the applicants and general public." SMC 6.75.095(b). Final decision-making authority was vested in the City Council. SMC 6.75.095(f).

Owens appeal specifically noted that the City lacked any legal authority for the various demands in the Notice and Order (e.g. repair and relocation plans). *CP 177-181*. In addition, Owens identified notice deficiencies, as well as objections to legal and factual foundation for the Notice and Order. Further, Owens noted that the inspection findings were inadequate under SMC 6.75.050(d), because:

> The findings consist of broad-stroke allegations, which are vague as to location (referring to "all buildings," "numerous apartments," "numerous windows," "the majority of X," etc.). The Selah Municipal Code requires that the Notice and Order contain a brief and concise description of "the conditions" and "the corrective action required." SMC 6.75.050(d)(1)-(2). The notice and order is not sufficiently specific as to location to provide notice of the conditions alleged to be in violation, and as noted above, the corrective action required is not noted in the Notice and Order.

CP 179.

(b) City of Selah was unable to identify the correct or applicable building code.

A fundamental problem with the Notice and Order was the failure to provide a concise description of conditions alleged to be code violations together with identification "...the provisions of this code alleged to have been violated." 9.75.050(d)(1). Building Official referenced generically [M]ultiple Violations of 2015 International Property Maintenance, Building, Residential, Plumbing, Mechanical, and Fire and Electrical Codes detailed in the attached reports .... *CP 2013.* Building Official then set forth a laundry list based on alleged violations of the *2015 International Property Maintenance Code (IPMC). CP 216-226.* The source of authority was SMC 11.02.010. SMC 11.02.010(6) states that the following code provision was adopted by the City:

> (6) The International Property Maintenance Code, 2015 Edition published by the International Code Council *as*

> *adopted and amended by the State of Washington or as may be hereafter amended.*

(Italics added). The problem was that Washington Building Code Council had not adopted the *2015 International Property Maintenance Code (IPMC)*.[5] On the other hand, the City Engineer (whose report was attached and incorporated in the Notice and Order) cited to a different code. – *2015 International Existing Building Code (IEBC)*. City Engineer stated:

> *The multifamily units are governed by the 2015 International Building Code (IBC), and the 2015 International Existing Building Code (IEBC).* Chapter 5 Repairs of the IEBC, grant certain exemptions to existing buildings or structures. *They are exempt from mandatory upgrades to current code requirements, provided the original occupancy classification is not changed, the original building is not substantially structurally damaged, and the building is maintained in a safe and sanitary condition.* (Emphasis added).

CP 240-241. (Italics added). No reference was made to the *International Property Maintenance Code.* Many of the identified "violations" of the IPMC are exempt or subject to reduced standards under IBEC.

(c) City and Owens Agreed a Review Process and Continuance of Appeal Hearing.

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[5] Washington State Building Code Council is vested with responsibility for adoption and maintenance of the state building code. WAC 51.04.010. See also RCW 19.27.031. The adopted building codes are set forth in WAC Chapter 51-50 (2015 Edition of International Building Code); Chapter 51-51 (2015 Edition of the International Residential Code); WAC Chapter 51-52 (2015 Edition of the International Mechanical Code); WAC Chapter 51-54A (2015 Edition of the International Fire Code); WAC Chapter 51-56 (2015 Edition of the Uniform Plumbing Code). The IPMC has not been adopted at the state level.

Following filing of the administrative appeal, City and Owens entered into an "Agreed Order of Continuance" ("Agreed Order") with respect to the administrative appeal. The agreement was executed by the parties and approved by Selah City Council on February 13, 2018. *CP 183-185.* The Agreed Order provided, in part, as follows:

> THIS MATTER having come on for hearing on February 13, 2018 before the City Council and the parties having agreed as follows:
>
> ***
>
> 3. Additional time is necessary to allow Defendants to complete a review of the City's findings contained in the Notice of Violation and Order of Correction, and its incorporated reports.
>
> 4. Additional time is also necessary to allow Defendants to consult with a structural engineer licensed in the State of Washington, and determine whether to (a) repair the subject property, (b) submit an application for a demolition permit, or (c) move forward with the appeal of the Notice of Violation and Order of Correction.
>
> 5. Defendants will provide a letter of intent on or before April 16, 2018, indicating which option Defendants intend to pursue.
>
> 6. If the Defendants choose to repair the subject property, Defendants will submit a repair plan within 120 days of February 13, 2018. This deadline shall be extended an additional 90 days if Defendants' submit a letter, signed by a retained structural engineer licensed in the State of Washington, indicating that such an extension is necessary to submit the repair plan. If Defendants' retained structural engineer requests an extension of greater than 90 days, the parties agree to discuss the

> request in good faith. If the parties cannot reach agreement, the City Council shall determine the reasonableness of Defendants' retained structural engineer's request, and whether the extension will be granted.

CP 173 and CP 183-184. The appeal hearing before the City Council was continued "...to allow [Owens] to complete review of the City's findings...." *CP 184.* Owens specifically reserved the right to move forward with the appeal process.

3. Owens Compliance with Agreed Order and Review of Notice and Order.

After filing the appeal and executing the Agreed Order, Owens retained a well-qualified and recognized structural engineer, Tim Bardell ("Bardell").[6] In addition to engaging a structural engineer, Owens also began to repair portions of the buildings referenced in the Notice and Order. *CP 777.* City Engineer had stated that he "...recommended the owner begin repair efforts immediately." *CP 246.* On January 2, 2018, Owens submitted a building permit application for repairs but City refused to process the applications. *CP 777* and *CP 913.* Staff had been instructed by the City Manager not to issue any building permits for work proposed by

[6] Bardell was the Senior Engineer and owner of B7 Engineering in Sunnyside, Washington. *CP 781.* He had been a licensed Professional Engineer (PE) for 25 years, with endorsements in both civil and mechanical engineering, all of which supported an emphasis in structural engineering. *Id.* He was licensed in the states of Washington, Oregon, Idaho, Montana, Alaska, and Wyoming. *Id.* A large portion of Mr. Bardell's work involved repairing "broken buildings." In his professional career, he had prepared repair plans for about 100 buildings. *CP 782.*

Owens. *CP 777.* Owens was between a rock and a hard place – he had been ordered to repair structures but was being denied building permits necessary for the work.

Pursuant to the Agreed Order, Owens sent a letter of intent to repair to the City on April 16, 2018. *CP 730.* The letter recognized that separate and individualized issues were presented as to each of the twenty (20) units and that the repair plan should be developed on a unit-by-unit basis.

> Based on Mr. Bardell's observations, the repair needs of the structures are not uniform; each apartment unit has separate, individualized issues of varying degrees and due to access issues, the full extent of the necessary repairs cannot be determined until the floors and ceilings are opened or removed. Thus, Mr. Bardell will need to include flexibility in the repair plan, to adjust the plan for each unit as additional observations are made. *For these reasons, Mr. Bardell will need to write the plan to address one unit at a time (likely starting with Unit 18), within a broader plan covering all the structures.*

CP 730-731. This approach was logical because the apartment buildings were originally separate structures built with different design and components and there had not been a full inspection. The City registered no objections to this approach.

Owens submitted a repair plan prepared by their licensed professional engineer on June 13, 2018. *CP 731*; *CP 755-767.* The repair plan provided"...that repair be done unit-by-unit in a progressive manner." *CP 758.* Since the project was for repair and modification of an existing

structure, it was confirmed that the International Existing Building Code (IEBC) provided the applicable standards for repair of the units. The plan identified applicable loads, materials, inspections, lateral force resisting systems and unit specific information. The development of the report included a detailed inspection of the apartments.[7] Bardell noted, however, that the term "plan" is not a provision defined in the relevant building codes.

> Plans do not have to be complicated to accomplish their purpose. *The term "plan" is not defined in the relevant building codes, and therefore its form and contents are subject to the judgment of the person preparing the plan.* The design professional's judgment of what is needed is balanced by the review by the building official, who may want additional information added to the plans.

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[7] Tim Bardell provided background regarding the inspections in the proposal to proceed on a unit-by-unit basis. Among his statements were the following:

> 9. On March 2, 2018, I visited the apartments and suggested that repair was possible but financially burdensome. The decision to repair would be up to Steve Owens.
>
> 10. On March 6, 2018, a more detailed inspection was conducted of the apartments, and the attic of Units 14-18. Access to the attics of Units 10-13 was not possible with a tool bag in hand; the conditions of these units were assumed to be similar to those observed in Units 14-18. Measurements were obtained, and other observations were made to prepare repair plans. I noted that the buildings were in poor shape but were repairable and were not unsafe.
>
> 11. I determined that the buildings qualify for the prescriptive rules of the International Building Code for design, and thus, do not require detailed engineering. This is because the size of the units, and small room sizes within the units, provide comfortable safety margins using typical building practices.

