

FILED

Court of Appeals

Division III

State of Washington

Case No. 367932

12/20/2019 3:04 PM

COURT OF APPEALS, DIVISION III

STATE OF WASHINGTON

CITY OF SELAH,

Plaintiff/Respondent,

vs.

STEVEN OWENS and JANET OWENS,

Defendants/Appellants.

BRIEF OF RESPONDENT

D. R. (ROB) CASE (WSBA #34313)
Larson Berg & Perkins PLLC
Attorneys for Respondent

105 North 3rd Street
Yakima, WA 98901
Phone: (509) 457-1515
Fax: (509) 457-1027

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES.....iv

A. INTRODUCTION.....1

B. STATEMENT OF THE CASE.....1

 B.1. The Subject Property, which the Defendants Call
 “Apartments” but which are More Accurately Described
 As “Ramshackle Tenements”.....1

 B.2. Life-Threatening Incident on September 13, 2017
 and Condition of Unit 18 on that Date.....2

 B.3. Walk-Through Inspection on October 2 or 3, 2017,
 Condition of Unit 18 as of that Date, Defendants’ Eviction of
 the Tenants, and Defendants’ Contentions about Supposed
 Repairs.....5

 B.4. Steve Owen Travels to the City’s Public Works Department
 and Demands to Know who “Entered his Property Without
 his Permission”.....10

 B.5. Because the Problems Continued to Exist, the City Filed
 a Nuisance Lawsuit. The Lawsuit was Not Any Sort of
 “Appeal”.....12

 B.6. The Superior Court’s “Order to Show Cause”, Responsive
 Pleadings Filed by Defendants, Preliminary Injunction
 Hearing, and Issuance of a Preliminary
 Injunction.....16

 B.7. Full Inspection on December 14, 2017, and Issuance of
 “Notice of Noncompliance and Order to Comply” on
 January 9, 2018.....18

 B.8. Defendants’ Receipt of the Notice of Noncompliance and
 Order to Comply, and Defendants’ Administrative
 Appeal.....22

| | |
|--|----|
| B.9. The “Agreed Order” and its Contents..... | 23 |
| B.10. The Defendants’ “Letter of Intent to Repair”..... | 24 |
| B.11. The Defendants’ Supposed “Repair Plan (which was “woefully inadequate”, “laughable” and “an insult”) and Subsequent Communications Between the Parties..... | 25 |
| B.12. The City’s Motion for Summary Judgment, the Defendants’ Cross-Motion for Summary Judgment (a/k/a motion to enforce settlement agreement), and the Court’s Order Thereon..... | 30 |
| B.13. The City’s Motion to Lift the Stay, which was Granted..... | 34 |
| B.14. The Defendants File this Appeal and Scope of Appeal..... | 34 |
| C. <u>ARGUMENT</u> | 35 |
| C.1. Standards of Review..... | 35 |
| C.2. LUPA Does <u>Not</u> Apply to the City’s Lawsuit Because the Lawsuit is <u>Not</u> an Appeal of a Prior Land Use Decision..... | 36 |
| C.3. LUPA Does <u>Not</u> Preclude All Nuisance Abatement Lawsuits. It Only Precludes Lawsuits that are a “Collateral Attack” on a Prior Land Use Decision (which the City’s lawsuit in the instant case is <u>not</u>)..... | 37 |
| C.4. The City’s Lawsuit is <u>Not</u> an Interlocutory Appeal, and the Selah Municipal Code Does <u>Not</u> Preclude a Lawsuit..... | 42 |
| C.5. The Instant Case is <u>Not</u> “Virtually Identical” to <i>Grandmaster Sheng-Yen</i> . Actually, the Instant Case is Fully Distinguishable from that Case..... | 44 |

///
///

| | |
|---|----|
| C.6. Summary Judgment and Injunctive Relief were Properly Granted to the City. A “Public Nuisance” Did Exist..... | 46 |
| C.7. The “Agreed Order” was <u>Not</u> a Settlement Agreement..... | 49 |
| D. <u>CONCLUSION</u> | 50 |
| APPENDIX A | |
| <i>City of Selah’s Designation of Supplemental Clerk’s Papers</i> | |
| APPENDIX B | |
| <i>Summons and Complaint for Injunction and Nuisance Abatement</i> | |
| APPENDIX C | |
| <i>Declaration of Andrew Wangler in Support of Motion for Preliminary Injunction</i> | |
| APPENDIX D | |
| <i>Declaration of Jeffrey R. Peters in Support of Motion for Preliminary Injunction</i> | |
| APPENDIX E | |
| <i>Supplemental Declaration of Jeffrey R. Peters in Support of Motion for Preliminary Injunction</i> | |
| APPENDIX F | |
| <i>Order to Show Cause Regarding Preliminary Injunction</i> | |
| APPENDIX G | |
| <i>Memorandum in Opposition to Motion for Preliminary Injunction</i> | |
| APPENDIX H | |
| <i>Declaratory Judgment, Injunction, and Order of Abatement</i> | |
| APPENDIX I | |
| <i>Order Setting Evidentiary Hearing</i> | |

TABLE OF AUTHORITIES

Page

Cases

| | |
|---|-------|
| <i>Asche v. Bloomquist</i> , 132 Wn. App. 784, 133 P.3d 475 (2006)..... | 38-42 |
| <i>Bavand v. OneWest Bank</i> , 196 Wn. App. 813, 385 P.3d 233 (2016)..... | 35 |
| <i>BD Lawson Partners, LP v. Central Puget Sound Growth Management Hearings Bd.</i> , 165 Wn. App. 677, 269 P.3d 300 (2011)..... | 42 |
| <i>Bloemkamp v. City of Edmonds</i> , 199 Wn. App. 1062 (2017)..... | 41 |
| <i>City of Mercer Island v. Steinmann</i> , 9 Wn. App. 479, 513 P.3d 80 (1973)..... | 46 |
| <i>City of Spokane v. J-R Distributors, Inc.</i> , 90 Wn. App. 722, 585 P.2d 784 (1978)..... | 14 |
| <i>City of Wenatchee v. Owens</i> , 145 Wn. App. 196, 185 P.3d 1218 (2008)..... | 43 |
| <i>Community Treasures v. San Juan County</i> , 192 Wn.2d 47, 427 P.3d 647 (2018)..... | 41 |
| <i>Cottingham v. Morgan</i> , 180 Wn. App. 1047 (2014)..... | 41-42 |
| <i>End the Prison Industrial Complex ("EPIC") v. King County</i> , 3 Wn. App.2d 1064 (2018)..... | 42 |
| <i>Everett v. Pachall</i> , 61 Wn. 47, 111 P. 879 (1910)..... | 49 |
| <i>Ferry v. City of Seattle</i> , 116 Wn. 648, 203 P. 40 (1922)..... | 49 |

| | |
|---|--------|
| <i>Gebbie v. Olson</i> , 65 Wn. App. 533, 828 P.3d 1170 (1992)..... | 35, 47 |
| <i>Grandmaster Sheng-Yen Lu v. King County</i> , 110 Wn. App. 92, 38 P.3d 1040 (2002)..... | 44-46 |
| <i>Gresh v. Okanogan County</i> , 178 Wn. App. 1012 (2013)..... | 41 |
| <i>Grundy v. Thurston County</i> , 155 Wn.3d 1, 117 P.3d 1089 (2005)..... | 39-40 |
| <i>Habitat Watch v. Skagit County</i> , 155 Wn.2d 397, 120 P.3d 56 (2005)..... | 41 |
| <i>Jones v. Wash. Dept. of Health</i> , 170 Wn.2d 338, 242 P.3d 825 (2010)..... | 49 |
| <i>James v. County of Kitsap</i> , 154 Wn.2d 574, 115 P.3d 286 (2005)..... | 41 |
| <i>Lakey v. Puget Sound Energy, Inc.</i> , 176 Wn.2d 909, 296 P.3d 860 (2013)..... | 48-49 |
| <i>Lewis v. Krussel</i> , 101 Wn. App. 178, 2 P.3d 486 (2000)..... | 35 |
| <i>Mercer Island Citizen for Fair Process v. Tent City 4</i> , 156 Wn. App. 393, 232 P.3d 1163 (2010)..... | 42 |
| <i>Richards v. City of Pullman</i> , 134 Wn. App. 876, 142 P.3d 1121 (2006)..... | 37 |
| <i>Smith v. Bates Technical Coll.</i> , 139 Wn.2d 793, 991 P.2d 1135 (2000)..... | 43 |
| <i>Stientjes Family Trust v. Thurston County</i> , 152 Wn. App. 616, 217 P.3d 379 (2009)..... | 41 |
| <i>Sutton v. Tacoma Sch. Dist. No. 10</i> , 180 Wn. App. 859, 324 P.3d 763 (2014)..... | 35 |

| | |
|---|----|
| <i>Tiegs v. Watts</i> , 135 Wn.2d 1, 954 P.2d 877 (1998)..... | 47 |
| <i>Toward Responsible Development v. City of Black Diamond</i> , 179 Wn. App. 1012 (2014)..... | 42 |
| <i>Turtle v. Fitchett</i> , 156 Wn. 328, 287 P. 7 (1930)..... | 47 |
| <i>Woods v. Kittitas County</i> , 162 Wn.2d 597, 174 P.3d 25 (2007)..... | 41 |

Selah Municipal Code

| | |
|-----------------------|--------|
| SMC 6.58.010..... | 47-48 |
| SMC 6.58.280..... | 44, 48 |
| SMC Chapter 6.75..... | 43-44 |
| SMC 6.75.020..... | 43 |
| SMC 6.75.100..... | 44 |

Statutes

| | |
|------------------------|--------|
| RCW 7.40.010..... | 14 |
| RCW Chapter 7.48..... | 37, 48 |
| RCW 7.48.020..... | 48 |
| RCW 7.48.220..... | 48 |
| RCW 35A.21.450..... | 44 |
| RCW Chapter 36.70..... | 39, 42 |
| RCW 36.70C.010..... | 36 |
| RCW 36.70C.020..... | 14 |
| RCW 36.70C.030..... | 39 |
| RCW 36.70C.040..... | 38, 41 |

Rules

| | |
|---------------|-------|
| GR 14.1..... | 41-42 |
| CR 11..... | 17 |
| CR 12..... | 39 |
| RAP 9.6..... | 2 |
| RAP 9.10..... | 2 |

Other

| | |
|---|----|
| Washington constitution (amendment 28)..... | 14 |
| 36 WAPRAC §7.3..... | 42 |
| 16 WAPRAC §3:13..... | 42 |

A. INTRODUCTION

The defendants' property was a public nuisance. The defendants had many months to submit a "repair plan", but they simply never offered anything close to sufficient. The City sued to abate the nuisance and it prevailed via summary judgment.

Now, the defendants twist the factual record and advance clearly wrong legal arguments in an effort to obtain a reversal. Division III should affirm the superior court in all regards. This is an easy case.

B. STATEMENT OF THE CASE¹

B.1. The Subject Property, which the Defendants Call "Apartments" but which Are More Accurately Described as "Ramshackle Tenements".

The subject property is located at 519 South First Street, Selah, WA 98942. CP 777 (ls.22-23). It is comprised of twenty (20) rental units. *See Appellants' Opening Brief*, p.13; CP 777 (lns.22-24). The units appear to be small individual cabins, measuring roughly 10x18 feet in size, "that were placed together to form the multi-family apartment buildings". CP 235. The units were "likely built in the 1920's". CP 234.²

¹ Except where explicitly noted, the facts presented in this brief are undisputed.

² The City's lawsuit alleged that the structures were likely constructed "in 1940." *See* Complaint (¶3.2); *Exhibit B* hereto (p.B-5 thereof) *see also infra*, p.2 n.3 (explaining that supplemental clerk's papers have been submitted) & "Appendix B" hereto (copy of the Summons and of the Complaint). However, a subsequent report from a structural engineer concludes that the 1920s is more accurate. *See* CP 234 (report by HLA Engineering).

Physical additions were “added to the back of each unit at some point throughout each buildings [*sic*, building’s] history”, and those additions were made without permits. CP 234 (bracketed material added); CP 216 (final sentence) CP 219-220.³

The defendants refer to the rental units as “apartments” (although two of the units are small houses). CP 777 (Ins.22-25). The City believes that “ramshackle tenements” is a more accurate characterization (based on inspection results, which results will be summarized later in this brief). A few exterior photographs can be found at Clerk’s Papers 322. The units are rented, with all utilities included, for no more than \$450 per month each. CP 26 (Ins.24-25); *Appellants’ Opening Brief*, p.3.⁴

B.2. Life-Threatening Incident on September 13, 2017, and Condition of Unit 18 on that Date.

³ Pursuant to RAP 9.6 and 9.10, the City has filed “City of Selah’s Designation of Supplemental Clerk’s Papers” with the Yakima County Clerk’s Office, and a copy thereof is appended to this brief as “Appendix A”. In turn, copies of the pleadings to-be-included within the supplemental clerk’s papers are respectively appended hereto as “Appendix B”, “Appendix C” and so on.

⁴ The subject property has a history of code violations, stretching back to at least “the early 1990s.” See Complaint (¶3.3); *Appendix B* hereto (p.B-6 thereof). In 2016, prior to the instant litigation and the code violations now at issue, code violations (mostly concerning a driveway) were the subject of litigation between the parties in Selah Municipal Court. See CP 135-136. On November 1, 2016, the parties entered into a “Stipulated Order of Continuance” for a maximum duration of one year. See CP 136 (Ins.4-16 and “Exhibit A” thereto). It required the defendants to cure those violations and also to not commit or allow any additional violations. See CP 141 (Ins.19-20 & 143 (¶10); see also CP 28 (one of the Declarations by defendant Steve Owen saying, at Ins.23-24: “As part of the SOC, I was to maintain good behavior, including refraining from any city code violations.”). The Selah Municipal Court matter was dismissed on November 28, 2017. CP 137 (ln.21); but see also CP 29 (¶22, which due to a typo mistakenly says it was dismissed on “October, 28, 2017”).

On September 13, 2017, the Selah Fire Department responded to a request for assistance at the apartments. *See Appellants' Opening Brief*, p.4; CP 27 (Ins.3-4); CP 134 (Ins.17-18); Complaint (§3.4); *Appendix B* hereto (p.B-6 thereof)⁵; Declaration of Wangler in Support of Motion for Preliminary Injunction (§3 & Exhibit A and Exhibit B thereto); *Appendix C* hereto (pp.C-2 and C-4 through C-6 thereof). A 56 year old female tenant (Debra Redman) had suddenly fallen through the bathroom floor of Unit 18. *See* Complaint (§3.4); *Appendix B* hereto (p.B-6 thereof); Declaration of Wangler (Exhibit B thereto); *Appendix C* hereto (p.C-6 thereof).⁶

Upon entering Unit 18, the Selah Fire Department recognized the situation as life-threatening. The woman remained was wedged in the floor in such a way that she could not extract herself. *See* Complaint (§3.4); *Appendix B* hereto (p.B-6 thereof); Declaration of Wangler (Exhibit B thereto); *Appendix C* hereto (p.C-6 thereof). She was struggling to breathe due to her predicament. *See id.*

Immediately, Captain Andrew Wangler “requested additional man power for assistance to extricate the patient due to her position and

⁵ The defendants never filed an “Answer”, nor any counterclaims.

⁶ The defendants falsely contend that this lawsuit supposedly did not arise from concerns by “existing tenants.” *See Appellants' Opening Brief*, p.3 (last sentence). Mr. and Mrs. Redman were existing tenants when they reported problems with their unit.

location with breathing being compromised.” *See* Declaration of Wangler (Exhibit B thereto); *Appendix C* hereto (p.C-6 thereof). Additional manpower was needed because, to free the woman, “the door jamb, jack stud, and carpet would have to be removed”. *See id.*

Once the woman was extracted, she “was moved onto a long board and 6 individuals used it as lever to move the patient to the bed”. *See* Declaration of Wangler (Exhibit B thereto); *Appendix C* hereto (p.C-6 thereof). Ambulance officers helped her “regain her breath”. *See id.*

The woman fell through the floor because it “had immense water damage and [was] rotting away.” *See* Declaration of Wangler (Exhibit B thereto) (bracketed changes made); *Appendix C* hereto (p.C-6 thereof); Complaint (¶3.5); *Appendix B* hereto (p.B-6 thereof). There were “numerous soft spots” and at least one visible preexisting hole to the bare exterior ground. *See id.* As a result, “cockroaches” had infested the floor. *See id.*

The defendants concede that Unit 18 was “in deplorable condition”. *See Appellants’ Opening Brief*, p.4.⁷

⁷ However, the defendants conspicuously fail to mention that the woman had fallen through the floor, that the Selah Fire Department was called to the scene, that the woman was struggling to breathe due to her predicament, that six first responders were needed to extract her, that the floor had a hole and was rotted, or that cockroaches had infested the floor. *See Appellants’ Opening Brief*, pp.1-50.

The defendants characterize the incident's victim (Debra Redman) as a "disgruntled tenant". *See Appellants' Opening Brief*, p.4. However, the defendants admit that she had been a tenant for five consecutive years (since September 1, 2012), lodging "no prior complaints" over those years, and they offer no citation to substantiate that she was (before this incident) "disgruntled" in any regard. *See id.*, p.4 & n.3. Thus, the assertion should be disregarded because it is supported.⁸

B.3. Walk-Through Inspection on October 2 or 3, 2017, Condition of Unit 18 as of that Date, Defendants' Eviction of the Tenants, and Defendants' Contentions about Supposed Repairs.

A few weeks later, the woman and her husband (Debra and Robert Redman) telephoned the City. This occurred on October 2 or 3, 2017. CP 150 (¶2.1); Complaint (¶3.6); *Appendix B* hereto (p.B-6 thereof); Declaration of Jeffery R. Peters in Support of Motion for Preliminary Injunction (¶3); *Appendix D* hereto (p.D-2 thereof).⁹

The tenants referenced the September 13th incident, described ongoing problems at the property, and said they were now being evicted

⁸ The defendants further assert "on September 13, 2017", the City contacted the defendants and requested to inspect the apartments *See Appellants' Opening Brief*, p.4. This is not true. What occurred on September 13, 2017, was the response by the Selah Fire Department to the incident described above. To be explained below, it was a couple weeks later – specifically on October 2 or 3, 2017 – when the first communication occurred between the City and the defendants in regard to the earlier September 13th incident. *See* Declaration of Jeffery R. Peters in Support of Motion for Preliminary Injunction (¶13); *Appendix D* hereto (pp.D-5 through D-6 thereof)

⁹ Due to one or more typos, the record is slightly unclear as to whether it was October 2nd or 3rd. Regardless, the distinction is ultimately immaterial.

by the defendants (their landlords). CP 150 (¶2.2); CP 151 (¶2.6); Complaint (¶3.6); *Appendix B* hereto (p.B-6 thereof); Declaration of Jeffery R. Peters in Support of Motion for Preliminary Injunction (¶3); *Appendix D* hereto (p.D-2 thereof).

Roughly thirty minutes later, an on-site meeting occurred between the tenants and the City's Administrator (Don Wayman), the City's Director of Community Development and Building Official (Jeffery R. Peters) and the City's Code Enforcement Officer (Erin Barnett). CP 151 (¶2.3); Declaration of Jeffery R. Peters in Support of Motion for Preliminary Injunction (¶¶4-5); *Appendix D* hereto (p.D-3 thereof); Complaint (¶3.6); *Appendix B* hereto (p.B-6 thereof). The group was soon joined by the City's Fire Marshall (James Lange). *See* Declaration of Jeffery R. Peters in Support of Motion for Preliminary Injunction (¶6); *Appendix D* hereto (pp.D-3 through D-4 thereof).

