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**COURT OF APPEALS
OF THE STATE OF WASHINGTON,
DIVISION ONE**

Artur Rojsza,

Respondent,

v.

City of Ferndale,

Appellant.

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BRIEF OF RESPONDENT

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I. INTRODUCTION

Artur and Margaret Rojsza (“Rojsza”) own real property located at 2147 Main Street in the City of Ferndale (“City”), which they bought in 2002. In 2005, the Rojszas began undertaking a remodel of their home. Although this remodel required a building permit, the Rojszas originally began their work without one. The City eventually instituted enforcement action, and the Rojszas ultimately obtained a building permit in April 2010, Permit No. 10001.RR (the “Permit”).

Throughout the process, it is fair to say that the Rojszas and the City have been at odds over various issues relating to the remodel on their Property, as well as other issues.¹ At some point in time (the actual date of which is disputed in this case), the City decided that: (1) the Permit had “expired”; (2) as a result, the Rojszas were required to apply for a new permit; and (3) as a condition of obtaining that “new” permit, the Rojszas were required to post a performance bond of \$30,000 and be subject to new time limitations not otherwise applicable under the building code.

As soon as it became apparent to the Rojszas that the City was in fact declaring the Permit expired and requiring them to apply for a new

¹ The Rojszas had been criminally charged for alleged violations arising out of these disputes with the City. Also, Artur and Margaret’s son, Norbert Rojsza, ran against incumbent Mayor Gary Jensen, leading to at least speculation that some of the enforcement activity was politically motivated. See CP 496-497 and CP 690 (internal memo re: alleged nuisance vehicles).

permit with onerous conditions—September 7, 2011—the Rojszas filed an administrative appeal to the City Hearing Examiner on September 16.

Before the Hearing Examiner, the City argued that the Rojszas had failed to timely appeal the administrative decisions, and were therefore forever barred from challenging them. The Hearing Examiner ultimately ruled in favor of the City, finding that the appeals were untimely filed and that the Rojszas were required to apply for a new permit, post a bond, and be subject to time limitations.

Although ultimately ruling against the Rojszas, the Hearing Examiner entered several findings and conclusions favorable to the Rojszas' case. The Hearing Examiner held that the Rojszas' original permit had actually *not* expired, contrary to the City's assertions. The Hearing Examiner also held that a letter dated May 11, 2011, which the City had relied on as its "final decision" was too vague and was not a final decision. Despite these favorable findings and conclusions, and despite the fact that the City never asserted there was a decision letter other than the May 11, 2011 one, the Hearing Examiner held *sua sponte* that a letter dated June 16, 2011 constituted a "final decision," causing the Rojszas' appeal rights to accrue, and thus, the appeal was untimely.

The Rojszas appealed the Hearing Examiner's decision to the Superior Court pursuant to RCW Chapter 37.70C, the Land Use Petition

Act (“LUPA”). The City filed no LUPA appeal. At the hearing on the merits, the Superior Court asked counsel for the City about the Hearing Examiner’s conclusion that the June 16 letter was a final decision:

Where in the June 16th letter does it state with any degree of reasonable certainty the status of the prior permit? We don’t need to talk about what it could have said, to make it clear. I just want to know what it does say and how that makes it clear. I mean, it just simply – the whole issue could have been resolved by insertion of one simple straightforward sentence somewhere in the body of the letter, but I’m trying to see if I can determine if I were a property owner, I am trying to see if I would have to read between the lines to much to figure out what this thing means with respect to the existing permit. (RP at 38).

The Superior Court ultimately reversed the Hearing Examiner and remanded with instructions to process the original Permit, with amendments. The City now appeals.

II. ASSIGNMENTS OF ERROR

While the Rojszas are the named Respondent in this appeal, this case originates from a decision of the Superior Court made pursuant to the Land Use Petition Act (RCW Chapter 36.70C “LUPA”). Because the Superior Court was acting in its appellate capacity, this Court reviews the Hearing Examiner decision as if it were standing in the shoes of the Superior Court. Thus, the Rojszas make the following Assignments of Error.

A. Assignment of Error No. 1: Finding of Fact No. XIII² is not supported by substantial evidence in part, as follows:

- that the June 16, 2011 letter was an “Order to Comply” or in any way informed the Rojszas that it was a final decision or determination upon which the 10 day administrative appeal period began to run;

- that in the June 16, 2011 letter, the Building Official invoked his authority to suspend or revoke the underlying permit.

B. Assignment of Error No. 2: Finding of Fact No. XVI is not supported by substantial evidence in part, as follows:

- That on August 30, 2011 the Appellants submitted new drawings as part of an application for a new building permit;

- The following sentence: “The record does not establish why, after all the work done by the Appellants’ agents [Attorney and Engineer] and the City of Ferndale, and submittal of the necessary drawings, information, and Permit Application, the Appellants herein decided, rather than to pick-up the permit and post the requested Performance Bond or Assignment of Savings, to file this Appeal.”

² A copy of the Findings of Fact, Conclusions of Law and Decision entered by the Hearing Examiner below is attached hereto as Appendix A, pursuant to RAP 10.4(c).

C. Assignment of Error No. 3: Finding of Fact No. XVII is not supported by substantial evidence in part, as follows:

- That Appellants had been aware the City was going to require a bond since at least August 19, 2011, 29 days before the appeal was filed;

- That only the issue of the bond was part of the decision contained in the September 7, 2011 email;

D. Assignment of Error No. 4: Conclusion of Law No. II was entered in error.

E. Assignment of Error No. 5: Conclusion of Law No. III was entered in error in part, as follows:

- To the extent it concludes that the Hearing Examiner's holding that the Permit in fact did not expire under FMC 18.12.090(C) is "moot;"

- To the extent it concludes that the City in any way required a new building permit or if it did, that it had authority to do so;

F. Assignment of Error No. 6: Conclusion of Law No. V was entered in error.

G. Assignment of Error No. 7: Conclusion of Law No. VI was entered in error in its entirety, but-for the portion where the Hearing Examiner "strongly suggests" the City of Ferndale adopt

procedures making it clear when Final Decisions or Final Determinations have been issued.

- H. Assignment of Error No. 8:** The Decision of the Hearing Examiner was entered in error.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- A.** Whether the Hearing Examiner erred in holding that the Rojszas' administrative appeal was untimely filed?
- B.** Whether the Hearing Examiner erred in holding that the Permit was actually revoked or suspended by the Building Official?
- C.** Whether the Hearing Examiner erred in holding that the International Residential Code and/or Ferndale Municipal Code authorized the City to revoke or suspend the Permit?
- D.** Whether the Hearing Examiner erred in holding that the City required the Rojszas to apply for a new permit, as opposed to merely amend the existing Permit?
- E.** Whether the Hearing Examiner erred in holding that the International Residential Code and/or Ferndale Municipal Code authorized the City to impose a performance bond and time limitation on the Rojszas?
- F.** Did the Hearing Examiner violate the Rojszas' right to procedural due process by interpreting and applying the Ferndale Municipal Code to conclude that the Rojszas failed to timely appeal?
- G.** The Constitutional Issues raised by the Rojszas were properly preserved.

IV. STATEMENT OF THE CASE³

Artur and Margaret Rojsza purchased the house located at 2147 Main Street in Ferndale, Washington in 2002. (CP 1283). The property contained an older single-family home. In April 2010, they obtained a permit to remodel their house, Permit No. 10001.RR (the "Permit"). (CP 1286; CP 742). In July 2010, the City issued a Stop Work order to the Rojszas for alleged work outside the scope of the Permit. (CP 1286). The Stop Work order was lifted on August 5, 2010 by agreement between the Rojszas and the City. (CP 1284-85).⁴

Work continued on the Rojsza property, with inspections and approvals taking place on September 10, September 21, and October 18, 2010. (CP 1287). The Rojszas called for another inspection on November 3, 2010 by calling the inspection hotline as required by the City. (CP 1287). Rather than conducting the inspection, the City responded to the inspection request by sending an email to Margaret Rojsza requesting additional information. (CP 1287-88). However, the email was

³ When appropriate, citations in this section are to unchallenged Findings of Fact entered by the Hearing Examiner below.

⁴ The Rojszas and the City had earlier entered into a Settlement Agreement which dealt with permitting issues as well as criminal nuisance charges the City had filed against the Rojszas. CP 1284-85. The Hearing Examiner accurately documented Mr. Rojszas' legitimate confusion over the scope of that Settlement Agreement as it applied to the property at 2147 Main Street. CP 1285. The confusion surrounding the "scope" of this Settlement Agreement is important in understanding the overall context of the communications between the City and the Rojszas.

improperly addressed, and Mrs. Rojsza never received it. (CP 1287-88). As a result, the Rojszas were under the impression that the next move was the City's, and the City believed the next move was the Rojszas'. The City and the Rojszas did not correspond at all on the Permit for the next five months, when a series of emails were exchanged in late April 2011. (CP 1289).

In these emails, the City was informing the Rojszas that they had failed to call for an inspection since October 2010, a fact that the Hearing Examiner ultimately found to be false. (CP 1290). The City staff involved in this issue had apparently completely forgotten about the November 3, 2010 call for inspection or the email that was sent. (CP 1290). Mr. Rojsza subsequently emailed requests for inspections on May 5 and May 9, 2011. (CP 1290-91). He also requested one via the telephone hotline on May 9, 2011. (CP 1292).

For the second time, the City did not conduct an inspection pursuant to the inspection request. Instead, the City responded via email again and informed Mr. Rojsza—erroneously—that he had not requested an inspection on the Permit since October 18, 2010. (CP 1291-92).

On May 11, 2011, Mr. Jori Burnett, in his capacity as the Building Official, sent a letter to the Rojszas. (CP 1292 (FF XII); CP 270 (May 11

Letter)).⁵ The letter is entitled “Potential Settlement Agreement” and states that the permit had expired due to a lack of inspections within 180 days. The letter also stated incorrectly that the Rojszas’ November 3, 2010 inspection request was not properly performed.

The Hearing Examiner below found that “none of the proposed conditions stated in the letter required application for a new building permit, even though it states that the City’s position is that the building permit expired. Instead, the letter is clearly oriented toward completion of the building and dismissal of the Criminal Charges....” (CP 1293). The Hearing Examiner found that the letter “is too vague to be interpreted as a Final Decision by the City that the original building permit had expired and that a new one was required.” (CP 1293).

On June 16, 2011, Mr. Burnett sent another letter to the Rojszas. (CP 277).⁶ This letter is entitled “Re: 2147 Main Street violations” and is four pages long. This is the letter the Hearing Examiner found to be a “final decision.” (CP 1293 (Finding XIII) and CP 1303-04 (Conclusion II)). This letter, however, does not state that the Permit is expired nor does it state that the permit is revoked. Instead, the letter cites International Residential Code (“IRC”) R106.4, which governs the process for amending construction documents on existing permits when construction

⁵ This letter is attached as Appendix B.

⁶ This letter is attached as Appendix C.

goes outside the approved plans. The letter indicates that the Rojszas are to submit amended plans and schedule an inspection by July 1, 2011. The letter goes on to require further follow up with the City, and closes with a request for the Rojszas to call City staff and schedule an appointment to submit their “revised plans.” (CP 280).

For the next three months, the Rojszas, their lawyer, and the City corresponded about the “requirements” of the May 11 and June 16, 2011 letters and worked through the process of amending the plans and obtaining approval by the City. (*See Generally*, CP 471; CP 473; CP 467; CP 387). The Rojszas submitted amended plans, and the City reviewed them. (CP 486-487).

While it is clear that the City believed there were still problems with the project and Permit after the June 16, 2011 “decision,” the City did not treat the process as one of a new permit application, but instead, treated it as a permit amendment.⁷ On July 14, 2011, Mr. Burnett emailed Mr. Lackey, the Rojszas lawyer: “Based upon your email, it is appropriate to require that the full engineering and related permit amendment information be submitted by no later than August 17th” (CP 467 (emphasis added)). On August 31, 2011, Mr. Burnett informed Mr. Lackey

⁷ The City was issuing criminal violations to the Rojszas during this time for “Failure to apply for a building permit for alterations to a structure (deviation from plans)” which would seem to indicate plans should be amended under R106.4. CP 110.

that the City would use the information from the original Permit to process the submitted amendments; that email was in direct response to the Rojszas' submittal of the amended plans. (CP 387).

During the months after the June 16, 2011 letter "decision" and before the September 7, 2011 email which was ultimately appealed by the Rojszas, the concept of a bond and time limitations were raised. However, the amount of the bond was never discussed until the September 7, 2011 email. (CP 177).

Further, the September 7, 2011 email was the first time the City actually made it absolutely clear that they were requiring the Rojszas to apply for a new permit, as opposed to just amending the original Permit. This email was the first time the City notified the Rojszas that new permit fees would be imposed, rather than just permit amendment fees. (CP 177, September 7, 2011 email).⁸

After the September 7, 2011 email it finally became apparent to the Rojszas and their lawyer that the City was requiring a *new* permit application and a bond of \$30,000, rather than amending the old Permit and imposing some much lower bond amount. As a result, this appeal was timely submitted on September 16, 2011. (CP 173).

⁸ This email is attached as Appendix D.

V. STANDARD OF REVIEW

This Court reviews this case from the same position as the Superior Court, applying the LUPA standards directly to the administrative record and Hearing Examiner's decision.⁹ The Rojszas have the burden here of establishing that the Hearing Examiner committed one of the following errors:

(a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;

(b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;

(c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;

(d) The land use decision is a clearly erroneous application of the law to the facts;

(e) The land use decision is outside the authority or jurisdiction of the body or officer making the decision; or

(f) The land use decision violates the constitutional rights of the party seeking relief.

RCW 36.70C.130(1).

⁹ *Griffin v. Thurston County Bd. of Health*, 165 Wn.2d 50, 54-55, 196 P.3d 141 (2008).

Standards (a), (b), (e), and (f) present questions of law, which the Court reviews de novo.¹⁰ Deference is afforded to a local authority's construction of its own ordinances, to the extent they are within its expertise.¹¹ This deference does not extend to interpretation of state law or constitutional principles.

Under standard (c), “substantial evidence” is evidence that would persuade a fair-minded person of the truth of the statement asserted. This Court must give deferential review, considering all of the evidence and reasonable inferences in the light most favorable to the party who prevailed in the highest forum that exercised fact-finding authority—here, the City.¹²

Under standard (d), “An application of law to the facts is ‘clearly erroneous’ when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.”¹³

¹⁰ *Abbey Rd. Grp., LLC v. City of Bonney Lake*, 167 Wn.2d 242, 250, 218 P.3d 180 (2009).

¹¹ *Id.*; see also RCW 36.70C.130(1)(b).

¹² *Id.*

¹³ *Norway Hill Pres. & Prot. Ass'n v. King County Council*, 87 Wn.2d 267, 274, 552 P.2d 674 (1976) (internal quotation marks omitted) (quoting *Ancheta v. Daly*, 77 Wn.2d 255, 259-60, 461 P.2d 531 (1969)).

VI. ARGUMENT

A. The Findings and Legal Conclusions Not Appealed by the City Are Conclusively Established.

The Hearing Examiner made several findings of fact and conclusions of law that were favorable to the Rojszas, despite the Rojszas ultimately losing their appeal below. The City has failed to appeal any of these findings or conclusions by timely filing and serving a LUPA petition. As a result, any findings and/or conclusions which the Rojszas do not challenge and wish to rely upon here must be considered verities and the law of this case.

LUPA is the exclusive means of appealing or challenging a land use decision.¹⁴ The Hearing Examiner's decision was a "land use decision"¹⁵ and must have been appealed pursuant to LUPA. A LUPA petition is timely only if filed and served within 21 days of the issuance of the land use decision.¹⁶

A party's failure to timely file and serve a LUPA Petition waives the right to challenge any issues which could otherwise be normally raised in a "cross-appeal" scenario. In *Lakeside Industries v. Thurston County*,¹⁷

¹⁴ RCW 36.70C.030 (RCW Chapter 36.70C is the "exclusive means of judicial review of land use decisions."). See also, *Holder v. City of Vancouver*, 136 Wn. App 104, 108, 147 P.3d 641 (2006).