Bardell Decl. ¶9-11, CP 782.

CP 784.[8] The form and content of the "repair plan" subsequently began a point of dispute between the parties.

To Owens surprise, City registered objections to the repair plan. Despite clear communication that the repair plan would be based upon a unit-by-basis, City sat silent for four months and then stated that the "...repair cannot be processed unit-by-unit." *CP 197.* This conclusion is in direct conflict with City Engineer's earlier statement that "...the repair plan can be evaluated based off a unit by unit basis..." if the "...units are independent structures ..." *CP 205.* A pattern was developing – despite Owens timely work and planning, City would arbitrarily refuse to process building permits, sit silent when presented with plan proposals, and unilaterally reject procedures specifically contemplated by its engineer. Owens was beginning to question the City's good faith in repair process.

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[8] Bardell elaborated on the language of the building codes. City had referenced a "repair plan" but such term does not appear in the applicable building codes. Bardell testified:

> The closest term in the building codes to what the city now appears to expect from the repair plan is "construction documents" which is found in the International Building Code, and does not apply to the repair of existing buildings. This term means, "written, graphic and pictorial documents prepared or assembled for describing the design, location and physical characteristics of the elements of the project necessary for obtaining the building permit." The definition does not specify a minimum number of sheets, details or format.

A satisfactory repair plan balances typical practice with other needed details to describe the design. In the repair plan, Bardell provided the essential elements of the repairs in the note blocks on Sheet 2, and the descriptive cover letter. *Id.*

On June 16, 2018, Owens responded to the City noting surprise at the City's response since the unit-by-unit approach to the repair plan had been fully disclosed to the City two months earlier. *CP 773-774.* Owens also requested clarification of the City's position. *Id.* Again, the City failed to respond. More than a month passed with no response. Upon Owens renewed follow-up on July 24, 2018, the City finally responded and stated it would be filing a summary judgment motion in superior court, which was almost complete. *Id.* at ¶*37, CP 733.* It was clear at this point that the City had no interest in proceeding on the basis agreed to by the parties. And more significantly, the City unilaterally terminated the administrative appeal and refused to proceed according to its own ordinance procedures.

C. Trial Court Summary Judgment Hearing and Decision.

City filed a motion for summary judgment in superior court seeking to enforce code provisions against the property located at 512 South First, Selah, Washington. *CP 149-171.* The motion sought "...summary judgment in the form of a declaratory judgment (public nuisance) and equitable relief (injunction and order of abatement). *CP 166.* Owens filed a cross motion for summary judgment requesting enforcement of administrative appeal rights and the Agreed Order. *CP 807-812, 704-726.*

Owens summarized their motion to enforce the continuance agreement: "the parties have either settled the matter or it's still pending at

the administrative level... " *Transcript*, at 1:18-20. Owens emphasized that City "does not dispute the existence of the agreement." City disputed the material terms. *Transcript*, at 1:21. City confirmed this by indicating, "we'll agree to honor our agreement… but he needs to submit the report that is required…" *Transcript*, at 9:10-11. Regardless, the trial court ignored City's concessions and found that no agreement had been reached. *Transcript*, at 11:8-13; *CP 926.*

The trial court consolidated its decision into a single order. *CP 925-928.* The court declared that "…a Public Nuisance exists at the Property; …" and further granted a permanent injunction and order of abatement. *CP 927.* The order was, however, stayed for a period of three (3) months for the purpose of preparing a detailed structural repair plan (which includes structural calculations and plans, and addresses all identified deficiencies within the reports attached to the January 9, 2018 Notice of Noncompliance and Order to Comply issued by the City). *Id.* And as a final point, the court denied Owens Motion to Enforce Settlement "…and the court finds that LUPA does not deprive this court of jurisdiction." *CP 926.*

IV. Argument

This appeal requests review of the trial court's entry of summary judgment in a code enforcement proceeding. The summary judgment was predicated upon a declaration of public nuisance and issuance of an order

of abatement. The trial court's premature exercise of jurisdiction was in direct conflict with applicable administrative review processes, contrary to Land Use Petition Act (LUPA's) exclusive jurisdiction and requirement for exhaustion of administrative remedies. Stated in another way, there was not a justiciable controversy that was ripe for review. The summary judgment was also built upon a record of controverted material facts and legal determinations that were contrary to clear and well established legal authorities.

A. Appellate Standard of Review of Summary Judgments.

An appellate court reviews summary judgment orders in the same manner as the trial court – "...we review questions of law de novo, and view the facts of the case and all reasonable inferences therefrom in a light most favorable to the nonmoving party." *Williamson v. Calibre Homes, Inc.,* 147 Wn.2d 394, 398, 54 P.3d 1186 (2002). Summary judgment is appropriate only when no genuine issue exists as to any material fact and the moving party is entitled to judgment as a matter of law. *Scrivner v. Clark College,* 181 Wn.2d 439, 444, 334 P.3d 541 (2014). A material fact is one that affects the outcome of the litigation. *Owen v. Burlington N. Santa Fe R.R.,* 153 Wn.2d 780, 789, 108 P.3d 1220 (2005). "In a summary judgment motion, the burden is on the moving party to demonstrate that there are no genuine issues as to a material fact and that, as a matter of law, summary judgment

is proper." *Atherton Condominium Apartment-Owners Ass'n Bd. Of Directors v. Blume Development Co.,* 115 Wn.2d 506, 516, 799 P.2d 250 (1990). The moving party is held to a strict standard. "Any doubts as to the existence of a genuine issue of material fact is resolved against the moving party." *Id.*

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

The trial court erroneously and prematurely exercised appellate jurisdiction in this code enforcement proceeding. The assumption of subject matter jurisdiction followed City's unilateral termination of Owens' administrative appeal rights and effort to "leap-frog" established procedures by commencing an independent judicial action for declaratory judgment and equitable injunctive remedies. It is well established that code enforcement decisions are "land use decisions" subject to the exclusive review procedures set forth in Land Use Petition Act (LUPA). RCW 36.70C.020(2). The trial court ignored the statutory directive and concluded that "...the court finds that LUPA does not deprive this court of jurisdiction." *CP 925-928.* Such decision is contrary to established law.

1. Land Use Petition Act (LUPA) provides the exclusive means for judicial review of land use decisions including code enforcement actions.

The Washington Land Use Petition Act (LUPA) is the "exclusive means for judicial review of land use decisions" made by a local jurisdiction.[9] RCW 36.70C.030. The superior court does not have subject matter jurisdiction in land use matters until all administrative processes have been exhausted. *Richards v. City of Pullman*, 134 Wn.App. 876, 880, 142 P.3d 1121 (2006) ("because LUPA provides an adequate and *exclusive* means for review of most land use decisions ... declaratory relief was not appropriate in this case."); and *Asche v. Bloomquist*, 132 Wn.App. 784, 801, 133 P.3d 475 (2006) (holding that where a public nuisance claim depends upon a finding that a land use violates an ordinance, LUPA precludes the public nuisance action). The courts "...should generally defer to local jurisdictions until a final determination on the use of land is made by the highest body or officer. ... [T]o hold otherwise would risk premature judicial intrusion into land use decisions." *Grandmaster Sheng-Yen Lu v. King County,* 110 Wn.App. 92, 101, 38 P.3d 1040 (2002) (holding that declaratory judgment was inappropriate when the local jurisdiction had not issued a "final decision" in the administrative hearing process.).[10]

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[9] In 1995, LUPA was enacted with the purpose "...to reform the process for judicial review of land use decisions by local jurisdictions, by establishing uniform, expedited appeal procedures in uniform criteria for reviewing such decisions, in order to provide consistent, predictable and timely judicial review." RCW 36.70C.010; See also, *James v. Kitsap County,* 154 Wn.2d 574, 582-583, 115 P.3d 286 (2005).

[10] In *Grandmaster Sheng-Yen Lu,* neighbors filed an independent action in superior court seeking declaratory judgment as to whether a conditional use permit was required for a proposed mining project. The declaratory judgment action was filed prior to completion

2. Code enforcement decisions are "land use decisions" subject to LUPA's exclusive review procedures.

A notice of violation of building code requirements is a land use decision. LUPA "...applies to actions that fall within the statutory definition of a land use decision." *Post v. City of Tacoma,* 167 Wn.2d 300, 309, 217 P.3d 1179 (2009)." A "land use decision" includes "...(c) *The enforcement by a local jurisdiction regulating the improvement, development, modification, maintenance, or use of real property."* RCW 36.70C.020(2)(c). There can be no dispute that a code enforcement order is a land use decision. *Richards,* 134 Wn. App. at 881 ("Pullman issued a notice to Richards that their addition violated an ordinance regulating improvement and development of property. The notice constituted a land use decision."). City issued an enforcement order in the form of the Notice and Order.