The tenants invited the City personnel into Unit 18 and showed them the location where Mrs. Redman had fallen through the floor weeks earlier. *See* Declaration of Jeffery R. Peters in Support of Motion for Preliminary Injunction (¶¶6-7); *Appendix D* hereto (pp.D-3 through D-4 thereof); Complaint (¶3.6); *Appendix B* hereto (p.B-6 thereof). The group clearly observed "that the landlord[s] had not come to fix the floor". *See*

id. The hole merely had “a linoleum roll/piece” lying atop it. CP 151 (¶2.7); Declaration of Jeffery R. Peters in Support of Motion for Preliminary Injunction (¶6); *Appendix D* hereto (pp.D-3 through D-4 thereof); Complaint (¶3.9d); *Appendix B* hereto (p.B-7 thereof). The linoleum was not affixed to the subfloor and it was easily “rolled back . . . to reveal a [still-existing] rotten hole in the subfloor”. CP 151 (¶2.7); Declaration of Jeffery R. Peters in Support of Motion for Preliminary Injunction (¶7) (ellipsis and bracketed material added); *Appendix D* hereto (p.D-4 thereof); Complaint (¶3.9d); *Appendix B* hereto (p.B-7 thereof). Moreover, “the area around the hole [was] spongy in nature.” *See id.*

Additional problems were observed, both as to the interior and exterior of Unit 18. Flooring timbers were “dark/black”, thus showing further “indications of rot.” CP 151 (¶2.9); Declaration of Jeffery R. Peters in Support of Motion for Preliminary Injunction (¶9) (ellipsis and bracketed material added); *Appendix D* hereto (p.D-4 thereof); Complaint (¶3.9f); *Appendix B* hereto (pp.B-7 & B-8 thereof). On the walls, there were “multiple places where the sheetrock/plaster showed signs of damage (mainly water) or was removed and replaced with oriented strand board.” *See* Declaration of Jeffery R. Peters in Support of Motion for Preliminary Injunction (¶9) (ellipsis and bracketed material added); *Appendix D* hereto (p.D-4 thereof); Complaint (¶3.9f); *Appendix B* hereto (pp.B-7 & B-8

thereof). “The area around the toilet and sink showed signs of present and past leakage and attempted repair”. *See id.* Also, significant amounts of “Comet cleanser and insect repellent powder” were observed “along window sills, countertops, door jam[b]s, and trim within the unit.” CP 151 (¶2.8); Declaration of Jeffery R. Peters in Support of Motion for Preliminary Injunction (¶9) (bracketed change made); *Appendix D* hereto (p.D-4 thereof); Complaint (¶3.9e); *Appendix B* hereto (p.B-7 thereof).

On the exterior, “deterioration” was obvious including a “rotten sill plate, pushed out siding, [and] rotten windowsills”. CP 151-152 (¶2.12); Declaration of Jeffery R. Peters in Support of Motion for Preliminary Injunction (¶¶11-12) (bracketed material added); *Appendix D* hereto (p.D-5 thereof); Complaint (¶¶3.9g & h); *Appendix B* hereto (p.B-8 thereof). There were “exposed electrical cords originating from the interior” and “windows sealed shut with flammable construction caulking”. *See id.*

During the walkthrough inspection on October 2nd or 3rd, Mrs. Redman was lying in bed and utilizing an oxygen tank to assist her breathing. CP 152 (¶2.17Ab); Declaration of Jeffery R. Peters in Support of Motion for Preliminary Injunction (¶6); *Appendix D* hereto (pp.D-3 through D-4 thereof); Complaint (¶3.96c); *Appendix B* hereto (p.B-7 thereof). She was later hospitalized. CP 27 (¶11).

Instead of fixing the floor or otherwise making any repairs, the defendants gave the tenants “an eviction notice”. CP 151 (¶2.6); Declaration of Jeffery R. Peters in Support of Motion for Preliminary Injunction (¶6); *Appendix D* hereto (pp.D-3 through D-4 thereof); Complaint (¶3.96c); *Appendix B* hereto (p.B-7 thereof). The defendants concede that “the tenants were evicted” following the September 13th incident. *See Appellants’ Opening Brief*, p.4; CP 27 (lns5-7).¹⁰

The defendants contend that all necessary repairs to Unit 18 supposedly “were completed within weeks” of the September 13th incident. *See Appellants’ Opening Brief*, p.4. Slightly more specific, one of the Declarations by defendant Steve Owens says all necessary repairs to Unit 18 supposedly were completed “[i]n early October”. CP 27 (¶11). To the contrary, when a subsequent inspection was done on December 14, 2017 – which subsequent inspection will be further addressed below – it was readily apparent most of Unit 18’s previously-identified problems still existed. *See* CP 212-703 (inspection reports and photographs issued in early 2018 following an inspection on December 14th, noting, *inter alia*, the continued existence of problems inside Unit 18 as follows: at CP 217,

¹⁰ Via their *Appellants’ Opening Brief*, the defendants conspicuously fail to mention the walkthrough inspection of October 2nd or 3rd and the many interior and exterior problems the City’s personnel observed during the walkthrough inspection. *See Appellants’ Opening Brief*, pp.1-50.

“rot of the windowsills” and “deteriorated and failed” structural members including “rotten exposed sill plate, budged siding”; at CP 218, windows “have rot, and/or mold, and deterioration” and are “not operable”; at CP 219, vinyl flooring had been installed “without permits” windows “had mold and mildew” and “were partially rotten”, and interior walls had plaster problems from “water damage”; and at CP 220, bathroom floors were still “spongy” and “sheetrock” and “plaster” problems existed on interior walls; and at CP 221, Unit 18 was still “infested with cockroaches”).¹¹

B.4. Steve Owens Travels to the City’s Public Works Department and Demands to Know who “Entered his Property Without his Permission.”

When the City personnel returned to the Public Works Department, they arrived to find defendant Steve Owens waiting at the front counter. CP 151 (¶2.13); CP 28 (¶15); Declaration of Jeffery R. Peters in Support of Motion for Preliminary Injunction (¶13); *Appendix D* hereto (pp.D-5 through D-6 thereof); Complaint (¶3.12); *Appendix B* hereto (p.B-13 thereof). He demanded to know “who from the City” had gone to his property “without his permission.” CP 152 (¶2.13); Declaration of Jeffery

¹¹ Many similar problems were observed in other units during a full inspection on December 14, 2017. *See* CP 212-703. This contradicts the defendants’ assertion those problems had supposedly been fixed “[i]n early October.”

R. Peters in Support of Motion for Preliminary Injunction (¶13); *Appendix D* hereto (pp.D-5 through D-6 thereof).¹²

In response, defendant Steve Owens was told that some of the tenants had requested City personnel to conduct a walkthrough inspection of their unit and of the exterior common areas. CP 152 (¶2.14); CP 28 (¶15); Declaration of Jeffery R. Peters in Support of Motion for Preliminary Injunction (¶13); *Appendix D* heret o (pp.D-5 through h D-6 thereof). Defendant Steve Owens was also told the names and titles of all City personnel who had participated in the walkthrough inspection. *See id.*

Mr. Owens said he “knew which tenant[s]” had made the request and that he was “evicting them so that he could repair the floor”. CP 152 (¶2.15); Declaration of Jeffery R. Peters in Support of Motion for Preliminary Injunction (¶14) (bracketed change made); *Appendix D* hereto (p.D-6 thereof).

Next, City personnel told defendant Steve Owens that “multiple” problems and violations had been observed during the walkthrough inspection. CP 152 (¶2.16); Declaration of Jeffery R. Peters in Support of

¹² As should be needless to say, there is no legal requirement of formal permission from the owner(s) in order for City personnel to conduct a walkthrough inspection of a property within the City limits. Rather, as occurred in the instant case, tenants lawfully in possession of a unit can voluntarily invite City personnel to conduct a walkthrough inspection of that unit and of common areas. Also, the defendants have

Motion for Preliminary Injunction (¶15); *Appendix D* hereto (p.D-6 thereof). Mr. Owens did not dispute this, but instead said he would “fix the units” once he received “the list of violations.” *See* Declaration of Jeffery R. Peters in Support of Motion for Preliminary Injunction (¶16); *Appendix D* hereto (p.D-6 thereof); *see also* CP 28 (one of the Declarations by defendant Steve Owens, saying, at ¶16: “I asked Mr. Peters to just tell me what needs to be done, and I would fix it.”).¹³

B.5. Because the Problems Continued to Exist, the City Filed a Nuisance Lawsuit. The Lawsuit Was Not Any Sort of “Appeal”.

Over the ensuing weeks (after October 2 or 3, 2017), there is no evidence of the defendants applying for any building permit(s) in order to repair the then-known problems in Unit 18. This is notable for two reasons. First, at least some of the then-known problems in Unit 18 required a building permit in order to be legally and competently repaired. *See e.g.*, CP 216-226 (subsequently issued “Notice of Noncompliance and Order to Comply”, which confirms, repeatedly, that work done “without permits” is unlawful and that all necessary repairs had to occur “with permits”). Second, as previously explained above, the defendants contend

never argued that the walkthrough inspection was somehow “illegal”.

¹³ Via their *Appellants’ Opening Brief*, the defendants do not mention this interaction between the City and defendant Steve Owens immediately following the walkthrough inspection. *See Appellants’ Opening Brief*, p.4.

that all necessary repairs to Unit 18 had supposedly been made “[i]n early October”. See CP 27 (¶11, advancing the “[i]n early October” assertion).¹⁴

On November 16, 2017, the City filed suit in Yakima County Superior Court under cause number 17-2-04115-39. See Complaint (p.1, “Filed” stamp); *Appendix B* hereto (p.B-4 thereof). The City’s “Complaint” referenced the prior walkthrough inspection of October 2nd or 3rd, and it also itemized the then-known violations and problems with specific citations to applicable building code sections. See Complaint (¶¶3.6-3.10q & also ¶1.1); *Appendix B* hereto (pp.B-6 through B-10 and B-4 through B-5 thereof). The City alleged, *inter alia*, that “the Defendants have taken no measures to correct the code problems or relocate the residents of the apartments to safe areas”. See Complaint (¶3.14); *Appendix B* hereto (p.B-14 thereof).¹⁵

The City’s lawsuit alleged that the apartments constituted a public nuisance, sued for abatement of that nuisance, and sought injunctive relief.

¹⁴ The only time the defendants applied for a building permit relative to the at-issue problems and violations was on January 2, 2018. See *Appellants’ Opening Brief*, p.12; see also CP 913 (building permit application). But that was long after the City had filed its nuisance lawsuit, which occurred on November 16, 2017. See Complaint (p.1, “Filed” stamp); *Appendix B* hereto (p.B-4 thereof). Even then, the defendants applied for a building permit only after they were caught – on January 2, 2018 – performing re-siding work without a necessary permit. See CP 754-755. The post-hoc permit application would have, if a permit had been issued, only pertained to residing work on Unit 18 for a total valuation of just \$1,000. See CP 913 (building permit application). No contractor was specified in the application. See *id.* The defendants do not dispute that they did not seek any building permit(s) between the September 13th and January 2, 2018.

¹⁵ As previously stated above, the defendants never filed an “Answer”, nor any

See Complaint (¶¶1.2 & 4.1-4.2); *Appendix B* hereto (pp.B-4 and B-14 thereof). The City invoked the Superior Court’s original jurisdiction to decide abatement matters and to issue injunctions. See Complaint (¶¶1.2 & 5.1-5.1e); *Appendix B* hereto (pp.B-5 and B-14 through B-15 thereof).¹⁶

The City’s lawsuit was not an appeal of a “land use decision” and it did not seek judicial review of a “land use decision” (as such term is defined by RCW 36.70C.020(2)). See Complaint (pp.1-12); *Appendix B* hereto (pp.B-4 through B-15 thereof). Rather, the City’s lawsuit was a first instance filing/action. See *id.* The lawsuit advanced a claim for nuisance abatement that not been previously adjudicated or decided. See *id.* By contrast, the lawsuit does not seek to change or vacate any prior decision or outcome (whether a “land use decision” or otherwise), which would be the case if the lawsuit were an appeal or some sort. See *id.*

Via their *Appellants’ Opening Brief*, the defendants contend that the City’s lawsuit was filed supposedly without “substantiated factual foundation” and that “[t]he sole basis for the requested injunction was a ‘concern’ about condition of the apartments.” See *Appellants’ Opening*

counterclaims. See *supra*, p.3 n.5.

¹⁶ Washington’s constitution explicitly establishes that “[t]he superior court shall have original jurisdiction . . . of actions to prevent or abate a nuisance”. See *Constitution*, Art. 4, §6 (amendment 28) (ellipsis added); see also *City of Spokane v. J-R Distributors, Inc.*, 90 Wn.2d 722, 788, 585 P.2d 784 (1978). “Moreover, the superior court has the power to issue injunctions (RCW 7.40.010)”. See *City of Spokane v. J-R Distributors*, 90 Wn.2d at 788.

Brief, p.5. Neither contention is true. The City filed multiple Declarations concurrently with its Complaint. Those pleadings substantiated much more than mere “concern”. They substantiated that numerous problems and code violations existed, and, as previously mentioned above, they provided specific citations to applicable building code sections. *See* Complaint (pp.1-12); *Appendix B* hereto (pp.B-4 through B-15 thereof); Wangler Declaration (pp.1-2 and Exhibit A and Exhibit B thereto); *Appendix C* hereto (pp.C-2 through C-6 thereof); Declaration of Jeffery R. Peters in Support of Motion for Preliminary Injunction (pp.1-5 thereof); *Appendix D* hereto (pp.D-2 through D-6 thereof); Supplemental Declaration of Jeffery R. Peters in Support of Motion for Preliminary Injunction (pp.E-2 through E-3 thereof); *Appendix E* hereto (pp.2-3 thereof); Declaration of Erin Barnett (a copy of which could not currently be obtained by the City’s attorney, because the Odyssey Portal System registered “Error Code: ER 141010”, however a copy should be submitted by the Yakima County Clerk’s Office when the supplemental clerk’s papers are transmitted to Division III).¹⁷

¹⁷ Oddly and invalidly, the defendants’ contention about the City’s lawsuit supposedly only being based on mere “concern” is cited to CP 150-152. *See Appellants’ Opening Brief*, p.5 (citing CP 150-152). However, CP 150-152 is a portion of the City’s “Motion for Summary Judgment” that was filed months later, specifically on July 27, 2018. *See* CP 150-152. Thus, the citation is erroneous and the assertion should be disregarded because it is unsupported.

The defendants further contend that the City's lawsuit "was filed without complying with ordinance and building code enforcement processes" that supposedly apply as pre-suit requisites. *See Appellants' Opening Brief*, pp.4-5. To advance this argument, the defendants twist the language and meaning of the Selah Municipal Code. *See id.*, pp.7-8. The actual language and proper meaning of the Selah Municipal Code will be addressed later in this brief. *See infra*, pp.43-44. In truth, the City was under no requirement to first pursue out-of-court "enforcement processes" prior to suing to abate this (or any other) public nuisance. *See id.*

B.6. The Superior Court's "Order to Show Cause", Responsive Pleadings Filed by Defendants, Preliminary Injunction Hearing, and Issuance of a Preliminary Injunction.

On November 16, 2017 – the same date that the City's lawsuit was filed – the superior court issued an "Order to Show Cause Regarding Preliminary Injunction". *See Order to Show Cause Regarding Preliminary Injunction* (pp.1-2); *Appendix F* hereto (pp.F-2 through F-3 thereof).

On November 30, 2017, the defendants filed multiple Declarations and a "Memorandum in Opposition to Motion for Preliminary Injunction". *See CP 1-3, 4-6, 7-25, 26-35, 36-134, & 135-144; Memorandum in Opposition to Motion for Preliminary Injunction* (pp.1-11 thereof); *Appendix G* hereto (pp.G-2 through B-12 thereof). The defendants argued that the condition of Unit 18 was supposedly "not indicative" of the

condition of the other apartments and that the legal bases for issuance of a preliminary injunction had supposedly not been met by the City. *See* Memorandum in Opposition to Motion for Preliminary Injunction (p.1 thereof); *Appendix G* hereto (p.2 thereof). Notably, however, the defendants acknowledged – at least tacitly – that repairs were necessary, by repeatedly saying they would make “whatever repairs are necessary”. *See* Memorandum in Opposition to Motion for Preliminary Injunction (p.2 thereof); *Appendix G* hereto (p.3 thereof). The defendants then went so far as to request that monetary sanctions via CR 11 be imposed against the City’s then-attorney. *See* Memorandum in Opposition to Motion for Preliminary Injunction (pp.9-10 thereof); *Appendix G* hereto (pp.10-11 thereof). That request appropriately fell on deaf ears.¹⁸

On December 1, 2017, the superior court (via Judge Michael G. McCarthy) issued a four-page “Preliminary Injunction”. *See* CP 145-148 (“Preliminary Injunction”). It explicitly said, *inter alia*, that “the Court finds on the basis of specific facts presented that a Preliminary Injunction should be issued.” CP 145 (Ins.23-24). Continuing further, it states that “[t]he City has established the existence of a clear legal and equitable

¹⁸ Via their *Appellants’ Opening Brief*, the defendants do not reference the Order to Show Cause. *See Appellants’ Opening Brief*, pp.1-50. The defendants also did not include their “Memorandum in Opposition to Motion for Preliminary Injunction” within their designation of clerk’s papers. *See* CP 1110-1114 (defendants’ designation of clerk’s papers); *see also Appendix G* hereto (copy of the Memorandum).

right”, that “[t]he City has further established a well-founded concern that Defendants have maintained a public nuisance”, that “[t]he City has established that there are code compliance issues present on Defendants’ property giving rise to concerns for structural integrity of building and for life and safety of its occupants”, and that “Defendants’ violation of the City’s properly adopted codes constitutes harm and injury to the City that is properly remedied by injunctive relief.” See CP 146 (Ins.2-14, including certain handwritten interlineations made by the presiding superior court judge).¹⁹²⁰

B.7. Full Inspection on December 14, 2017, and Issuance of the “Notice of Noncompliance and Order to Comply” on January 9, 2018.

Pursuant to the Preliminary Injunction, a full inspection of the subject property was conducted on December 14, 2017. See *Appellants’ Opening Brief*, p.5. This inspection focused on all aspects – interior and exterior – of the subject property (rather than just Unit 18 and common

¹⁹ These findings and the issuance of the Preliminary Injunction further belie the contention that the City has supposedly proceeded without “substantiated factual foundation”, as the defendants contend at page 5 of their *Appellants’ Opening Brief*. In truth, the City’s Declarations substantiated “specific facts”.

²⁰ Via their *Appellants’ Opening Brief*, the defendants contend that the court supposedly “denied injunctive relief.” See *Appellants’ Opening Brief*, p.5. This is not true, as explained in this brief. See *supra*, pp.16-19. Admittedly, the superior court declined – at this time – to enjoin the defendants from allowing continued occupancy of the apartments. See CP 147 (Ins.1-9 and handwritten interlineations striking those proposed findings). But the superior court did issue the Preliminary Injunction. Among other things, the Preliminary Injunction obligated the defendants to make the totality of the subject property available for a full inspection (over-and-above the walkthrough inspection from back in October). See CP 147 (Ins.9-20); *Appellants’ Opening Brief*, p.5.

exterior areas, which were the focus during October's walkthrough inspection). *See* CP 212-703 (inspection reports and photographs issued in early 2018 following the December 14th full inspection).

The full inspection of December 14th was conducted not only by City personnel but also by other now-participating agencies and entities, including Labor & Industries, HLA Engineering, Fulcrum Environmental Consulting and the City of Yakima. *See* CP 210 (¶4) & 156 (Ins.11-23); *see also* CP 212-703 (inspection reports and photographs issued in early 2018 following an inspection on December 14th). Each agency and entity issued a written report as to its specific findings, and many confirmatory photographs were also taken. *See* CP 210 (¶5); *see also* CP 212-703 (with the photographs mostly, but not exclusively, set forth at CP 343-703).

As previously explained above (*see supra*, pp.9-10), the full inspection of December 14th found that most of Unit 18's previously-identified problems (from the October) still existed. *See* CP 212-703 (inspection reports and photographs issued in early 2018, noting, *inter alia*, the continued existence of problems inside Unit 18). The full inspection also found many additional problems (beyond those from October) inside Unit 18 and throughout all the apartments. *See* CP 212-703.