¹⁵ RCW 36.70C.020(2)(a).

¹⁶ RCW 36.70C.040(3).

¹⁷ *Lakeside Industries v. Thurston County*, 119 Wn. App 886, 83 P.3d 433 (2004).

Lakeside Industries applied for a special use permit to construct an asphalt plant.¹⁸ As part of the permit process, the county issued an “MDNS” despite local citizen’s skepticism about whether the project complied with local planning policies. A citizen group appealed the MDNS to the Hearing Examiner who upheld the MDNS and granted Lakeside the permit.¹⁹

The citizen group then appealed to the county board of commissioners. The board of commissioners reversed the Hearing Examiner and denied the permit, but the denial was on grounds completely unrelated to the MDNS.²⁰

Lakeside filed a LUPA petition in superior court challenging the Board’s reversal. That petition was filed on October 24, day 20 of the 21 day appeal period.²¹ The citizen groups never filed their own LUPA petition within that 21 days period but tried to raise issues in a “cross-appeal.” The superior court summarily denied the citizen groups’ challenges as untimely under LUPA,²² holding that the citizen groups “cross-appealed the non-significance determination within 21 days of Lakeside’s LUPA petition, but not within 21 days of the Board’s

¹⁸ *Id.* at 890.

¹⁹ *Lakeside*, 119 Wn. App at 892.

²⁰ *Id.* 892-893.

²¹ *Id.* at 900.

²² *Id.* at 900-901.

decision.”²³ The *Lakeside* court noted that counterclaims are generally not permitted in administrative appeals, and the 21 day filing period in RCW 36.70C.040(3) is a jurisdictional requirement and unambiguous.

Here, the City never filed a LUPA petition to the superior court challenging any of the Hearing Examiner’s Findings or Conclusions. The City “won” the appeal, but obviously “lost” on some of the factual and legal issues it raised in response to the Rojszas’ administrative appeal before the Hearing Examiner. As a result, the City was required to file a LUPA petition within 21 days of the Hearing Examiner decision to preserve any of its potential challenges to those adverse rulings. The City failed to do this.

1. Favorable Findings/Conclusions. Any and all findings or conclusions which were not appealed through LUPA are now verities. The following are rulings that the Rojszas specifically rely upon in this appeal which are now conclusively established in this case.

a. May 11, 2011 Letter Was Not a Final Decision.

The Hearing Examiner held that the May 11, 2011 letter was “too vague” to be considered a final decision that the Permit had expired. (CP 1293).

b. The Original Permit (10001.RR) Did Not Expire.

In Conclusion of Law III, (CP 1304-1305) the Hearing Examiner held that

²³ *Id.* at 901-902

the original Permit did not expire under FMC 18.12.090 as the City suggested.

c. The Hearing Examiner's Authority is Limited.

The Hearing Examiner does not have authority to set aside local ordinances. (CP 1306). The Hearing Examiner did not have jurisdiction or authority to address the constitutional arguments raised by Rojszas based on Procedural Due Process. (CP 1308).

d. Procedures Related to Notice of Final Decisions.

In his decision finding the June 16, 2011 letter as "final decision," the Hearing Examiner strongly suggested that the City of Ferndale adopt procedures to make it clear to applicants when a final appealable decision is made. (CP 1308). The Hearing Examiner also stated it would be "good practice" for the City to specifically note when they have made Final Decisions or Final Determinations and to set forth applicable appeal rights. (CP 1308).

B. The Rojszas' Administrative Appeal was Timely Filed.

Ferndale Municipal Code 14.11.070.B governs when an appeal should be filed:

Every appeal to the Hearings Examiner of an administrative interpretation or administrative permit decision shall be filed in writing with the Planning and Building Director

within 10 calendar days from the date of the interpretation or decision regarding the matter being appealed.²⁴

Thus, the “date of the interpretation or decision” is the point in time in which the 10 day period accrues. The ordinance does not state the decision being appealed must be “final”; rather, it simply indicates any decision must be appealed.

The Hearing Examiner erroneously held that the 10 day period began to run from two different times for the two different decisions appealed, both of which were more than 10 days before the day the appeal was filed on September 16, 2011. (CP 1301-1304).²⁵ On the expiration issue: the Hearing Examiner held that the June 16, 2011 letter adequately notified the Rojszas of an appealable decision. (CP 1304). On the bond issue: the Hearing Examiner held that the Rojszas had been notified of an appealable decision to impose a performance bond on August 19, 2011, and then again on August 31, 2011 and September 1, 2011. (CP 1302).

1. A Decision Must be sufficiently “Final” For Appeal Timelines To Accrue.

No exhaustion of administration remedies requirement can arise without issuance of a final, appealable order from the City.²⁶ An agency’s letter does not constitute an order, unless the letter clearly affixes a legal

²⁴ Copy attached as Appendix A.

²⁵ (Conclusion of Law III, addressing the timeliness issue for both the “expiration of permit” as well as the “bonding” issue).

²⁶ *WCHS Inc., vs. City of Lynnwood*, 120 Wn.App 668, 679, 86 P.3d 1169 (2004).

relationship as a consummation of the administrative process.²⁷ Such a letter must be so written as to be clearly understandable as a final determination of rights; doubts as to the finality of such communications must be resolved in favor of the citizen.²⁸

In *Lee v. Jacobs*,²⁹ a State agency argued that letters denying workers' compensation benefits constituted final orders. The Court held:

“That is nonsense. If every letter from every agency of state government which arrives on a lawyer's desk must be scrutinized to determine if it contains an appealable order, indeed a burden of considerable magnitude will have been created by fiction.”³⁰

In FMC 14.11.070.B as well as in FMC Chapter 18.12 (governing zoning appeals), the City has chosen to adopt an ordinance scheme authorizing a hearing examiner to decide administrative appeals of staff interpretations or administrative permit decisions. Under LUPA, these administrative remedies *must* be exhausted before court review can commence. Thus, the timing of filing an administrative appeal, if missed, can severely limit a property owner's ability to challenge government

²⁷ *Id.*; See also, *Valley View Industrial Park v. City of Redmond*, 107 Wn.2d 621, 634, 733 P.2d 182 (1987).

²⁸ *Id.*

²⁹ *Lee v. Jacobs*, 81 Wn.2d 937, 506 P.2d 308 (1973).

³⁰ *Id.* at 940-941.

decisions directly affecting their property rights.³¹ As demonstrated by this case, failure to timely file an administrative appeal will make all decisions forever valid—even illegal ones.³² It is therefore of paramount importance that when local governments exercise their police powers in derogation of individual property rights, such action and notice thereof to the owner complies with minimum standards established by law.

The FMC does not define what constitutes a final “determination” or “decision” under FMC 14.11.070.B. Instead, the Rojszas (and the Hearing Examiner) were left to guess which of the numerous emails and letters constituted a “final” and appealable decision. The Rojszas believed it was the September 7, 2011 email. The City thought it was the May 11, 2011 letter. The Hearing Examiner disagreed with both, holding it was the September 16, letter. If the City cannot even properly identify which of its own letters is a “final” decision upon which appeal rights accrue, how can the Rojszas or other citizens be expected to?

This Court recently addressed the issue of a “final decision” in the context of a LUPA appeal in *Durland v. San Juan County*.³³ There, the

³¹ In fact, the City argues that Rojszas LUPA petition should have been dismissed by the trial court because of the Rojszas’ alleged failure to exhaust administrative remedies by filing an untimely appeal. (See Appellant’s Opening Brief at 26 and 32-35).

³² *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 407, 120 P.3d 56 (2005) (“LUPA embodies the same idea expressed by this Court in pre-LUPA decisions—that even illegal decisions must be challenged in a timely, appropriate manner”).

³³ ___ Wn. App. ___, ___ P.3d ___, (No. 67429-3-I, Slip Opinion Filed October 29, 2012; Publication Ordered March 27, 2013) (2012 WL 7830034).

court was tasked with determining whether a “Compliance Plan” entered by San Juan County constituted a “final determination” under RCW 36.70C.020, and thus, a “land use decision” to which LUPA applied.³⁴ While the analysis in *Durland* was specific to LUPA whereas here it is specific to the Ferndale Municipal Code, the case is very instructive. The *Durland* court held that a

“[F]inal land use decision should memorialize the terms of the decision, not simply reference them, in a tangible and accessible way so that a diligent citizen may “know whether the decision is objectionable or, if it is, whether there is a viable basis for a challenge. [citation omitted]. It must be clear to a reviewing court what decision is presented for review.”³⁵

The facts of *Durland* are similar to this case in that there was much negotiation between the county and the permit applicant regarding the imposition of the compliance plan and performance thereafter. In determining whether the plan was a “final determination” the *Durland* court analyzed the wording of the compliance plan and even the county’s actions after issuing the plan³⁶

The court ultimately held that the compliance plan was not a final determination under LUPA. The court noted that the compliance plan had more than one possible course of action, which did not “set at rest” the

³⁴ *Durland*, ___ Wn. App. ___, Slip Op. at 9.

³⁵ *Id.* at 11.

³⁶ *Id.* at 12-13.

cause of action.³⁷ The compliance plan did not guarantee a result, but instead suggested two paths that could be followed for compliance with the code. Moreover, the plan set compliance deadlines into the future which were outside the appeal period, making an appeal at that time, “illogical.”³⁸ Finally, the compliance plan did not leave “nothing open to further dispute” as was evidenced by after-the-fact negotiation and amendment to the compliance plan by the County.³⁹ The court held that such later amendment or changes in the terms of what was put forth in the compliance plan confirmed that the initial plan was not a final determination of the applicant’s rights or obligations.⁴⁰

The appellant in *Durland* argued that the compliance plan was a final decision under *Heller Bldg., LLC v. City of Bellevue*⁴¹ and *WCHS, Inc. v. City of Lynwood*,⁴² because the County had complied with the elements enumerated in those cases.⁴³ The *Durland* court rejected this argument, stating: “While these [elements] may be necessary to find a final determination under Heller Bldg and WCHS, these cases do not say that these circumstances are sufficient for a final decision.”⁴⁴ It is

³⁷ *Id.* at 12.

³⁸ *Id.* at 14.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ 147 Wn. App. 46, 194 P.3d 264 (2008).

⁴² 120 Wn. App. 668, 86 P.3d 1169 (2004).

⁴³ *Durland*, ___ Wn. App. ___, Slip Op. at 16.

⁴⁴ *Id.* (emphasis in original).

important to note that in the case at bar, the City relies on *Heller Bldg* and *WCHS* for this same exact argument which the *Durland* court discredited.⁴⁵

Without written and published rules and procedures specifically setting forth when a decision is “final” and “appealable” rather than just another e-mail, interpretation of the city code in a manner that curtails the Rojszas’ appeal rights constitutes an “anonymous procedure”. Anonymous procedures are those that can be applied in an uncertain or discretionary fashion, and would constitute a violation of a permit applicant’s rights.⁴⁶ Under the Hearing Examiner’s interpretation of the Ferndale Municipal Code, any email could be deemed a “final decision” accruing the 10 day period. The code contains no standard of how an owner is to determine when a final decision is issued, and the Hearing Examiner enunciated none either. In the absence of a specific direction in this regard, leniency must favor a property owner’s appeal rights.

Finally, the Ferndale Municipal Code must be interpreted and applied in a manner which promotes justice:

1.04.080 Construction.

The provisions of the ordinances of the City of Ferndale, and all proceedings under them, are to be construed with a view to effect their objects and to promote justice.

⁴⁵ See Appellant’s Opening Brief at 33, footnote 120.

⁴⁶ See *WCHS, Inc. v. Lynnwood*, 120 Wn. App at 677.

The Hearing Examiner interpreted the Ferndale Municipal Code in a manner which causes injustice, by labeling a series of confusing and equivocal emails and letters as final administrative “decisions” affecting the Rojszas’ appeal rights. The superior court did not err in reversing the Hearing Examiner.

2. The June 16, 2011 Letter Was Not A Final Decision.

The Hearing Examiner held that the June 16, 2011 letter⁴⁷ was a “Final Decision” that adequately notified the Rojszas that the original permit had expired and that a new permit was to be required. These findings and conclusions are not supported by the law or the record.

The June 16, 2011 letter never says a “new” permit must be applied for. The letter only mentions providing necessary information, “including building permit applications” but it does not state that the information or application is for a new permit. The letter cites the building code provision authorizing the City to revoke or suspend a permit, but it does not take the next step and expressly state that the Permit was revoked.⁴⁸ Instead, the letter goes directly into a citation to IRC R106.4 which deals with permit amendments.

⁴⁷ (CP 277-280) Appendix C.

⁴⁸ The trial court noted this deficiency as well, and counsel for the City agreed. RP at 40. Despite this, the City and Hearing Examiner both rely on this letter as notice to the Rojszas that the Permit had been revoked.

The reality is, instead of being “expired,” “suspended” or “revoked” the City was actually treating the original permit as still alive, or at a minimum, being extremely equivocal about it. IRC R106.4, as directly quoted in the June 16, 2011 letter states:

R106.4 Amended Construction Documents. Work shall be installed in accordance with the approved construction documents, and any changes made during construction that are not in compliance with the approved construction documents shall be resubmitted for approval as an *amended* set of construction documents.”⁴⁹

This is what the Rojszas (and their counsel) believed they were doing when they submitted updated plans and engineering calculations. Pursuant to the letter and the IRC, they were submitting amended construction documents. They were not applying for a new permit, and, they had no idea that a “final appealable decision” was included in that June 16, 2011 letter. In fact, absent from the record is even a cover sheet for a “new” permit application submitted by the Rojszas. The Hearing Examiner’s findings and conclusions to the contrary are in error.

After June 16, 2011, the Rojszas were trying to comply with the specific items listed in the June 16, 2011 letter. The letter threatened criminal charges and fines if the Rojszas did not provide appropriate information and inspections. The Rojszas did their best to comply with

⁴⁹ CP 278 (bottom of letter, quoting IRC) (emphasis added).

this letter by submitting *amended* permit documents and submitting to inspections as required by July 1, 2011.⁵⁰ The Hearing Examiner’s reliance on other conclusions or findings is erroneous and unsupported by the evidence in the record.

On July 7, 2011, the City sent the Rojszas’ attorney, Mark Lackey, a letter. The reference line of this letter states “RE: 10001.RR – 2147 Main Street.”⁵¹ The letter goes on to discuss the need to submit additional information and plans. It does include the phrase “plans must be prepared before building permits are issued” but it is in no way clear whether it means “new” permits or simply amended permits.

Jeff Stover,⁵² a licensed architect and project manager for the remodel, drew up the original plans for the remodel and the amended plans that were submitted. None of the changes from the original to the amended were major. Instead, they were normal changes that one would see in any residential construction project.⁵³ Attached to that declaration were the updated plans showing that contrary to what the City has claimed

⁵⁰ See *Generally*, CP 484 (Letter from Jori Burnett acknowledging the July 1, 2011 inspection took place, as required by the June 16, 2011 letter); CP 491 (email string between the City and Rojszas attorney scheduling the July 1 inspection where everyone is referencing the original permit number, 10001.RR).

⁵¹ CP 484.

⁵² (CP 1202).

⁵³ *Id.* The Court can compare for itself the original plans from January 2010 (CP 774-779) to the amended plans from July 9, 2011 CP 1205-1212.

throughout this case, and as alleged in the June 16, 2011 letter, a “new story” was never added to the structure.

Emails between Jori Burnett at the City and Ryan Long, the Rojszas’ engineer, explain that the City gave Long more time to get the required engineering calculations to the City in response to the June 16, 2011 letter.⁵⁴ These emails also referenced the information as a permit amendment, not a new permit. The original June 16, 2011 letter said these calculations were due by July 18, 2011. The email string shows Burnett agreeing to extend the deadline to August 17, 2011. Importantly, Burnett himself states that the information required in the June 16, 2011 letter was for the purpose of a permit amendment and not a new permit:

Based upon your email, it is appropriate to require that the engineering and related **permit amendment information** be submitted by no later than Wednesday, August 17th. This should provide you with a couple of extra days, and would allow the Rojszas to prepare any other information necessary for the permit submittal.⁵⁵

Thus, in the same paragraph, Burnett states “permit amendment” and “permit submittal.”