3. Declaratory Judgement and Nuisance Actions May Not be Utilized to Circumvent Administrative Land Use Processes.

In seeking judicial intervention, City unilaterally terminated a pending but uncompleted administrative appeal process. City requested superior court intervention through a separate and independent declaratory

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of the administrative review process and before issuance of a final decision. *Id.* 110 Wn.App. at 100-101. The court followed *Ward v. Board of Skagit County Commissioners,* 86 Wn.App. 266, 936 P.2d 42 (1997) and held "...that in order to obtain a final determination one must, by necessity, exhaust one's administrative remedies."

judgment and nuisance action. "The City now seeks the relief it requests through summary judgment in the form of a declaratory judgment (public nuisance) and equitable relief (injunction and order of abatement). *CP 166.*[11] No final decision had been issued at the administrative level.

The courts have consistently recognized the value and integrity of established land use processes and refused interlocutory intervention in the form of declaratory judgment or nuisance actions. *Grandmaster Sheng-Yen Lu, v. King County,* 110 Wn. App. 92, 38 P.3d 1040) (2002); (Declaratory Judgment); and *Asche v. Bloomquist,* 132 Wn. App. 784, 133 P.3d 475 (2006) (Nuisance). The foundation of the courts' reasoning has been adherence to the legislative recognition that LUPA was adopted as the exclusive means for review of land use decision. LUPA requires a "final decision" at the local level before judicial appellate jurisdiction may be invoked.

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[11] City's motion for declaratory judgment and equitable relief was based upon authority of SMC 6.58.280. *CP 166-167.* The ordinance authority provides as follows:

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

(Italics added). SMC Ch. 6.75 does not provide any procedure or authorization to disrupt the administrative process or authorize the municipality to terminate administrative processes in the exercise of its sole discretion. If an emergency exists, the ordinance provides processes for such emergencies. SMC 6.75.080. City did not invoke or follow the emergency powers and authorization provisions of its ordinance.

In a virtually identical context, the court in *Grandmaster Sheng-Yen Lu*, reviewed the propriety of an interlocutory complaint for declaratory judgment. No final decision on a conditional use permit had been issued by the local jurisdiction. LUPA clearly recognizes that the superior court does not have jurisdiction to hear matters regarding "land use decisions" until there has been a final decision issued by the administrative body with final decision making authority. *Durland v. San Juan County,* 182 Wn.2d 55, 64, 340 P.3d 191 (2014) ("the superior court did not have jurisdiction to hear this appeal because there was no land use decision"). In *Grandmaster Sheng-Yen Lu,* the court dismissed a declaratory judgment action that was filed prior to a final decision being issued by the local jurisdiction. The court summarized its decision as follows:

> 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 decisions involving the use of land until such decisions are final – that is when the highest body or officer has finally acted.*

Grandmaster Sheng-Yen Lu, 110 Wn. App. at 100 (Italics original). The court considered the 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.*

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 is not ripe for judicial review. *Grandmaster Sheng-Yen Lu,* 110 Wn. App. at 98-99.

The finality doctrine is particularly applicable where the local jurisdiction has adopted a specific administrative review procedure.

> *But where the permitting authority creates an administrative review process, a building permit does not become "final" for purposes of LUPA until administrative review concludes.* Only then is there a final land use decision that can be the subject of a LUPA petition. *Ferguson v. City of Dayton,* 168 Wn. App. 591, 277 P.3d 705 (2012) (no land use decision prior to final determination by planning commission, which was the entity with the last word on the permit). *This comports with the plain reading of the statute, which requires that the "final determination" come from the "officer with the highest level of authority..., including those with authority to hear appeals*." RCW 36.70C.020(2).

Durland, 182 Wn.2d at 64-65. "A 'final decision' is '[o]ne which leaves nothing open to further dispute and which sets at rest cause of action between the parties." *Samuel's Furniture, Inc. v. Department of Ecology,* 147 Wn.2d 440, 452, 54 P.3d 1194 (2002). Compliance with adopted

procedures is a necessary predicate to the exercise of appellate judicial jurisdiction.[12] No final decision was issued in the administrative enforcement process. Rather, City chose to abandon its established appeal procedures and sought to substitute the superior court through a separate declaratory judgment action. The problem is that the City mandated its code enforcement process – "...this chapter *shall* be utilized to enforce code violations ..." and then abandoned the adopted procedures.

The finality doctrine is also consistent with the well-established duty to exhaust administrative remedies. *Durland,* 182 Wn.2d at 66 (holding that the superior court lacked jurisdiction where there had been a failure to exhaust administrative remedies). [13] The court in *Durland* stated:

> LUPA's definition of "land use decision" implies *that exhaustion of administrative remedies is always required before a superior court may exercise its appellate*

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[12] *James v. Kitsap County,* 154 Wn.2d 574, 587, 115 P.2d 286 (2005) ("Developers ignore the well-established rule that where statutes prescribe procedures for resolution of a particular type of dispute, state courts have required substantial compliance or satisfaction of the spirit of the procedural requirements before they will exercise jurisdiction over the matter"); and *Torrance v. King County,* 136 n.2d 783, 793-94, 966 P.2d 891 (1998) (holding that writ of certiorari "...is not available when a party has failed to avail itself to other procedures that would have afforded the opportunity for an adequate remedy.").

[13] Where a local jurisdiction establishes an administrative review process, there must be an exhaustion of the administrative remedies prior to the issuance of a "final decision". *Ferguson v. City of Dayton,* 168 Wn.App. 591, 708, 277 P.3d 705 (2012) (holding that issuance of a building permit was not a "final decision" where the municipality had established an administrative review process with final decisionmaking authority vested in the Planning Commission). "The issuance of a permit [or enforcement order] may qualify as a final land use decision if there is *not* a way to administratively appeal the permit under the applicable code." *Durland,* 182 Wn.2d at 64 (holding that the issuance of a building permit was not a final decision since the applicable ordinance authorized appeal to a hearing examiner).

> *jurisdiction.* RCW 36.70C.020(2); see also *West v. Stahley,* 155 Wn.2d 691, 697, 229 P.3d 943 (2010) ("[t]o obtain a final determination from a local jurisdiction, a LUPA petitioner must necessarily exhaust all available administrative remedies"). *Accordingly, no court has ever excused the exhaustion requirement in a LUPA case.*

Durland, 182 Wn.2d at 66 n. 6 (Italics added). The courts have uniformly recognized that exhaustion of administrative remedies is a condition to superior court review of land use decision. *See e.g. West v. Stahley*, 155 Wn. App. 691, 701, 229 P.3d 943 (2010) (holding that appeal was frivolous because "West failed to exhaust his administrative remedies before challenging" the land use decision.); *Nickum v. City of Bainbridge Island,* 153 Wn. App. 366, 376, 223 P.3d 1172 (2009). The application of exhaustion requirements is consistent with LUPA's policy of efficient and timely review of land use decision.

> The exhaustion of remedies prerequisite furthers LUPA's policy of efficient and timely review of land use decisions. *Durland v. San Juan County,* 182 Wn.2d 55, 68, 340 P.3d 191 (2014). In all settings, the doctrine of exhaustion: (1) insures against premature interruption of the administrative process, (2) allows the agency to develop the necessary factual background 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 do not ignore its procedures by resorting to the courts. *South Hollywood Hills Citizen Association for the Preservation of Neighborhood Safety and the Environment v. King County,* 101 Wn.2d 68, 73-74, 677 P.2d 114 (1984).

Aho Construction I, Inc. v. City of Moxee, 6 Wn. App.2d 441, 457, 430 P.3d 1131 (2018). There are "...no equitable exceptions to the exhaustion requirements". *Durland,* 182 Wn.2d at 66-67.

In addition, the courts have recognized that premature judicial intervention is not authorized where the case is not ripe for review. *Grandmaster Sheng-Yen Lu,* 110 Wn. App. at 106-109. "[A] claim is ripe for judicial determination if the issues raised are primarily legal and do not require further factual development, *and the challenged action is final.*" *Neighbors & Friends of Viretta Park, v. Miller,* 87 Wn. App. 361, 383, 940 P.2d 286 (1997). The finality requirement under the ripeness doctrine is consistent with LUPA's "final decision" and exhaustion of remedies requirements. Each supports a very simple and fundamental proposition – a trial court should not exercise jurisdiction until administrative processes are completed.