After amassing each agency's and entity's written report, the City compiled the materials with its own and issued a written "Notice of Noncompliance and Order to Comply". See CP 210 (§5) & 212-703. The Notice of Noncompliance and Order to Comply was issued on January 9, 2018. See CP 213 (date) & 156 (lns.5-10). The defendants mistakenly say it was issued on January 20, 2018. See *Appellants' Opening Brief*, p.5.

The Notice (which incorporated each agency's and entity's written report) repeatedly referenced the pending superior court lawsuit. See CP 213 & 216. However, it did not say that the lawsuit had been, or would be, dismissed. See CP 212-703. Nor was the lawsuit dismissed by the superior court following issuance of the Notice. Rather, the lawsuit remained pending and the previously-issued Preliminary Injunction remained in effect. This is because the lawsuit and the Notice were effectively separate tracks. One was a litigation track and the other was an administrative track. There is no indication – whether in the superior court case file, in the Notice and/or in applicable law – that issuance of the Notice somehow had the effect of dismissing or settling the lawsuit.

The Notice specified – in written narrative detail with citations to the applicable building code sections, and also via numerous confirmatory

photographs – the myriad problems and violations existing at the subject property. *See* CP 212-703.²¹

The Notice imposed a thirty-day deadline for the defendants to either provide “a letter of intent to repair the subject buildings” or to “submit a demolition permit”. CP 214 (¶1); *see also Appellants’ Opening Brief*, pp.6-7. If the repair option was going to be pursued, the Notice specified that the defendants needed to hire “a licensed structural engineer” and that they needed to submit “a detailed repair plan, which includes structural calculations and plans, and addresses all identified deficiencies within the attached reports” within 120 days of the Notice’s issuance date. CP 214 (¶¶1-2); *see also Appellants’ Opening Brief*, p.7. “[U]pon receipt of a letter form the retained structural engineer requesting the extension and showing substantial progress towards completion of the plan”, the City would consider granting an extension of such 120-day deadline. CP 214 (¶4); *Appellants’ Opening Brief*, p.7.

²¹ Via their *Appellants’ Opening Brief*, the defendants contend that the Notice only offered supposedly “vague” and “generic” allegations while supposedly “fail[ing] to provide a concise description of conditions alleged to be code violations” together with citations to the applicable building code sections that were violated. *See Appellants’ Opening Brief*, p.9 (bracketed change made). This contention is partially belied by the defendants’ acknowledgment that the Notice (including its incorporated reports) was “491 pages” in length, and their lament that “[i]t is impossible to digest and adequately respond to such a volume of materials” within the deadlines specified in the notice. *See* CP 177 (one of the letters by the defendants’ attorneys). The contention is further belied by the Notice’s actual contents. Upon review of the Notice, Division III will realize just how detailed and specific it is.

The Notice also imposed a thirty-day deadline for the defendants to submit a “relocation plan” for the tenants. CP 214 (¶3).

The Notice advised the defendants that they could file an administrative appeal “within ten calendar days” after their receipt of the Notice. CP 214 (“Right of Appeal” ¶); *see also Appellants’ Opening Brief*, p.8. Again, however, that was specific to one track only – the code enforcement track. As previously stated above, there is no indication – whether in the superior court case file, in the Notice and/or in applicable law – that issuance of the Notice somehow had the effect of dismissing or settling the still-pending nuisance lawsuit.²²

B.8. Defendants’ Receipt of the Notice of Noncompliance and Order to Comply, and Defendants Administrative Appeal.

The defendants received the Notice on January 10, 2018. *See* CP 177 (2nd ¶ of letter by defendants’ attorneys, however this letter has a typo as to its proper date, which should be January 19, 2018).

²² The defendants falsely say that no “threat of life or safety of residents” issues were found during the full inspection of December 14th and/or included in the corresponding reports. *See Appellants’ Opening Brief*, p.6. To the contrary, the Selah Fire Department’s report noted a “[s]trong smell of natural gas”, the absence of “labeled for breakers in panels”, that smoke detectors and carbon monoxide detectors were missing, that windows needed for emergency egress were sealed shut, and a litany of electrical problems and violations. *See* CP 28-229. The defendants were on site and were instructed to immediately correct “four urgent life safety issues.” *See* CP 229. The Notice said, in relevant part, “the subject buildings qualify as dangerous and are unfit for human occupancy”. *See* CP 214 (¶3); *see also Appellants’ Opening Brief*, p.6 (¶3).

On January 19, 2018, the defendants filed an administrative appeal in regards to the Notice. *See* CP 177-181, again noting a typo as to the year recited on CP 177); *see also* CP 173 (¶3). The City agreed, and still agrees, that the defendants' administrative appeal was timely filed. *See* CP 157 (Ins.1-3) & 183 (¶1); *see also Appellants' Opening Brief*, p.8.

The defendants' administrative appeal did not deny that myriad problems and violations existed, and it did not express any confusion about what type of "repair plan" needed to be submitted. Instead, it said the defendants "are willing to provide a structural repair plan . . . by a licensed structural engineer." CP 178 ("As noted" ¶, ellipsis added). It further expressed a belief that additional time (beyond the 120-day deadline) might be necessary. *See id.* Of final note, it expressed an opinion that the inspection findings were supposedly "inadequate" and it specifically challenged the necessity of a relocation plan for the tenants. CP 179 (¶C.) & 178 (¶B.3.); *see also Appellants' Opening Brief*, p.8.

B.9. The "Agreed Order" and its Contents.

Following the defendants' request for additional time, the parties entered into an "Agreed Order" relative to the administrative appeal. CP 173 (¶¶5-6); *see also Appellants' Opening Brief*, p.11. The Agreed Order was formalized on February 13, 2018. *See* CP 183 (Ins.21-22); *see also Appellants' Opening Brief*, p.11.

Per the Agreed Order, the City withdrew any demand/requirement of a tenant relocation plan. *See* CP 183 (¶2). The defendants fail to acknowledge this. *See Appellants' Opening Brief*, pp.1-50.

The Agreed Order extended the defendants' deadline for providing a letter of intent as to which option they were going to pursue (*i.e.*, repair or demolition) to April 16, 2018. CP 184 (¶5); *see also Appellants' Opening Brief*, p.11 (¶5). If the defendants were to choose the repair option, they now had to “submit a repair plan within 120 days of February 13, 2018.” *Id.* (¶6); *see also Appellants' Opening Brief*, p.11 (¶6). By simply arithmetic, the corresponding deadline for submission of the structural repair plan was June 13, 2018 (*i.e.*, February 13th plus 120 days).

There is no indication – whether in the Agreed Order, in the superior court case file, and/or in applicable law – that the Agreed Order somehow dismissed or settled the still-pending nuisance lawsuit.

B.10. The Defendants' “Letter of Intent to Repair”.

On April 16, 2018 – which, under the Agreed Order, was the new deadline for the defendant to choose either repair or demolition – the defendants submitted a “Letter of Intent to Repair”. *See* CP 174 (¶8) & 188-190. The Letter of Intent said that “a structural repair plan” would be forthcoming from engineer Tim Bardell “or on before June 13, 2018.” CP 188. As before, the defendants expressed no confusion as to what “a

structural repair plan” meant or needed to include. *See id.* By this point, more than seven months had passed since the September 13th incident.²³

The defendants’ Letter of Intent sought approval for the defendants’ engineer (Tim Bardell of B7 Engineering) to communicate directly with the City’s engineer (Michael Heit of HLA Engineering). *See* CP 154 (Ins.1-11), 188-189, 204 (Ins.16-19) & 174 (¶10). The City granted that approval. *See* CP 174 (¶11), 175 (¶13) & 191-193.²⁴

B.11. The Defendants’ Supposed “Repair Plan” (which was “woefully inadequate”, “laughable” and “an insult”) and Subsequent Communications Between the Parties.

On June 13, 2018 – the applicable deadline – the defendants submitted their supposed “repair plan”. CP 158 (Ins.14-16), 200 (Ins.7-8), 731 (¶28) & 757-767 (the repair plan); *see also Appellants’ Opening Brief*, p.13. In truth, what the defendants actually submitted was just an outline

²³ The defendants’ Letter of Intent purported to request a further extension of time – for submission of the “structural repair plan” – to June 13, 2018. *See* CP 188. However, that date was already the applicable deadline under the Agreed Order for submission of the structure repair plan. *See supra*, pp.23-24. The City’s pleadings say it “reluctantly” granted the defendants’ purported request and “agreed that defendants could submit their repair plan on or before June 8, 2018.” *See e.g.*, CP 174 (¶9) & 157 (Ins.17-23). This appears to be both a typo and an overall mistake. It is a typo because the newly-agreed-deadline was June 13, 2018, not June 8, 2018. It was an overall mistake because, as previously explained, the deadline was already June 13th and thus no further extension was actually sought nor actually granted.

²⁴ Via their *Appellants’ Opening Brief*, the defendants emphasize that their Letter of Intent said their engineer “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.” *See Appellants’ Opening Brief*, p.13 (quoting CP 730-731). Continuing further, the defendants say: “The City registered no objections to this approach.” *Id.* Yes, the City registered no objections at this point. But that was because a detailed “plan covering all the structures” was supposed to be forthcoming. *See id.*

of a “conceptual repair sequence”. *See* CP 196, 205 (lns.8-12) & 758 (last line). Some minimal “general plans” were offered relative to Unit 18, but nothing was offered for the other units. *See* CP 759 (penultimate ¶).

Upon receipt of the repair plan, the City’s personnel began evaluating it and a copy was forwarded to the City’s engineer (Mike Heit of HLA Engineering) for review. *See* CP 195, 205 (¶7) & 849 (¶2).

On June 15, 2018, the City sent a responsive letter to the defendants’ attorney. *See* CP 195-197 (with the date recited on CP 195 being a typo, and the correct date being June 15, 2018). That responsive letter noted that supposed repair plan “reflects no serious inspection and analysis of the structures” and “is devoid of any significant structural analysis and repairs”. *See* CP 195 (2nd ¶). It also incorporated the comments of the City’s engineer indicating that “[t]he unit by unit approach suggested will not suffice to address structural component issues.” *See* CP 196 (1st ¶); *see also* CP 197 (final ¶).

By way of further response, the City’s engineer (Mike Heit of HLA Engineering) also said:

. . . the document submitted is merely an outline of the procedure [the defendants’ engineer] intends to follow for gathering the information needed to prepare a detailed repair plan, and [by contrast it is] not an actual repair plan.

. . . It was our understanding that this exploration was already to have been completed and a detailed repair plan and structural

calculation package submitted at this time, verifying the adequacy for all existing and new structural framing members.

. . . it is not possible to adequately evaluate all the structural needs for the building[s] based o[n] one unit [*i.e.*, Unit 18]. If the intent is to repair a single unit at a time, the engineer must provide a structural evaluation report documenting that the units are independent structures

CP 196 (inset multi-paragraph quotation, with bracketed changes and ellipses now added); *see also* CP 205 (Ins.8-20).

What the defendants had submitted was “woefully inadequate”. *See* CP 158 (Ins.15-16, using this characterization). As described by the City’s Director of Community Development and Building Official (Jeffery R. Peters), the defendants’ submission “was simply put laughable and an insult to the City”. *See* CP 200 (Ins.7-9). It was now nine months since the September 13th incident and yet the defendants’ engineer (Tim Bardell of B7 Engineering) had not even done the necessary “exploration/investigation” to actually write a structural repair plan. The defendants were not acting in good faith. *See* CP 158 (Ins.23-24, making this argument). They were procrastinating and perpetuating the nuisance.

Notably, it was upon submission of their supposed “repair plan” that the defendants and their engineer (Tim Bardell of B7 Engineering) first raised any supposed confusion as to what the term “plan” meant. *See* CP 784 (¶19); *see also Appellants’ Opening Brief*, pp.14-15.

Via their *Appellants' Opening Brief*, the defendants claim that they were “surprise[d]” that the City objected to the defendants’ supposed repair plan. *See Appellants' Opening Brief*, p.15. To hear the defendants tell it, the City had supposedly “sat silent for four months” only to later suddenly change positions. *See id.* This is not true.

Communication did occur between February 13 and June 13, 2018. Specifically, communication occurred directly between the two sides’ respective engineers via phone and via email. *See e.g.*, CP 205 (Ins.5-8). Admittedly, that communication was sparse, but it was sparse because the defendants’ engineer (Tim Bardell of B7 Engineering) simply never made any meaningful effort to communicate. *See id.*²⁵

More generally, neither City personnel nor the City’s engineer (Mike Heit of HLA Engineering) had ever said that a unit-by-unit approach would be allowed, either as to performance of the physical repairs or as to drafting of a repair plan. Quite the contrary, when the defendants were caught performing re-siding work without a necessary permit, the City issued a letter to the defendants’ attorneys saying, *inter alia*, that “the purpose of requiring comprehensive plans [repairing the

²⁵ The supporting citation offered by the defendants for their four-month contention is CP 197. *See Appellants' Opening Brief*, p.15 (citing CP 197). However, CP 197 is the final page of a Declaration by the City’s then-attorney (Bob Noe) and it actually says, in relevant part, “the entire structure must be evaluated”. *See* CP 197. Thus, the defendants’ four-month assertion should be rejected because it is unsupported.

apartments] is thwarted if your clients engage in piecemeal repairs prior to formulation of global plans for repair.” See CP 754 (3rd ¶). This letter was dated February 7, 2018 (*see id.*), which was many months before the defendants submitted their supposed “repair plan” (on June 13, 2018).

Thus, it is not true that the City retroactively changed positions and suddenly disapproved to a unit-by-unit approach for the first time during June of 2018. Rather, after receiving the defendants’ supposed “repair plan”, the City lodged objections that – in part – repeated that a piecemeal/unit-by-unit approach was not proper and that a comprehensive/global repair plan was necessary. The City also objected because the supposed “repair plan” was merely a conceptual outline instead of an actual repair plan. *See supra*, p.26.²⁶

On July 24, 2018 – after some additional unfruitful communications – the defendants’ counsel was told that the City was

²⁶ Inconsistently, the defendants later contend that it was only “two months” – not “four months” – that the unit-by-unit approach had supposedly been disclosed. *See and Compare, Appellants’ Opening Brief*, p.15 (saying four months) & p.16 (saying two months). This two-month contention traces back to the defendants’ Letter of Intent, which was submitted on April 16, 2018. *See Appellants’ Opening Brief*, p.16 (citing, on this point, CP 773-774, which appears to be a typo and with the correct citation appearing to be CP 771, which is the first page of a letter by the defendants’ attorneys dated June 16, 2018 and which references the Letter of Intent); *see also* CP 731 (¶31). However, as previously stated above, the Letter of Intent promised that a detailed “plan covering all the structures” would be forthcoming. *See supra*, p.25 n.24. Thus, there was nothing for the City to object to at that point. It was only upon submission of the supposed “repair plan” on June 13, 2018, that the City first learned that the defendants had not actually been working on a “plan covering all the structures” and that their engineer (Tim Bardell of B7 Engineering) had merely developed an “outline” that was “conceptual” in nature.

moving forward with a summary judgment motion on the still-pending lawsuit. *See* CP 733 (¶37); *see also Appellants' Opening Brief*, p.16. It was obvious that the defendants were not going to make the repairs.²⁷

B.12. The City's Motion for Summary Judgment, the Defendants' Cross-Motion for Summary Judgment (a/k/a motion to enforce settlement agreement), and the Court's Order Thereon.

On July 27, 2018, the City filed a motion for summary judgment and supporting Declarations. *See* CP 149-171 (“Motion for Summary Judgment – Declaratory Judgment, Permanent Injunction and Order of Abatement”); CP 172-703; *see also Appellants' Opening Brief*, p.16.

On August 24, 2018, a “Stipulated Motion and Order” was entered. *See* CP 805-806. That Order rescheduled the summary judgment hearing dated to September 21, 2018. *See* CP 806 (Ins.7-9).

On August 20, 2018, the defendants filed pleadings in opposition to the City's motion for summary judgment, including “Defendants' Response to Motion for Summary Judgment”. *See* CP 704-726.

On August 27, 2018, the defendants filed “Defendants' Motion to Enforce Settlement Agreement” (which was treated as a cross-motion for summary judgment). *See* CP 805 (n.1) & 807-812; *see also Appellants' Opening Brief*, p.16.

²⁷ The defendants' engineer has had repair plans rejected in other situations, though he claims such occurrences are “rare”. *See* CP 784 (¶22).

On September 10, 2018, the City filed its “Plaintiff’s Reply Brief on Motion for Summary Judgment”, its “Plaintiff’s Response to Defendants’ [Cross-]Motion for Summary Judgment” and related Declarations. *See* CP 833-870 & 828-832 (bracketed material added).

On September 17, 2018, the defendants filed their “Reply in Support of Defendants’ Motion to Enforce Settlement Agreement [a/k/a cross-motion for summary judgment].” *See* CP 873-885 (bracketed material added).

On September 21, 2018, the superior court (via Judge Michael G. McCarthy) held a hearing on the cross-motions and orally ruled in favor of the City. On October 26, 2018, a corresponding written Order was entered. *See* Declaratory Judgment, Injunction, and Order of Abatement (entered on October 26, 2018); *Appendix H* hereto (pp.H-2 through H-5 thereof); *see also Appellants’ Opening Brief* (citing to CP 925-928, which is actually just the Proposed, unsigned version of the Order).

The superior court’s written Order found that “[c]onditions exist at defendants’ Property constituting numerous violations of the property maintenance, building, plumbing, fire and mechanical codes”, that those conditions impacted “the structural integrity of the buildings”, and that the conditions are “dangerous and unsafe” and “injurious to the public”. *See* Declaratory Judgment, Injunction, and Order of Abatement (entered on

October 26, 2018, specifically pp.1-2, ¶¶1-4 thereof); *Appendix H* hereto (pp.3-4 thereof); *see also Appellants' Opening Brief* (citing to CP 925-928, which are actually just the Proposed, unsigned version of the Order). It further said – via handwritten interlineations – that “the court finds that LUPA does not deprive this court of jurisdiction.” *See* Declaratory Judgment, Injunction, and Order of Abatement (entered on October 26, 2018, specifically p.2, lns.16-18 thereof); *Appendix H* hereto (p.H-3 thereof).

The superior court’s written Order denied the defendants’ cross-motion (a/k/a motion to enforce settlement agreement). *See* Declaratory Judgment, Injunction, and Order of Abatement (entered on October 26, 2018, specifically p.2, lns.15-16 thereof); *Appendix H* hereto (p.H-3 thereof); The written Order further ruled that “DECLARATORY JUDGMENT is entered DECLARING that a Public Nuisance exists at the Property”, that “a PERMANENT INJUNCTION preventing and prohibiting the defendants from maintaining, permitting, or allowing the public nuisances to continue to exist at the Property is hereby entered”, and that “an ORDER OF ABATEMENT is hereby ENTERED.” *See* Declaratory Judgment, Injunction, and Order of Abatement (entered on October 26, 2018, specifically p.3, lns.5-16 thereof); *Appendix H* hereto (p.H-4 thereof); *see also Appellants' Opening Brief*, p.17.

However, the “ORDER OF ABATEMENT” portion of the superior court’s written Order was “STAYED for a period of 3 months” so as to allow one last chance for defendants to “prepare 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 of Selah) and which addresses each building and the structural concerns for each building (not on a unit by unit approach)”. See Declaratory Judgment, Injunction, and Order of Abatement (entered on October 26, 2018, specifically p.3, ln.17 through page 4, ln.2 thereof); *Appendix H* hereto (pp.H-4 through H-5 thereof); see also *Appellants’ Opening Brief*, p.17. By contrast, the other portions of the superior court’s written Order – including the grant of summary judgment – were not stayed. See Declaratory Judgment, Injunction, and Order of Abatement (entered on October 26, 2018, pp.1-4 thereof); *Appendix H* hereto (pp.H-2 through H-5 thereof).²⁸

²⁸ On October 24, 2018 – after the superior court’s written Order had been entered (which occurred on October 26, 2018), the defendants filed “Defendants’ Memorandum Regarding Declaratory Judgment, Injunction and Order of Abatement”. See CP 917-924. The superior court treated that filing as a motion for reconsideration. On October 31, 2018, the City filed its “City of Selah Response in Opposition to Motion for Reconsideration”. See CP 929-936. The superior court concluded that there was no valid basis for reconsideration, denied any reconsideration and thereby adhered to its prior written Order. See CP 937-938.