The Hearing Examiner erred in finding and concluding that the June 16, 2011 constituted a final appealable decision, or adequately

⁵⁴ CP 439-440 (email string with most recent email on top).

⁵⁵ CP 440 (Email dated July 14, 2011 at 4:06 pm from Jori Burnett to Ryan Long)(emphasis added).

advised the Rojszas of that final appealable decision. The letter is just as, or more, vague than the May 11, 2011 letter the Hearing Examiner found to be too vague to provide such a notice.⁵⁶ Reviewing this letter in the context of the history of back and forth correspondence between the City and the Rojszas on this same subject, and perhaps more importantly, the correspondence from the City *after* the June 16, 2011 letter demonstrates (as in *Durland, supra*) it was not a final decision.

3. August 19, August 31 and September 1, 2011 Were Not Final Decisions.

The Hearing Examiner cites the August 19,⁵⁷ August 31,⁵⁸ and September 1, 2011⁵⁹ emails as each somehow constituting a final decision on the bond requirement, thereby accruing the 10 day appeal period. However, even the Hearing Examiner acknowledges that these emails do not state an amount of the bond. The City and Hearing Examiner both concede that neither the Rojszas nor their attorney was aware of the *amount* of the bond until the September 7, 2011 email. That email was timely appealed.

An important fact related to the August 19, 2011 email is the correspondence that followed it but which preceded the August 31, 2011

⁵⁶ May 11 letter is at CP 270-274) The Hearing Examiner's Finding of Fact that it was too vague to constitute notice of a final decision is at CP1292-1293 (Finding of Fact XII).

⁵⁷ (CP 303-304).

⁵⁸ (CP 306-307).

⁵⁹ *Id.*

email cited by the Hearing Examiner. In an email string on August 30, 2011,⁶⁰ Mark Lackey and Jori Burnett discuss the criminal citations being issued daily against the Rojszas after they missed the August 17, 2011 deadline to submit plans and engineering calculations. Mark Lackey asks Burnett what else the Rojszas had to do, because he thought all that had to be done was submit the amended plans and calculations. Burnett agreed that was all that was required, but told Lackey the plans had not been submitted. Lackey had thought they were, and as soon as this was realized, Lackey tells Burnett that he'll get the plans to him immediately.⁶¹ Burnett acknowledges that he received the plans the same day.⁶²

This exchange is significant because in that exchange it is clear that the issue of the bond is still up in the air. Recall, that the criminal citations and yet to be delivered plans being discussed in this exchange all arose out of the June 16, 2011 letter and its requirements to amend the permit. Thus, at the time of the emails, the Rojszas and their lawyer were trying to jump through the hoops the City of Ferndale had set out for them. They were trying to determine what amount of bond might be required, and they were working on amending their permit.

⁶⁰ CP 397-398.

⁶¹ CP 391.

⁶² CP 387.

The dollar amount of a bond is a critical component of the City issuing a final decision on imposing a bond, and critical in an applicant determining whether to assert their appeal rights. At no point prior to the September 7, 2011 email did the City notify the Rojszas of the amount of the possible bond. Considering this, as well as the informal context of the e-mails being exchanged, the Hearing Examiner erred in finding and concluding that e-mails on August 19, 2011, August 31, 2011 and September 1, 2011 constituted a final decision.

C. If the Rojszas' Appeal Was Untimely Under the Ferndale Municipal Code, Their Rights to Procedural Due Process Were Violated.

A Hearing Examiner Decision can be overturned in a LUPA proceeding if the decision infringes on the constitutional rights of the appellant.⁶³ Here, under the facts of this case, if the Hearing Examiner's decision regarding timeliness of the appeal is upheld, the City of Ferndale violated the Rojszas' Procedural Due Process rights.

Procedural Due Process protections arise from both the United States Constitution and the Washington State Constitution.⁶⁴ Parties whose property and liberty rights are to be affected by governmental action are entitled to be heard; "and in order that they may enjoy that right

⁶³ RCW 36.70C.130(1)(f).

⁶⁴ *Olympic Forest Products, Inc., v. Chaussee Corp.*, 82 Wn.2d 418, 421, 511 P.2d 1002 (1973).

they must first be notified.”⁶⁵ Thus, “notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections” must be provided.⁶⁶

The question here is whether the “notices” of final decisions that the Hearing Examiner found sufficiently apprised the Rojszas of the accrual of their appeal rights, were in fact “reasonably calculated under all circumstances” to apprise the Rojszas that their failure to act would cause them to forever lose rights. We know that the Rojszas’ and their attorney’s subjective belief is that notice was not provided.

Whether Due Process has been afforded a particular litigant must be individually analyzed in each case. “Due process is a flexible concept; the exact contours are determined by the particular situation.”⁶⁷ The right to notice and a meaningful opportunity to be heard are critical. Determining what process is due requires consideration of “(1) the private interest involved; (2) the risk that current procedures will erroneously deprive a party of that interest; and (3) the governmental interest involved.”⁶⁸

⁶⁵ *Id.* at 422.

⁶⁶ *Id.*

⁶⁷ *Downey v. Pierce County*, 165 Wn. App 152, 164, 267 P.3d 445 (2011).

⁶⁸ *Id.* at 165.

1. Private Interest Involved. The Rojszas face monetary penalties if they are not able to assert their appeal. They will have to buy (or deposit cash for) a \$30,000 bond to complete their project, pay additional permit fees, and be subject to stringent timelines not otherwise applicable to them. If they fail to meet these timelines, the City would have the authority to call the bond and hire contractors to “finish” the Rojszas’ residence. Further, the Rojszas will have lost the right to their existing building permit and the vested rights attendant thereto.⁶⁹ The Rojszas will have to pay thousands in “new” permit fees.

This is a “deprivation” case with a right to a pre-deprivation hearing. The Rojszas were deprived of their existing building permit when it was declared “expired” by the City or later “suspended” or “revoked” by the Hearing Examiner. The Rojszas have an inherent property interest in their residence and ensuring they do not face orders to demolish or remove portions of it or even have a new contractor hired by the City take over the remodel of their residence against the Rojszas’ will. The individual private interests of the Rojszas at stake here are high.

⁶⁹ See RCW 19.27.095

2. Risk of Current Procedures Depriving a Party of the Interest.

The risk presented by this situation is made abundantly clear by the facts and circumstances of this case. If an administrative appeal deadline is missed, a grievant has no right to a hearing, and due to exhaustion requirements of LUPA, no right to go to court. This means that the grievant would have no constitutional meaningful opportunity to be heard before their rights are deprived. This further means that a grievant could never challenge even illegal or unconstitutional decisions.

This case, as in the *Downey v. Pierce County* case cited *supra*, involves a situation where the hearing contemplated is labeled an “appeal” but for Due Process purposes it is not. Instead, here, like in *Downey* the hearing examiner “appeal” below was actually the first opportunity for the Rojszas to engage in an evidentiary and adversarial hearing to contest the deprivation of their rights.⁷⁰ Thus, the risk of depriving the Rojszas of their rights to a meaningful opportunity to be heard is conclusively proven here, by virtue of the fact that the Hearing Examiner substantively ruled in their favor on many grounds but threw out the appeal due to the timeliness issue.

⁷⁰ *Downey*, 165 Wn. App at 167.

3. Governmental Interest Involved. The governmental interest involved here is legitimate, inasmuch as the City has an interest and obligation to enforce its building and zoning codes. The Rojszas do not contest this interest, and in fact, their assertion of their rights does not hinder the City's goals to protect this interest, rather, it bolsters and legitimizes it. However, the City's motivations here were more about aesthetics than life-safety. The City wanted to force the Rojszas to finish their remodel because they thought it was unsightly, even when the City itself acknowledged that the code allowed for virtually continuous construction.⁷¹ The City itself refers to the project as a "nuisance."⁷²

The governmental interest involved in this case is not whether the City can enforce its life-safety codes. The City has proven it is capable of issuing definitive "stop work orders" and criminal citations which halt all construction. Instead, the real "governmental interest" furthered by the City is whether the City can label equivocal emails and letters as "final

⁷¹ In an August 6, 2010 email discussing setting submittal deadlines in the compliance negotiation to lift the 2010 stop work order, Building Official Jori Burnett stated to Rojsza engineer Ryan Long: "However, we have concerns that without a submittal date for the revised plans, and with the understanding that a building permit can remain active for nearly unlimited period of time provided that periodic inspections take place, it is conceivable that plans would not need to be submitted for many months." CP 660 (emphasis added).

And again, in a November 2010 email between Jori Burnett and staff, "It's sort of like the Art Rojsza scenario—we've designed our codes with the expectation that people want to finish their work. But if they want to have an ongoing project forever, we're limited in what we can do." CP 618.

⁷² Appellant's Opening Brief at 44.

decisions” when all that would be required to clear up the confusion is the inclusion of the simple phrase at the top “This Letter is a Final Appealable Decision under FMC 14.11.070.B.” This interest is minimal at best, particularly when weighed against the Rojszas’ property and personal interests at stake.

The Hearing Examiner “strongly” urged the City to adopt a policy of using clear language notifying applicants of final decisions. Requiring the City to provide this information on final decisions in a manner that protects the Rojszas’ (and other citizens’) rights to notice and a meaningful opportunity to be heard would be relatively easy and promote justice as required under the code. Whatever interest the City has in enforcing the zoning and building codes would not in any way be thwarted by instituting procedures which ensure citizens are adequately notified of decisions affecting their property rights.

The City argues in its opening brief that any due process hearing requirement was satisfied by the administrative hearing that took place. The City misses the point of the argument: it is the “notice” portion of “notice and opportunity to be heard” that is the problem here, not the hearing. While the Hearing Examiner decided all the issues, he still dismissed the appeal for being untimely; a meaningless hearing does not satisfy Due Process.

The procedure of the hearing that was held before the Hearing Examiner was more than adequate. This is not the deficiency however. Rather, it was the procedural basis for dismissal that runs afoul of the constitution. The fact that the Hearing Examiner found that the Rojszas' permit did not actually expire shows the prejudice that occurred here. Had the City provided a notice reasonably calculated to inform the Rojszas of the decision, notifying them of their appeal rights, the Rojszas could have appealed and prevailed on that issue, as demonstrated by the actual decision.

As will be addressed further below, the Hearing Examiner's ruling on the propriety of the bond is clearly erroneous in light of the finding that the permit did not expire. The City provides no legal authority that any section of the Ferndale Municipal Code other than FMC 18.12.090.C allows the City to impose a bond on the Rojszas. Had the Hearing Examiner not dismissed the appeal based on timeliness, even if a new permit was required because the original Permit was "revoked", the bond could not have been required nor time restrictions imposed. The result of the appeal, therefore, would have been different. This shows a true prejudice to the Rojszas and demonstrates that because of a defective notice of a final decision, the Rojszas were found to have failed to timely appeal, giving them no real meaningful opportunity to be heard.

D. Regardless of Whether the Permit Was Revoked or Suspended, A Bond and Time Restrictions Cannot Be Imposed.

Both the City and the Hearing Examiner cite the same Ferndale Municipal code provision as providing authority for the City to impose a bond and time restrictions: FMC 18.12.090. Close scrutiny of this code section is, therefore, warranted. FMC 18.12.090 states in its entirety:⁷³

18.12.090 Building permits – Expiration.

A. If the work described in any building permit has not commenced within 180 days from the date of issuance thereof, said permit shall expire and be null and void.

B. If the work described in any building permit has commenced but there has been no construction activity for a period of 180 days, as evidenced by a failure to call for necessary inspections, said permit shall expire, and automatically become null and void.

C. The Building Official may send written notice of expiration to the persons affected together with notice that work as described in the expired permit shall not proceed unless and until a new building permit has been obtained. Such new permit may be based on the original application or on a new application. The new permit may include limitations on time allowed for substantial completion of the work, and provisions for a reasonable performance bond to ensure completion within the time limit set. (Ord. 1400 § 2, 2006)

⁷³ This code section was repealed in 2012 and a new code section addressing building permit expiration was adopted in FMC Chapter 15.04. See Ferndale Ordinance No. 1723 (2012) and Ferndale Ordinance No. 1721 (2012). The new code in no way resembles the code at issue in this case and no longer contains authority to impose a bond.

The language in this statute is unambiguous—a performance bond and time limitations can be imposed *only* if a permit has first expired, and then a new permit is issued. The language authorizing a bond or limitations on time allowed for substantial completion does not apply to the “revocation” or “suspension” of building permits—authority to revoke or suspend is found in the International Residential Code, R105.6.⁷⁴

The Hearing Examiner has already ruled that the original Permit, 10001.RR did not expire and that ruling cannot now be changed.⁷⁵ As a result, the Hearing Examiner’s findings and conclusions that a bond was appropriately imposed on a new permit required not as a result of “expiration” under FMC 18.12.090 but as a result of “revocation” under IRC R105.6 is clearly erroneous.

In an attempt to avoid the fact that the only authority the City had to impose a bond arises out of FMC 18.12.090.C, the City will most likely argue it has some type of inherent authority to impose a bond, above and beyond what the Ferndale Municipal Code explicitly states. Before the trial court, the City cited the case of *Pacific County v. Sherwood Pacific*⁷⁶

⁷⁴ IRC R105.6 can be found at CP 1166 and is also attached herein as Appendix E.

⁷⁵ Ironically, the City argues for the first time on appeal here that the bond issue has been prematurely appealed by the Rojszas (Opening Brief at 48). Aside from being completely opposite of their legal positions below, this argument is a red herring because the Hearing Examiner and Rojszas agree the bond was imposed through a final decision—it is just an issue of when that decision was formally made.

⁷⁶ 17 Wn. App. 790, 567 P.2d 642 (1977).

in support of this proposition. The City cited *Sherwood* suggesting it authorizes a City to impose a bond based on its inherent authority, without a specific enabling ordinance adopted by the city council.

A review of *Sherwood* demonstrates it in no way stands for the proposition the City suggests. The *Sherwood* case simply held that a Pacific County ordinance requiring a developer to post a performance bond during development was authorized under the general enabling statutes related to county authority. The *Sherwood* case merely stands for the proposition that a county (or city) may adopt an ordinance granting its administration authority to impose a bond. It did not, however, hold that a city has bonding authority without first adopting a local ordinance granting its administration such powers.

This is the distinguishing factor making *Sherwood* completely inapposite. In *Sherwood*, Pacific County had an express ordinance authorizing its administration to impose the bond, and the county followed that ordinance. Here, the City concedes the only ordinance authorizing it to impose a bond is FMC 18.12.090.C. The City copes with this problem by making the strained argument that despite the fact FMC 18.12.090.C addresses only expired permits, it somehow also provides authority for the City to impose a bond and time limits when a permit is revoked under IRC R105.6.

Because the Hearing Examiner specifically held that the original Permit did not expire, and FMC 18.12.091.C is applicable only to permits that have expired, neither a bond nor timeline requirement can be imposed on the Rojszas, even if the original Permit was “revoked” under IRC R105.6.

E. The Hearing Examiner Erred In Holding the City Could Require a New Permit.

Because the Permit did not expire, the only way the Hearing Examiner could justify requiring the Rojszas to apply for a new permit is by declaring the original Permit revoked or suspended. The authority to revoke or suspend a permit arises only out of the IRC:

R105.6 Suspension or Revocation. The building official is authorized to suspend or revoke a permit issued under the provisions of this code wherever the permit is issued in error or on the basis of incorrect, inaccurate or incomplete information, or in violation of any ordinance or regulation or any of the provisions of this code.⁷⁷

1. The City did not In Fact Revoke or Suspend the Permit.

The June 16, 2012 letter is cited by the Hearing Examiner as the point at which the City notified the Rojszas that their permit was revoked. All parties involved agree that the letter recites R105.6 and includes the following phrase: “As a result, as the Building Official of the City of

⁷⁷ CP 1166 and Appendix E.