As a final point, the courts have consistently found that superior courts should not exercise jurisdiction over land use decisions through declaratory judgment or nuisance proceedings. *Stafne v. Snohomish County,* 156 Wn. App. 667, 688, 234 P.3d 225 (2010) (recognizing that "...LUPA is the exclusive means of judicial review" and the legislation provided an adequate alternative remedy); *Grandmaster Sheng-Yen Lu v. King County,* 110 Wn. App. at 98-99 (holding declaratory judgment action

may not replace adopted LUPA processes); *Asche v. Bloomquist,* 132 Wn. App. at 801 (holding public nuisance action is preempted by LUPA). This same rule has been applied in the context of the Administrative Procedures Act (APA). *Evergreen Wash. Healthcare Frontier, LLC v. Dept. of Social and Health Services,* 171 Wn. App. 431, 452, 287 P.3d 40 (2012) (a declaratory judgment is not available if courts can review the challenged agency action under the Administrative Procedures Act).

In the context of code enforcement, the court in *Richards v. City of Pullman,* 134 Wn. App. at 883, recognized that LUPA provided an adequate alternative remedy and declaratory relief was inappropriate. The court stated:

> Although declaratory relief is available when a court determines that other available remedies are unsatisfactory, this exceptional relief is rare. *Sheng-Yen Lu,* 110 Wn. App. at 106, 38 P.3d 1040. Because LUPA provides an adequate and *exclusive* means for review of most land use decisions, and because Pullman is not required by law to enforce its zoning code in a court of limited jurisdiction, declaratory relief was not appropriate in this case. *Id.* This commonsense reading of the language in RCW 36.70C.020(1)(c) and PCC 17.10.090 comports with the purpose of LUPA to promote administrative finality in land use decisions. *James v. Kitsap County,* 154 Wn.2d 574, 589, 115 P.3d 286 (2005).

(Italics original). Because there was an established administrative review process set forth in the ordinance, there was an adequate remedy available

to City with respect to the alleged code violations. City acknowledged that there was no emergency or exigent circumstances. This was not a rare case.

> The lesson of these cases is that while declaratory relief may be available if the court finds that other remedies are unsatisfactory, such situations justifying exceptional treatment are very rare. *This case is not one of those rare exceptions. Because LUPA provides an adequate alternative means of review, declaratory relief is not proper.*

Grandmaster Shen-Yen Lu, 110 Wn. App. at 106 (italics added). The same reasoning and principles apply to public nuisance actions. See *Asche,* 132 Wn. App. at 801 (holding that where nuisance is based upon alleged violations of building codes, a nuisance action may not be substituted for compliance with LUPA processes).

C. Trial Court's Failure to Comply With Established Administrative Review Procedures Violated Owens Procedural Due Process Rights.

City adopted specific mandatory administrative processes governing code enforcement. SMC Ch. 6.75. Code enforcement was initiated under such procedures but unilaterally terminated by the City before completion of the appeal process. The termination of administrative proceedings was not authorized by ordinance or other applicable law. There was no emergency and City acknowledged that it "...has chosen not to require immediate condemnation of the subject buildings." An administrative agency's failure to follow its own procedures violates the

constitution only when (1) the agency violates minimal constitutional requirements [in violation of procedural of procedural due process], or (2) its resulting decision is so arbitrary and capricious that it amounts to a violation of substantive due processes." *Niesch v. Concrete School Dist.,* 129 Wn. App. 632, 641, 127 P.3d 713 (2005).

City correctly acknowledged that it "...agreed to proceed through the administrative appeal process ... in order to assure that due process was fully afforded to the defendants....." *CP 167.* And it is well settled that an administrative body must follow its own rules and regulations when it conducts a proceeding which could result in depriving an individual of some benefit or entitlement. *Ritter v. Board of Com'rs of Adams County Public Hospital Dist. No. 1,* 96 Wn.2d 504, 507, 637 P.2d 940 (1981); 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). Administrative agencies are bound by their own rules. *Skamania County v. Woodall,* 104 Wn. App. 525, 539, 16 P.3d 701 (2001). "A constitutionally protected property interest exists when a plaintiff demonstrates that he or she possesses a 'legitimate claim of entitlement' under the law." *Durland,* 182 Wn.2d at 69. Code enforcement directly impacts property interests. Those interests are entitled to protection.

"Though the procedures may vary according to the interest at stake, the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Post v. City of Tacoma,* 167 Wn.2d 300, 313, 217 P.3d 1179 (2009). The arbitrary termination of administrative processes eliminated hearing and rights to challenge the code enforcement action. The due process challenge is not a facial challenge but rather an "as-applied challenge". "An as-applied challenge to the constitutional validity of a statute is characterized by a party's allegation that the application of the statute and the specific context of the party's actions, or intended actions is unconstitutional." Owens was prejudiced by loss of repair options and benefits of Agreed Order. *Lang v. Washington State Department of Health,* 138 Wn. App. 235, 252, 156 P.3d 919 (2007) (due process violation requires showing of prejudice). Prejudice is patent in this case. All appeal rights were terminated; administrative hearings cancelled; terms of the Agreed Order discarded; enforcement based on uncertain (and perhaps nonexistent) building code ordinance; and simple refusals to communicate and cooperate in the agreed upon repair processes. There is no authority that authorizes this unilateral arbitrary action.

D. Trial Court Erroneously Granted Summary Judgment and Ordered Abatement and Removal of Building Structures.

City sought relief for an alleged public nuisance through summary judgment in the form of a declaratory judgment and equitable relief. *CP 166.* City has the burden to establish each element for the requested relief. This burden is elevated in the context of summary judgment where the moving party must also establish the absence of any genuine issue of material fact. *Atherton Condominium Apartment-Owners Ass'n v. Blume Development,* 115 Wn.2d 506, 516, 799 P.2d 250 (1990). Despite a clearly conflicting factual record, the trial court found a public nuisance, ordered relocation of tenants and directed demolition of all structures. The draconian remedy was not supported by the record.

1. Issuance of permanent injunctive relief was contrary to law and based on disputed factual record.

City requested a permanent injunction. The requirements for permanent injunction are well settled:

> To obtain permanent injunctive relief, a party generally 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. *Huff v. Wyman,* 184 Wn.2d 643, 651, 361 P.3d 727 (2015).

SEIU Healthcare v. DSHS, 193 Wn. App. 377, 393, 377 P.3d 214 (2016). Failure to establish any one of the criteria results in a denial of the injunction. *Kucera v. Washington State Department of Transportation,* 140 Wn.2d 200, 210, 995 P.2d 63 (2000). An injunction is distinctly an

equitable remedy that "should not be lightly indulged in, but should be used sparingly and only in a clear and plain case." Accordingly, injunctive relief will not be granted where there is a plain, complete, speedy and adequate remedy at law. *State v. Ralph Williams' N.W. Chrysler Plymouth, Inc.*, 87 Wn.2d 298, 312, 553 P.2d 423 (1976); *see also Tyler Pipe Indus., Inc. v. Department of Revenue,* 96 Wn.2d 785, 792, 638 P.2d 1213 (1982).

(a) There are material issues of fact as to whether the City has a clear legal or equitable right.

To support the first element of its claim for injunctive relief ("a clear legal or equitable right"), City asserted that it had a clear legal or equitable right to enforce its ordinances and regulations. *CP 168-169*. However, City failed to establish a clear legal or equitable right for three reasons: (i) material issues of fact remain as to whether the alleged conditions constitute code violations, (ii) there are material issues of fact as to whether the alleged nuisance is actionable, and (iii) there are material issues of fact as to whether the alleged nuisance is a "public nuisance."

"A municipal ordinance may not make a thing a nuisance, unless it is in fact a nuisance." *Greenwood v. Olympic, Inc.*, 51 Wn.2d 18, 21, 315 P.2d 295 (1951);[14] *Kitsap County v. Kev, Inc.*, 106 Wn.2d 135, 138, 720

[14] 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

P.2d 818 (1986). "An actionable nuisance must either injure the property or unreasonably interfere with enjoyment of the property." *Tiegs v. Watts*, 135 Wn.2d 1, 13, 954 P.2d 877 (1998). And public nuisance is a nuisance "which affects equally the rights of an entire community or neighborhood." RCW 7.48.130.