B.13. The City's Motion to Lift the Stay, which Was Granted.

On January 23, 2019, the City filed "Selah's Motion to Lift Stay on Order of Abatement". *See* CP 988-999. Therein, the City noted that "[t]he defendants have filed to submit a repair plan" consistent with the superior court's written Order on the cross-motions for summary judgment. *See* CP 990 (lns.10-11).

On January 31, 2019, the defendants filed their "Response to Motion to Lift Stay". *See* CP 1085-1093. Therein, the defendants argued that an "updated repair plan" had been submitted during November 2018 and/or February 2019. *See* CP 1087 (lns.20-21). In fact, that supposedly "updated" repair plan was plagued by the same problems as the original supposed "repair plan". *See* CP 1095 (lns.16-19).

On February 1, 2019, the superior court (via judge Michael G. McCarthy) issued an "Order Setting Evidentiary Hearing". *See* Order Setting Evidentiary Hearing; *Appendix I* hereto. On March 7, 2019, the court conducted the evidentiary hearing. On March 29, 2019, the court entered an "Order Lifting Stay and Implementing Abatement Order". *See* CP 1094-1097. The court found that the "updated" repair plans "do not comply with the Court's Declaratory Judgment, Injunction, and Order of Abatement dated October 26, 2018." *See* CP 1095 (lns.16-19).

B.14. The Defendants File this Appeal and Scope of Appeal.

On April 23, 2019, the defendants filed their “Notice of Appeal to Division III of the Court of Appeals”. *See* CP 1089-1109. The defendants challenge only the entry of one of the superior court’s Orders. Specifically, the defendants only challenge the superior court’s written Order on the parties’ cross-motions for summary judgment. *See Appellants’ Opening Brief*, pp.17-18.

C. ARGUMENT

C.1. Standards of Review.

Vis-à-vis summary judgment, the defendants correctly summarize some of the standards of review. *See Appellants’ Opening Brief*, pp.18-19. In addition: “If reasonable minds can reach only one conclusion on an issue of fact, that issue may be determined on summary judgment.” *Sutton v. Tacoma Sch. Dist. No. 10*, 180 Wn. App. 859, 865, 324 P.3d 763 (2014). “A material fact is one that affects the outcome of the litigation.” *Lewis v. Krussel*, 101 Wn. App. 178, 182, 2 P.3d 486 (2000). An appellate court “may affirm on any basis supported by the record whether or not the argument was made below.” *Bavand v. OneWest Bank*, 196 Wn. App. 813, 825, 385 P.3d 233 (2016).

Vis-à-vis issuance of an injunction, the deferential abuse of discretion standard applies. *See e.g., Gebbie v. Olson*, 65 Wn. App. 533, 538, 828 P.3d 1170 (1992) (a trial court’s issuance of an injunction “will

be disturbed on appeal only if it is based on untenable grounds, is manifestly unreasonable, or is arbitrary.”).

C.2. LUPA Does Not Apply to the City’s Lawsuit Because the Lawsuit is Not an Appeal of a Prior Land Use Decision.

The defendants’ primary legal argument is that LUPA applies to the City’s lawsuit. *See Appellants’ Opening Brief*, pp.20-21. This is not true. LUPA pertains to appeals of land use decisions. LUPA’s “purpose” section recites, in relevant part, that the purpose of LUPA “is to reform the process for judicial review of land use decisions made by local jurisdictions, by establishing uniform, expedited appeal procedures and uniform criteria for reviewing such decisions”. *See* RCW 36.70C.010 (underscore emphases added). LUPA does not apply to anything else.

The City’s lawsuit was not an appeal of a land use decision and it did not seek judicial review of a land use decision. Rather, the City’s lawsuit was a first instance filing/action. The lawsuit advanced a claim for nuisance abatement and it sought injunctive relief. This was a new claim, advanced for the first time via the lawsuit and never previously adjudicated or decided. The lawsuit does not seek to change or vacate any prior decision or outcome, which would be the case if it were an appeal.

As the City argued at the superior court level, “LUPA does not cover nuisance abatement [lawsuits], nor does it supplant the provision[s]

o[f] RCW 7.48 relating to nuisances and the abatement of the same.” CP 837 (Ins.23-25) (bracketed changes made).

In reliance on *Richards v. City of Pullman*, the defendants assert that “[t]here can be no dispute that a code enforcement order is a land use decision.” See *Appellants’ Opening Brief*, p.21 (citing *Richards v. City of Pullman*, 134 Wn. App. 876, 880-881, 142 P.3d 1121 (2006)). But this assertion misses the mark. As stated above, LUPA only applies to appeals of land use decisions. Parsing the definition of “land use decision” does not convert a non-appeal lawsuit into an appeal. Stated another way, when a statutory Act only applies to “appeals of X”, the specific definition of “X” is, at most, only one-half of the equation. Even if “X” is definitionally satisfied, the statutory Act still does not apply unless an “appeal” of X is occurring. Fundamentally, the City’s lawsuit does not seek any appeal of anything (whether a “land use decision” or otherwise). Thus, LUPA does not apply to the City’s lawsuit.²⁹

C.3. LUPA Does Not Preclude all Nuisance Abatement Lawsuits. It Only Precludes Lawsuits that are a “Collateral Attack” on a Prior Land Use Decision (which the City’s lawsuit in the instant case is not).

²⁹ Arguing otherwise, defendants write “[the] City issued an enforcement order in the form of the Notice and Order.” See *Appellants’ Opening Brief*, p.21 (bracketed material added). However, the Notice and Order are not mentioned in the City’s lawsuit because the City’s lawsuit was filed before the Notice and Order was issued.

The defendants next contend that LUPA “precludes” a public nuisance lawsuit if the at-issue nuisance happens to constitute a violation of a building ordinance. In making this argument, the defendants rely on – but conspicuously do not actually quote – *Asche v. Bloomquist*. See *Appellants’ Opening Brief*, p.20 (citing, but not quoting, *Asche v. Bloomquist*, 132 Wn. App. 784, 801, 133 P.3d 475 (2006)). The defendants summarize *Asche v. Bloomquist* as supposedly holding that “where a public nuisance claim depends upon a finding that a land use violates an ordinance, LUPA precludes the public nuisance action.” See *Appellants’ Opening Brief*, p.20. This is not true.

Asche v. Bloomquist is distinguishable from the instant case and the defendants grossly misstate its holding. The Bloomquists obtained a building permit from Kitsap County. See *Asche v. Bloomquist*, 132 Wn. App. at 788-789. The Asches, as owners of adjacent property, argued “that the [Bloomquists’] building permit was erroneous because the County [had] misapplied the zoning ordinance and [thus] miscalculated the maximum allowable height of the structure.” See *id.*, at 789 (bracketed material added). However, the Asches did not file a LUPA appeal/petition within 21 days of the permit’s issuance, as LUPA requires. See *id.*, at 789; see also RCW 36.70C.040(3) (establishing the 21-day requirement). Instead, the Asches took no action until much later.

Roughly 5 months after the permit had been issued, the Asches filed a lawsuit. *See id.*, at 788-789.

The Asches' lawsuit claimed, *inter alia*, that “[b]ecause the project violates the zoning code, the project constitutes a public nuisance.” *See Asche v. Bloomquist*, at 788 & 801. The superior court dismissed the Asches' public nuisance claim via CR 12(b)(6) and that result was affirmed by Division II on appeal. *See id.*, at 789-790 & 802.

The Asches' public nuisance claim was dismissed because it was effectively an attempted “collateral attack” on the permit. Because the Asches failed to utilize LUPA, they could not seek to invalidate the permit via a lawsuit. *See Asche v. Bloomquist*, at 790 (citing RCW 36.70C.030). If that were allowed, then the supposedly “exclusive” LUPA process would be rendered merely optional because parties could disregard LUPA and still pursue equivalent relief via a lawsuit. *See CP 838* (where City made this argument, and cited Justice Sanders's separate opinion in *Grundy v. Thurston County*, 155 Wn.2d 1, 117 P.3d 1089 (2005), at the superior court level).³⁰

³⁰ The relevant passages from Justice Sanders's separate opinion in *Grundy v. Thurston County*, are the following: (¶40: “The trial court clearly dismissed the nuisance claims on the ground that Grundy could not collaterally attack the permits absent a timely challenge under LUPA,” underscore emphasis added; and ¶44: “I would follow the learned Court of Appeals opinion to hold that because Grundy did not challenge the permit in a LUPA action, she is foreclosed from claiming the illegality of the permit as the basis of her public nuisance claim. Such would simply be a collateral attack on the

The instant case is distinguishable. The City's lawsuit is not a collateral attack on a land use decision. Rather, as previously explained above, the City's lawsuit does not seek to change any prior decision or outcome. *See supra*, pp.12-15. The lawsuit exists as a separate track.

The defendants grossly misstate the holding of *Asche v. Bloomquist*. Division II did not rule that all public nuisance lawsuits are precluded by LUPA. Rather, Division II only ruled that the Asches' specific lawsuit was precluded by LUPA because, as previously stated above, the lawsuit was effectively an attempted "collateral attack" on a previously-issued permit. The following passages make this plain:

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

...

In conclusion, although there may be some nuisances, either private or public, which may be brought outside LUPA's framework, in this case the claims directly related to the invalidity or the misapplication of the zoning ordinance. Because the action was not brought within 21

permit and would allow any party to avoid the procedural requirements of LUPA by claiming development authorized by an unchallenged permit is a 'public nuisance' and later suing to abate the alleged public nuisance. By explicitly stating that LUPA is the 'exclusive means of judicial review of land use decisions,' RCW 36.70C.030(1), the legislature clearly did not intend for public nuisance actions premised on permit invalidity to 'end run' around chapter 36.70 RCW.", underscore emphases added); *see Grundy v. Thurston County*, 155 Wn.2d 1, 117 P.3d 1089 (2005) (Justice Sanders, concurring in part and dissenting in part); *see also* CP 838 (where City, at the superior court level in the instant case, cited portions of Justice Sanders's separate decision).

days of the date when the land use decision was issued, the action is barred; and dismissal under CR 12(b)(6) was appropriate because the action failed to state a claim upon which relief could be granted.

See Ashe v. Bloomquist, 132 Wn. App. at 799 & 802 (underscore emphases added); *see also* CP 838-839 (where the City made this argument at the superior court level).

Explicitly, Division II noted that “some nuisance” claims can be “brought outside of LUPA’s framework”. *See Ashe v. Bloomquist*, 132 Wn. App. at 802.³¹

³¹ Admittedly, Division II did not use the phrase “collateral attack” in its decision in *Ashe v. Bloomquist*. *See Ashe v. Bloomquist*, 132 Wn. App. at 784-802. However, the phrase/concept accurately captures the rationale of Division II’s holding in that case. Also, the phrase/concept is used in many other decisions wherein the potential interplay of LUPA and lawsuits has been considered. *See e.g., Habitat Watch v. Skagit County*, 155 Wn.2d 397, 410, 120 P.3d 56 (2005) (“Because appeal of the special use permit and its extensions are time barred under LUPA, Habitat cannot collaterally attack them through its challenge to the grading permit.”, underscore emphasis added); *Stientjes Family Trust v. Thurston County*, 152 Wn. App. 616, 624 n.8, 217 P.3d 379 (2009) (permit challenges brought “after LUPA’s 21-day time period for filing an appeal constitute impermissible collateral attacks.”, underscore emphasis added); *James v. County of Kitsap*, 154 Wn.2d 574, 591, 115 P.3d 286 (2005) (Justice Sanders dissenting opinion) (“Prior to the enactment of the LUPA statute, it was possible to either attack a land use decision through a statutory or constitutional writ of certiorari or maintain an action for monetary relief, or both.”, underscore emphasis added); *Community Treasures v. San Juan County*, 192 Wn.2d 47, 52, 427 P.3d 647 (2018) (failure to timely comply with LUPA “precluded collateral attack of the land use decision”, underscore emphasis added); *Gresh v. Okanogan County*, 178 Wn. App. 1012, *1 (2013) (unpublished decision filed after March 1, 2013, and thus properly citable pursuant to GR 14.1(a)) (“our Supreme Court has already determined that LUPA does not permit such untimely collateral attacks”, underscore emphasis added); *Woods v. Kittitas County*, 162 Wn.2d 597, 629, 174 P.3d 25 (2007) (“His LUPA petition was a collateral attack upon a zoning ordinance that could have been earlier subjected to review by the growth board.”, underscore emphasis added); *Bloemkamp v. City of Edmonds*, 199 Wn. App. 1062, *3 (2017) (unpublished decision filed after March 1, 2013, and thus properly citable pursuant to GR 14.1(a)) (“the failure to pursue a right to appeal a land use decision, such as a permit, precludes a subsequent collateral attack of that decision.”, underscore emphasis added); *Cottingham v. Morgan*, 180 Wn. App. 1047, *3 (2014) (unpublished

In relevant part, Washington Practice Series confirms that “[t]he provisions of RCW Ch. 36.70 [LUPA] have been found to not apply to . . . a nuisance claim that did not depend on the validity of a land use decision.” See 36 WAPRAC §7.3, 9th ¶ & n.30 (citing *Asche v. Bloomquist*) (underscore emphasis, bracketed material and ellipsis added). Washington Practice Series further confirms, “a public nuisance claim is not precluded by LUPA”. See 16 WAPRAC §3:13, 2nd ¶ (underscore emphasis added).

C.4. The City’s Lawsuit is Not an Interlocutory Action, and the Selah Municipal Code Does Not Preclude a Lawsuit.

Because the City’s lawsuit is not an appeal of any sort, it is also true that it is not an “interlocutory appeal”. This negates additional arguments by the defendants. See *Appellants’ Opening Brief*, pp.19 & 22

decision filed after March 1, 2013, and thus properly citable pursuant to GR 14.1(a) (“because the Cottinghams failed to file a petition for judicial review within 21 days of the permit decision as required by RCW 36.70C.040(3), the decision became final, is deemed valid, and is not subject to collateral attack here.”, underscore emphasis added); *BD Lawson Partners, LP v. Central Puget Sound Growth Management Hearings Bd.*, 165 Wn. App. 677, 690, 269 P.3d 300 (2011) (“Yarrow Bay argues any challenge under the GMA to the 2010 permits approved consistent with the 2009 ordinances constitutes an impermissible collateral attack on the 2009 ordinances. RCW 36.70C.290(2). We agree.”, underscore emphasis added); see also *Mercer Island Citizens for Fair Process v. Tent City 4*, 156 Wn. App. 393, 402, 232 P.3d 1163 (2010) (“failure to challenge a land use decision in a LUPA petition bars any claims that are based on challenges to that land use decision”, underscore emphasis added); *End the Prison Industrial Complex (“EPIC”) v. King County*, 3 Wn. App.2d 1064, *3 (2018) (unpublished decision filed after March 1, 2013, and thus properly citable pursuant to GR 14.1(a)); *Toward Responsible Development v. City of Black Diamond*, 179 Wn. App. 1012, *4 n.25 (2014) (unpublished decision filed after March 1, 2013, and thus properly citable pursuant to GR 14.1(a)). There are also additional, older unpublished decisions wherein the phrase/concept “collateral attack” is used.

(interlocutory appeal argument) & 24-29 (similar arguments about “the finality doctrine” and “exhaustion of administrative remedies”).³²

The defendants contend that the sole method whereby the City can seek to correct a public nuisance is via the City’s “adoptive administrative procedures under SMC CH. 6.75.” *See Appellants’ Opening Brief*, p.7 (partially quoting SMC 6.75.020). This is not true.

The defendants focus on language from SMC 6.75.020, specifically language saying “[t]he procedures set forth in this chapter shall be utilized to enforce violations of this code”. *See Appellants’ Opening Brief*, p.7 (partially quoting SMC 6.75.020). The defendants emphasize the word “shall” and then cite a court precedent indicating that “shall” typically means “must”. *See id.* (citing *City of Wenatchee v. Owens*, 145 Wn. App. 196, 204, 185 P.3d 1218 (2008)). But there are additional sections of the SMC that the defendants conveniently ignore, which negate the defendants’ argument.

One such additional section of the SMC is found in SMC’s Title 6, which Title is labeled “Public Peace, Safety and Morals”. Specifically, SMC 6.58.280 says, in relevant part, that “[t]he city may seek to enforce

³² Exhaustion of administrative remedies is only required when, *inter alia*, “the administrative remedies can provide the relief sought by the party.” *See e.g., Smith v. Bates Technical Coll.*, 139 Wn.2d 793, 808, 991 P.2d 1135 (2000). The City’s lawsuit sought a remedy – specifically an injunction of abatement – that was not available via the administrative track. The City Council cannot issue an injunction for abatement.

the provisions of this chapter, enjoin, or abate any nuisance . . . consistent with Chapter 6.75 of this code”. See SMC 6.58.280 (underscore emphases and ellipsis added). Another relevant section of the SMC is SMC 6.75.100(3)(b), which section is labeled “Additional Relief – Injunction – Abatement”. In relevant part, this section provides as follows:

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. . . . The remedies provided by this chapter are cumulative and shall be in addition to any other remedy provided by law.

See SMC 6.75.100(3)(b) (underscore emphases and ellipsis added).

Thus, it is not true that the sole method whereby the City can seek to correct a public nuisance is via the “adoptive administrative procedures under SMC CH. 6.75”, as the defendants falsely argue. See *Appellants’ Opening Brief*, p.7. The City can sue if it chooses. Additionally and/or alternatively, the City can pursue the code enforcement administrative procedure track, if it chooses. But the two tracks are separate.³³

C.5. The Instant Case is Not “Virtually Identical” to *Grandmaster Sheng-Yen*. Actually, the Instant Case is Fully Distinguishable from that Case.

³³ Provisions of state law are in accord with the SMC and the analysis set forth in this brief. Washington’s statutes grant the City the authority to, *inter alia*, sue to abate a nuisance. See RCW 35A.21.450(1)&(2) (each saying, “A code city that exercise its authority under chapter 7.48 RCW, RCW 34.22.280, 35.23.440, or 35.27.410, or other applicable law to abate a nuisance . . .”, underscore emphasis and ellipsis added).

The defendants characterize *Grandmaster Sheng-Yen Lu v. King County* as “virtually identical” to the instant case. See *Appellants’ Opening Brief*, pp.23-24 (discussing *Grandmaster Sheng-Yen Lu v. King County*, 110 Wn. App. 92, 38 P.3d 1040 (2002)). This is not true.

Grandmaster Sheng-Yen concerned a to-be-constructed gravel mine on forestry land, whereas the instant case concerns existing ramshackle tenements on residential land within city limits. See and Compare, *Grandmaster Sheng-Yen*, 110 Wn. App. at 95-96 & *Appellants’ Opening Brief*, p.13; CP 777 (lns.22-24). In *Grandmaster Sheng-Yen*, the planning department (King County’s Department of Development and Environmental Services, “DDES”) initially decided that a conditional use permit would not be required for the gravel mine but it then switched positions and indicated that a conditional use permit was required. See *Grandmaster Sheng-Yen*, 110 Wn. App. at 96-97. By contrast, no permit is at-issue in the instant case.

In *Grandmaster Sheng-Yen*, the aggrieved neighbors started a LUPA petition. See *Grandmaster Sheng-Yen*, 110 Wn. App. at at 97. By contrast, the instant case is not a dispute between property neighbors. The instant case is a dispute between the defendants as owners of the ramshackle tenements, and the City as a municipality seeking to abate the

public nuisance that those ramshackle tenements constitute. No LUPA petition was filed in the instant case.

The word “nuisance” is nowhere to be found in the *Grandmaster Sheng-Yen* decision, because that case did not concern a public nuisance. *See Grandmaster Sheng-Yen*, 110 Wn. App. at 92-111.