Ferndale, I have determined that it now appears that the permit was issued on the basis of incorrect, inaccurate, and incomplete information.”⁷⁸

What is also clear is that the letter stops there. That is it. There is no “and therefore your permit is revoked” or similar language. The trial court focused on this fact and the City conceded at oral argument that the letter in no way expressly states that the permit is revoked or suspended.⁷⁹ Under these circumstances, it was error for the Hearing Examiner to declare that the Rojszas’ permit was in fact revoked and that the decision revoking it was contained in the June 16, 2011 letter.

Throughout this case, the City has hung its hat on the argument that the permit expired; revocation was an afterthought at best. The City’s May 11, 2011 letter demonstrates this⁸⁰ as well as the inquiry by the trial court of the City’s counsel at the hearing on the merits below:

THE COURT: They [the Rojszas] submitted an application for a new building permit?

MS. MORRIS: Well, they submitted the revised plans and the information and the city told them it’s ready to pick up.

THE COURT: Yeah. I saw that in the regard [sic]. Did they ever apply for it?

MS. MORRIS: They submitted the information.

⁷⁸ CP 279.

⁷⁹ RP at 40. The Rojszas encourage this Court to closely review the questions by the trial court and answers by the City as found in the transcript of the hearing as it provides valuable insight into the rationale of the trial court. RP at 37 to 51. While the Rojszas recognize that the trial court’s ruling is typically deemed “surplusage” the City seems to criticize the trial court for entering its order “without finding.” (Appellant’s Opening Brief at 3). The City expressly requested that the trial court not adopt findings or conclusions. RP at 65.

⁸⁰ CP 270-274.

THE COURT: They submitted the information.⁸¹

The City has no reasonable answer for the fact that the Rojszas did not even submit a cover sheet for a new permit or take any other action which would indicate their subjective intent to apply for a “new permit.” The City never actually revoked the permit.

2. The City Had No Authority to Revoke or Suspend the Permit.

Even if the City tried to revoke the Permit, they could not have legally done so. IRC Section R105.6 authorizes the Building Official to revoke or suspend a permit under very specific circumstances: when a permit is

- *issued in error, or*
- *on the basis of incorrect, inaccurate or incomplete information, or*
- *in violation of any ordinance or regulation or any provisions of this code.*

Thus, by its own terms, the IRC authorizes a permit to be revoked only if it was **issued** based on the enumerated criteria. Here, permit No. 10001.RR was not issued in error, it was based on good information, and not in violation of any code provision. Thus, the Permit was not issued incorrectly and cannot therefore be revoked or suspended.

IRC R106.4 bolsters this interpretation. IRC R106.4,⁸² which is quoted in the June 16, 2011 letter and copied verbatim above on page 25

⁸¹ RP 50.

supra states that “any changes made during construction that are not in compliance with the approved construction documents shall be resubmitted for approval as an amended set of construction documents.”⁸³ Thus, if changes are made during construction that do not follow the original “construction documents,” the code permits those “construction documents” to be amended, but the permit cannot be revoked. This makes sense, since revoking a correctly issued permit would serve to invalidate the work previously performed that was within the scope of the original construction documents.

The City cites *Heller Bldg*⁸⁴ in support of the proposition that the Hearing Examiner was correct in finding the permit revoked on the sole basis that work outside the scope of the original permit was performed.⁸⁵ *Heller* is inapposite on this issue. While it is true that *Heller* held the permit revocation in that case was appropriate, the basis for that revocation was different than alleged here. In *Heller*, the original permit application contained incorrect information regarding the value of the remodel. When corrected, the *original permit* was deemed to be in

⁸² CP 1167. Attached hereto as Appendix F.

⁸³ “Construction Documents” are defined in the IRC Section R202 as those “graphic and pictorial documents prepared or assembled for describing the design, location and physical characteristics of the elements of a project necessary for obtaining a building permit.”

⁸⁴ 147 Wn. App. 46, 194 P.3d 264 (2008)

⁸⁵ See Appellant’s Opening Brief at 37-38.

violation of the city's land use code.⁸⁶ Thus, revocation of the *original permit* was justified and none of the work performed thereunder was appropriate.

Here, unlike *Heller*, the original permit had no such errors or deficiencies. When the Rojszas performed work outside the scope of the original construction drawings, the work done within the scope of the original permit did not automatically violate the code as in *Heller*. Rather, the original permit was still valid and legal as was the work performed pursuant thereto. The work outside the scope of the original construction documents needed to be covered by a permit and it is the amendment process under R106.4 which should be followed (or violations and stop work orders issued).

F. The Court Must Consider All of the Rojszas' Arguments.

The City expends great effort arguing that the Rojszas failed to preserve their constitutionally based arguments because they allegedly did not preserve them below. The City is wrong.

⁸⁶ *Heller*, 147 Wn. App. at 59-60 ("The scope of work under HBL's permit was limited by BCC 20.20.560, which governs the extent to which nonconforming structures and sites can be remodeled without requiring the structure or site to come into compliance with current code requirements." The parties originally agreed the remodel valuation was just under the 30% range, but this was based on the applicant's statement that the foundation was sound. During construction HBL discovered the foundation was not sound, and needed major repairs, thereby increasing the valuation of the remodel to over 30%. Once the project value increased the original permit violate the land use code.)

1. The City is Barred from Raising Issues of LUPA Jurisdiction.

The City argues that the Rojszas failed to substantively raise the constitutional issue before the Hearing Examiner and as a result failed to exhaust their administrative remedies. The City argues that without exhaustion of administrative remedies, the trial court did not have LUPA jurisdiction to hear this part of the Rojszas' appeal.

Assuming for argument that the City is correct, the City is still prohibited from raising it now. Under LUPA, a failure to exhaust administrative remedies constitutes a jurisdictional challenge. LUPA is the sole method of appealing land use decisions, and by virtue of the statutory definition of a "land use decision" in LUPA, a party cannot have a "land use decision" to appeal unless all administrative remedies are first exhausted.⁸⁷

Under LUPA, the City was required to raise any jurisdictional challenges at the initial hearing, pursuant to RCW 36.70C.080(3). Failure to do so is a complete waiver of the defense. Here, the City stipulated to entry of an agreed order establishing this Court's jurisdiction and waiving

⁸⁷ See RCW 36.70C.020(2) (definition of land use decision); *See Also West v. Stahley*, 155 Wn. App 691, 697, 229 P.3d 943 (2010) (holding that in LUPA, exhaustion of administrative remedies is akin to a statute of limitations, is a fundamental tenet of LUPA and serves as an absolute bar on review if not accomplished).

all defenses under RCW 36.70.C.080(3).⁸⁸ The City is barred from raising this issue.

2. The Rojszas Can Now Raise the Due Process Issue.

If this Court reaches the substantive issue raised by the City in this regard, the Rojszas still prevail. This Court has jurisdiction to reverse a hearing examiner who commits constitutional error. Specifically, RCW 36.70C.130(1)(f) allows this Court to reverse the Hearing Examiner's decision if it "violates the constitutional rights of the party seeking relief."⁸⁹ In their LUPA petition, the Rojszas specifically asserted this issue.⁹⁰

There was no way to raise the constitutional issue below because it had not yet arisen. Had the Hearing Examiner determined the Rojszas' appeal was timely but upheld the City's determinations on substantive grounds, this issue would not even exist in this appeal. The Hearing Examiner created the issue by dismissing the appeal as untimely.

In support of its argument, the City cites *Harrington v. Spokane County*.⁹¹ In *Harrington*, the petitioner filed a Land Use Petition

⁸⁸ See Superior Court Docket Sub No. 18 (Stipulation and Agreed Order in Lieu of Initial LUPA Hearing, Filed April 12, 2012); Document designated in Respondents' Supplemental Designation of Clerks Papers on April 22, 2013.

⁸⁹ Further, RAP 2.5(a)(3) permits an appellant to raise a constitutional issue for the first time on appeal.

⁹⁰ CP 14.

⁹¹ See Appellant's Opening Brief at 40.

appealing an administrative decision without first filing an administrative appeal at all.⁹² Harrington justified skipping this procedure on the basis that his only claim was an as-applied constitutional challenge. The *Harrington* court held that “administrative review is . . . required to develop the facts necessary to adjudicate this “as applied” constitutional challenge.”⁹³

The *Harrington* court recognized that administrative appeal and exhaustion requirements permit the agency below to correct any potential errors it may have made.⁹⁴ This rationale makes sense:

The question is not whether the administrative procedure can respond to the charge of unconstitutionality, but whether the procedure can alleviate any harmful consequence of the ordinance to the complaining party.⁹⁵

The purpose of the doctrine of exhausting administrative remedies is to allow a factual record to be developed below, and also, to afford the city the opportunity to correct any mistakes thereby avoiding intervention of the courts. Here, it is the Hearing Examiner’s decision which runs afoul of the constitution. Until the Hearing Examiner issued its final

⁹² *Harrington v. Spokane County*, 128 Wn. App. 202, 207, 114 P.3d 1233 (2005).

⁹³ *Id.* at 210.

⁹⁴ *Id.* at 211.

⁹⁵ *Ackerley Communications, Inc. v. City of Seattle*, 92 Wn. 2d 905, 909, 602 P.2d 1177 (1979)

decision, there was no determination by any official that the June 16, 2011 letter was a “decision” to be appealed.

Further, even if the issue had been ripe at the time of the administrative hearing, the Hearing Examiner had no authority to address it. The Hearing Examiner had no jurisdiction to decide issues based on constitutional grounds, as he himself confirmed in his findings and conclusions. The Hearing Examiner was bound by the Ferndale Municipal Code, for better or for worse. The law does not require the Rojszas to fully brief and argue legal issues which even the City and Hearing Examiner admit could never have been resolved in the administrative proceeding.⁹⁶

The purpose of raising the issue below—to develop the factual record—was satisfied here. In light of the hundreds of pages of exhibits and numerous declarations submitted by both parties, the City surely is not asserting it had no opportunity to develop the record on this subject. The constitutional issue exists *because* of the administrative review process, not in spite of it. The issue is properly before this Court.

⁹⁶ *Orion Corp. v. State*, 103 Wn.2d 441, 458, 693 P.2d 1369, 1379 (1985) (courts will not require vain and useless acts. “The administrative remedies which must be exhausted are only those which promise adequate and timely relief.”).

G. The Trial Court’s Order on Remand Is Explicit and Valid.

The City complains that the trial court’s order remanding the permit is not specific enough as to the basis for the reversal, particularly with respect to the constitutional violations alleged.⁹⁷ However, the City cites no authority demonstrating that the trial court was obligated to explain itself. Moreover, the City does not provide a rational reason why the trial court’s order need be more specific, particularly in light of this court’s *de novo* review of the administrative record.

The bases for the order and remand are sufficiently set forth in the order itself. An express determination of whether the court ruled on the constitutional issue is unnecessary because the order on the merits⁹⁸ sufficiently orders that the Hearing Examiner is reversed and directs what should occur on remand. The trial court had authority to make this order pursuant to RCW 36.70C.140. If this Court finds on the merits in favor of the Rojszas, the trial court should be summarily affirmed.

VII. CONCLUSION

For the reasons stated herein, the Rojszas respectfully request this court AFFIRM the Superior Court.

⁹⁷ See Appellant’s Opening Brief at 6, Assignment of Error No. 4.

⁹⁸ CP 1464-1466.

RESPECTFULLY submitted this 22nd day of April 2013.

BELCHER SWANSON LAW FIRM, PLLC

A handwritten signature in black ink, appearing to read "Peter R. Dworkin", written over a horizontal line.

PETER R. DWORKIN, WSBA# 30394
Attorney for Respondent Artur Rojsza

CITY OF FERNDALE HEARING EXAMINER

RE: Administrative Appeal) 11001.APP
Application for)
)
Artur and Margaret Rojsza, Appellants) FINDINGS OF FACT,
) CONCLUSIONS OF LAW,
) AND DECISION

SUMMARY OF APPEAL AND DECISION

Appeal: This is an Appeal of the Decision of the City of Ferndale to require a \$30,000 Performance Bond or Assignment of Savings, as set forth in an email, dated September 7, 2011. As part of the relief requested, the Appellants asked the Hearing Examiner to enter a ruling that a new building permit was not required.

Decision: The Hearing Examiner upholds the requirement of the City of Ferndale that the Appellants obtain a new building permit for unpermitted construction work already done and construction work proposed to be done on their building, located at 2147 Main Street, Ferndale, Washington. The Hearing Examiner also upholds the requirement that the Appellants post a \$30,000 Performance Bond or Assignment of Savings to ensure completion of the work within the time limitation set forth on the new building permits.

FINDINGS OF FACT

I.

Background Information

Appellant/Property Owner: Artur and Margaret Rojsza

Appellant Representative: Mark Lackey, Attorney at Law, Belcher Swanson Law Firm, PLLC

Property Address: 2147 Main Street, Ferndale, Washington

Parcel Number: 390230 501495

Location: The property is located on the south side of Main Street, directly across from the Main Street/Hamlin Avenue intersection

Zoning: City Center (CC)

Hearing Dates: November 10 and continued on December 8, 2011

Exhibits

- 1 Planning Department Staff Report
 - 1-1 Appeal Application
 - 1-2 Official Zoning Map
 - 1-3 Comprehensive Plan Map
 - 1-4 Aerial Photo/Vicinity Map
 - 1-5 Building Permit 10001.RR
 - 1-6 Public Notification Affidavits
 - 1-7 Letter dated February 8, 2010 from David Nelson
 - 1-8 Letter dated February 19, 2010 from Murphy Evans
 - 1-9 Email from Jori Burnett to Art Rojsza dated August 6, 2010
 - 1-10 Email from Jori Burnett to Ryan Long dated October 27, 2010
 - 1-11 Email exchange between Jori Burnett & Art Rojsza – November 2, 2010
 - 1-12 Email from Jori Burnett to David Nelson dated November 2, 2010
 - 1-13 Email exchange between Jori Burnett & Art Rojsza – April 26, 2011
 - 1-14 Email from Craig Bryant to Jori Burnett dated April 27, 2011
 - 1-15 Email from Jori Burnett to Art Rojsza dated April 28, 2011
 - 1-16 Email exchange between Jori Burnett & Art Rojsza – May 5, 2011
 - 1-17 Email from Jori Burnett to Art Rojsza dated May 9, 2011
 - 1-18 Email from Art Rojsza to Jori Burnett dated May 9, 2011
 - 1-19 Letter from Jori Burnett to Art Rojsza dated May 11, 2011
 - 1-20 Letter from Jori Burnett to Art Rojsza dated June 16, 2011
 - 1-21 FMC 18.12.090 – Building Permits - Expiration
 - 1-22 FMC 15.04.020 – International Residential Code
 - 1-23 International Residential Code (IRC) R105.5 - Expiration
 - 1-24 WAC 51-04-035 – Procedure for submittal of proposed local government residential amendments
 - 1-25 RCW 19.27.020 – Purposes – Objectives – Standards
 - 1-26 RCW 19.27.040 – Cities and counties authorized to amend state building code –
- Limitations
 - 1-27 FMC 18.12.200 – Appeals From Zoning Administrator Decisions
 - 1-28 FMC 14.13.070 – Governing Principles
 - 1-29 FMC 14.13.080 – Order of Proceedings
 - 1-30 Email from Jori Burnett to Mark Lackey dated August 19, 2011
 - 1-31 Email from Mark Lackey to Jori Burnett dated September 1, 2011
- 2 Appellant's Hearing Memorandum, submitted by Mark Lackey, dated November 10, 2011, [black 3-ring notebook] with attachments:
 - 2-1 Declaration of Artur Rojsza, dated November 10, 2011, with Exhibit A email and letter correspondence betw Appellant, City and Engineering Reports
 - 2-2 Declaration of Margaret Rojsza, dated November 10, 2011, with Exhibit A- AT&T Summary of Wireless Data, 11/0/10-12/01/10 (page 103 of 135) and Exhibit B AT&T Call Detail 05/02/11-06/01/11 (page 90 of 132)