(i) Material issues of fact remain as to whether the alleged conditions constitute code violations. City claimed that the subject property constituted a *public nuisance* based *solely* on alleged building code violations. The primary focus was on the structural integrity of the buildings and whether such conditions constituted code violations. *See* CP 927; *see also Transcript*, 12:24 – 16:13. Experts for the two parties had clearly opposing opinions.

Owens presented contravening evidence through declarations by Tim Bardell ("Bardell"), a licensed professional engineer with 25 years' experience. *CP 781-802*; *CP 1000-1061*. Bardell specifically indicated, "I have reviewed the Declaration of Mike Heit ... and I disagree with its contents in several respects, including the implication that the buildings at issue are unsafe." *CP 782*. Bardell conducted a detailed inspection,

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hotel had been constructed prior to the existing building code; was not an nuisance at the time; and there had been no complaints over the years. The court stated that "...[i]f they became a nuisance, it was because the city council of Seattle, by ordinance ... declared them so to be. A municipal ordinance may not make a thing a nuisance, unless it is in fact a nuisance." *Id.* 51 Wn.2d at 21.

evaluated the buildings and determined that the prescriptive design rules of the International Building Code are applicable (which means that detailed engineering is not required) and prepared various structural calculations, including lateral load and gravity calculations. *CP 782*.

Bardell determined that the "size of the units, and small room sizes within the units, provide comfortable safety margins using typical building practices." *Id.* He noted that, "I recommend repairs, but conditions are livable." *CP 783*. And the fact is that the City agreed to a repair regimen to the Agreed Order. Bardell disputed City's contention that "substantial structural damage" existed, and noted that if such conditions did exist, his repair plan would address those conditions. *CP 785*. Further, Bardell determined that collapse was very unlikely, even during repairs, because "[m]ultiple cross walls provide good redundancy in the lateral resisting system, and a good margin of safety preventing a collapse during both a significant earthquake and/or severe wind event." *CP 785*.

Thus, the trial court was presented with the testimony from two conflicting experts To resolve the issue, one must make a credibility determination, which is not proper in a summary judgment proceeding. *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) (issue of credibility is established by contradicting or impeaching evidence).

(ii) There are material issues of fact as to whether the alleged nuisance is actionable. "An actionable nuisance must either injure the property or unreasonably interfere with enjoyment of the property." *Tiegs*, 135 Wn.2d at 13. City failed to present any evidence to support a finding that the alleged conditions constituted a substantial and unreasonable interference with the use and enjoyment of land. On the other hand, Owens provided uncontroverted tenant testimony establishing that the alleged conditions did not interfere with their enjoyment of the property. *See Naranjo Decl., CP 1-2; Carter Decl., CP 4-5;* and *Cortez Decl., CP 7-25*. Even assuming minor code violations, the conditions did not elevate to a nuisance.

Tenants, Guillermina Naranjo, Asya Carter and Diana Cortez each testified that they were existing tenants and had not had any concerns or issues regarding condition, cleanliness or structural aspects of any of the apartments. *CP 1-2*, ¶¶1, 3-4. There were no issues with water leakage, floors were in good condition, windows opened and were in good condition, and there were no cracks in ceiling or walls. *CP 2*, ¶5. Owners had accommodated disabilities and always been responsive to repair requests. *CP 4-5*.

Finally, tenant-manager Diana Cortez testified that she has lived in four different apartments on the property over a period of 20 years. *CP 7-8*, ¶¶7-4. Cortez has never had any concerns about the cleanliness or condition of any apartment and Owens were quick to make repairs when necessary. *CP 8*, ¶5-6. Ms. Cortez, also submitted photos with her declaration, showing that the apartments were clean and in good condition. *CP 10-25*. The uncontroverted evidence was that the alleged code violations did not unreasonably interfere with the enjoyment of the property. City offered no contravening evidence.

(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. City failed to present any evidence to support this required finding. *See generally, Tiegs*, 135 Wn.2d at 13; *and Grundy*, 155 Wn.2d at 6-7. Instead, City asserted that it was not required to present evidence of harm to the community because a municipality may enact an ordinance establishing that any code violation constitutes a public nuisance (*See CP 168-169*; *839-840*). This argument is in direct conflict with established law providing that "[a] municipal ordinance may not make a thing a nuisance, unless it is in fact a nuisance." *Greenwood*, 51 Wn.2d at 21. Absent evidence regarding the effect the

alleged conditions have on the entire community or neighborhood, the record does not support the finding that the alleged conditions are in fact a "public nuisance." *See* RCW 7.48.130.

(b) City lacked a well-grounded fear of immediate invasion of its right to enforce its ordinances.

City attempted to satisfy the second element of the injunction test (a well-grounded fear of immediate invasion of its rights), by claiming that the immediate invasion relates to its "right to enforce its ordinances." *CP 169*. This is a strange argument. City had already commenced an enforcement action under the adopted city ordinance. Those processes were mandatory. SMC 6.75.020. The only impediments to City's right to enforce its ordinances were (1) the City's decision not to follow its own established administrative procedures; and (2) the City's decision not to honor the terms of the Agreed Order of Continuance. City should be estopped from taking inconsistent positions. See *Kitsap County v. Kitsap County Rifle and Revolver Club,* 184 Wn. App. 252, 296, 337 P.3d 328 (2014).

Owens repeatedly attempted to begin repairs to the property, but the City literally prevented or prohibited the commencement of repairs. For example, it is undisputed that: (1) prior to filing this matter, City refused to tell Owens what repairs were necessary (*CP 28)*; (2) City refused to process Owens' building permit applications on two occasions (*CP 777*; *CP 913*;

CP 915-16); (3) City informed Owens it would not accept permit applications while litigation was pending (*CP 777*; *CP 915-16)*; (4) City posted a blanket Stop Work Order in January, 2018 (*CP 780)*; (5) City requested that Owens "cease any construction or repair activity…" (*CP 754*); (5) City failed to object to Bardell's proposed unit-by-unit approach for two months (*CP 188-189*; *CP 730-31*, *CP 197)*; (7) City purported to allow the parties' engineers to communicate to develop the repair plan, but secretly prohibited its engineer from making "recommendations, or provid[ing] insight regarding approval of structural repair plans ..." (*CP 887-888*, ¶8; *CP 910*); (8) City told Owens that it "will accept Mr. Bardell's approach to addressing the repairs, but in accord with the observations Mike Heit has made…" but cut off communications, and (9) then filed for summary judgment in superior court (*CP 197*; *CP 732-733*; *CP 776*). Under these undisputed facts, there was no well-grounded fear of immediate invasion of its right to enforce its ordinances. There was no evidence of changed or deteriorating conditions. In fact, the conditions that triggered the investigation had been fully repaired. *CP 29.* Therefore, the trial court's finding that City had a well-grounded fear of immediate invasion of its rights was made in error.

(c) There are material issues of fact as to whether the act complained of is resulting in, or will result in, actual and substantial injury.

To attempt to satisfy the third element of the injunction test (regarding actual and substantial injury), City made the bare conclusory allegation that City and its citizenry suffer continuing injury, without any analysis or evidence. *See CP 169*. City failed to present even prima facie evidence.

On the other hand, Owens submitted evidence that there is no actual (let alone substantial) injury caused by the alleged code violations. *See Naranjo Decl., CP 1-2; Carter Decl., CP 4-5; and Cortez Decl., CP 7-25*. The tenants were happy with their units. The disputed code violations did not unreasonably interfere with their enjoyment of the property, and had no effect on the community or neighborhood. *See Tiegs*, 135 Wn.2d at 13. Further, structural engineer Tim Bardell testified that the apartments are safe and livable. *CP 781-802*; *CP 1000-1061*. Accordingly, the trial court's finding that the acts complained of are resulting in, or will result in, actual and substantial injury is simply not supported by the record.

(d) Trial Court erroneously issued injunctive relief where adequate remedy existed at law.

An injunction "should not be lightly indulged in, but should be used sparingly and only in a clear and plain case." *Kucera,* 140 Wn.2d at 201. Injunctive relief will not be granted where there is an adequate remedy at law. *Richards,* 134 Wn. App. at 883 ("Because LUPA provides an adequate

and *exclusive* means for review of most land use decisions, and because Pullman is not required by law to enforce its zoning code in a court of limited jurisdiction, declaratory relief was not appropriate in this case.")

Here, an adequate remedy was available through the administrative review process established by municipal ordinance. Perhaps the clearest evidence that the administrative review process provides an adequate remedy at law is the fact that City initially chose to follow the ordinance and not pursue permanent injunctive relief. City explicitly acknowledged that emergency action was not appropriate. *CP 225*. Thus, City consciously decided that the administrative review process in SMC 6.75 provided an adequate remedy to enforce its ordinances. Nothing changed substantively with the apartments. The only thing that changed with the City's "mind."