The aggrieved parties’ lawsuit was dismissed in *Grandmaster Sheng-Yen* because it was premature. *See Grandmaster Sheng-Yen*, 110 Wn. App. at at 106 (“The County, Cadman, and Weyerhaeuser also argue that this case is not ripe for review and that no justiciable controversy exists yet. We agree.”). By contrast, the City prevailed on its lawsuit in the instant case on the merits via summary judgment and no premature/mootness issue exists. *See* Declaratory Judgment, Injunction, and Order of Abatement (entered on October 26, 2018); *Appendix H* hereto (pp.H-2 through H-5 thereof).

So where is the supposed similarity, let alone identicalness, between the instant case and *Grandmaster Sheng-Yen*? There is none.

C.6. Summary Judgment and Injunctive Relief were Properly Granted to the City. A “Public Nuisance” Did Exist.

“Injunctive relief is available against zoning violations which are declared by ordinance to be nuisances.” *City of Mercer Island v. Steinmann*, 9 Wn. App. 479, 485, 513 P.3d 80 (1973). “Granting an

injunction is addressed to the sound discretion of the trial court.” *Gebbie v. Olson*, 65 Wn. App. 533, 538, 828 P.3d 1170 (1992). “The court’s decision will be disturbed on appeal only if it is based on untenable grounds, is manifestly unreasonable, or is arbitrary.” *Gebbie v. Olson*, 65 Wn. App. at 538. The defendants do not advance any argument on these points. *See Appellants’ Opening Brief*, pp.1-50.

“A nuisance per se is an act, thing, omission, or use of property which of itself is a nuisance, and hence not permissible or excusable under any circumstance.” *Tiegs v. Watts*, 135 Wn.2d 1, 13, 954 P.2d 877 (1998). “[I]f it be shown reasonable grounds exist to believe the proposed construction will result in a nuisance, and it is reasonably certain the health or comfort of complainants will be harmed by the threatened act, the court will decree immediately to restrain such acts.” *Turtle v. Fitchett*, 156 Wn. 328, 336, 287 P. 7 (1930).

SMC 6.58.010(a) makes this property a nuisance, because the conditions violated several applicable ordinances.³⁴ This is not a situation

³⁴ SMC 6.58.010 provides: (a) “Nuisance” means:

- (1) Doing an unlawful act, or omitting to perform a duty, or suffering or permitting any condition or thing to be or exist, which act, omission, condition or thing either:
 - (A) Annoys, injures or endangers the comfort, repose, health or safety of others,
 - (B) Offends decency,
 - (C) Is offensive to the senses,
 - ...
 - (D) In any way renders other persons insecure in life or the use of property, or
 - (E) Obstructs the free use of property so as to essentially interfere with the

where a city ordinance purported to declare proper conditions a “nuisance”. The problems and violations were myriad, patent, life-threatening (in part), and had existed for upwards of a year between the September 13th incident and summary judgment on October 26, 2018.

The defendants contend that because their hired expert (engineer Tim Bardell of B7 Engineering) disagreed with certain aspects of the investigation reports, summary judgment was improper. *See Appellants’ Opening Brief*, pp.32-36. This not true. He did not dispute that numerous problems and violations existed at the property. Rather, he conceded that “repairs” were necessary. *See id.*, p.35. Quibbling over the severity of the violations and/or how to fix them does not change the fundamental reality that the existence of violations was undisputed. *See also* CP 841-844.³⁵

State law and the City’s code each empowered the City to sue for injunctive relief to abate this nuisance. *See* RCW 7.48.020 & .220; SMC 6.58.280. Actual bodily harm is not required for a finding that a “public nuisance” exists. A public nuisance exists when there is a “fear” of harm or interference. *See e.g., Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d

comfortable enjoyment of life and property; or
(2) Any violation of any city . . . zoning or other land use ordinance . . . or public health ordinance . . . (underscore emphases and ellipses added);
accord RCW Chapter 7.48.

³⁵ Declarations by other tenants saying, in their opinion, the property was not that bad also does not change the fundamental reality: myriad, patent violations existed.

909, 932, 296 P.3d 860 (2013); *see also* *Everett v. Paschall*, 61 Wn. 47, 50-53, 111 P. 879 (1910); *Ferry v. City of Seattle*, 116 Wn. 648, 662-666, 203 P. 40 (1922). Regardless, Mrs. Redman was harmed. Other tenants and/or members of the public also faced risk. Natural gas leaks, sealed emergency egress windows, improper electrical components, cockroaches, rot and mold, and a failing structure are each a public nuisance.³⁶

C.7. The “Agreed Order” was Not a Settlement Agreement.

The “Agreed Order” constitutes a “final” land use decision, but not a settlement agreement of the lawsuit. As written in an analogous case:

By accepting and entering into the stipulations and agreed order, the Board ended the administrative process. It is true that the Board never had an adjudicative hearing because Jones waived his right to a regularly scheduled hearing as part of the agreed order. However, as the State itself notes, the Board had the discretion to reject the agreed order.

Jones v. Wash. Dept. of Health, 170 Wn.2d 338, 357, 242 P.3d 825 (2010). Likewise, the defendants in the instant case chose to enter into the Agreed Order – it was their own idea. *See* CP 177-180. In doing so, they waived “a regularly scheduled hearing”. *See* CP 184 (Ins.22-25); *see also* CP 934-935. Contrary to the repeated assertion that the City “unilaterally” ended the administrative track, the defendants simply never asked the City Council for a hearing after submission of the bogus “repair plan”.

³⁶ It is beyond dispute that the defendants received due process. They participated throughout the superior court action. They simply lost on the merits.

The Agreed Order was not a settlement agreement vis-à-vis the lawsuit. It did not resolve any factual matter and did not at all reference the lawsuit. It merely pertained to scheduling of the separate administrative track. The defendants effectively argue that so long as they submitted something labeled “repair plan”, everything was settled. This is absurd. A true structural repair plan was necessary. By failing to submit one, the defendants breached the Agreed Order and/or failed to satisfy a condition precedent to its enforceability. *See* CP 831-832.

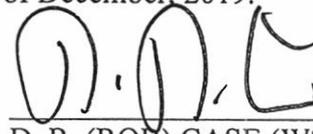
The defendants flaunted the process, so it is exceedingly rich for them to now argue that it was the City that somehow violated the Agreed Order. To date, there is still no legitimate repair plan for this property. The City bent over backward, for upwards of a year, to give the defendants repeated chances. If the defendants had ever submitted a valid repair plan, the City likely would have dismissed the lawsuit. But the City could not wait forever. Abatement became necessary.³⁷

D. CONCLUSION

Division III should affirm the trial court’s order.

³⁷ All reasonable people would agree that the defendants’ supposed “repair plan” was woefully inadequate. All reasonable people would conclude that myriad, patent violations existed at the subject property (as recited in the Notice and depicted in many photographs). *See* CP 212-703. Property owners who maintain ramshackle tenements are not entitled to a full-blown trial simply because they and/or others think the violations are not that bad.

DATED this 2nd day of December, 2019.

A handwritten signature in black ink, appearing to read "D. R. CASE". The signature is written in a cursive, somewhat stylized font.

D. R. (ROB) CASE (WSBA #34313)
Larson Berg & Perkins PLLC
Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify on the 2nd day of December, 2019, I served the foregoing document by the method indicated below and addressed to the following:

James C. Carmody (WSBA 5205)
Meyer, Fluegge & Tenney, P.S.
230 South 2nd Street, Ste. 101
Yakima, WA 98901
Attorneys for Appellants

- First Class Mail, Postage Prepaid
- Certified Mail, Return Receipt
- Federal Express, Overnight
- Hand Delivery
- Attorney Messenger Service
- Email: Carmody@mftlaw.com
- Facsimile

Court of Appeals, Division Three
500 N. Cedar Street
Spokane, WA 99201-1905

- First Class Mail, Postage Prepaid
- Certified Mail, Return Receipt
- Federal Express, Overnight
- Hand Delivery
- Attorney Messenger Service
- Email
- Facsimile
- Washington State Appellate Courts' Secure Portal

D. R. (ROB) CASE (WSBA #34313)

APPENDIX A

A-1

FILED
DEC 02 2019

YAKIMA COUNTY CLERK

SUPERIOR COURT OF WASHINGTON FOR YAKIMA COUNTY

CITY OF SELAH, a Washington municipality,

Plaintiff,

vs.

STEVE and JANET OWENS, husband and wife, and the martial community composed thereof,

Defendants.

NO. 17-2-04115-39

CITY OF SELAH'S DESIGNATION OF SUPPLEMENTAL CLERK'S PAPERS

(Division III Case No. 367932)

TO: YAKIMA COUNTY SUPERIOR COURT CLERK

AND TO: APPELLANTS/DEFENDANTS, via their attorneys of record

Pursuant to RAP 9.6 and 9.10, plaintiff CITY OF SELAH asks that the Yakima County Clerk's Office transmit to the Court of Appeals, Division III, in case number 367932, as "Supplemental Clerk's Papers," the following items:

| <u>Sub No.¹</u> | <u>Date Filed</u> | <u>Document Title</u> |
|----------------------------|-------------------|---|
| 1. | 11/16/2017 | Summons and Complaint for Injunction and Nuisance Abatement |

¹ The Odyssey Portal System does not show submission numbers for pleadings in this case. I have endeavored to recite the likely submission numbers for these supplemental clerk's papers. However, it is possible that one or more errors have occurred in the numbering. Thus, I have recited the full name of each pleading. Also, please note that the submission numbers on this document are not necessarily in chronological order. For instance, submission number 5 precedes submission numbers 3 and 4.

CITY OF SELAH'S DESIGNATION OF SUPPLEMENTAL CLERK'S PAPERS - 1

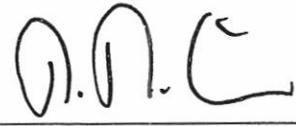
LARSON BERG & PERKINS PLLC
105 North 3rd Street
P.O. Box 550
Yakima, WA 98907
(509) 457-1515
(509) 457-1027 (fax)

A-2

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30

- 5 11/16/2017 Declaration of Andrew Wangler in Support of Motion for Preliminary Injunction
- 3 11/16/2017 Declaration of Jeffrey R. Peters in Support of Motion for Preliminary Injunction
- 4 11/16/2017 Supplemental Declaration of Jeffrey R. Peters in Support of Motion for Preliminary Injunction
- 8 11/16/2017 Order to Show Cause Regarding Preliminary Injunction
- 11 11/16/2017 Memorandum in Opposition to Motion for Preliminary Injunction
- 50 10/24/2018 Declaratory Judgment, Injunction, and Order of Abatement
- 65 02/01/2019 Order Setting Evidentiary Hearing

DATED this 2nd day of December, 2019.



D. R. (ROB) CASE (WSBA #34313)
Larson Berg & Perkins PLLC
Attorneys for Plaintiff/Respondent

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30

CERTIFICATE OF SERVICE

I hereby certify on the 2nd day of December, 2019, I served the foregoing document by the method indicated below and addressed to the following:

James C. Carmody (WSBA 5205)
Meyer, Fluegge & Tenney, P.S.
230 South 2nd Street, Ste. 101
Yakima, WA 98901
Attorneys for Appellants

- First Class Mail, Postage Prepaid
- Certified Mail, Return Receipt
- Federal Express, Overnight
- Hand Delivery
- Attorney Messenger Service
- Email: Carmody@mftlaw.com
- Facsimile

Court of Appeals, Division Three
500 N. Cedar Street
Spokane, WA 99201-1905

- First Class Mail, Postage Prepaid
- Certified Mail, Return Receipt
- Federal Express, Overnight
- Hand Delivery
- Attorney Messenger Service
- Email
- Facsimile
- Washington State Appellate Courts' Secure Portal

D. R. (ROB) CASE (WSBA #34313)

A-6

APPENDIX B

B-1

240

FILED
JANET OWENS

NOV 16 11:20

SUPERIOR COURT
YAKIMA CO WA

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

SUPERIOR COURT OF WASHINGTON FOR YAKIMA COUNTY

CITY OF SELAH, a Washington municipal
corporation,

Plaintiff,

NO. **17 2 0 4 1 1 5 3 9**

SUMMONS - 20 AND 60 DAYS

vs.

STEVE OWENS and JANET OWENS,
husband and wife, and the marital
community composed thereof,

Defendants

THE STATE OF WASHINGTON to Defendants above named:

A lawsuit has been started against you in the above-entitled court by the City of Selah,
Plaintiff herein. Plaintiff's claim is stated in the written Complaint for Injunction and
Nuisance Abatement, a copy of which is served upon you with this Summons.

In order to defend against this lawsuit, and if service is made within the state of
Washington, you must respond to the Complaint by stating your defense in writing, and serve
a copy upon the undersigned attorney for Plaintiff within twenty (20) days after the service of
this Summons, excluding the day of service, or a default judgment may be entered against you
without notice. A default judgment is one where the Plaintiff is entitled to what Plaintiff asks

ORIGINAL



Kenyon Disend, PLLC
The Municipal Law Firm
11 Front Street South
Issaquah, WA 98027-3820
Tel: (425) 392-7090
Fax: (425) 392-7071

B-2

1 for because you have not responded. If you serve a Notice of Appearance on the undersigned
2 attorney, you are entitled to notice before a default judgment may be entered.

3 In order to defend against this lawsuit, and if service is made outside of the state of
4 Washington, you must respond to the Complaint by stating your defense in writing, and serve
5 a copy upon the undersigned attorney for Plaintiff within sixty (60) days after the service of
6 this Summons, excluding the day of service, or a default judgment may be entered against you
7 without notice. A default judgment is one where Plaintiff is entitled to what Plaintiff asks for
8 because you have not responded. If you serve a Notice of Appearance on the undersigned
9 attorney, you are entitled to notice before a default judgment may be entered.

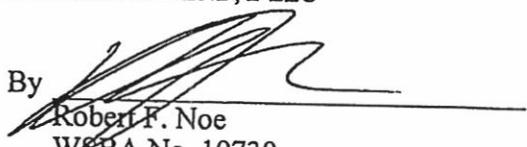
10 You may demand that Plaintiff file this lawsuit with the court. If you do so, the
11 demand must be in writing and must be served upon Plaintiff. Within fourteen (14) days after
12 you serve the demand, Plaintiff must file this lawsuit with the court, or the service on you of
13 this Summons and the Complaint for Injunction and Nuisance Abatement will be void.
14

15 If you wish to seek the advice of an attorney in this matter, you should do so promptly
16 so that your written response, if any, may be served on time.

17 This Summons is issued pursuant to Rule 4 of the Civil Rules for Superior Courts of
18 the State of Washington.

19 DATED this 15th day of November, 2017.

20 KENYON DISEND, PLLC

21 By 

22 Robert F. Noe
23 WSBA No. 19730
24 Attorneys for City of Selah
25



FILED
JANET OWENS

'17 NOV 16 AM 11:20

SUPERIOR COURT
YAKIMA CO WA

SUPERIOR COURT OF WASHINGTON FOR YAKIMACOUNTY

CITY OF SELAH, a Washington municipal corporation,

Plaintiff,

vs.

STEVE OWENS and JANET OWENS,
husband and wife, and the marital
community composed thereof,

Defendants.

NO. **1720411539**

COMPLAINT FOR INJUNCTION
AND NUISANCE ABATEMENT

Plaintiff, City of Selah ("City"), by and through its attorneys Robert F. Noe and Kenyon Disend, PLLC, brings this action against the Defendants above-named ("Defendants") and alleges the following:

I. JURISDICTION AND VENUE.

1.1 This Court has subject matter jurisdiction in this action and venue is properly brought in Superior Court pursuant to provisions of both Washington state law and the City of Selah Municipal Code.

The City alleges herein multiple violations of the International Property Maintenance Code ("IPMC"), which the City has adopted by reference in Chapter 11.02 of the Selah Municipal Code; "Nuisances", Chapter 6.58 of the Selah Municipal Code;

ORIGINAL



Kenyon Disend, PLLC
The Municipal Law Firm
11 Front Street South
Issaquah, WA 98027-3820
Tel: (425) 392-7090
Fax: (425) 392-7071

B-4

1 "Code Enforcement", Chapter 6.75 of the Selah Municipal Code; "Injunctions", Chapter
2 7.40 Revised Code of Washington; "Nuisances", Chapter 7.48 Revised Code of
3 Washington; and, "Unfit Dwellings, Buildings and Structures", Chapter 35.80 Revised
4 Code of Washington.

5 1.2 The Court has personal jurisdiction in this action because the code violations
6 and nuisances alleged herein have been committed, and continue to occur, at Defendants'
7 property located at 519 South First Street, Selah, Washington, also known as Yakima
8 County Parcel No. 18130123002 (the "Property").

9 1.3 The Court further has personal jurisdiction in this action because Defendants
10 reside within Yakima County, State of Washington.

11 II. PARTIES.

12 2.1 Plaintiff is a political subdivision of the State of Washington, authorized by
13 Article XI, Section 11 of the Washington State Constitution to exercise its police power
14 in the making and enforcing of laws within the City.

15 2.2 At all times relevant hereto, Defendants Steve Owens and Janet Owens have
16 and continue to own title interest in the Property. Each act by each Defendant was done
17 individually and on behalf of the marital community.

18 III. FACTUAL ALLEGATIONS.

19 3.1 Defendants have been the owners of the Property for decades.

20 3.2 Situated on the Property is an apartment building containing approximately
21 twenty units, believed to be constructed in 1940.
22
23
24
25

1 3.3 The apartment building on the Property has been in varying states of disrepair
2 and has been the site of ongoing public nuisance and building code violation concerns
3 since the early 1990s.

4 3.4 On September 13, 2017, the Selah Fire Department was required to respond
5 to the Property because of the dangerous situation presented. The tenant in Unit 18,
6 Debra Redman, had fallen through a hole in the bathroom floor because the floor gave
7 way due to rot, and Ms. Redman was wedged face down between toilet and bathtub and
8 the door jamb. She was having difficulty breathing and was unable to extract herself.
9 The Fire Department was required to take measures to safely extract Ms. Redman from
10 the bathroom, including cutting away the door jamb, jack stud, and carpeting.

11 3.5 Once Ms. Redman was safely extracted, it was observed that the bathroom
12 subfloor suffered from water damage and significant rot. There was a hole in the
13 subfloor and numerous soft spots were detected on the subfloor throughout the bathroom
14 and entryway to the bathroom. The subfloor in the entryway was wet and rotting.
15 Cockroaches were observed throughout the residence.

16 3.6 Recently, on October 3, 2017, the City's City Administrator, Don Wayman,
17 was contacted by Ms. Redman concerning problems she was experiencing at Unit 18 of
18 the apartment complex and because her landlord was now taking steps to have her evicted
19 as result of the Fire Department response to the unit on September 13, 2017.

20 3.7 The City Administrator; the City's Code Compliance Officer, Erin Barnett;
21 the City's Building Official / Community Development Director, Jeff Peters; and the
22 City's Fire Marshall, Jim Lange; went to the Property at Ms. Redman's request to
23 conduct an inspection.
24
25

1 3.8 The City Officials upon arriving at the apartment complex and went to Unit
2 18 which is the residence of Ms. Redman. They contacted Mr. Redman, Ms. Redman's
3 husband, who invited them into the unit.