- 3 Brief – City of Ferndale, prepared by Christina Farnham, dated December 6, 2011 [white 3-ring notebook] with attachments:
 - 3-1 Affidavit of Greg Young, dated December 5, 2011
 - 3-2 Affidavit of Sam Taylor, dated December 6, 2011
 - 3-3 Affidavit of Jori Burnett, dated December 5, 2011
 - 3-4 Affidavit of Craig Bryant, dated December 5, 2011
 - 3-5 Affidavit of Ryan Morrison, dated December 2, 2011
- 4 Appellants’ Supplemental Hearing Memorandum, prepared by Mark Lackey, dated December 7, 2011, with Exhibit A Ordinance #1396, Title 14 – Development Review and Application Procedures, revised August 21, 2006; Exhibit B Ordinance #1643, Chapter 14.07 Applications, 14.09, Review and Approval Processes, 14.11 Decisions and Appeals, 14.13 Public Meetings and Hearings, 14.15 Public Notices; Exhibit C State v. J.P., 149 Wash.2d 444 (2003); Exhibit D Stégriy v. King County Bd. of Appeals, 39 Wash.App. 346 (1984); Exhibit E Supplemental Declaration of Margaret Rojsza, December 7, 2011
- 5 Supplemental Brief-City of Ferndale, prepared by Christina Farnham, dated December 15, 2011, with attachments:
 - 5-1 Supplemental Affidavit of Jori Burnett, December 14, 2011, with attached Letter undated, from Jori Burnett to Art and Margaret Rojsza re: Stop Work Order – 10001.RR
 - 5-2 Supplemental Affidavit of Craig Bryant, December 14, 2011, with attached Exhibit A: Typed Text from file notes dated July 29, 2010 re: Stop Work Order dated July 29, 2010; Exhibit B: Email from Craig Bryant to Artus@COMCAST.NET, dated 11/4/10 re: Inspection request for 2147 Main Street; 2009 International Residential Code, Chapter 1 Scope and Administration
 - 5-3 Affidavit of Delivery, Deborah L. Corbett, Affiant, December 15, 2011
- 6 Appellants’ Second Supplemental Hearing Memorandum, prepared by Mark Lackey, December 22, 2011 with attachments:
 - 6-1 Second Supplemental Declaration of Margaret Rojsza, December 22, 2011
 - 6-2 Supplemental Declaration of Artur Rojsza, December 22, 2011
 - 6-3 Declaration of Jeff Stover, December 22, 2011, with Exhibit A Vicinity Map and Site Foundation Plans
- 7 Hearing Examiner Memorandum, dated Wednesday, January 11, 2012, with attached email from Chris Farnham, dated January 11, 2012
- 8 Affidavit of Craig Bryant and Jerry Shiner, January 19, 2012, with attachments
 - 8-1 Exhibit A, Site Drawings, [A-6, A-7], dated January 9, 2010
 - 8-2 Exhibit B, Rojsza: Observed Deviations from 2010 Plans
 - 8-3 Large copies of Exhibit A [8-1], with red-lines
 - 8-4 Exhibit A [8-1] Site Drawings showing red-line deviations
- 9 Affidavit of Jori Burnett re: Inspection Request, dated January 26, 2012, with attachments
 - 9-1 Email from Jori Burnett to Art Rojsza, Craig Bryant, Mark Lackey, Chris Farnham, January 5, 2012
 - 9-2 Email correspondence, Jori Burnett, Art Rojsza, Ryan Morrison, January 3 and January 4, 2012, and December 28, 2011, re: building inspection [2-pages]

- 9-3 Email correspondence, Ryan Morrison, Art Rojsza, Craig Bryant, December 23, 2011 [2-pages]
- 9-4 Email from Ryan Long to Artus, October 27, 2010 re: Inspection Report, with attached Inspection Report from Jones Engineers
- 9-5 Affidavit of Mailing, Deborah L. Corbett, Affiant, January 26, 2012
- 10 Appellants' Memorandum in Response to Examiner Memorandum Dated January 11, 2012, submitted by Mark Lackey, January 17, 2012
- 11 Second Supplemental Declaration of Artur Rojsza, dated January 31, 2012
- 12 Third Supplemental Declaration of Margaret Rojsza, dated January 31, 2012
- 13 Hearing Examiner Memorandum, dated November 14, 2011 to Jori Burnett, Chris Farnham, and Mark Lackey

Parties of Record

Artur and Margaret Rojsza
2147 Main Street
Ferndale, Washington

Appellants represented by Mark Lackey, Belcher Swanson Law Firm, PLLC
900 Dupont Street
Bellingham, WA 98225

City of Ferndale represented by Christina Farnham, Langabeer & Tull, P.S.
PO Box 1678
Bellingham, WA 98227

Jori Burnett
City of Ferndale Director for Community Development and Building Official

II.

In 2002, the Appellants purchased the property at 2147 Main Street, Ferndale, Washington. The property contains an older single-family home, which the Appellants have been renovating. The property is zoned City Center (CC); however, the Appellants' single-family residence, at this address, is a legally established nonconforming use.

The record indicates that there was a building permit issue with the Appellants on a different property located on Vista Drive. The date and details of this conflict are not in the record, but the record shows that the City believes the Appellants used an incomplete building permit application as

an approved building permit. Starting in March 2009, there is a documented ongoing conflict between the City and the Appellants regarding alleged Nuisance Violations of Chapter 8.08 of the Ferndale Municipal Code.

On October 6 and October 14, 2010, written Violation Notices were sent to the Appellants, alleging various violations of Chapter 8.08 FMC. These are unrelated to the building permit issues raised by this Appeal.

On July 29, 2010, a Stop Work Order was issued to the Appellants, based on construction activity on the property without a building permit.

In a letter, dated June 16, 2011, Exhibit 3-20 of the Hearing Examiner's file, reference is made to a Criminal Complaint against the Appellants, CB-34504, filed in Ferndale Municipal Court. The record is unclear as to the criminal violations alleged, but indicates that the violations are separate from the current ongoing controversy about construction activities without a building permit, or beyond the scope of an issued permit.

In regard to the Criminal Case, the City of Ferndale's Prosecuting Attorney and the Appellants' Defense Attorney exchanged letters in February 2010, starting with a letter from Ferndale's Prosecuting Attorney, David Nelson, dated February 10, 2010, with a response from the Appellants' Attorney, dated February 19, 2010. These letters have been characterized as a "Settlement Agreement" that could lead to dismissal of the Criminal Case. The letters indicate the contents of a proposed "Agreement," but an actual written "Settlement Agreement," outside the information contained in the letters, was not prepared. Under the discussed terms of the "Settlement Agreement," the City agreed to dismiss the pending Criminal Citations if the Appellants complied with the terms of the "Agreement." These terms required the Appellants to obtain a building permit for the construction activities that had been done or started without a building permit, and to complete the construction activities that had been done or started without a permit within 180-days.

The letter from the Appellants' Attorney in the Criminal Action, dated February 19, 2010, [Exhibit No. 8 attached to the Staff Report, which is Exhibit No. 1 in the Hearing Examiner file] set forth a proposed resolution, including a Speedy Trial Waiver for the Criminal Action, CB-34504, valid for 300-days, and a detailed agreement and time frame for the application for permits and completion of the work.

In the second to last paragraph of this letter, the Appellants' Attorney, Murray Evans, states as follows:

“Unrelated to the Notice of Violation, Rojsza does have plans for other improvements to the 2147 Main Street property. Rojsza and his representatives have had discussion with various City officials regarding those plans. Rojsza will continue to have discussions with City officials as those other plans develop. Because those plans are unrelated to C-34504 and the notice of violation, they should not be made part of this agreement.”

Much of the misunderstanding between the Appellants and the City regarding the “Settlement Agreement” was centered around Mr. Rojsza's impression, perhaps correctly, that the “Settlement Agreement” only covered construction work already done or started without a permit. The City, in various communications after Mr. and Mrs. Rojsza finally obtained a building permit, indicated the City's position that all construction allowed by the permit was part of the “Settlement Agreement,” and needed to be completed prior to dismissal of the Criminal Case.

The “Settlement Agreement” was part of negotiations in a pending Criminal Case in the Ferndale Municipal Court and the interpretation of the “Agreement” was within the jurisdiction of the Judge in that Court and was, basically, immaterial to the ongoing construction work, outside of what was allowed by the initial building permit, which started no later than July 2011. The ongoing focus on the “Settlement Agreement” by both the City and the Appellants complicated issues raised by ongoing construction work outside the work approved by the building permit issued April 9, 2010.

Mr. Rojsza's calls for inspection in November 2010 and in May 2011 were in his mind related to the work required to be completed under the building permit identified in the “Settlement

Agreement,” which was to be completed prior to dismissal of the pending Criminal Case. The City took the opposite stance, indicating that, in their opinion, all the work covered by the initial building permit had to be done within the time frame set forth in the “Settlement Agreement.”

III.

On January 12, 2010, the Appellants did apply for a building permit. The application was incomplete and later additional materials were submitted and a building permit for work on the subject property and residence was issued on April 9, 2010.

On July 29, 2010, a Stop Work Order was posted on the property, based on deviations from the construction permitted under the building permit issued on April 9, 2010.

On August 5, 2010, the Stop Work Order was lifted, subject to a number of conditions, and the Appellant was allowed to re-start construction work on the elements of the construction permitted pursuant to the issued building permit, with new plans to be submitted for the recent work done outside of that approved in the April 9, 2010, building permit.

IV.

The conditional release of the Stop Work Order was memorialized in an email from Jori Burnett to Art Rojsza, with a copy to Craig Bryant. Mr. Rojsza’s emailed response indicated he felt the City’s terms under the conditional release of the Stop Work Order were inappropriate and he was waiting for the City’s apology. In response to Mr. Rojsza’s email, on August 6, 2010, Jori Burnett responded with an email which reads as follows:

“Art, thank you for your comments. We have discussed the matter with Ryan Long and have agreed that plans must be submitted at least two weeks prior to the next inspection. The last inspection occurred on May 17, 2010, so the next inspection must occur no later than November 13, 2010 (180 days). In order for the City to review the plans for your revisions, we will require that they be submitted at least two weeks prior to the inspection; therefore, the plans must be submitted by the end of October.”

The plans referred to above were required for work started outside that approved in the April 9, 2010, building permit. The record then shows inspections and approvals on September 10, September 21, and October 18, 2010. The record does not indicate if any plan revisions were submitted prior to these inspections.

V.

An email dated October 27, 2010, from Jori Burnett to Ryan Long, Engineer for the Appellants, indicated that the City could support a one-time extension of the time period set forth in the "Settlement Agreement" for completion of the work authorized by the building permit. The email discusses a 180-day extension.

The Appellant responded in an email, dated November 2, 2010, indicating that all structural interior and exterior walls would be done within the 180-day extension, as per the City's request, putting into place a 180-day extension from November 13, 2010, to finish the construction activities identified. The extension was an agreement to have the work completed on or about May 9, 2011. This date was more than 14-months after the "Settlement Agreement" letters and well beyond the 300-day Speedy Trial Waiver agreed to by the Appellants. A violation of the Appellants' right to a Speedy Trial would require Dismissal of the Criminal Charges and made the "Agreement" irrelevant to the ongoing building permit issues.

VI.

On November 3, 2010, the Appellants called for an inspection on the Inspection Hotline, as required by the August 6, 2010, memo. The plans for the unpermitted revisions had not been submitted two weeks prior to the requested inspection date, a requirement of the City, set forth in the August 6, 2010, memo. On November 4, 2010, Craig Bryant, the Ferndale Official who would be conducting the inspection, attempted to send an email to the Appellants (Exhibit B attached to Supplemental Affidavit of Craig Bryant, dated December 14, 2011, and attached to Supplemental Brief - City of Ferndale, Exhibit #4 in the Hearing Examiner file.)

The November 4th email was apparently improperly addressed. A zero (0) instead of an (o) was typed into Comcast, so that the email was addressed to ARTUS@COMCAST.NET, instead of ARTUS@COMCAST.NET. The email was copied to Jori Burnett, who is the City's Building Official, and to Craig Bryant, the Building Inspector, perhaps to remind him that he indicated in the email he was going to contact Brian Long, the Appellants' Engineer. Exhibit B in its entirety reads as follows:

Original Message

From: Craig Bryant [CraigBryant@cityofferndale.org]

Received: 11/4/10 9:30 AM

To: ARTUS@COMCAST.NET [ARTUS@COMCAST.NET]

CC: Jori Burnett [JoriBurnett@cityofferndale.org]; Craig Bryant [CraigBryant@cityofferndale.org]

Subject: Inspection request for 2147 Main Street

Good Morning Margaret, The following is in response to your request for inspection at your house at 2147 Main Street. I tried to contact Ryan Long your engineer on 11/3/10 and was informed that he was out of town until Monday the 8th. I understand that Ryan has been out to do some on-site inspections and has generated a list of deficiencies that require correction or completion. We should probably postpone your inspection until Monday or Tuesday after I have had a chance to talk to Ryan Long regarding his list of items so I am not reproducing or misinterpreting his list. Also as a reminder, at this time the City still does not have any revised plans for the foundations on the north and the west, as the original plans showed the foundations being replaced and there are also revisions to the rear upper roof that have not been received. Contact me on Monday after I have communicated with Ryan and then we can see where he stands on his list. I hope this is not too much of an in convince [sic] for your project and look forward to hearing from you on Monday [sic]

**Craig Bryant, CBI
Building Inspector
PO Box 936
Ferndale, WA 98248
360-384-4006 ext. 206**

This email acknowledges the inspection request of November 3, 2010; indicates that the inspection should be postponed so that Mr. Bryant, the Inspector, has a chance to discuss with the

Appellants' Engineer, Ryan Long, the list of items or deficiencies that required correction or completion, and requests that the Appellant, Margaret Rojsza contact him on Monday "... after I have communicated with Ryan."

If, as it appears, the email address was mistyped, then Mrs. Rojsza did not receive the email, which is consistent with her statement made under oath in her affidavit, attached to Appellants' Second Supplemental Hearing Memorandum, Exhibit #6 in the Hearing Examiner file.

It appears that Mr. Bryant never contacted Mr. Long regarding the list of items mentioned in the above email and there was no further correspondence between Mr. Bryant, Jori Burnett, and the Appellants until a series of emails, dated April 26 and April 27, 2011.

VII.

The April 26 and 27, 2011, emails, Exhibit #13 attached to the Staff Report, start with a request from Jori Burnett to Artur Rojsza, requesting a status report on the building work, which "... should be completed by mid-May" It acknowledges work has been on-going. The mid-May completion date is apparently referring to the end of the 180-day extension, agreed to in early November 2010, for completion of the work required by the "Settlement Agreement."

In response, Mr. Rojsza indicated his belief that the work required by the "Settlement Agreement" was completed some time ago, and that his Structural Engineer had performed the inspections and generated a punch list of deficiencies, which had been corrected. It also indicates the Rojsza's call for a City inspection shortly after completion of the punch list and the Building Inspector did not show up. This was a reference to the call for inspection on November 3, 2010, a verified call to the Inspection Hotline by the Appellants.

In response to Mr. Rojsza's response, Jori Burnett emailed Craig Bryant, inquiring as to if he was aware of the prior call for inspection, indicated in Mr. Rojsza's email. And on April 27, 2011, Craig Bryant responded to Jori Burnett, with a copy to Ryan Morrison, which reads as follows:

From: Craig Bryant
Sent: Wednesday, April 27, 2011 8:52 AM
To: Jori Burnett; Ryan Morrison
Subject: RE: building in general

Jori- I have no knowledge of any structural inspection request for the city to inspect the project nor have I received any correspondence from there [sic] structural engineer that he has performed any inspections. It is possible that the Rojsza's are having inspections done by there [sic] engineer and are not forwarding the information to the City of Ferndale and anticipate turning in the signed [sic] of Structural Observation after or near the end of there [sic] project. As for the statement that they requested an inspection from the City of Ferndale, my last requested inspection was on 10/18/10 for the clock tower north wall forms and have not received any other inspection request. It is interesting that they would state that they requested an inspection and no one showed up to inspect and they did not call back to check the status [sic] of there [sic] inspection or inspection request. To my knowledge "the City of Ferndale "has not missed ANY inspection that was properly requested. [sic]

As shown by Mr. Bryant's response, he had completely forgotten about the request for inspection on November 3, 2010; his awareness of the deficiency and correction list repaired by Ryan Long; and he states, incorrectly, that he has not received any other inspection requests since October 18, 2010.