Owens complied with City's requirements to appeal the Notice and Order and agreed to the terms of the Agreed Order. *CP 177-180 and CP 183-185*. Owens timely submitted the repair plan. *CP 731*; *CP 755-767*. City's expert confirmed that Owens' repair plan was a reasonable approach. *CP 205*, ¶8. The parties communicated about the changes the City's engineer believed were necessary in the repair plan. *CP 731*, at ¶31; *CP 773-774*. City then cut off communication regarding the repair plan, abandoned the administrative review process, and filed for summary

judgment in Superior Court. *CP 731-733*. An adequate remedy existed through the administrative process.

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

The trial court erroneously held that no settlement had been reached by the parties. The fact is there was a clear and unambiguous Agreed Order. The Agreed Order removed certain requirements, recognized that time was required to evaluate claimed violations, allowed development of repair plans and set a schedule to move forward. Owens complied with each and every aspect of the agreement. They also relied on the agreement in agreeing to continue their appeal hearing.

There is a strong public policy favoring the compromise of litigation. *Eddleman v. McGhan*, 45 Wn.2d 430, 432, 275 P.2d 729 (1954); *Bryant v. Palmer Coking Coal Co.*, 67 Wn. App. 176, 179, 858 P.2d 1110 (1992), as modified, (Sept. 21, 1993). In fact, encouraging settlement is the express public policy of this state. *City of Seattle v. Blume*, 134 Wn.2d 243, 258, 947 P.2d 223 (1997). Enforcement of settlement agreements is governed by CR 2A and RCW 2.44.010. The purpose of these provisions is to encourage the enforcement of agreements intended to settle or narrow a cause of action. *In re Marriage of Ferree*, 71 Wn. App. 35, 40-41 856 P.2d 706 (1993).

Settlement agreements are governed by general principles of contract law. *Stottlemyre v. Reed*, 35 Wn. App. 169, 171, 665 P.2d 1383 (1983). A contract is created when the parties manifest to each other their mutual assent to the same bargain at the same time. *Pacific Cascade Corp. v. Nimmer*, 25 Wn. App. 552, 555-56, 608 P.2d 266 (1980). Washington adheres to the objective manifestation theory of contracts, which imputes an intention that corresponds to the reasonable meaning of a person's words and acts. *Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005) . Courts do not look to unexpressed intentions. *Hearst*, 154 Wn.2d at 504. Where a party has signed a contract, he or she is presumed to have objectively manifested assent to its contents. *See Skagit State Bank v. Rasmussen*, 109 Wn.2d 377, 381–84, 745 P.2d 37 (1987); *Tjart v. Smith Barney, Inc.*, 107 Wn. App. 885, 897, 28 P.3d 823 (2001).

Despite more than six (6) months of work under the Agreed Order, City denied the existence of the settlement and unilaterally filed its summary judgment motion. Owens moved to enforce the agreement. When considering a motion to enforce a settlement agreement, a trial court should treat the burdens of proof and evidence in the same way as the court would treat any motion for summary judgment. *Lavigne v. Green*, 106 Wn. App. 12, 16, 23 P.3d 515 (2001). The party opposing the settlement is

obligated to establish a genuine dispute as to the existence of the agreement, or one or more of its material terms. *In re Marriage of Ferree*, 71 Wn. App. at 40-41; *In re Patterson*, 93 Wn. App. 579, 969 P.2d 1106 (1999) (burden on party opposing settlement agreement to prove defense such as coercion, fraud, or mistake).

1. The parties entered into a valid, binding settlement agreement. The Agreed Order of Continuance effective February 13, 2018. *CP 173*; *CP 183-186*; *CP 730*. The agreement was reduced to a formal writing, signed by the Mayor, approved by City Council and confirmed parties' respective attorneys. *CP 183-186*.

It is particularly noteworthy that at the trial court, City did not dispute the existence of the settlement agreement or that the agreement contained the materials terms sufficient to be valid and binding. *See CP 828-832*. Rather, Selah disputed the enforceability of the settlement agreement; arguing that "submission of a repair plan meeting the approval of the parties was clearly a *condition precedent* in this matter to the enforceability of the agreement." *CP 831*:23-24. In oral argument, City confirmed this by stating, "we'll agree to honor our agreement… but he needs to submit the report that is required…" *Transcript*, at 9:10-11. The Agreed Order did not set submission of the repair plan as a condition

precedent. And the settlement did not give the City the unilateral and arbitrary right to abandon the argument.

The terms of the agreement were specific and unambiguous. *CP 729*, at ¶¶11-12, 21; *CP 741, 743-752*; *CP 183-186*. The agreement confirmed that Owens had filed a timely appeal; portions of the order were withdrawn; appeal hearing continued; and repair or demolition procedures adopted. *CP 183-184*. In addition, the Agreed Order provided that,

> 5. Defendants will provide a letter of intent on or before April 16, 2018...
> 6. If the Defendants choose to repair the subject property, Defendants will submit a repair plan within 120 days of February 13, 2018...

CP 184. Further, the Scheduling Order of the agreement provided, in pertinent part,

> 5. The Defendants' Appeal Hearing before the city council shall be continued to allow Defendants to complete a review of the City's findings contained in the Notice of Violation and Order of Correction, and its incorporated reports.
> 6. On or before April 16, 2018, Defendants shall provide a Letter of Intent… indicating Defendants' intent to (a) repair the subject property, (b) submit an application for a demolition permit, or (c) move forward with the appeal of the Notice of Violation and Order of Correction.
> 7. Paragraph 3 of the Order Requiring Correction… is withdrawn.
> 8. If the Defendants choose to repair the subject property, Defendants shall submit a repair plan within 120 days of February 13, 2018…

> 9. If the Defendants choose to move forward with the appeal… upon receipt of the Defendants' Letter of Intent, the City's counsel shall note a hearing before the City Council.

CP 184-185. Owens retained a structural engineer, choose to repair the property, advised the City of intent to repair by letter dated April 16, 2018, and submitted a repair plan on June 13, 2018.

The point of conflict related to the contents of the repair plan. *See CP 183-186.* The contents of the repair plan were left to the expertise of the retained structural engineer. The Agreed Order did not provide specific procedures for review and approval of the repair plan. The normal place and time of review would be conducted on submission of "construction documents" for building permits. *CP 784-786*

Rather than honoring the terms of the agreement and allowing Owens to repair the property as City had claimed it was willing to do (*Transcript*, at 9:10-11), City abandoned the administrative process and moved for summary judgment in superior court requesting "demolition of the structures." *CP 171.* The most troubling point is that the trial court simply came to a conclusion that there was no agreement. *CP 926.* (Order simply denied enforcement of the settlement). The court entered no specific findings or conclusions.

2. Submission of a repair plan "meeting the approval of the parties" was not a condition precedent to enforcement of the settlement agreement.

At the trial court, City contended that a condition precedent (i.e. "submission of a repair plan meeting the approval of the parties") precluded enforcement of the settlement agreement. The Court ultimately held that no settlement had been reached but failed to address whether the submission of a repair plan meeting approval of the parties was a condition precedent, material term, or had no bearing on the Court's ruling. In an abundance of caution, we address the issue directly.

"Conditions precedent are not favored by the courts and will be excused if enforcement would involve extreme forfeiture or penalty and if the condition does not form an essential part of the bargain." *Ashburn v. Safeco Ins. Co. of America*, 42 Wn. App. 692, 698, 713 P.2d 742 (1986). Washington law implies a duty of good faith and fair dealing in each contract, obligating each party to cooperate with one another. *City of Woodinville v. Northshore United Church of Christ*, 166 Wn.2d 633, 647, 211 P.3d 406 (2009). When a party refuses to cooperate so as to allow a condition to be satisfied, a condition will be excused. *See Id.* ("When the City rejected the Church's application without even considering it, the Church was excused from full compliance" with the agreement requiring the Church to obtain a permit prior to operating a homeless encampment);

see also Cavell v. Hughes, 29 Wn. App. 536, 539-40, 629 P.2d 927 (1981) (Defendant hindered the plaintiff's ability to perform a condition precedent, in part, by "permit[ing] confusion to persist" regarding the condition precedent in a bad faith effort to frustrate the contract).