4 3.9 The City Officials observed or noted the following, among other things, when
5 conducting their inspection:

6 a. The inside of the dwelling unit was dirty and comprised of two living
7 areas a kitchen/living room of approximately 100 to 120 square feet in size, and a
8 bedroom/bathroom about 100 square feet in size; and

9 b. In the bedroom/bathroom area Ms. Redman was lying in a bed
10 breathing with the assistance of an oxygen bottle; and

11 c. Ms. Redman and her husband described that she had fallen through the
12 bathroom floor on September 13, and that the landlord had not yet come to fix the floor,
13 but had, instead, given them an eviction notice; and

14 d. There was a hole in the area in the bathroom where Ms. Redman had
15 fallen through the floor. The hole was now covered with a piece of linoleum roll. When
16 the linoleum was rolled back it revealed a rotten hole in the subfloor (the area around the
17 hole was spongy in nature indicative of rot); and

18 e. There were two different types of powder spread along window sills,
19 counter tops, door jams, and trim within the unit. The tenants indicated that the powders
20 were Comet cleanser and insect repellent powder. Both applied due to insect infestation;
21 and
22

23 f. Through the hole in the bathroom floor there were signs that the
24 subfloor was failing as there were moisture darkened timbers (floor joists), which are
25

1 indications of rot. In addition, there were multiple places in the bathroom where the
2 sheetrock/plaster showed signs of water damage or was removed and replaced with
3 oriented strand board plywood; and

4 g. Upon visual inspection of the exterior of the apartment units, it was
5 noted that there is failure to maintain landscaping and deterioration of the outside of the
6 buildings, exposed electric cords that were plugged inside and run out to the exterior, and
7 windows sealed with flammable construction caulking; and

8 h. There are rotten sill plates, pushed out siding, indicative of serious
9 structural issues and rotting windowsills; and

10 3.10 Based on the observations, the following code violations were observed to
11 be present:

12 a. Violation of International Property Maintenance Code (IPMC) 108.1
13 General and IPMC 108.1.3 Structure unfit for human occupancy. Unit 18 has a failed
14 floor suffering from rot and dilapidation. There is also interior and exterior dilapidation
15 of the roof rafters, sheeting, covering, and sheetrock, vermin infestation (as indicated by
16 high amount of insect power and Comet cleanser spread along the baseboards,
17 windowsills, and counters). Other buildings within the apartment complex exhibit
18 similar signs of exterior and interior rot/dilapidation (such as exposed rotten sill
19 plates/floor joists, siding, and windowsills), windows which have been sealed shut with
20 flammable construction caulking making the occupants of the unable to escape in the
21 event of a fire); and
22
23
24
25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

b. Violation of IPMC 108.1.5 Dangerous structure or premises:

i. Due to the collapsed floor in Unit 18, and due to general deterioration or neglect, and because there are numerous other signs of rot and decay, the building is a dangerous building in accordance with IPMC 108.1.5(3) and (5); and

ii. The top sill plate of the floor joists in the two most northerly buildings of the apartment complex have been exposed to the elements, and have rotted/deteriorated and have partially collapsed causing bulging and pushing out of the siding due to the pressure of the exterior walls, the building is believed to be dangerous in accordance with IPMC 108.1.5(3) and (5); and

c. Violation of IPMC 302.4 Weeds. The Property contains weeds and plant growth more than two feet tall along the back of the subject property; and

d. Violation of IPMC 304.1.1 Unsafe conditions:

i. The northerly buildings are believed to be unsafe due to the deterioration of the of the sill plate along the back of the two apartment buildings. Individual sections of the of the IPMC 304.1.1 believed to be violated are as follows:

1. the nominal strength of any structural member is exceeded by nominal loads, the load effects or the required strength; and

2. the anchorage of the floor or roof to walls or columns, and of walls and columns to foundations is not capable of resisting all nominal loads or load effects; and

1 3. structures or components thereof that have reached their
2 limit state; and

3 4. structural members have evidence of deterioration or
4 that are not capable of safely supporting all nominal loads and load effects; and

5 e. Violation of IPMC 304.2 Protective Treatment and IPMC 304.6
6 Exterior Walls. The exterior siding of the buildings has multiple locations where
7 dilapidation/rot or other defects has occurred and are in need of repair and/or
8 replacement. There are multiple locations where the weatherproofing/paint has failed on
9 the siding and are required to be sealed with a surface coat to prevent deterioration; and

10 f. Violation of IPMC 304.4 Structural Members. The
11 deterioration/collapse of the sill plate and bulging of the siding on the two most northern
12 building are key indicators that the structural members of the two buildings have
13 deterioration, and are no longer capable of safely supporting the imposed dead and live
14 loads they are required to bear; and

15 g. Violation of IPMC 304.7 Roofs and Drainage. The roofs of the two
16 easterly structures of the apartment complex are in need of replacement as both roofs
17 show signs of defects and dilapidation that have allowed for entrance of water into the
18 roof itself. The roofs of both buildings have multiple depressions along their length
19 indicating that there is rotten or dilapidated sheeting and/or rafters, there is no fascia
20 board, and the ends of the rafters also shows signs rot or dilapidation. The interior ceiling
21 in Unit 18 also shows signs of water damage or intrusion; and

22 h. Violation of IPMC 304.13 Window, Skylight and Door Frames. All
23 the buildings within the apartment complex have doorways, thresholds, and window
24
25

1 frames that are in disrepair and need repair and/or replacement as the frames are in a state
2 of decay and do not prevent the intrusion of the elements; and

3 i. Violation of IPMC 304.13.1 Glazing: One or more of the
4 windows within the complex have cracks, holes, or have been boarded up; and

5 ii. Violation of 304.13.2 Openable Windows. Numerous windows
6 within the complex appear to be sealed with flammable construction caulking,
7 screws and other hardware, or lumber rendering the windows inoperable and
8 incapable of opening; and

9 i. Violation of IPMC 305.1 Interior Structure General. Because the City
10 was only permitted access to Unit 18, the City is unable to definitively state the interior
11 conditions present in each of the units in the apartment complex. It is believed that Unit
12 18 interior condition is representative of the units within the complex. This allegation
13 may be supplemented based on further discovery that may occur in this case. The general
14 condition of the interior of Unit 18 demonstrates a failure to maintain the unit in good
15 repair, there are signs of structural instability and failure, and the unit is not maintained in
16 a clean and sanitary condition. The living/kitchen area of the unit is unsanitary with a
17 filthy floor, and baseboards and countertop backsplashes that had a thin layer of two
18 different powers (which the City was advised is Comet and insect repellent) to keep pests
19 from entering the unit and from invading kitchen counters. The sleeping area and
20 bathroom have linoleum floor covering which is not adhered to the subfloor, and upon
21 examination was easily removable to reveal a large rotten hole in the subfloor. The walls
22 and ceiling of the bedroom and bathroom have multiple places where the
23 sheetrock/plaster shows signs of damage (mainly water), or was removed and replaced
24
25

1 with oriented strand board plywood. Both sink and toilet showed signs of present and
2 past leakage and attempted repairs; and

3 j. Violation of IPMC 305.1.1 Unsafe Conditions. Based upon the hole
4 within the subfloor of Unit 18 the City of Selah Building Official determined that the unit
5 is unsafe in accordance with IPMC 305.1.1(3) as the structure's subfloor (component) has
6 reached its limit state due to rot, deterioration/dilapidation; and

7 k. Violation of IPMC 305.4 Stairs and Walking Surfaces. Due to failure
8 of the subfloor, the unit's walking surface does not meet the requirement to be
9 maintained in a sound condition with good repair; and

10 l. Violation of IPMC 306.1 Component Serviceability General. The
11 components of a structure and equipment therein, like the apartment complex, shall be
12 maintained in good repair, structurally sound and in a sanitary condition, the apartment
13 complex on the Property has not been so maintained; and

14 m. Violation of IPMC 306.1.1 (6) Unsafe Condition. Unit 18
15 demonstrates the following conditions without repair and thus constitutes an unsafe
16 condition: (6)(1) Ultimate deformation (collapse of floor); (6)(2) Deterioration (rot,
17 dilapidation, and mold (see picture of hole in floor); and (6)(3) Damage from insects,
18 rodents and other vermin; and

19 n. Violation of IPMC 308.1 Accumulation of Rubbish or Garbage. The
20 Property has rubbish and garbage spread in various places throughout the apartment
21 complex; and

22 o. Violation of IPMC 309.1,.2,.4, and .5 Infestation. It is apparent that the
23 structures are suffering from insect and/or rodent infestation. The infestations in the
24
25

1 apartments must be promptly exterminated by approved processes that will not be
2 injurious to human health; and

3 p. Violation of IPMC [P] 504.1 Plumbing Systems and Fixtures General.

4 Plumbing fixtures in Unit 18 failed. Defective wax ring or other sealing failed resulting
5 in moisture damage/water intrusion to the subfloor and floor joists; and

6 q. Violation of IPMC 605 Wiring. It is apparent that flexible power
7 cords/extension cords are being used for permanent wiring, or for running through doors,
8 windows, or cabinets, or concealed within walls, floors, or ceilings, which is not
9 permitted.

10 3.11 Based on the allegations contained in paragraphs 3.9 and 3.10, the City of
11 Selah Building Official made the determination that the apartment complex is unsafe and
12 unfit for human occupation.

13 3.12 Later that day, Defendant Steve Owens appeared at the Selah Public Works
14 Department and spoke with Jeff Peters, Community Development Director/Building
15 Official. Mr. Peters advised Defendant concerning the inspection of Unit 18, code issues
16 related to that unit, and of the other code concerns noticed during the inspection related to
17 the apartment complex.

18 3.13 The conditions presented at the apartment complex on the property are
19 dangerous to the health and safety of the residents therein. The apartments are not fit for
20 human occupation and may result injuries to the occupants and have resulted in injury
21 requiring emergency response to the occupant of Unit 18.
22
23
24
25

1 d. Authorizing, but not obligating, the City to demolish the apartment
2 buildings or to otherwise abate the above-described violations if Defendants fail to do so,
3 and to record the full direct and indirect cost of any such demolition or other abatement
4 as a lien against the Property; and

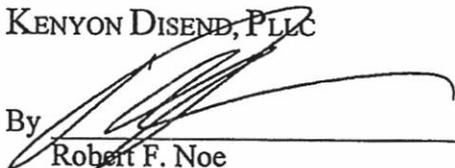
5 e. Enjoining Defendants from any future violations of the Selah
6 Municipal Code, RCW 7.48, or other applicable provisions of state law or City code.

7 5.2 A judgment for civil penalties, and for all of the City's costs, including
8 reasonable attorneys' fees, incurred in bringing this action and for the costs of any
9 necessary abatement, as authorized by Chapters 6.58 and 6.75 of the Selah Municipal
10 Code, and RCW 7.48.220, 7.48.230, 7.48.260, and 7.48.280.

11 5.3 Further relief as the Court deems just and proper.

12 DATED this 15th day of November, 2017.

13
14 KENYON DISEND, PLLC

15
16 By 

17 Robert F. Noe
18 WSBA No. 19730
19 Attorneys for Plaintiff City of Selah
20
21
22
23
24
25

APPENDIX C

C-1

FILED
JANET OWENS

17 NOV 16 P2:06

SUPERIOR COURT
YAKIMA CO WA

SUPERIOR COURT OF WASHINGTON FOR YAKIMA COUNTY

CITY OF SELAH, a Washington municipal
corporation,

Plaintiff,

vs.

STEVE OWENS and JANET OWENS,
husband and wife, and the marital
community composed thereof,

Defendants.

NO.

DECLARATION OF ANDREW
WANGLER IN SUPPORT OF
MOTION FOR PRELIMINARY
INJUNCTION

I, Andrew Wangler, declare and state as follows:

1. I am over the age of eighteen and competent to testify herein, and make this
declaration on personal knowledge of the facts stated.

2. I am a Captain for the City of Selah Fire Department and an Emergency
Medical Technician. I have served in this capacity since April 1, 2017.

3. On September 13, 2017, I was part of the Fire personnel who responded to an
incident at 519 South First Street, Unit 18, Selah, Washington.

4. An incident report was prepared relating to the response and I also prepared a
narrative report concerning the response. True and accurate copies of the incident

DECLARATION OF ANDREW WANGLER IN SUPPORT
OF MOTION FOR PRELIMINARY INJUNCTION - 1



Kenyon Disend, PLLC
The Municipal Law Firm
11 Front Street South
Issaquah, WA 98027-3820
Tel: (425) 392-7090
Fax: (425) 392-7071

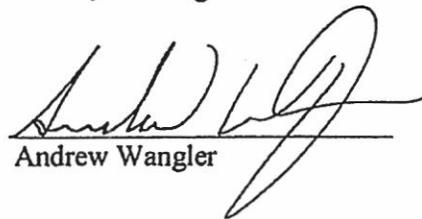
C-2

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

response and of my narrative report are attached hereto as Exhibits A and B. The contents of those documents are incorporated into this declaration as if fully set forth herein.

I declare that the foregoing is true and correct subject to the penalty of perjury under the laws of the State of Washington.

DATED this 7 day of November 2017, at Selah, Washington.


Andrew Wangler



C-3



**Selah Fire Department
#2**

Station: 21C
Shifts Or Platoon: Volunteer Response

| | |
|--|---|
| Location: 519 S 1ST ST # 18 Selah WA 98942 PLEASANT AVE & RIVERVIEW AVE | Incident Type: 321 - EMS call, excluding vehicle accident with injury |
| Lat/Long: N 46° 38' 43.72" W 120° 31' 46.59" | EMSID: 39D02 FDID: 39D02 Incident #: 2017-256006 Exposure ID: 27237951 Incident Date: 09/13/2017 Dispatch Run #: 1627441 |
| Zone: SE7 - SEFD CITY Location Type: 1 - Street address Population Density: Urban Cross Street, Directions or National Grid: PLEASANT AVE & RIVERVIEW AVE | |

| | | | | |
|-----------------------------|---------------|-----------------|--|--|
| Report Completed by: | Huri, Kylie | ID: | | Date: 09/19/2017 |
| Report Reviewed by: | Huri, Kylie | ID: | | Date: 10/03/2017 |
| Report Printed by: | HANNA, Gary W | ID: 1050 | | Date: 10/23/2017 Time: 15:17 |

| | | | | | |
|--------------------------------------|----------------------|--------------------------------|---------------------------------------|--|-------------|
| Type of Service Requested: | 911 Response (Scene) | Mass Casualty Incident: | No | Complaint Reported By Dispatch: | Fall Victim |
| Aid Given or Received: | None | Primary action taken: | 32 - Provide basic life support (BLS) | | |
| Total # of apparatus on call: | 2 | | Total # of personnel on call: | 6 | |

| |
|--|
| <p>NARRATIVE (1)</p> <p>Narrative Title: n/a</p> <p>Narrative Author: Huri, Kylie</p> <p>Narrative Date:</p> <p>Narrative Apparatus ID: n/a</p> <p>Narrative: SFD dispatched to above address for lift assist. SFD arrived on scene to find 56 yof in forward lying position in the bathroom. Patient was stuck with door jam. Extrication was need to remove door jam stud to get patient out of bathroom. Ambulance arrived on scene. Patient care was transferred. Patient was placed on back board and moved to bed. SFD was clear of scene and in service. One patient refusal.</p> <p>Narrative from dispatch:</p> <p>lift assist 19:09:13 09/13/2017 - Knack W 60yof con/alert not injured 19:09:24 09/13/2017 - Knack W husband with pt to open door 19:10:17 09/13/2017 - Knack W req to reset alarm when pt helped 19:10:27 09/13/2017 - Knack W per lifeline 19:18:52 09/13/2017 - Giles J *URGENT* Address change from 51 S 1ST ST ; 18 to 519 S 1ST ST; RED ROOSTER; 18 19:37:25 09/13/2017 - Giles J - From: Selah Fire 01 REQUESTING SELAH PD</p> |
|--|

C-4

| APPARATUS | | | |
|---|---------------------------|------------------------|---------------------------|
| Unit | D-21 | Unit | R-21 |
| Type: | Chief officer car | Type: | BLS unit |
| Use: | Suppression | Use: | EMS |
| Response Mode: | Lights and Sirens | Response Mode: | Lights and Sirens |
| # of People | 1 | # of People | 5 |
| Injury Or Onset | -- / -- / -- -- : -- : -- | Injury Or Onset | -- / -- / -- -- : -- : -- |
| Alarm | 09 /13/2017 19:08:21 | Alarm | 09 /13/2017 19:08:21 |
| Dispatched | 09 /13/2017 19:09:19 | Dispatched | 09 /13/2017 19:09:19 |
| Enroute | -- / -- / -- -- : -- : -- | Enroute | 09 /13/2017 19:10:08 |
| Arrived | 09 /13/2017 19:20:12 | Arrived | 09 /13/2017 19:20:13 |
| Cancelled | -- / -- / -- -- : -- : -- | Cancelled | -- / -- / -- -- : -- : -- |
| Cleared Scene | 09 /13/2017 20:01:44 | Cleared Scene | 09 /13/2017 20:01:34 |
| In Quarters | -- / -- / -- -- : -- : -- | In Quarters | -- / -- / -- -- : -- : -- |
| In Service | 09 /13/2017 20:05:22 | In Service | 09 /13/2017 20:05:22 |
| Number Of People not on apparatus: 0 | | | |

| PEOPLE -- PERSON 1 | | | |
|-------------------------|--------------------|----------------------|---------|
| Telephone Number | (888)289-2018 | Involvement | CONTACT |
| Name | brianne life alert | Date of Birth | |
| Address | case ID | | |

| PEOPLE -- PERSON 2 | | | |
|-------------------------|--------------------|----------------------|---------|
| Telephone Number | (888)289-2018 | Involvement | CONTACT |
| Name | brianne life alert | Date of Birth | |
| Address | case ID | | |

| PATIENT #1 - PCR 3795830 | | | |
|--------------------------|---|------------------------------|-----------------------------|
| Name | Home Address | Gender | Pregnancy |
| Debra A Redmond | 519 S 1ST ST #18 , Selah , WA 98942 United States | Female | No |
| Race | Ethnicity | DOB | Age |
| () | () | 5/28/1961 | 56 Years |
| Unit Number | Unit Service Level | Estimated Body Weight | Pediatric Color Code |
| R-21 | BLS, Emergency | kg | () |

| PATIENT HISTORY | | |
|-------------------------|---------------------------------------|-------------------------------------|
| Primary Symptom: | What happened to this patient: | ICD-9 Condition Code Number: |
| None | Patient Refused Care | [Not Applicable] |

| COMPLAINT | |
|-------------------------------------|--------------------|
| Chief Complaint Narrative | Lift Assist |
| Complaint Anatomic Location | General/Global |
| Primary Symptom | None |
| Providers Primary Impression | Not Applicable |

| DESTINATION | |
|-------------------------------------|----------------------|
| Incident Patient Disposition | Patient Refused Care |

Member Making Report (Kylie Hurl): _____

Supervisor (Kylie Hurl): _____

C-5



Chief Gary Hanna

Selah Fire Department Yakima County Fire District # 2

206 West Fremont Avenue - Selah, Washington 98942
Business Phone (509) 698-7310 • Fax (509) 698-7317

On 9/13/2017 Selah Fire was dispatched to 519 S. 1st street #18 for injuries from a fall. Rescue 21 arrived on scene to find a large 56 y/o female on the floor in the bathroom of a small studio apartment. Patient was stuck between the toilet bathtub and door jamb. Rescue 21 requested additional man power for assistance to extricate the patient due to her position and location with breathing being compromised. It was determined at that time that the door jamb, jack stud, and carpet would have to be removed in order to make room for extrication. Selah Police were called to do a report for damages the Selah Fire Department made in order to provide patient care and increase her ability to breath. When the structural members of the door and carpet were removed it was noted that the floor had immense water damage and rotting away. The floor had about 1x1 inch hole in the sub floor to the ground with numerous soft spots on the sub floor throughout the bathroom and entry way to the bathroom. The sub floor also was wet and rotted on the entry way. It was also observed to have cockroaches residing with the residents. After all this was done the patient was moved onto a long board and 6 individuals used it as a lever to move the patient to the bed where she was able to regain her breath and refused transport to the hospital.

Selah Police Department also has pictures and took an information report to protect the City of Selah Fire Department and Yakima County Fire District #2 for damages caused to provide patient care.

Report written by

Andrew Wangler (Captain 221)

APPENDIX D

D-1

FILED
JANET L. RIDDLE CLERK

17 NOV 16 P2:06

SUPERIOR COURT
YAKIMA CO WA

7 SUPERIOR COURT OF WASHINGTON FOR YAKIMA COUNTY

8 CITY OF SELAH, a Washington municipal
9 corporation,

10 Plaintiff,

11 vs.