VIII.

Exhibit #16, attached to the Staff Report, consists of four emails between Art Rojsza and Jori Burnett. The sequence is started by an email, dated May 5, 2011, from Appellant Art Rojsza to Building Official Jori Burnett, again, requesting a building inspection for the work he felt was covered by the "Settlement Agreement" concerning the Criminal Citation, and stating that the work needing to be done to comply with this "Agreement" had been completed in November.

Mr. Burnett responded by asking Mr. Rojsza to call for inspections on the Hotline number two weeks after submission of engineering plans reflecting the current condition of the structure. Appellant Rojsza's response, again, indicated that he felt the work required to be done pursuant to the "Settlement Agreement" had been done and that an inspection should take place in relation to this

work only.

IX.

Exhibit #17, attached to the Staff Report, starts with an email, dated May 9, 2011, from Appellant Art Rojsza to Building Official Jori Burnett, again, asking for an inspection, to finalize the renovation part of their project that Mr. Rojsza believed was covered by the "Settlement Agreement," reached regarding the Criminal Case filed in Municipal Court.

Jori Burnett's response informed the Appellant that they had recent consultation with the City Prosecuting Attorney and reviewed their building permit records in relation to the "Settlement Agreement" entered into on February 19, 2010. The email points out that the City's position is that, pursuant to the "Agreement," Mr. Rojsza was required to obtain a building permit for work that was out of compliance, acknowledges that a permit was obtained, and states that the inclusion of additional work, which included the clock tower on the northern portion of the structure, made completion of the work on the clock tower part of the "Settlement Agreement." It states that no inspections have been done for the work done between October 18, 2010, and the date of the email, May 9, 2011.

Mr. Burnett re-states in this email that the last inspection took place on October 18, 2010, and that "the next legitimate request for an inspection was last week, seven months after the last inspection, and that request did not include any structural engineering or reports." Mr. Burnett's remarks indicate he was still unaware of the November 3, 2010, inspection request, which the Appellants properly requested through the Building Inspection Hotline number [even though it did not include prior submission of structural engineering or reports], and does not reveal an awareness of Craig Bryant having been given notice that a deficiency or correction list had been prepared by the Appellants' Engineer, prior to the November 3, 2010, phone request for an inspection.

X.

It is clear from the record that the Appellants' construction work done after issuance of the

building permit, dated April 9, 2010, and between November 3, 2010, and the present, included work not covered by the only building permit issued to the Appellants. However, no Stop Work Order was issued after the Stop Work Order of July 29, 2010, was conditionally lifted on August 5, 2010. Instead, there was an "Agreement" leading to lifting of the Stop Work Order that required the Appellants submit new plans [which would then be covered under the existing permit] for the unauthorized construction, which lead to the Stop Work Order of July 29, 2010.

XI.

The emails of May 9 and 10, 2011, show that the Appellants requested, via the Building Inspection Hotline, an inspection for May 9, 2011, in the afternoon. The City, apparently, did not show up for this requested inspection, perhaps, because the Appellants had not submitted an updated structural analysis, structural engineering plans, or reports. This was the second call for inspection made through the Inspection Hotline, as required by the permit, which the City chose not to make.

XII.

On May 11, 2011, Jori Burnett [both the Building Official and Community Development Director] sent a letter informing Appellant Rojsza that, due to the lack of inspections, the building permit has expired, stating the last inspection occurred on October 18, 2010, and more than 180-days has past since that date. The letter states the City's position that a request for inspection on the Building Inspection Hotline was not a proper request unless structural plans detailing any revisions had been submitted at least two weeks prior to the requested inspection date.

This May 11, 2011, letter also incorrectly states that the request for inspection on November 3, 2010 "... was not made pursuant to the requirements of your building permit, by calling the building permit hotline." This shows that as late as May 11, 2011, Jori Burnett was not aware of the November 3, 2010, call to the Inspection Hotline, nor aware of Craig Bryant's email response, which was not received by the Appellants, but was copied to Mr. Burnett, containing the request that the November inspection be put off until Mr. Bryant had an opportunity to contact the Appellants' Engineer, Ryan Long.

Mr. Burnett's letter, dated May 11, 2011, goes on to propose a new Settlement Agreement after laying out the City's position that the original "Settlement Agreement" required that all construction authorized was required to be completed within the timeframe of the "Settlement Agreement," prior to dismissal of CB-34504, the Criminal Case filed in Ferndale Municipal Court. The letter states that the City had been informed that the Appellants' Engineer, Ryan Long, had had no contact with the Appellants since November 2010; that work had continued over the 6-month period prior to the date of the letter; and that the City had not been provided with the information necessary to conduct an adequate inspection beyond the initial foundation inspection which took place in October 2010. The letter goes on to indicate the City cannot dismiss the Criminal Case and ends with a proposal "to bring what we consider to be final closure to this ordeal and to avoid costly and lengthy litigation ..." and goes on to set forth the proposed new "Settlement Agreement." None of the proposed conditions stated in the letter required application for a new building permit, even though it states that the City's position is that the building permit expired. Instead, the letter is clearly oriented toward completion of the building and dismissal of the Criminal Charges under CB-34504. This letter is too vague to be interpreted as a Final Decision by the City that the original building permit had expired and that a new one was required.

XIII.

On June 16, 2011, Jori Burnett sent a letter to Appellant Artur Rojsza directing the Appellant to comply with a number of conditions, which are set forth in the letter. The Order to Comply states that it is the result of continued violations of the Ferndale Municipal Code and the International Residential Code; states there are building violations related to residential construction on the building at 2147 Main Street (consisting of a deviation from the approved building plans and the Appellants' failure to provide information necessary for the City Inspectors to conduct an inspection) resulting in the failure to have the structure inspected in a timely manner, and an overall lack of inspections for more than 180-days.

The Order to Comply required the Appellants to schedule an inspection with the City of Ferndale and the Appellants' Structural Engineer, to take place by Friday, July 1, 2011, and thereafter

to provide the City with all necessary information "... including building permit applications ..." within ten business days of the inspection, no later than July 18, 2011. The letter goes on to state the rationale for the requirements, and indicates that if the deadlines are not met, the City "...will have no choice but to cite you for continued failure to comply." It goes on to again state that this is the last opportunity the Appellant has to work with the City, cooperatively, without financial or criminal penalties.

The letter lays out sections of the Ferndale Municipal Code, including the section making violations of the Code a misdemeanor, and states that the Appellant has done work requiring a building permit without a permit and has failed to resubmit documents for approval for changes made during construction under the original permit.

The Order to Comply states that Jori Burnett, as the Building Official, has concluded that the original building permit can be suspended or revoked based on construction beyond that approved by the issued building permit, and states that the Permit Application and required plans must be submitted by July 18, 2011.

The letter ends by informing Mr. Rojsza that the City "...will issue you citation(s), Including [sic] a fine of \$500 per day per violation and a date to appear in the Ferndale Municipal Court."

XIV.

On August 19, 2011, Jori Burnett sent an email to the Appellants' Attorney, Mark Lackey. This email informs Mr. Lackey that the City will be requiring the Appellants "...submit a reasonable performance bond to ensure completion within the time set;" that the bond amount would be equal to 150% of the valuation the City places on the work permitted under the new building permit, prior to its issuance; and that the City expects to call the bond if the work is not completed and inspected within six weeks of permit issuance.

The email notes that the City cannot identify the bond amount until the permit application has

been reviewed.

XV.

A series of emails, Exhibit #31 attached to the Staff Report, dated August 31, 2011, and September 1, 2011, indicates that engineered drawings had been submitted to the City and that the City expects to be able to issue building permits "...contingent on having a bond/AOS [Assignment of Savings] in place. These emails, between the Appellants' Attorney, Mark Lackey, and Jori Burnett, Building Official, and Ryan Long, Appellants' Engineer, indicate that they believed an agreement was in place to finally resolve the years of controversy and conflict regarding the Appellants' Main Street property. It turned out that this positive outlook was premature when the Appellants decided not to pick-up the building permits approved by the City and not to post a bond or Assignment of Savings, but instead filed this Appeal two weeks later.

XVI.

During the summer of 2011, the City started issuing Criminal Citations to the Appellants, alleging violations of the Ferndale Municipal Code. The citations were for failure to apply for a building permit. Ongoing negotiations between the Appellants' Attorney and the Building Official continued through August. On August 30, 2011, the Appellants submitted new engineering drawings, as part of an application for a new building permit to cover the work already done without a building permit, as well as future planned work.

The City reviewed drawings and Permit Application, and notified the Appellants on September 7, 2011, that the City was ready to issue the new building permit. On September 13, 2011, the City acknowledged, by email, receipt of a second set of architectural drawings and again stated that the building permit was ready to issue upon payment of fees and posting of a bond or Assignment of Savings. At this point, the City Building Official and Staff in the Building Department had worked with the Appellants' Engineer and Attorney to resolve the ongoing disputes about the construction work done on the site without a permit. The necessary work was done to enable the City to issue a permit, which the City was willing to do, upon payment of fees and the posting of a Performance

Bond or Assignment of Savings.

On the next day, September 14, 2011, emails, between the Appellants' Attorney and the Building Official, raised for the first time the possibility of an Appeal by the Appellants herein. In a September 15, 2011, email, the Building Official notified the Appellants' Attorney of the costs for an Appeal. On September 16, 2011, this Appeal was submitted. The building permit, which was prepared and approved, was never paid for or picked up, and no Performance Bond or Assignment of Savings was put in place. The record does not establish why, after all the work done by the Appellants' agents [Attorney and Engineer] and the City of Ferndale, and submittal of the necessary drawings, information, and Permit Application, the Appellants herein decided, rather than to pick-up the permit and post the requested Performance Bond or Assignment of Savings, to file this Appeal.

XVII.

On September 16, 2011, the City of Ferndale received this Appeal, submitted by Mark Lackey on behalf of Artur and Margaret Rojsza.

Included in the Appeal package filed with the City was Exhibit A, which contained emails from Jori Burnett to Mark Lackey, dated Wednesday, September 7, 2011, setting forth the total fees for the new permits approved by the City. The total fees requested were \$2,799.98. The email also states that an Assignment of Funds or bond for no less than \$30,000 was required to be submitted to ensure sufficient funds available to allow the City to complete the work if the Appellants failed to do so in compliance with the Permit.

The Appeal Worksheet submitted indicates that the Appellant was appealing the requirement for a Performance Bond and states that the Decision being appealed was set forth in an email sent by the City of Ferndale on September 7, 2011, the Exhibit A, referred to above. However, as indicated above, the Appellants had been aware the City was going to require a bond, at least, since August 19, 2011, 29 days before the Appeal was filed.

As indicated above, the Appellants were first notified of the Bond Requirement August 19, 2011. The Appellants were again notified of the Bond Requirement on August 31 and September 1, 2011. The only new information or Decision contained in the September 7, 2011, email was the specific amount of the bond or Assignment of Savings the City required (\$30,000). The Appellant has not challenged the appropriateness of the bond amount.

The Appellant submitted a list of reasons why the Appellant believed the Decision [to require a bond] was wrong. The Appellants state that they were in compliance with Ferndale Municipal Code, Sections 18.12.090(A) and (B).

The Appellants further state that Ferndale Municipal Code, Section 18.12.090(C), does not apply to the Appellants because the City did not send a Notice of Termination of a Permit; or notice of the requirement for an application for a new building permit to the Appellants. The Appellants state their current permit has been valid and enforceable since issuance. The Appeal Statement also alleges that the Appellants were in compliance with the applicable Sections of the International Residential Code (IRC), 15.04.020.

The list of reasons for the Appeal of the Bond Requirement include an assertion that the City of Ferndale has improperly amended the International Residential Code in violation of Washington State Administrative Code, Section 51-04-035, by providing for a Bond Requirement in certain instances, which is alleged to be an illegal amendment to the IRC, having been done without submitting the proposed amendment to the Washington State Building Code Council for approval.

The reasons for Appeal also include an assertion that the City improperly adopted FMC 18.12.090 because that Section diminishes one of the objectives enumerated in RCW 19.27.020.

On the portion of the Appeal Worksheet, Exhibit 1-1, where the Appellant is asked to describe the desired outcome or changes to the Decision (in this case, the Decision to require a bond, dated September 7, 2011), the Appellants set forth the following:

- 1) Under [sic] Section 19.12.090(C) shall be interpreted so that calling for inspections is not the only way to evidence construction activity. Other evidence shall be considered when determining if there has been construction activity under section 19.12.090(C) of the Code.
- 2) The Permit is and has been valid since issuance.
- 3) The City is prohibited from requiring Appellant to apply for a new permit.
- 4) The City is prohibited from requiring Appellant from posting and [sic] performance bond or its equivalent under [sic] for the Permit.

Only number 4, above, is part of the Decision in the September 7, 2011, email, which is the subject of this Appeal. However, the Hearing Examiner will address them all.

During the Appeal process, including the submission of briefs, the City of Ferndale has challenged the timeliness of the Appeal. The Appellant has raised additional issues regarding the jurisdiction of the Hearing Examiner to hear the Appeal.

Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted as such. Based on the foregoing Findings of Fact, now are entered the following

CONCLUSIONS OF LAW

I.

A number of legal issues have been raised by this Appeal. One of these is the Appellants' assertion that the Hearing Examiner does not have authority to hear this Appeal; that, instead, this Appeal is required to be heard by the Ferndale City Council. Resolution of this issue resolves around Ferndale Municipal Code, Section 14.05.030(1)(2), which gives the Hearing Examiner the authority to "review, hold hearings, and take final action" on "appeals of administrative decisions and interpretations pertaining to Title 15, 16, 17, (and) 18," and Section 112 of the International Residential Code, which was adopted by reference in FMC 15.04. The current version of the IRC was adopted in 2011. Section R112 of the International Residential Code contains specific appeal provisions requiring the City to appoint a Board of Appeals.

FMC 14.05.030.I (2) reads as follows:

- I. **The Hearings Examiner shall review, hold hearings where applicable, and take final action on the following:**
 1. ...
 2. **Appeal of administrative decisions and interpretations pertaining to Titles 15, 16, 17, 18 or other development-related portions of the Municipal Code, and the Shoreline Master Program.**

Section R112 Board of Appeals of the International Residential Code reads as follows:

SECTION R112 BOARD OF APPEALS

R112.1 General.

In order to hear and decide appeals of orders, decisions or determinations made by the *building official* relative to the application and interpretation of this code, there shall be and is hereby created a board of appeals. The *building official* shall be an ex officio member of said board but shall have no vote on any matter before the board. The board of appeals shall be appointed by the governing body and shall hold office at its pleasure. The board shall adopt rules of procedure for conducting its business, and shall render all decisions and findings in writing to the appellant with a duplicate copy to the *building official*.

R112.2 Limitations on authority.

An application for appeal shall be based on a claim that the true intent of this code or the rules legally adopted there under have been incorrectly interpreted, the provisions of this code do not fully apply, or an equally good or better form of construction is proposed. The board shall have no authority to waive requirements of this code.

R112.3 Qualifications.

The board of appeals shall consist of members who are qualified by experience and training to pass on matters pertaining to building construction and are not employees of the *jurisdiction*.

R112.4 Administration.

The *building official* shall take immediate action in accordance with the decision of the board.

FMC 15.04.140 reads as follows:

15.04.140 Board of Appeals

The City Council shall serve as a Board of Appeals. The Building

Official shall be an ex-official member and shall act as secretary to said board. The Building Official shall have no vote on said Board of Appeals.

The Hearing Examiner requested the Parties to provide memorandums on this issue and both the Appellants and the City provided memorandums. After a review of the memorandums, case law cited, and a careful reading of FMC Title 14, Title 18, and Section 112.1 of the International Residential Code now in effect, the Hearing Examiner concludes that the two sections can and should be read in a manner which gives substance to both.