Both construction of the contract and determinations regarding alleged satisfaction of "condition precedents" present questions of fact. *Viking Bank v. Firgrove Commons 3, LLC,* 183 Wn. App. 706, 711, 334 P.3d 116 (2014) ("Interpretation of a contract as a question of fact."). "Where extrinsic evidence is needed, summary judgment is rarely appropriate." *Hearst Communications, Inc. v. Seattle Times Co.,* 120 Wn. App. 784, 791, 86 P.3d 1194 (2004). In addition, the condition is redundant and unnecessary because City would have been able to review the building permit applications and inspect the work performed in accordance with the building permit application process. *CP 784-786*, at ¶¶23 & 28. Thus, the condition only served to delay the Owens ability to repair the property. Further, enforcement of the condition involved extreme forfeiture or penalty (i.e. demolition of the property), and the alleged condition should be excused. *See Ashburn*, 42 Wn. App. at 698.

Second, City's conduct violated the duty of good faith and fair dealing, which would excuse the alleged condition precedent. *See Northshore United Church of Christ*, 166 Wn.2d at 646-47 (When obtaining

a permit application was a contingency to the agreement, the City's refusal of the permit without considering the application violated the duty of good faith and fair dealing, and excused the contingency); *see also Cavell,* 29 Wn. App. at 539-40 (Defendant hindered the plaintiff's ability to perform a condition precedent, in part, by "permit[ing] confusion to persist" regarding the condition precedent in a bad faith effort to frustrate the contract.).

City's efforts to prevent Owens from repairing the property or "submitting a repair plan meeting the approval of the parties" included: refusal to inform Owens of what repairs were necessary in November 2017 (*CP 28*, ¶15-17); failure to process a building permit application on January 2, 2018 (*CP 777*, ¶3; *CP 913*); explicitly refusing to process a building permit application on January 29, 2018 (*CP 777*, ¶3-4); informing Owens that City would not accept building permit applications while litigation was pending on January 29, 2018 (*CP 777*, ¶3); posting a blanket Stop Work Order which failed to comply with City's code provisions (*CP 915-16*; *CP 780*); requesting that Owens' counsel "advise your client to cease any construction or repair activity" in February 2018 (*CP 754*); failing to object to the proposed approach to repairs for 60 days (*CP 188-189*; *CP 197*); failing to object to the repair plan itself until after the plan became due -- despite discussions about the content and receipt of a draft of the plan in advance (*CP* 783, ¶15; *CP 197*); informing Owens that the parties

respective engineers could communicate directly to resolve any issues with the repair plan, but secretly prohibiting City's engineer from making "recommendations, or provid[ing] insight regarding approval of structural repair plans without City consent." (*CP 887-888*, ¶8; *CP 910*); and informing Owens that City will accept the proposed approach to repairs "but in accord with the observations Mike Heit has made," then ceasing all communications regarding the repair plan in order to prepare a motion for summary judgment in Superior Court (*CP 197*; *CP 732-733*; *CP 776*).

The parties settlement agreement did not contain the alleged condition precedent (the "submission of a repair plan meeting the approval of the parties"), but if it had, City's bad faith hindered Owens ability to perform the condition and the alleged condition should be excused. *See Cavell*, 29 Wn.App. at 539-40.

V. 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 1st day of October, 2019.

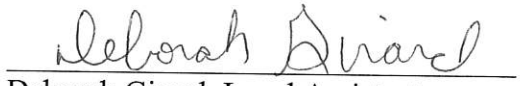
/s/ James C. Carmody
/s/ Sean M. Worley
JAMES C. CARMODY, WSBA #5205
SEAN M. WORLEY, WSBA # 46734
Meyer, Fluegge & Tenney, P.S.
Attorneys for Defendants

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:

Robert F. Noe Robert F. Noe, PLLC 4109 Tieton Dr. Yakima, WA 98908	☐First Class U.S. Mail ☑E-Mail bob@noe-law.com ☑Hand Delivery ☐ UPS Next Day Air

DATED at Yakima, Washington, this 1st day of October, 2019.



Deborah Girard, Legal Assistant

ATTACHMENT A

MUNICIPAL CODE

Chapter 6.75
CODE ENFORCEMENT

Sections:

6.75.010	Purpose.
6.75.020	Scope.
6.75.030	Violations.
6.75.040	Enforcement.
6.75.050	Investigation, infraction citations and notices of violation.
6.75.060	Timely compliance.
6.75.070	Stop work orders.
6.75.080	Emergency orders.
6.75.090	Right of appeal – Timeliness.
6.75.095	Appeal procedure.
6.75.100	Penalties.

6.75.010 Purpose.

The purpose of this chapter is to establish an efficient process for enforcement of code violations. (Ord. 1613 § 1, 2004.)

6.75.020 Scope.

The procedures set forth in this chapter shall be utilized to enforce violations of this code; as such violations are described within the code. The remedies found in this chapter are cumulative to and are in addition to any other remedy already specified within this code. (Ord. 1613 § 1, 2004.)

6.75.030 Violations.

(a) It is unlawful for any person to initiate, maintain, or cause to be initiated or maintained, the use of any structure, land or property within the city without first obtaining the permits or authorizations required for the use by the applicable provisions of any of this code.

(b) It is unlawful for any person to use, construct, locate, demolish or cause to be used, constructed, located, or demolished, any structure, land, or property within the city in any manner that is not permitted by the terms of any permit or authorization issued pursuant to the applicable provisions of this code.

(c) It is unlawful for any person to engage in or conduct business within the city without first obtaining appropriate business licensing.

(d) It is unlawful to:

(1) Remove or deface any sign, notice, complaint or order required by or posted in accordance with this chapter;

(2) Misrepresent any material fact in any application, plans, or other information submitted to obtain any building or construction authorization; or

(3) Fail to comply with any of the requirements of an order to cease activity issued under this chapter or issued pursuant to authority provided in other chapters of this code.

(e) It is unlawful to:

(1) Maintain, allow, permit or fail to prevent a nuisance as defined in Chapter 6.58 or as defined throughout this code; or

(2) Fail to comply with any applicable provisions of this code. (Ord. 1613 § 1, 2004.)

6.75.040 Enforcement.

(a) The code enforcement officer(s) is/are the person(s) authorized by the mayor to enforce the civil provisions of this code.

(b) The code enforcement officer shall have the responsibility for enforcement of this chapter. The code enforcement officer may call upon the police, fire, building, public works or other appropriate city departments to assist in enforcement. As used in this chapter, "code enforcement officer" shall also mean his or her duly authorized designee.

(c) This chapter shall be enforced for the benefit of the health, safety, and welfare of the general public, and not for the benefit of any particular person or class of persons.

(d) It is the intent of this chapter to place the obligation for complying with its requirements upon the owner, occupant, tenant, manager, agent, or other person responsible for the condition of land and buildings situated within the city and within the scope of this code.

(e) No provision or any term used in this chapter is intended to impose any duty upon the city or any of its officers or employees which would subject them to damages in a civil action. (Ord. 1613 § 1, 2004.)

6.75.050 Investigation, infraction citations and notices of violation.

(a) *Authority to Enter.* Upon presentation of proper credentials, the code enforcement officer may, with the consent of the owner or occupant of a building or premises, enter at reasonable times any building or premises in order to perform the duties imposed by this chapter.

(b) *Investigation Upon Complaint or Personal Knowledge.* The code enforcement officer shall investigate any structure or use when he or she receives a complaint from an identifiable person who owns, rents or leases real property affected by the code violation to which the complaint relates or when the code enforcement officer reasonably believes, based on personal knowledge, that any structure or use does not comply with the applicable standards and requirements of this code.

(c) *Infraction Citation.* If after investigation the code enforcement officer has probable cause to believe that the applicable standards or requirements of this code have been violated, the code enforcement officer may issue a civil infraction citation in accordance with RCW 7.80, which is incorporated herein by this reference, upon the owner, occupant, tenant, manager, agent, or other person responsible for the condition.

(d) *Notice of Violation and Order/Administrative Proceeding.* Alternatively, after investigation, the code enforcement officer may serve a notice of violation and order upon the owner, occupant, tenant, manager, agent, or other person responsible for the condition. The notice of violation and order shall contain the following information:

(1) The notice of violation and order shall contain a brief and concise description of the conditions alleged to be in violation of the municipal code and the provisions of this code alleged to have been violated.

(2) The notice of violation and order shall contain a statement of the corrective action required and shall specify a reasonable time within which the action must be accomplished.

(3) The notice of violation and order shall contain an explanation of the appeal process and the specific information required to file an appeal.