12 STEVE OWENS and JANET OWENS,
13 husband and wife, and the marital
community composed thereof,

14 Defendants.

NO. 1720411539

DECLARATION OF JEFFERY R.
PETERS IN SUPPORT OF
MOTION FOR PRELIMINARY
INJUNCTION

15 I, Jeff Peters, declare and state as follows:

16 1. I am over the age of eighteen and competent to testify herein, and make this
17 declaration on personal knowledge of the facts stated.

18 2. I am the City of Selah's Director of Community Development and Building
19 Official. I have served in this capacity since the middle of April, 2017.

20 3. On October 2, 2017, the City of Selah was contacted by Robert and Debra
21 Redman, tenants who occupy 512 South First Street, Unit 18, Selah, Washington. The
22 tenants contacted the City Administrator, Don Wayman, because of conditions existing at
23 the apartment.
24

25
DECLARATION OF JEFFERY R. PETERS IN SUPPORT
OF MOTION FOR PRELIMINARY INJUNCTION - 1



Kenyon Disend, PLLC
The Municipal Law Firm
11 Front Street South
Issaquah, WA 98027-3820
Tel: (425) 392-7090
Fax: (425) 392-7071

D-2

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

4. When Mr. Wayman contacted me, he indicated that he had just received a phone call from a tenant (Mrs. Debra Redman) of Defendants' apartment complex at 519 South First Street. He said that the tenant related that she had fallen through the floor in the unit in the process of going to the restroom, had to be rescued by Emergency Medical Services, and was now being evicted by her landlord. The City Administrator further stated that Mrs. Redman and her family members were living in substandard conditions and had requested that the city come in and view the condition of the dwelling. I was asked to have the City's Building Inspector, Roy Brons; Code Enforcement Officer, Erin Barnett; and Fire Marshal, James Lange meet at the structure approximately one-half hour later.

5. At the requested time, the City Administrator, Code Enforcement Officer, and I met at 519 South First Street, Selah, Washington. We proceeded to the front door of Unit 18 where the City Administrator knocked, and an elderly man answered the door. The City Administrator asked if the gentleman was Mr. Redman and introduced himself and the rest of the city personnel. The elderly man replied that he was Mr. Redman and invited the three of us into the dwelling unit.

6. The inside of the dwelling unit was dirty and comprised of two living areas a kitchen/living room of about 100 to 120 square feet in size, and a bedroom/bathroom of about 100 square feet in size (rooms were not measured). The City Administrator and Code Enforcement Officer proceeded through the kitchen/living room led by Mr. Redman, which was cramped with a couch, TV and stand, and other possessions, to speak with Mrs. Redman who was lying in a bed with an oxygen bottle in the bedroom/bathroom area of the dwelling. Mrs. Redman and her husband described to the



1 City Administrator how she had fallen through the floor and that the landlord had not
2 come to fix the floor, but had given them an eviction notice (which was presented to the
3 City Administrator). Mrs. Redman further explained that the landlord claimed that he
4 had to kick them out in order to repair the unit. During the initial conversation James
5 Lange, the City Fire Marshal knocked and was let into the unit as well.

6 7. Mr. Redman showed the City Administrator and Code Compliance Officer the
7 location where his wife had fallen through the floor. The hole was covered with a
8 linoleum roll/piece, which was rolled back by the City's Code Compliance Officer to
9 reveal a rotten hole in the subfloor (with the area around the hole spongy in nature).

10 8. While the Code Compliance Officer and Administrator were reviewing the
11 hole in the floor and other areas of dilapidation and damage in and around the bathroom,
12 I noticed that there appeared to be two different types of powder spread along window
13 sills, countertops, door jams, and trim which I presumed to be insect powder. The
14 Redman's son indicated that it was Comet cleaner and insect repellent powder. Knowing
15 that insects are often attracted to wet and dark places, I asked to inspect underneath the
16 kitchen sink and cupboards. I found no water damage or leaking pipes.

17 9. After the Code Enforcement Officer and others exited the bedroom/bathroom
18 area, I examined the hole in the floor and saw the failed subfloor, and dark/black timbers,
19 which are indications of rot. In addition, I noticed that the bathroom had multiple places
20 where the sheetrock/plaster showed signs of damage (mainly water) or was removed and
21 replaced with oriented strand board. The area around the toilet and sink showed signs of
22 present and past leakage and attempted repair (see pictures for additional information).

23 24 25 10. After exiting the dwelling Mr. Wayman asked me my opinion of the

1 situation. I indicated that the situation was not good and that I saw more than one
2 violation of the International Property Maintenance Code on the outside and roof of the
3 subject building. Mr. Wayman then directed that we should walk the property and note
4 any violations of the Property Maintenance Code we found. Because of this, Mrs.
5 Barnett and I walked the property and noted the violations we observed on a visual
6 inspection of the exterior of the buildings and property.

7 11. We proceeded around the outside of the southeast building, which contained
8 Unit 18 noting numerous violations and taking pictures of the condition of the building.
9 After circling the southeast building, we noted that there were additional violations on the
10 northeast building that were visible from the face of the building which we proceeded to
11 note and photograph (deterioration of the outside of the building, exposed electric cords
12 that were plugged in inside, and sealed windows with flammable construction caulking to
13 name a few).

14 12. We then proceeded to circle the southeast building taking photos of visible
15 violations. After completing the southeast building, we walked around the north
16 building taking photos and notes of the buildings violations which included but was not
17 limited to the rotten sill plate, pushed out siding, rotten windowsills, and flammable
18 construction caulked windows.

19 13. Upon return to the office I found that Mr. Owens was at the Public Works
20 front counter demanding to know who from the City had entered upon his property
21 without his permission. I came to the front counter and indicated that the City
22 Administrator had been contacted by one of the tenants who had requested that the City
23 come and review the condition of their residence, and the officials present were, the City
24
25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Administrator, Mr. Wayman; the City's Code Enforcement Officer, Erin Barnett; the City's Fire Marshal, James Lange; and myself.

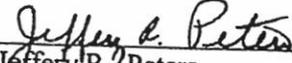
14. Mr. Owens indicated that he knew which tenant had requested the city come to the complex and that the tenant had fallen through the floor. He then indicated that he was evicting the tenant so that he could repair the floor, as he was not able to make the repair with the tenant residing in the unit and said, "we are on the same side and want the same things."

15. I indicated that there were multiple potential violations of the International Property Maintenance Code that we had noted, but that we could not share them until we consulted with the City Administrator who would determine the direction the City would take.

16. Mr. Owens indicated that he would fix the units when we provided him the list of violations. I indicated that I could not give him any further information until the City Administration provided me direction to do so.

I declare that the foregoing is true and correct subject to the penalty of perjury under the laws of the State of Washington.

DATED this 9th day of November 2017, at Selah, Washington.



Jeffery R. Peters



D-6

APPENDIX E

E-1

FILED
CLERK: BRIDLE COURT

17 NOV 16 P2:06

SUPERIOR COURT
YAKIMA CO. WA

SUPERIOR COURT OF WASHINGTON FOR YAKIMA COUNTY

CITY OF SELAH, a Washington municipal
corporation,

Plaintiff,

vs.

STEVE OWENS and JANET OWENS,
husband and wife, and the marital
community composed thereof,

Defendants.

NO. 1720411539

SUPPLEMENTAL
DECLARATION OF JEFFERY R.
PETERS IN SUPPORT OF
MOTION FOR PRELIMINARY
INJUNCTION

I, Jeff Peters, declare and state as follows:

1. I am over the age of eighteen and competent to testify herein, and make this declaration on personal knowledge of the facts stated.

2. I am the City of Selah's Director of Community Development and Building Official. I have served in this capacity since April, 2017.

3. I have reviewed the City of Selah's Motion for Order to Show Cause Regarding Preliminary Injunction, and specifically reviewed Paragraphs 2.17, 2.17A, 2.17B, and 2.18 in the Statement of Facts section. They are incorporated into this Supplemental Declaration by reference as if fully set forth herein. The allegations

SUPPLEMENTAL DECLARATION OF JEFF PETERS IN
SUPPORT OF MOTION FOR PRELIMINARY
INJUNCTION - 1

KENYON
DISEND

Kenyon Disend, PLLC
The Municipal Law Firm
11 Front Street South
Issaquah, WA 98027-3820
Tel: (425) 392-7090
Fax: (425) 392-7071

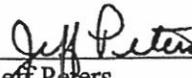
E-2

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

contained in those Paragraphs are true and accurate to best of my knowledge..

I declare that the foregoing is true and correct subject to the penalty of perjury under the laws of the State of Washington.

DATED this 14th day of November 2017, at Selah, Washington.



Jeff Peters

SUPPLEMENTAL DECLARATION OF JEFF PETERS IN
SUPPORT OF MOTION FOR PRELIMINARY
INJUNCTION - 2



Kenyon Disend, PLLC
The Municipal Law Firm
11 Front Street South
Issaquah, WA 98027-3820
Tel: (425) 392-7090
Fax: (425) 392-7071

E-3

APPENDIX F

F-1

FILED
ANGELLE RIDDLE, CLERK

'17 NOV 16 P1:44

SUPERIOR COURT
YAKIMA CO WA

SUPERIOR COURT OF WASHINGTON FOR YAKIMA COUNTY

CITY OF SELAH, a municipal corporation,

Plaintiff,

vs.

STEVE OWENS and JANET OWENS,
husband and wife, and the marital
community composed thereof,

Defendants.

NO. 1720411539

ORDER TO SHOW CAUSE
REGARDING
PRELIMINARY INJUNCTION

(Clerk's Action Required)

THIS MATTER having duly come before this Court on the motion of Plaintiff for an Order to Show cause requiring the Defendants, Steve Owens and Janet Owens, to appear in court and show cause why a preliminary injunction should not issue in this case, the Court having considered the motion, the complaint filed herein, the declarations of Jeffery Peters, Erin Barnett, and Andrew Wangler, with attachments thereto, and being otherwise fully advised in the premises, it is hereby

ORDERED, ADJUDGED and DECREED that defendants, Steve Owens and Janet Owens, shall appear in Yakima County Superior Court, 128 North Second Street, Yakima, Washington on FRIDAY, the 1st day of Dec, 2017 at 1:30 p.m. to show cause, if any, why a

ORIGINAL

ORDER TO SHOW CAUSE REGARDING
PRELIMINARY INJUNCTION - 1



Kenyon Disend, PLLC
The Municipal Law Firm
11 Front Street South
Issaquah, WA 98027-3820
Tel: (425) 392-7090
Fax: (425) 392-7071

F-2

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

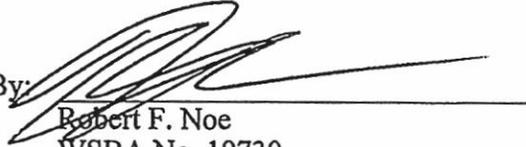
preliminary injunction in the form and substance attached hereto, should not issue pending final adjudication of the matter on the merits.

DONE IN OPEN COURT this 16 day of NOV, 2017.


The Honorable

Presented by:

KENYON DISEND, PLLC

By: 
Robert F. Noe
WSBA No. 19730
Attorneys for City of Selah



F-3

APPENDIX G

G-1

FILED
JANET F. RIDDLE, CLERK

17 NOV 30 P 3:59

SUPERIOR COURT
YAKIMA COUNTY, WA

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

| | |
|---|-----------------------------|
| CITY OF SELAH, a Washington municipal corporation, | No. 17-2-04115-39 |
| Plaintiff, | MEMORANDUM IN OPPOSITION TO |
| v. | MOTION FOR PRELIMINARY |
| STEVE OWENS and JANET OWENS, | INJUNCTION |
| husband and wife, and the marital community composed thereof, | |
| Defendants. | |

COME NOW Defendants, by and through their attorneys of record, James C. Carmody and Sean M. Worley of Meyer, Fluegge & Tenney, P.S., and responds to Plaintiff's Motion for Preliminary Injunction.

I. INTRODUCTION

The City attempts to rely on the condition of Unit 18 as it existed on September 13, 2017, and a cursory walk around the apartments at 519 South First Street, Selah Washington ("Apartments"), to argue that all tenants should be evicted so that an inspection can be done to determine whether the Apartments are repairable or must be razed.

Unit 18 was not and is not indicative of the condition of the Apartments. The condition of Unit 18 was caused by the tenant at the time, and the City was on notice that Unit 18 had been

6-2

1 repaired long before this law suit was filed. The City's motion is based on pure speculation, and
2 is completely unnecessary.

3
4 Defendants are more than willing to make necessary repairs. The City has refused to
5 inform the Defendants what repairs are necessary, and the basis of their request.

6 Further, the City based its motion on unadopted provisions of the 2015 International
7 Property Maintenance Code, and the City failed to comply with the required ordinance
8 procedures contained in the adopted 2006 International Property Maintenance Code.
9

10 II. COUNTER STATEMENT OF FACTS

11 For purposes of this Memorandum in Opposition to Motion for Preliminary Injunction,
12 Defendants rely upon the Declarations of Steve Owens, Diana Cortez, Guillermina Naranjo,
13 Asya Carter, James C. Carmody, and Sean M. Worley.
14

15 The condition of Unit 18 on September 13, 2017 is not an indication of the condition of
16 all of the units at the Apartments. *Decl. of Steve Owens, ¶4; Decl. of Diana Cortez; Decl. of*
17 *Guillermina Naranjo; Decl. of Asya Carter.* Defendants were not notified of any issues in the
18 unit, and the condition of the unit was a result of how the tenants at the time treated the unit.
19
20 *Decl. of Steve Owens, ¶5-8.* Unit 18 was repaired in early October. *Decl. of Steve Owens, ¶11.*
21

22 The City has been on notice that Unit 18 was repaired since at least October 31, 2017.
23 *Decl. of Sean M. Worley, ¶6-7.* A representative of the Northwest Community Action Center
24 approved Unit 18 as fit for occupancy in mid-November, after an inspection, as part of a rental
25 assistance program for the current tenant. *Decl. of Steve Owens, ¶23; Decl. of Diana Cortez,*
26 *¶14.* Mr. Owens has maintained that he is willing to make whatever repairs are necessary;
27 however, the City has consistently refused to provide notice of alleged violations, or tell
28 Defendants what needs to be repaired. *Decl. of Steve Owens, ¶¶15, 24.*
29
30

6-3

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30

III. LEGAL ARGUMENT/ANALYSIS

A. Standard For Preliminary Injunction.

The City trivializes the standard necessary to obtain a preliminary injunction. It is an extraordinary remedy, and may not be granted based on speculative harm.

To obtain a preliminary injunction, a plaintiff must show: "(1) that he has a clear legal or equitable right, (2) that he has a well-grounded fear of immediate invasion of that right, and (3) that the acts complained of are either resulting in or will result in actual and substantial injury to him." *Kucera v. State, DOT*, 140 Wn.2d 200, 209-10, 995 P.2d 63 (2000) (quoting *Tyler Pipe Indus., Inc. v. Dep. of Revenue*, 96 Wn.2d 785, 792, 638 P.2d 1213 (1982)). "If a party seeking a preliminary injunction fails to establish any one of these requirements, the requested relief must be denied." *Id.* at 210 (citing *Washington Fed. Of State Employees, Council 28, AFL-CIO v. State*, 99 Wn.2d 878, 888, 665 P.2d 1337 (1983)). The rule in this state is that injunctive relief will not be granted where there is a plain, complete, speedy and adequate remedy of law. *Tyler Pipe Industries, Inc. v. Department of Revenue*, 96 Wn.2d 785, 791, 638 P.2d 1213 (1982).

The first requirement imposes a burden on the movant to show a likelihood of success on the merits. "To establish a clear legal or equitable right, the moving party must show that it is likely to prevail on the merits at trial." *Ameriquest Mortgage Co. v. Attorney Gen.*, 148 Wn. App. 145, 158, 199 P.3d 468 (2009). Thus, mere allegations or even a prima facie offering of some evidence is not enough. "[A]n injunction will not issue in a doubtful case." *Tyler Pipe Indus.*, 96 Wn.2d at 793. While the trial court does not adjudicate the ultimate factual issues when ruling on a preliminary injunction, "[it] must reach the merits of purely legal issues for purposes of deciding whether to grant or deny the preliminary injunction." *Travis v. Tacoma Pub. Sch. Dist.*, 120 Wn. App. 542, 553, 85 P.3d 959 (2004).

Further, the third requirement gives the movant the burden of demonstrating that he will suffer concrete and substantial harm if the injunction is not issued. "An injunction is an extraordinary equitable remedy designed to prevent serious harm. Its purpose is not to protect a plaintiff from mere inconveniences or speculative and insubstantial injury." *Kucera*, 140 Wn.2d at 221.

1 **B. The City Has Failed To Demonstrate That It Is Likely To Succeed On The**
2 **Merits.**

3 To establish the first element (a clear legal or equitable right), “the moving party must
4 show that it is likely to prevail on the merits at trial.” *Ameriquest Mortgage Co. v. Attorney*
5 *Gen.*, 148 Wn.App. at 158. The City indicates that it has a “clear legal right to enact ordinances
6 and to expect compliance.” *Motion Re Preliminary Injunction*, at 12. A fundamental initial
7 problem is that the City has not enacted the 2015 International Property Maintenance Code. The
8 purported legal basis for this action simply does not exist. Further, the authorities cited by the
9 City have little-to-no application to the preliminary injunction analysis.¹

10 **(1) Selah incorrectly relies upon 2015 International Property Maintenance Code as**
11 **basis for preliminary injunction.**

12 The issuance of a temporary or preliminary injunction requires that the moving party
13 establish that it “...has a clear legal or equitable right...” to the requested relief. City relies
14 solely upon referenced sections of the 2015 edition of the *International Property Maintenance*
15 *Code (“2015 IPMC”).*² There are no references to local ordinance provisions or other
16 recitation of legal authority.

17 City has not adopted the *2015 International Property Maintenance Code*. The operative
18 ordinance provision is MC 11.02.010 which to begin, provides:

19 Except as amended by other chapters of this title, the following
20 International Codes are adopted by the City:

21 ¹ The only preliminary injunction case cited by the City in reference to the first element of the analysis is
22 *Kitsap County v. Kev, Inc.*, 106 Wn.2d 135, 720 P.2d 818 (1986) (Preliminary relief was appropriate to enforce
23 ordinance based upon undercover officer’s 105 visits to the location and observation of “scores” violations over that
24 time frame). The remainder of the cases discuss whether injunctive relief may be appropriate in general. *See e.g.*
City of Mercer Island v. Steinmann, 9 Wn.App. 479, 513 P.2d 80 (1973) (Injunctive relief to enforce zoning
ordinance was appropriate after trial).

25 ² The *International Property Maintenance Code* is a model code developed by the International Code
26 Council, a membership association established for the purpose of developing model building safety and fire
27 prevention codes. The model codes include *International Building Code*, *International Residential Code*,
28 *International Fire Code*, *International Plumbing Code*, *International Mechanical Code*, *International Energy*
29 *Conservation Code* and various other model codes. The model codes have been adopted by jurisdictions throughout
30 the United States as a basis for established “building codes”. In the State of Washington, the legislature established
a statewide vehicle for development of a “State Building Code.” RCW 19.27.031. The Building Code Council has
authority to adopt by regulation applicable model codes. The Building Code Council is a state agency created by the
legislature to provide independent analysis and objective advice to the legislature, Governor and local jurisdictions
with respect to minimum building, mechanical, fire, plumbing and energy code requirements. RCW 19.27.031. The
BCC adopts provisions that become the “State Building Code”. RCW 19.27.074. Local jurisdictions are required to
adopt comparable provisions subject to local modifications.

6-5

1
2 ***

3 (6) The International Property Maintenance Code, 2006 Edition,
4 published by the International Conference of Building Officials as
5 *adopted and amended by the state of Washington* or as may be
6 hereafter amended.

7 First, the referenced model code is the *2006 International Property Maintenance Code*,
8 ("*2006 IPMC*").

9 Second, State of Washington did not adopt the IPMC. Neither of the model codes has
10 been formally adopted as the law for the municipality. If the municipal ordinance is to be given
11 any effect, it is only to the adoption of the *2006 IPMC*.