The Hearing Examiner concludes that Section R112.1 of the International Residential Code sets up a Board of Appeals to resolve technical substantive issues, raised in regard to the construction standards, set forth in the IRC.

The Hearing Examiner has concluded that FMC 14.05.030, FMC 15.04.120, along with Section R112 of the International Residential Code can be interpreted in such a manner which gives meaning to FMC 14.05.030, which gives the Hearing Examiner authority to hear Appeals of Administrative Decisions of Title 14, Title 15, Title 18, FMC, and Section R112, and FMC 15.04.120.

A careful reading of Section R112 of the IRC, in its entirety, leads to the conclusion that the Board of Appeals set up pursuant to that Section has limitations on its authority as set forth in R112.2 of the IRC, and that Appeals under Section R112 must involve the Sections of the IRC designed to carry out the Intent of the IRC, as set forth in R101.3. This Intent is to establish minimum requirements for the construction of residential buildings in a manner which safeguards the public safety, health, and general welfare. The Intent Section, R101.3, reads as follows:

R101.3 Intent.

The purpose of this code is to establish minimum requirements to safeguard the public safety, health and general welfare through affordability, structural strength, means of egress facilities, stability, sanitation, light and ventilation, energy conservation and safety to life and property from fire and other hazards attributed to the built

environment and to provide safety to fire fighters and emergency responders during emergency operations.

The Hearing Examiner concludes that the Board of Appeals is designed to review controversies regarding the actual construction techniques called for in the Code. This interpretation is reinforced by R112.3 [set forth above], which calls for a Board consisting of "members who are qualified by experience and training to pass on matters pertaining to building construction and are not employees of the *jurisdiction*." [The Hearing Examiner acknowledges that this Section calls into question the appointment of the City's Council as the City's Board of Appeals. The City should consider setting up a Board of Appeals which conforms to R112.3, by appointing "members who are qualified by experience and training to pass on matters pertaining to building construction." The issue of the appropriateness of the City Council as the Board of Appeals under Section R112 of the International Residential Code is not before the Hearing Examiner and is not within the jurisdiction of the Hearing Examiner to consider. A Hearings Board with members experienced in construction, along with the Hearing Examiner to conduct the Hearing and to write the Decision, would be one alternative to consider. The Hearing Examiner could be either a voting or non-voting member].

Since this Appeal does not raise construction issues, but instead raises procedural issues, the Hearing Examiner concludes that it was the intent of the Ferndale City Council in adopting FMC 14.05.030 to have the Hearing Examiner decide all non-construction related issues, such as procedural issues, arising out of the administration of Titles 14, 15, 16, and 18. This interpretation would include Appeals regarding procedural issues under the International Residential Code, which is part of Title 15 of the Ferndale Municipal Code, along with issues raised under FMC 18.12.070.

The Hearing Examiner concludes that proper jurisdiction, for the issues raised by this Appeal, is with the Hearing Examiner for the City of Ferndale.

II.

A major issue in this case is whether the Appellant filed the Appeal in a timely manner. As noted in the Findings of Fact, the Appeal Statement itself stated it was an Appeal of an emailed

Determination, dated September 7, 2011. This Determination only restated that a bond would be required as part of an issuance of a new building permit. It is arguable that the Appeal is limited to the issue of the City's requirement of a Performance Bond or Assignment of Savings as part of the new building permit. However, the Hearing Examiner has decided to rule of the broader range of issues raised by the Appellant in the Appeal Worksheet, including, but not limited to, requirement for a new building permit.

As set forth in the Findings of Facts, the Appellants were notified of the Bond Requirement by the City, as early as August 19, 2011, and then again, the requirement for a bond or Assignment of Savings was re-iterated in written material sent to the Appellants' Agent on August 31, 2011, and again on September 1, 2011. The email to the Appellants' Attorney reiterating the Bond Requirement on September 7, 2011, was at least the fourth time the Appellants had been given notice that the City was demanding a bond or Assignment of Savings with the new building permit. The first written notice of the Bond Requirement was approximately 29-days before the Appeal was filed.

Pursuant to FMC 14.11.070.B, Appeals of Administrative Decisions or Determinations must be filed within 10-calendar days from the date of the interpretation or Decision being appealed. The Decision or Determination requiring a bond was made in writing, clearly stated as a requirement by the Building Official, on three separate occasions more than 10-days before the Appeal was filed.

The Hearing Examiner concludes that the appeal of the requirement for a bond or Assignment of Savings to accompany a new building permit, based on the authority of FMC 18.12.090, was not filed in a timely manner and must be dismissed for that reason.

In the Appeal Worksheet, under the Section, The Relief Sought by the Appellant, the Appellant listed the Building Official's requirement for a new building permit as an appealed issue and asked the Hearing Examiner to conclude that the City is prohibited from requiring the Appellant to apply for a new building permit. Since the Appellant had already applied for a new permit and had been notified by the City that the permit was approved and ready to be picked-up, the reason for the

Appellants' request for a ruling that no new building permit is required at this point is mysterious.

As set forth in the Findings of Fact, the Appellant has continually done work without a building permit or outside the work approved by a building permit since at least late 2009. In an attempt to work cooperatively with the Appellant, the City did not require a new building permit even after determining that new unpermitted construction had taken place after the issuance of the permit, and the placement of a Stop Work Order on the property in July 2010. The City attempted to work within the frame of the original permit by requesting the Applicant to submit new plans for work which changed or exceeded that permitted in the Appellants' original building permit when lifting the July 2010 Stop Work Order, instead of requiring a new permit. This Stop Work Order was issued within three months of the issuance of the building permit and was lifted, conditioned on the Appellants submitting new plans and the completion of the work in a timely manner.

Both the City and the Appellants bear some responsibility for the fact that, in June 2011, additional work outside the scope of the permit, and not supported by plans submitted to and reviewed by the City, were ongoing and unresolved. However, the fact that additional, illegal construction activity continued to take place after the lifting of the second Stop Work Order in August 2010 is clearly established by materials in the file, including the fact that a new application for a building permit and the submission of updated plans, covering both work already accomplished and future proposed work, were submitted in August and September 2011. The City's ongoing attempts to work cooperatively with the Appellant was the reason no unequivocal statement to the Appellant that a new building permit was required was made until the letter from the Building Official, Jori Burnett, to the Appellant, Artur Rojsza, on June 16, 2011. This letter and Order to Comply clearly notified the Appellants that there were building code violations consisting of ongoing construction outside the approved building permit and plans set, and, amongst other things, directed the Appellant to submit new building permit applications no later than July 18, 2011. This letter included notifying the Appellant that the City would be filing criminal charges in the Ferndale Municipal Court if the required submittals, which included a completed building permit application, were not submitted by July 18, 2011.

The Determination on June 16, 2011, that a new building permit was required was an appealable Determination by the Building Official. The Appellants' Right to Appeal the requirement for a new building permit expired 10-days after the date the Appellants were given notice of the City's requirement, on or about June 26, 2011. Thereafter, numerous exchanges of emails and/or letters between the City and the Appellants' Attorney and Engineer reiterate the City's requirement for a new building permit application and associated plans. In fact, the Applicant eventually did file the permit applications and associated plans and the City gave notice to the Appellant that the permits had been approved and could be picked-up, before this Appeal was filed on September 16, 2011, three-months after the Appellant was given written notice that the Building Official was requiring a new building permit.

The Appellant did not appeal the requirement for a new building permit in a timely manner and the appeal of the requirement for a new building permit should be denied for this reason.

Even if the Appeal of the new permit requirement was timely, the assertion that no new permit is required is without merit. Both the International Residential Code, incorporated into Title 15 of the Ferndale Municipal Code, and FMC 18.12.070 require a building permit prior to any construction work. Since the Appellant has done substantial construction work outside of the permit issued, over a two-year period, the City is entitled to require the Appellant to apply for a new building permit.

As with the requirement for a new building permit and a Performance Bond, the Appellants' attempt to appeal the Building Official's Determination that their building permit expired was not filed in a timely manner and, therefore, is not properly before the Hearing Examiner, and should be dismissed as not being a timely Appeal.

III.

The City urges the Hearing Examiner to uphold their Determination that the original building permit of the Applicant expired pursuant to FMC 18.12.090. The original permit was issued on April 9, 2010. Pursuant to FMC 18.12.090, the permit holder was required to commence work within 180-days of the issuance of the permit and that proof of construction during that period would be "...

evidenced by a failure to call for a necessary inspections, ..." Although the Building Official forgot or was not aware of the fact, the Appellants did, in fact, call the Inspection Hotline for an inspection on November 3, 2010. This call was acknowledged by an email from the Building Inspector, a copy of which was sent to the Building Official. No inspection took place. However, at that time, there was email communication granting the Appellant another 180-day period in which to complete the work authorized by the building permit which had been issued.

Since there was a call for inspection on November 3, 2010, that was the required evidence to prove construction activity and started a new 180-day period. This new 180-day period would require a call for inspection, on or about May 9, 2011. In late April 2011, email communication between the Building Official and the Appellant regarding the status of construction activity under the permit started back up. On May 5, 2011, the Appellant requested by email a building inspection. The Appellant was notified by the Building Official that the only way to properly call for an inspection was to call the Inspection Hotline. The Appellant had been notified of this requirement numerous times and the requirement does appear on the face of the building permit. After this exchange, the record does indicate the Appellants did request an inspection for May 9, 2011, in the afternoon, on the Inspection Hotline. Again, the City did not show for this requested inspection.

Because of these inspection requests and the failures of the Building Inspector to show up for the inspections, the Hearing Examiner concludes that the City cannot rely on the automatic expiration of a building permit provided for in FMC 18.12.090, and that the permit issued April 9, 2010, did not automatically expire pursuant to FMC 18.12.090.

However, this issue is moot since, thereafter, the City appropriately notified the Appellant of the Building Official's Decision that a new building permit would be required. This Decision or Determination was not appealed in a timely manner, and the Appellant, at this time, has applied for a building permit, which has been approved and which can be picked-up by the Appellant at any time.

IV.

The Appellant argues that the Building Permit Requirements set forth in FMC 18.12.070, .080, and .090 are invalid because they were amendments to the International Residential Code, which were not submitted to the State Building Code Council for approval, pursuant to the requirements set forth in the Washington Administrative Code, WAC 51.04. The City argues that these amendments to the Residential Code are amendments to administrative provisions which do not require submission to the State Building Code Council for review.

The Hearing Examiner concludes that the City has the better of this argument. However, the Hearing Examiner does not have the authority to set aside local ordinances passed by the Ferndale City Council and a determination as to the validity of the Building Code Sections of Chapter 18.12 Ferndale Municipal Code is not within the jurisdiction of the Hearing Examiner.

V.

The Appellant requests that the Hearing Examiner conclude that the City is prohibited from requiring the Appellant to post a Performance Bond or Assignment of Savings as a condition for issuance of the new building permit. Setting aside the Hearing Examiner's Conclusion, set forth above, that this issue was not raised by the Appellant in a timely manner, the Hearing Examiner also concludes that the Building Official has the clear authority to require a reasonable Performance Bond or Assignment of Savings to ensure completion of the construction work approved under the permit within the time limits set [FMC 18.12.090.C].

The Decision of the Building Official to impose time limits allowed for substantial completion of the work and requiring the posting of a Performance Bond or Assignment of Savings is an issue appealable to the Hearing Examiner.

In this case, there is ample evidence that the Appellants have been unable or unwilling to comply with the requirement to obtain a building permit; to ensure the construction done is within the scope of the permit; and to complete the work within a reasonable length of time. The construction work, mostly done without building permits, has been going on in excess of two-years. The building

sits within the downtown area of Ferndale, on Main Street, in an unfinished and unsightly condition. A Decision to require a bond in this case is clearly within the discretion of the Building Official, is not clearly erroneous, and should be upheld.

While the Building Official is well within his authority and used appropriate discretion to require a bond and time limit, it is not clear from the record as to whether or not the amount of the bond requested is reasonable. However, since the Appellants have not raised the issue of the reasonableness of the amount of the bond and since the condition setting the amount is no longer appealable, the Hearing Examiner upholds the requirement of a \$30,000 Performance Bond or Assignment of Savings and the time limitations set forth in the building permit, approved, but not yet picked-up by the Appellant.

VI.

The Appellant raises the issue of whether or not a Final Decision appealable to the Hearing Examiner has been issued by the Building Official. The language of the Ferndale Municipal Code makes any "decision or determination" made by an Administrative Official in the City pursuant to Titles 14, 15, 16, 17, and 18 appealable to the Hearing Examiner. The question raised is at what point was an appealable Decision or Determination made?

As set forth in the Conclusions of Law, above, in a letter sent to the Appellant, dated June 16, 2011, the Building Official made in writing and notified the Appellants of his Decision that a new permit was required. This letter clearly stated that new building permit applications were required and directs the Appellant to comply with a number of steps in order to correct building code violations related to construction work on the building at 2147 Main Street. The stated requirement for a new building permit was clear and unequivocal in this letter. At this point, the Building Official's Order to Comply was clearly a Decision or Determination and, therefore, appealable to the Hearing Examiner.

The same can be said of the August 19, 2011, communication by email of the Building

Official to the Appellant's Attorney, stating that the City was requiring the Appellants to submit a reasonable Performance Bond to ensure completion in the timeframe to be set forth in the new building permit. This clearly stated, unequivocal requirement was, at that point, a Decision or Determination by the Building Official appealable to the Hearing Examiner. The Appellant raises the issue of the fact that these written Determinations or Decisions did not inform the Appellant of his Right to Appeal, pursuant to the Ferndale Municipal Code. The Appellant's Counsel points out that the Whatcom County Planning Department routinely includes such language on their Decisions or Determinations. The inclusion of such language is appropriate and is a best management practice. Whatcom County has been routinely placing Appeal Rights language, even though, in many cases, it is not specifically required by the Whatcom County Code, as a response to the suggestion, request, and urging of this Hearing Examiner.

It would be a good practice for Administrative Officials for the City of Ferndale to specifically note when they have made Final Decisions or Determinations and to set forth information about the applicable Appeal Rights. This is especially applicable to Decisions or Determinations the Officials know to be subject to disagreement.

However, there is nothing in the Ferndale Municipal Code which requires this notice. The only legal basis the Hearing Examiner can see for requiring such a notice would be based on procedural Due Process Requirements of either the Washington State or the United States Constitution. The Hearing Examiner does not have jurisdiction or authority to add notice requirements to the Ferndale Municipal Code or to rule on the Constitutionality of issuing such Decisions without notification of Appeal Rights. The Code does not require notification. In general, citizens are presumed to be aware of the law and lack of knowledge or understanding of the law is not an excuse for not complying with it. The time limits for Appeals are clearly set out in the Ferndale Municipal Code and are readily available to the public.

The Hearing Examiner would strongly suggest that Ferndale Administrative Officials adopt procedures which will make it clear when Final Decisions or Determinations have been issued and

procedures which will make it clear when Final Decisions or Determinations have been issued and what the Appeal Rights there are in regard to that Decision or Determination.

VII.

Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such. Based on the foregoing Findings of Fact and Conclusions of Law, now is entered the following

DECISION

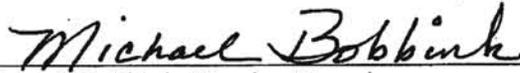
The Hearing Examiner upholds the requirement of the City of Ferndale that the Appellants obtain a new building permit for unpermitted construction work already done and construction work proposed to be done on their building, located at 2147 Main Street, Ferndale, Washington. The Hearing Examiner also upholds the requirement that the Appellant post a \$30,000 performance bond or assignment of savings to ensure completion of the work within the time limitation set forth on the new building permits.

NOTICE OF APPEAL PROCEDURES FROM FINAL DECISIONS OF THE CITY OF FERNDALE HEARING EXAMINER

Judicial Appeals

In accordance with Ferndale Municipal Code, 14.11.080, Appeals from the Final Decision of the Hearing Examiner's Decision shall be made to Whatcom County Superior Court within twenty-one (21) days of the date the Notice of Decision or action became final, unless another time period is established by State law or local ordinance.