(e) *Service of a Notice of Violation.* A notice of violation and order shall be served on the owner, occupant, tenant, manager, agent, or other person responsible for the condition by personal service, registered mail, or certified mail with return receipt requested, addressed to the last known address of such person. If, after a reasonable search and reasonable efforts are made to obtain service, the whereabouts of the person(s) is unknown or service cannot be accomplished and the code enforcement officer makes an affidavit to that effect, then service of the notice upon such person(s) may be made by:

(1) Publishing the notice once each week for two consecutive weeks in the city's official newspaper; and

(2) Mailing a copy of the notice to each person named on the notice of violation by first class mail to the last known address if known, or if unknown, to the address of the property involved in the proceedings.

(f) *Posting.* A copy of the notice shall be posted at a conspicuous place on the property, unless posting the notice is not physically possible.

(g) *Amendment.* A notice of violation and order may be amended at any time in order to:

(1) Correct clerical errors; or

(2) Cite additional authority for a stated violation.

(h) *Final Orders.* Any notice of violation and order issued by the code enforcement officer pursuant to this chapter shall become a final order unless, no later than ten calendar days after the order is served, any person aggrieved by the order files an appeal with the code enforcement officer in accordance with Sections 6.75.090 and 6.75.095.

(i) *Separate Offenses.* For enforcement purposes, each day, defined as the twenty-four-hour period beginning at 12:01 a.m., in which violation of this chapter occurs, shall constitute a separate violation. (Ord. 1613 § 1, 2004.)

6.75.060 Timely compliance.

(a) *Infraction Citations.* Civil infraction citations will be issued and processed in accordance with RCW 7.80, which is incorporated herein by reference. The Selah Municipal Court shall have jurisdiction over all civil infraction citations issued under this chapter.

(b) *Determination of Time for Compliance with Notices of Violation and Order.* Persons receiving a notice of violation and order shall rectify the code violations identified within the time period specified by the code enforcement officer pursuant to Section 6.75.050(d)(2) of this chapter. (Ord. 1613 § 1, 2004.)

6.75.070 Stop work orders.

Whenever a continuing violation of this code will materially impair the code enforcement officer's ability to secure compliance with this code, or when the continuing violation threatens the health or safety of the public, the code enforcement officer may issue a stop work order specifying the violation and prohibiting any work or other activity at the site. Any violation of a stop work order is declared to be a nuisance and the code enforcement officer is authorized to enjoin or abate such nuisance summarily by any legal or equitable means as may be available. The costs for the injunction or abatement shall be recovered by the city from the owner, occupant, tenant, manager, agent, or other responsible person in the manner provided by law. (Ord. 1613 § 1, 2004.)

6.75.080 Emergency orders.

Whenever any use or activity in violation of this code threatens the health and safety of the occupants of the premises or any member of the public, the code enforcement officer may issue an emergency order directing that the use or activity be discontinued and the condition causing the threat to the public health and safety be corrected. The emergency order shall specify the time for compliance and shall be posted in a conspicuous place on the property, if posting is physically possible. Any condition described in the emergency order which is not corrected within the time specified is declared to be a public nuisance and the code enforcement officer is authorized to enjoin or abate such nuisance summarily by any legal or equitable means as may be available. The cost of such abatement shall be recovered from the owner, occupant, tenant, manager, agent, or other person responsible in the manner provided by law. (Ord. 1613 § 1, 2004.)

6.75.090 Right of appeal – Timeliness.

(a) Any person aggrieved by the code enforcement officer's action (defined as an order, decision, ruling or interpretation by the code enforcement officer), may appeal the code enforcement officer's action by filing a written request for appeal with the code enforcement officer within ten calendar days after receiving or otherwise being served with notice of the code enforcement officer's action. When the last day of the period so computed is a Saturday, Sunday, or state recognized holiday, the period shall run until four-thirty p.m. on the next business day. Failure to file a written request for appeal within time prescribed will result in the code enforcement officer's action becoming a final order and the appellant shall be bound thereby.

(b) A timely filed appeal will be heard by the city council. Any appeal of the code enforcement officer's action may be affirmed, reversed, or modified in the city council's final order. The decision of the city council shall be a final order and the appellant and the code enforcement officer shall be bound thereby unless, within twenty-one days from the date of the issuance of the city council's final order, a person with standing to appeal files a petition to the superior court. The cost for transcription of all records ordered certified by the superior court for such review shall be borne by the appellant. (Ord. 1999 § 1, 2016; Ord. 1613 § 1, 2004.)

6.75.095 Appeal procedure.

(a) An aggrieved person who desires to file an appeal of the code enforcement officer's action must do so pursuant to the provisions set forth in this section. The appeal process set forth in this section replaces an appeal to the board of appeals provided for in each of the International Codes, which the city of Selah has adopted by reference under Section 11.02.010 of the Selah Municipal Code. The appellant shall file a written appeal to the code enforcement officer within the time period prescribed in Section 6.75.090(a) and shall pay a filing fee of fifty dollars. The written appeal shall contain the following information:

(1) The names of all appellants participating in the appeal;

(2) A brief statement of the specific code enforcement officer's action protested, together with any material facts claimed to support the contentions of the appellant;

(3) A brief statement of the relief sought, and the reason why it is claimed the protested code enforcement officer's action should be reversed, modified, or otherwise set aside;

(4) The signatures of all parties named as appellants and their mailing addresses; and

(5) The verification (by declaration under penalty of perjury) of at least one appellant as to the truth of the matters stated in the appeal.

(b) Upon the receipt of the appeal and the filing fee, the code enforcement officer shall schedule an appeal hearing before the city council and give due notice thereof to the appellants and general public.

(c) At or after the appeal hearing, the city council may affirm, reverse, or modify the code enforcement officer's action or continue the hearing to a date certain for receipt of additional information.

(d) The city council shall issue a written decision within thirty days after the hearing and shall cause copies thereof to be sent to the code enforcement officer and appellants.

(e) All written orders by the city council pursuant to this section and Section 6.75.090 shall include a report giving findings of fact, conclusions, and the city council's decision.

(f) The written decision of the city council shall be a final order, and the appellant and the code enforcement officer shall be bound thereby unless the order is appealed to superior court within the time period prescribed in Section 6.75.090(b) by a person with standing to appeal. (Ord. 1999 § 1, 2016; Ord. 1613 § 1, 2004.)

6.75.100 Penalties.

(a) *Violations of this Code.*

(1) *Infraction Citation.*

(A) Any person violating or failing to comply with the provisions of this code, may be issued a civil infraction citation pursuant to Section 6.75.050(b) of this chapter. Each civil infraction shall carry with it a monetary penalty of two hundred fifty dollars.

(2) *Notice of Violation and Order.*

(A) Any person violating or failing to comply with the provisions of this code, may, in the alternative, be issued a notice of violation and order pursuant to Section 6.75.050(d) of this chapter. A violation subject to a notice of violation and order shall carry with it a cumulative monetary penalty of five hundred dollars per day for each violation from the date set for compliance until compliance with the notice of violation and order is achieved. Each day that a violation of the chapter occurs constitutes a separate offense pursuant to Section 6.75.050(i).

(B) In addition to any penalty that may be imposed by the city, any person violating or failing to comply with any of the provisions of this code shall be liable for all damage to public or private property arising from such violation, including the cost of restoring the affected area to its condition prior to the violation.

(C) The penalty imposed by this section under a notice of violation and order may be collected by civil action brought in the name of the city. The code enforcement officer may notify the city attorney of the name of any person subject to the penalty, and the city attorney may, with the assistance of the code enforcement officer, take appropriate action to collect the penalty. The penalty shall become a lien against the property that is the subject of the code enforcement action.

(3) *Criminal Penalties.* Every offense defined by this chapter or conduct made unlawful by this chapter shall also constitute an offense under the Selah criminal code and the code enforcement officer is free to pursue a criminal action notwithstanding the provisions related to infraction citations or notices of violation and order contained in this chapter. Any person convicted of such an offense shall be punished by a fine not to exceed one thousand dollars or by imprisonment in the jail not to exceed ninety days, or both imprisonment and fine.

(b) *Additional Relief – Injunction – Abatement.* The 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. In the event the city must obtain an injunction or must obtain an order of abatement or must conduct an abatement, the responsible party shall be assessed the costs associated with such actions, including reasonable attorney's fees. Those costs shall become

a lien against the property that is the subject of the code enforcement action. The remedies provided in this chapter are cumulative and shall be in addition to any other remedy provided by law. (Ord. 1613 § 1, 2004.)

The Selah Municipal Code is current through Ordinance 2084, passed July 23, 2019.

Disclaimer: The finance department has the official version of the Selah Municipal Code. Users should contact the finance department for ordinances passed subsequent to the ordinance cited above.

City Website: selahwa.gov
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