12 (2) **City's motion is based upon unadopted provisions of the *2015 International***
13 ***Property Maintenance Code*.**

14 There are significant differences between the *2006 IPMC* and the *2015 IPMC*. City basis
15 its motion solely upon purported violations of the *2015 IPMC*. This code has not been adopted
16 and has no legal force or effect within the jurisdictional boundaries. The following provisions of
17 the *2015 IPMC* are not found within the *2006 IPMC*.

- 18 • *2015 IPMC 108.1.5 – Dangerous Structure or Premises*. City relies upon this
19 provisions as a basis for its motion for preliminary injunction. *Motion for*
20 *Preliminary Injunction Section 2.17B(b)*.
- 21 • *2015 IPMC 304.1.1 – Exterior Structure Unsafe – Unsafe Conditions*. City relies
22 upon this provisions as a basis for its motion for preliminary injunction. *Motion for*
23 *Preliminary Injunction Section 2.17B(d)*.
- 24 • *2015 IPMC 305.1 – Interior Structure – Unsafe Conditions*. City relies upon this
25 provisions as a basis for its motion for preliminary injunction. *Motion for*
26 *Preliminary Injunction Section 2.17B(k)*.
- 27 • *2015 IPMC 305.1.1* - City relies upon this provisions as a basis for its motion for
28 preliminary injunction. *Motion for Preliminary Injunction Section 2.17B(l)*.
- 29 • *2015 IPMC 306.1 – Component Serviceability*. City relies upon this provisions as a
30 basis for its motion for preliminary injunction. *Motion for Preliminary Injunction*
Section 2.17B(n).

- 1 • 2015 IPMC 306.1.1 – *Unsafe Conditions*. City relies upon this provisions as a basis
2 for its motion for preliminary injunction. *Motion for Preliminary Injunction Section*
3 *2.17B(o)*.
- 4 • 2015 IPMC 605.4 – *Wiring*. City relies upon this provisions as a basis for its motion
5 for preliminary injunction. *Motion for Preliminary Injunction Section 2.17B(s)*.

6 There is no legal basis for asserting ordinance violations with respect to any of the above-
7 referenced provisions.

8 **(3) City failed to follow proscribed ordinance procedures with respect to purported**
9 **violations of the 2006 IPMC.**

10 2006 IPMC establishes specific provisions with respect to alleged violations, notices and
11 orders and appeal procedures. City failed to follow any of the required procedural or process
12 requirements. The ordinance establishes procedures that assure due process protections and
13 opportunity for review of alleged violations.

14 To begin, the 2006 IPMC sets forth a procedure to identify alleged violations and provide
15 written notice to the property owner. See 2006 IPMC Section 107. The ordinance form of notice
16 requires identification of the property, statement of violation, correction order, reasonable period
17 of time for repair, and notice of the right to appeal. 2006 IPMC Sections 107.2 The order must
18 identify the specific violation and allow "...a reasonable time to make the repairs and
19 improvements required to bring the dwelling unit or structure into compliance with the
20 provisions of [the] code."³ *Id.*

21 2006 IPMC also provides procedures for appeal of alleged code violations. 2016 IPMC
22 Section 111. The appeal process provides for a twenty (20) day appeal period; open hearing, and
23 decision. 2016 IPMC Sections 111.1, 111.4 and 111.6. Judicial review is not allowed until this
24 process is completed. 2006 IPMC Section 111.7 addresses judicial review and provides:

25 111.7 – Court Review. Any person, whether or not a previous
26 party of the appeal, shall have the right to apply to the appropriate
27 court for a *writ of certiorari* to correct errors of law. Application
28 for review shall be made in the manner and time required by law
29 following the filing of the decision in the office of the chief
30 administrative officer.

³ SMC 11.13.010 requires the City to maintain "...no less than one copy..." of the 2006 IPMC at the office of the City Clerk. The City has failed to maintain the record in the required location.

6-7

1
2 An appeal stays any further enforcement action. 2016 IPMC Section 111.8. The doctrine of
3 exhaustion of administrative remedies is well established in Washington. The test for imposition
4 of the doctrine was summarized by the court in *South Hollywood Hills Citizens Ass'n for*
5 *Preservation of Neighborhood Safety and Environment v. King County*, 101 Wn.2d 68, 73, 677
6 P.2d 114 (1984) as follows:

7 [A]dministrative remedies must be exhausted before the courts will
8 intervene: (1) "when a claim is cognizable in the first instance by
9 an agency alone", (2) when the agency's authority "establishes
10 clearly defined machinery for the submission, evaluation and
11 resolution of complaints by aggrieved parties", an (3) when the
"relief sought ... can be obtained by resort to an exclusive or
adequate administrative remedy."

12 Each of these principal components is present in this case. Alleged violations of the 2006
13 IPMC are vested in the primary jurisdictional authority of the established administrative
14 tribunals. City should be required to follow the procedures it has established for alleged
15 ordinance violations.

16
17 **C. The City Lacks A Well-Founded Fear Of Immediate Invasion Of Its Rights.**

18 The City attempts to satisfy the second element of the preliminary injunction test (a well-
19 grounded fear of immediate invasion of its rights) through conclusory and unsubstantiated
20 statements of fact. The City contends that it has a feat that its "right to enforce its ordinances"
21 will be invaded. However, the City's entire basis for claiming a violation of its ordinances are:
22 the condition of Unit 18 on September 13, 2017, and a cursory walk around the Apartments.
23

24
25 First, the condition of Unit 18 on September 13, 2017 is not (and was not) indicative of
26 the condition of the apartments as a whole. *Decl. of Diana Cortez*, 3; *see generally Decl. of*
27 *Guillermina Naranjo*; *see generally Decl. of Asya Carter*.

28
29 The condition of Unit 18 was not a result of the Defendant's conduct, it was a result of
30 the tenants treatment of the unit at the time. *Decl. of Steve Owens*, 5-8; *Decl. of Diana Cortez*, 7-

1 11. In addition, Unit 18 was repaired long before this law suit was filed. *Decl. of Steve Owens,*
2 ¶11. In fact, a representative of the Northwest Community Action Center inspected Unit 18 in
3 connection with a rental assistance program, and found that the unit was acceptable. *Decl. of*
4 *Diana Cortez,* ¶13-14; *Decl. of Steve Owens.* The City was given notice that Unit 18 was
5 repaired almost three weeks prior to filing this law suit. *Decl. of Sean Worley,* ¶6; *Decl. of Steve*
6 *Owens,* ¶21.

9 Perhaps more importantly, Mr. Owens has consistently indicated that he is willing to
10 cooperate with the City to determine what repairs are necessary, and he is willing to make those
11 repairs. *Decl. of Steve Owens,* ¶¶15, 24. On the other hand, the City has consistently refused to
12 provide notice of violations, or even tell Mr. Owens what it believes needs to be repaired. *Decl.*
13 *of Steve Owens,* ¶15-17. The City has failed to even request an inspection.

16 The City's purported well-grounded fear has no basis in fact. It is purely speculative, and
17 cannot support a preliminary injunction. *Kucera,* 140 Wn.2d at 221 ("An injunction is an
18 extraordinary equitable remedy designed to prevent serious harm. Its purpose is not to protect a
19 plaintiff from mere inconveniences or speculative and insubstantial injury.")

21 **D. The City Has Failed To Demonstrate That The Acts Complained Of Are**
22 **Resulting In, Or Will Result In Actual And Substantial Injury.**

23 The City has completely failed to address the third element of the preliminary injunction
24 test (the acts complained of are either resulting in or will result in actual and substantial injury to
25 the City). *See Kucera,* 140 Wn.2d at 209-10. Instead, the City skips this element, arguing its
26 belief that it is likely to prevail on the merits (an analysis that belongs under the first element).
27 *Ameriquest Mortgage Co.,* 148 Wn.App. at 158. It is entirely unclear what *actual and*
28 *substantial* injury the City contends is at issue.
29
30

6-9

1 On the other hand, the interest of the public is an appropriate consideration for the Court,
2 and it is clear that granting the City's requested relief would cause hardship to the tenants. See
3 *Mains Farm Homeowners Ass'n v. Worthington*, 64 Wn.App. 171, 179, 824 P.2d 495 (1992).
4 The City essentially requests that this Court Order that Defendants evict all tenants at the
5 Apartments. See [Proposed] Preliminary Injunction, at 3. This would result in an eviction of
6 the tenants in 20 units, in December, just weeks before the holidays. Not to mention the
7 additional hardship to certain tenants like Ms. Carter, who recently moved to the apartments, has
8 made improvements to accommodate her disability, and particularly enjoys living at the
9 apartments because her caregiver lives on the premises as well.

10 The harm to the tenants that would be caused by the City's proposed injunction should
11 not even be considered.

12
13 **E. The Court Should Grant CR 11 Sanctions Should be Imposed Against the City.**

14 Washington courts have articulated three distinct duties imposed by CR 11 on the signer of a
15 pleading, motion, or legal memorandum. The signing party or attorney must: (1) conduct a
16 reasonable inquiry into the facts supporting the paper; (2) conduct a reasonable inquiry into the
17 law to ensure that the paper filed is warranted by existing law, or a good faith argument for the
18 extension, modification, or reversal of existing law; and (3) avoid interposing the paper for any
19 improper purpose, such as delay, harassment or increasing the costs of litigation. *Miller v.*
20 *Badgley*, 51 Wn. App. 285, 300, review denied, 111 Wn.2d 1007 (1988). These three duties fit
21 neatly under the two main purposes of CR 11 identified by the Washington Supreme Court in
22 *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 219 (1992): The first two duties deter baseless
23 filings, and the third curbs abuses of the judicial system. See also *Blair v. GIM Corp.*, 88 Wn.
24 App. 475, 482 (1997).

6-10

1 Here, the City was put on notice that the allegations regarding Unit 18 had been repaired
2 almost three weeks before the law suit was filed. The municipal matter was set over for the
3 purpose of either issuing notice of violation, or confirming that Mr. Owens had in fact repaired
4 the alleged violations. The City did not follow-up to determine whether Unit 18 was repaired.
5 Instead it filed this law suit, without making a reasonable inquiry as to whether the allegations
6 are based in fact.
7
8

9 In addition, the City's motion is not based on existing law. The City based its motion on the
10 2015 IPMC, which has not been adopted by the City. At least seven of the alleged violations are
11 based on provision that are not contained in the 2006 IPMC. Accordingly, large portion of the
12 City's motion is based on unadopted law.
13

14 Thus, the City failed to conduct a reasonable inquiry into the factual or legal basis of the
15 action. *Doe v. Spokane & Inland Empire Blood Bank*, 55 Wn.App. 106, 111 (1989).
16

17 IV. CONCLUSION

18 The City's request for a preliminary injunction is based on speculation, unverified facts,
19 and unadopted ordinance provisions. The City's motion should be denied, and CR 11 sanctions
20 should be imposed.
21
22

23 DATED this 30th day of November, 2017.
24

25
26
27 
28 _____
29 JAMES C. CARMODY, WSBA #5205
30 SEAN M. WORLEY, WSBA # 46734
Meyer, Fluegge & Tenney, P.S.
Attorneys for Defendants

G-11

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30

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 Kenyon Disend, PLLC 11 Front Street South Issaquah, WA 98027-3820 | <input type="checkbox"/> First Class U.S. Mail <input checked="" type="checkbox"/> E-Mail <u>bob@kenyondisend.com</u> <input type="checkbox"/> Hand Delivery <input type="checkbox"/> UPS Next Day Air |
| | |

DATED at Yakima, Washington, this 30 day of November, 2017.

Deborah Girard
Deborah Girard, Legal Assistant

6-17

APPENDIX H

H-1

FILED
JANELIE RIDDLE, CLERK

'18 OCT 26 P2:16

SUPERIOR COURT
YAKIMA CO. WA

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

SUPERIOR COURT
IN AND FOR THE COUNTY OF YAKIMA
STATE OF WASHINGTON

| | |
|---|--|
| CITY OF SELAH, a Washington municipality, STEVE AND JANET OWENS, husband and wife and the marital community composed thereof, | Plaintiff, vs. Defendants. |
|---|--|

NO. 17-2-04115-39

**DECLARATORY JUDGMENT,
INJUNCTION, AND ORDER OF
ABATEMENT (PROPOSED)**

This MATTER having come before the Court upon Plaintiff City of Selah's Motion for Summary Judgment seeking declaratory judgment that a public nuisance exists, an injunction against permitting that nuisance, and an order of abatement relating

ORDER DENYING MOTION TO ENFORCE SETTLEMENT AND GRANTING SUMMARY JUDGMENT FOR DECLARATORY JUDGMENT, A PERMANENT INJUNCTION, AND AN ORDER OF ABATEMENT - 1.

ROBERT F. NOE, PLLC
4109 Tieton Drive
Yakima, Washington 98908
(509) 910-7372; bob@noe-law.com

H-2

1 to the structures on real property situated at 519 S. 1st Street in Selah, Washington,
2 Assessor's parcel No. 18130123002, (hereinafter referred to as the "Property"),

3 and upon Defendants Owens' cross Motion for Summary Judgment to Enforce
4 Settlement,

5 and the Court having considered records and files in this matter (including the
6 Motions, Responses, and Reply briefs on each), the Declaration and 2nd Declaration of
7 Jeffery Peters, the Declaration and 2nd Declaration of Michael Heit, the Declaration and
8 2nd Declaration of Erin Barnett, the Declaration of Andrew Wangler, and the Declaration
9 of Robert F. Noe filed in support of the Motion for Summary Judgment, the Declaration
10 of Glenn Denmann, and the Declaration of Chuck Williams, and the Response in
11 Opposition from Defendants along with the Declarations of James Carmody, Sean
12 Worley, Steve Owens, and Tim Bardell, the argument of counsel, and being otherwise
13 fully advised in the premises;
14

15 NOW THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND
16 DECREED that Defendants' Motion to Enforce Settlement is DENIED. *and the Court*
17 *finds that LURA does not deprive this court of jurisdiction.*
18 IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there being no

19 material issues of fact that Plaintiff City of Selah's Motion for Summary Judgment is
20 hereby GRANTED as a matter of law.

21 The Court specifically finds the following:

22 1). Conditions exist at defendants' Property constituting numerous violations of
23 the property maintenance, building, plumbing, fire, and mechanical codes;
24

25 ORDER DENYING MOTION TO ENFORCE
SETTLEMENT AND GRANTING SUMMARY
JUDGMENT FOR DECLARATORY
JUDGMENT; A PERMANENT INJUNCTION,
AND AN ORDER OF ABATEMENT - 2

ROBERT F. NOE, PLLC
4109 Tieton Drive
Yakima, Washington 98908
(509) 910-7372; bob@noe-law.com

H-3

1 2). Conditions exist giving rise to concerns about the structural integrity of the
2 buildings;

3 3). Conditions exist that rise to the level of being dangerous and unsafe; and

4 4). These conditions are injurious to the public.

5
6 As a consequence, DECLARATORY JUDGMENT is entered DECLARING that
7 a Public Nuisance exists at the Property;

8 IT IS FURTHER ORDER, ADJUDGED AND DECREED, based on the Court's
9 Findings and its Declaration that a public nuisances exists, that a PERMANENT
10 INJUNCTION preventing and prohibiting the defendants from maintaining, permitting,
11 or allowing the public nuisances to continue to exist at the Property is hereby entered;
12 and,

13
14 IT IS FURTHER ORDERED, ADJUDGED AND DECREE that the public
15 nuisances present at defendants' Property must be abated and an ORDER OF
16 ABATEMENT is hereby ENTERED.

17 The ORDER OF ABATEMENT, however, is STAYED for a period of 3 months
18 from the date of entry of this SUMMARY JUDGMENT ORDER. During the 3 month
19 stay, Defendants shall prepare a detailed structural repair plan (which includes structural
20 calculations and plans, and addresses all identified deficiencies within the reports
21 attached to the January 9, 2018 Notice of Noncompliance and Order to Comply issued by
22 the City of Selah) and which addresses each building and the structural concerns for each
23

24
25 ORDER DENYING MOTION TO ENFORCE
SETTLEMENT AND GRANTING SUMMARY
JUDGMENT FOR DECLARATORY
JUDGMENT, A PERMANENT INJUNCTION,
AND AN ORDER OF ABATEMENT - 3

ROBERT F. NOE, PLLC
4109 Tieton Drive
Yakima, Washington 98908
(509) 916-7372; bob@noe-law.com

H-9

1 building (not a unit by unit approach) and defendants shall take substantial steps toward
2 effectuating repairs to the structures on the Property.

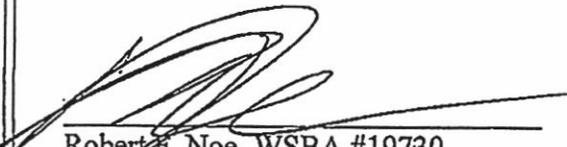
3 In the event that Defendants have not submitted the repair plan or have not taken
4 substantial steps toward repairing the structures on the Property during the 3 month stay,
5 the City can, through motion to the Court, request that the Court lift the stay and
6 impose/implement the Order of Abatement.

7
8 The issue of an award to the City for its costs in seeking an abatement is reserved.

9 DONE IN OPEN COURT this 26th day of October, 2018.

10
11 
12 _____
13 The Honorable Michael McCarthy
14 Yakima County Superior Court Judge

15 Presented by:

16 
17 _____
18 Robert F. Noe, WSBA #19730
19 Attorney for Plaintiff, City of Selah

20 Approved as to form; Copy Received:

21
22 _____
23 Sean Worley, WSBA #46734
24 James C. Carmody, WSBA #5205
25 Attorneys for Defendants Owens

ORDER DENYING MOTION TO ENFORCE
SETTLEMENT AND GRANTING SUMMARY
JUDGMENT FOR DECLARATORY
JUDGMENT, A PERMANENT INJUNCTION,
AND AN ORDER OF ABATEMENT - 4

ROBERT F. NOE, PLLC
4109 Tieton Drive
Yakima, Washington 98908
(509) 910-7372; bob@noe-law.com

H-5

APPENDIX I

I-1

CA

FILED
TRACEY M. SLAGLE, CLERK

'19 FEB -1 AIO :41

SUPERIOR COURT
IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

CITY OF SELAH

NO. 17-2-04115-39

vs.

STEWART JANET OWENS

ORDER SETTING EVIDENTIARY
HEARING

THIS MATTER HAVING COME ON for hearing before the undersigned judge/commissioner of the above-entitled court, it is hereby ORDERED THAT:

The Stay of Abatement Order dated Oct
26, 2018 is not lifted at this time;

The parties will arrange with the Court
Administrators time for an evidentiary hearing
to provide testimony of Mr. Bardell,
Mr. Peters, and Mr. Helt within
30 days - approximately one half day

DONE IN OPEN COURT this 1 day of Feb, 2019

JUDGE/COURT COMMISSIONER

Presented by:
(Copy received)

[Signature]
Attorney for 19730
CITY OF SELAH

Approved as to form:
(Copy received)

[Signature] 46734
Attorney for Plaintiffs

I-2

LARSON BERG & PERKINS PLLC

December 20, 2019 - 3:04 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 36793-2
Appellate Court Case Title: City of Selah v. Steve Owens and Janet Owens
Superior Court Case Number: 17-2-04115-6

The following documents have been uploaded:

- 367932_Briefs_20191220150340D3610829_1713.pdf
This File Contains:
Briefs - Respondents
The Original File Name was Respondents Brief Corrected First Page.pdf

A copy of the uploaded files will be sent to:

- bob.noelaw@gmail.com
- carmody@mftlaw.com
- girard@mftlaw.com
- lepez@mftlaw.com
- noe.robert@yakimaschools.org
- worley@mftlaw.com

Comments:

Sender Name: Daniel Case - Email: rob@lbplaw.com
Address:
105 N 3RD ST
PO BOX 550
YAKIMA, WA, 98907-0550
Phone: 509-457-1515

Note: The Filing Id is 20191220150340D3610829