DATED this 15th day of February 2012.


Michael Bobbink, Hearing Examiner



COMMUNITY DEVELOPMENT DEPARTMENT

P.O. Box 936, 2095 Main Street, Ferndale, WA 98248 - (360) 384-4006

May 11, 2011

Artur Rojsza
2147 Main Street
Ferndale, WA 98248

RE: Potential Settlement Agreement

Dear Mr. Rojsza,

This letter is intended to inform you of the current status of your building permit (Permit 10001.RR), as well as providing you and your attorneys with direction related to a potential settlement agreement associated with pending legal matters (Ferndale v Rojsza, C-34504).

The City has determined that, due to lack of inspections, your building permit has expired. The last inspection occurred on October 18, 2010, and more than 180 days has passed since that date.

You have indicated that you had attempted to request an inspection previously. However, pursuant to an August 6, 2010 email (attached), the City informed you that it would require structural plans detailing any revisions you have made at least two weeks prior to the next inspections. The purpose of this requirement was to provide the inspector with some ability to understand what was being inspected. Throughout this process, you have indicated that the structure was subject to changes as construction occurred. We have never received these modified structural plans.

Recognizing that non-prescriptive structural changes can occur with the review and approval of a structural engineer, the City determined that it was possible to rely on the ongoing review of the structural engineer to guide the process. This is out of the ordinary for residential developments, but can be allowed pursuant to the International Residential Code.

You have stated that you requested an inspection in November 2010. However, you again did not provide structural drawings prior to this request, as per the City's permit requirements. Additionally, the request for inspection was not made pursuant to the requirements of your building permit, by calling the building permit hotline. As the holder of a building permit, you are responsible for not only requesting inspections, but ensuring that those inspections occur. The City has no other way of confirming that work has been completed.

Based upon your email correspondence dated May 9, 2011 (also attached), it appears that you interpreted the settlement agreement differently than the City. The City has attached an

Appendix
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email sent March 15, 2010, which was then verbally communicated to both yourself and your structural engineer. In this email, I stated "the applicants need to be reminded that there are two distinct processes going on here: one is compliance, and the other is the new addition. The compliance issues need to be resolved as soon as possible." The City has been clear in stating its concerns that building permits which included both compliance-related issues and new additions would tie the two elements together, preventing the resolution of one without the completion of the other.

In your May 9 email, you repeated your assertion that the compliance issues would be completed separately from the building permit. That is not the case, and that is not what the agreement states:

Condition 2 of the settlement agreement states that you would "submit a building permit application for any structural modifications that were made to the 2147 Main Street property by Rojsza without a necessary building permit." You did that. However, you also expanded the permit to include a clock tower and a new addition on the rear of the structure. By that action, you tied all subsequent conditions in the agreement referring to the building permit to the whole of that building permit.

The City reviewed the project and determined that the application was complete, pursuant to Conditions 3 and 4 of the agreement. You then purchased the permit pursuant to Condition 4.

Condition 5 of the settlement agreement states that "if the building permit requires no additional structural work, the City of Ferndale will dismiss C-34504 with prejudice." By including additions to the existing residence in the building permit, the permit clearly required additional structural work.

Condition 6 states that any additional structural work shall be completed within 180 days of the permit's issuance. As stated previously in this letter, the only way for the City to confirm that this work was completed was through an onsite inspection, accompanied by structural observations/plans from the structural engineer. Even though your structural engineer has determined that the elements of the structure that were previously built without a permit are now in conformance, that determination does not allow you to disregard the remainder of the agreement.

As per Condition 6, work associated with the building permit must be performed within 180 days of issuance. This 180 day period has passed and the City granted you a 180 day extension which has also since expired. The City has not been provided with documentation necessary to perform an inspection, and no legitimate request for an inspection was submitted to the City until May 2011, following the expiration of the building permit. In addition, the City has contacted your structural engineer, who has stated that he has not been in contact with you since November 2010.

Over the last six months, work has clearly continued on your project, as evidenced by the clock tower at the front of the structure. Yet the City has not been provided with the information necessary to conduct an adequate inspection beyond the initial foundation inspection which took place in October 2010.

The City has sought to provide you with as much leniency as possible. To this end the City has allowed you to work with your structural engineer, Ryan Long, to ensure that your construction was, if not built to the exact prescriptive standards of the International Residential Code, at least safe. However, it now appears that you have failed to keep the structural engineer involved in the project and have disregarded the timelines and requirement for inspections.

It is not the responsibility of the City to ensure that developments meet required deadlines, or that inspections occur. That is very clearly the role of the permit holder - you.

Based on these factors, the City cannot dismiss C-34504: the building has not yet been inspected to be complete, and the City cannot rely on the approved drawings (which no longer reflect the majority of actual construction) to guide the inspection.

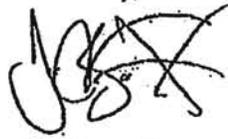
The City's interest extends to the point of ensuring that the project is safe, that it is complete, and that it does not present a lasting nuisance to nearby residents. We have worked with you in the past but the city did not anticipate that you would extend this project past the initial 180 days, past the subsequent 180 days and that, as of this writing, is still not completed.

To bring what we consider to be final closure to this ordeal and to avoid costly and lengthy litigation, the City proposes the following:

- A penalty of \$500 shall be paid by you due for failure to comply with the intent of the agreement and to compensate the City for ongoing legal and administrative expenses.
- The City will delay further enforcement action under C-34504 for a period of no more than 180 days, provided that *all* of the following occur:
 - o At or prior to June 1, 2011, your structural engineer shall conduct a structural observation of the entire structure, including all elements proposed by the building permit or built subsequent to that permit's issuance.
 - o Within ten days of this structural observation, a report, architectural and engineered plans from the structural engineer will be submitted to the City, unless there are structural deficiencies identified in the report which require modification.

- o If structural modifications are required, they must be made by July 1, 2011, and a new structural report and plans must be submitted to the City.
- o An inspection will be requested at the time of submittal of the structural observation report, following the inspection request guidelines, and will occur not less than two weeks following the submittal of the structural report.
- o The City Inspector shall conduct an inspection, in the presence of your structural engineer. The City Inspector and structural engineer shall determine if future inspections are necessary.
- o If future inspections are necessary, these inspections must also be requested at least two weeks prior to the inspection date, and must be accompanied by a structural report and revised engineering and architectural plans, unless a letter in writing is submitted by the structural engineer stating that previous plans submitted to the City remain current.
- o The City will not dismiss C-34504 until a final inspection has been completed by the City on all elements of the building permitted or constructed following the issuance of building permit 10001.RR. Such completion shall be evidenced by the initials and date of the City of Ferndale building inspector on the Final Inspection check off on the City-supplied inspection sheet associated with 10001.RR.
- o In addition to total structural completion of the building, the City will not dismiss C-34504 until all exterior non-structural elements are in place, including but not limited to; siding, exterior painting, landscaping, and general site cleanup. These elements must be in place no later than November 10, 2011. This requirement shall not be delayed due to elements such as carvings and other ornamentation that you desire to manufacture and install. Such optional elements may be put in place at a later date or in concert with the other items listed above, but it shall be no defense on your part that the such work requires more time. Completion of these non-structural elements shall be determined by my signature on the City-supplied inspection sheet associated with 10001.RR, and a memorandum on City of Ferndale letterhead addressed to David Nelson, the City of Ferndale's prosecuting attorney.
- o Following the strict adherence to all of these conditions, the City will dismiss C-34504 with prejudice.

Sincerely,



Jori Burnett
Community Development Director

Cc: Gary Jensen
Greg Young
David Nelson
Richard Langabeer
Ryan Morrison
Craig Bryant
Jerry Shiner

Att: Referenced correspondence



COMMUNITY DEVELOPMENT DEPARTMENT

P.O. Box 936, 2095 Main Street, Ferndale, WA 98248 - (360) 384-4096

June 16, 2011

Artur Rojsza
2147 Main Street
Ferndale, WA 98248

RE: 2147 Main Street violations

Dear Mr. Rojsza,

In an effort to ensure that the City's regulations are met, that minimum life safety standards are adhered to, and that you are provided with appropriate notice to come into compliance, the City is transmitting this letter to you. In addition to your home address, this letter is also being hand delivered to 2147 Main Street, and copies are being sent to you via email. Additional letters are being sent to your attorney and your Blaine address.

Due to continued violations of the Ferndale Municipal Code and the International Residential Code, you must now comply with the requirements set forth in this letter. Failure to comply with these requirements by the dates identified will result in immediate citations and penalties. The City has determined that these requirements are reasonable, in order to resolve at least two outstanding building violations related to your building at 2147 Main Street in Ferndale:

1. You have deviated from your approved plans by adding an additional story to your clock tower and raising the height of that structure beyond what was previously allowed; and
2. You have failed to provide information necessary for City inspectors to conduct an inspection, resulting in the failure to have the structure inspected in a timely manner, and an overall lack of inspections for more than 180 days.

You are required to schedule an inspection with the City of Ferndale and your structural engineer, and that inspection must take place by Friday, July 1st 2011 (ten business days from tomorrow). Following this inspection, you shall provide the City with all necessary information, including building permit applications and accurate structural, engineered, and architectural plans within ten business days of the inspection, no later than July 18, 2011. The City will then review these application materials with your structural engineer, and if deemed to be complete and accurate will make the building permit available to you for issuance.

As you will recall, in 2010 you received a building permit to correct previously existing violations. At that time, you also proposed expanding the structure to include a clock tower, as well as an addition on the rear (south) of your building. The City reviewed that permit (10001.RR) based on the structural information provided and subsequently issued it.

Appendix

C

Soon after Issuance, you illegally deviated from the plans without consulting the City by expanding the southern addition. The City placed a stop work order on your project, but agreed to lift that stop work order provided that you submitted information that the structure built to that point was properly engineered, and with the expectation that you would provide the City with information necessary to approve the work, including structural observations. You have never provided these structural observations to the City, and have thus not received an inspection to review the work that has apparently now been completed.

You have now illegally altered your plans again, by adding an additional story to the clock tower structure. This is a violation of not only the Ferndale Municipal Code, but the International Residential Code as well. The additional level has not been reviewed or authorized by the City of Ferndale, nor has it been reviewed by your engineer. The City has confirmed with your structural engineer that he has not reviewed the deviations from the original drawings, and has not visited the site since Fall 2010.

It is the City's sole intent and purpose to ensure that your work is and will be safe. The entire effort on the part of the City has been to seek assurance that these minimum standards will be met. You have been unwilling to provide the City with the information necessary to complete inspections or reviews, and have continued to deviate from the plans that have been provided to the City, all in violation of both the Ferndale Municipal Code and the International Residential Code.

To be clear: you are currently in violation of several code sections, and the City has the ability to cite you for these violations immediately. However, the City is providing you with a reasonable grace period, allowing you to prepare necessary information for application submittal. This grace period is a concession on the part of the City, in an effort to treat you as fairly as possible and to provide you with sufficient time to prepare an accurate application submittal without additional penalty. If you do not meet this deadline, the City will have no choice but to cite you for continued failure to comply. This represents the last opportunity you and the City have to work cooperatively to resolve this ongoing and continuous violation without financial or criminal penalties.

In the past, it has not been possible for the City to work with you. Unless the City is allowed to conduct a structural observation with your engineer, unless the City receives the information necessary to complete its reviews, and provided that you then cooperate fully with the City during subsequent reviews and inspections, the City will be forced to cite you with further penalties.

As per the Ferndale Municipal Code:

18.12.070 Building permits required.

It is unlawful to erect, move, add to or structurally alter a building or other structure without a permit therefor. No building permit shall be issued except in conformity with the provisions of this title

As per the International Residential Code:

R106.4 Amended construction documents. *Work shall be installed in accordance with the approved construction documents, and any changes made during construction that are not in compliance with the approved construction documents shall be resubmitted for approval as an amended set of construction documents.*

The International Residential Code further states:

***R105.6 Suspension or revocation.** The building official is authorized to suspend or revoke a permit issued under the provisions of this code whenever the permit is issued in error or on the basis of incorrect, inaccurate or incomplete information, or in violation of any ordinance or regulation or any of the provisions of this code.*

The City has determined that you have illegally added to and altered the structure of your building without a permit therefor. You have also built the structure in a manner not reflected by the approved permit. As a result, as the Building Official of the City of Ferndale, I have determined that it now appears that the permit was issued on the basis of incorrect, inaccurate, and incomplete information.

As per the Ferndale Municipal Code, you will be considered guilty of the following penalties unless you correct the violation:

18.12.290 Violation – Penalty.

Any person, firm, corporation, association, other entity or agent thereof who violates the provisions of this title or fails to comply with any of the requirements of this title or of terms of any permits issued pursuant to this title shall be guilty of a misdemeanor punishable by a fine of not more than \$500.00 or by imprisonment in the City Jail Facility for not more than 90 days, or both. Each day such violation continues shall be considered a separate offense.

This letter serves notice, based on these provisions of the Ferndale Municipal Code and the International Residential Code, that you have violated both regulations.

The City will work cooperatively with your structural engineer, following the structural observation which will take place on or before July 1, to identify those elements that are unpermitted and/or which require additional review.

Recognizing that it will take some time to prepare information and plans based on the structural observation, the City will require that you submit the following by July 18, 2011:

- Completed building permit application
- Structural, architectural, and stamped engineered plans accurately showing the new addition to the clock tower
- Structural observation by your structural engineer reviewing the entire existing structure. While a previous observation was apparently conducted by your structural engineer, the City has never received a report detailing those findings. If your engineer believes that those original findings still apply, he/she may submit a stamped letter to that effect, and attach it to the original report.

- Confirmation that all necessary electrical permits have been received through the Washington State Department of Labor and Industries

If you fail to comply with any of these requirements, the City will issue you citation(s), including a fine of \$500 per day per violation and a date to appear in the Ferndale Municipal Court. Please note that compliance with one element of this order shall not in any way provide you with additional time to satisfy other elements. Failure to comply with all elements will result in additional citations. The City will reserve the right to amend this list, subject to the results of the structural observation.

Please note that pursuant to the City of Ferndale adopted Unified Fee Schedule, you will be assessed an additional investigation fee equal to and in addition to the amount of the permit fee for working without a permit.

Please call Marci Wightman at 384-4006 to schedule an appointment to submit your revised building drawings.

Sincerely,



Jeri Burnett

Community Development Director

CC: Gary Jensen
Greg Young
Richard Langabeer
David Nelson

EXHIBIT "A"

Mark Lackey

From: Jori Burnett [JoriBurnett@cityofferdale.org]
Sent: Wednesday, September 07, 2011 5:01 PM
To: Mark Lackey
Subject: FW: 2147 Main St building fees

Mark – as promised, we have finished our review. We are therefore ready to issue, although we will need some time to make copies/ transfer notes if that is what you choose to do. As per my previous emails, this permit must be picked up within ten business days. Therefore, this permit must be picked up by 5pm Wednesday September 21st. We will require that an assignment of funds or bond for no less than \$30,000 be submitted as well, in addition to language authorizing the City to utilize those funds to hire a contractor and for that contractor to finish the exterior siding of the building. Finally, we will require that the exterior be finished within six weeks of issuance.

We hope that you and your clients recognize that the City has made a good-faith effort to complete these reviews, to recognize the scope of work that has already taken place, to work within your client's stated time frames, and more. At this point, the City's job is more or less completed – the City has done what it promised. Now it is Mr. Rojsza's turn.

Below are the fees for the permit and the methodology that was used.

From: Jerry Shiner
Sent: Wednesday, September 07, 2011 12:07 PM
To: Jerry Shiner
Cc: Jori Burnett; Marc Wightman
Subject: 2147 Main St building fees

Since the project is not a total rebuild I am deducting 80% of the valuation cost because most of the structure is there. I will charge full fees for the uncovered decks and the tower as they are new.

I will also charge an investigation fees for work being done without a building permit, as it had been expired by several months.

Main floor	1481 sq. ft. x 103.39 =	\$ 153,120.59	x 20%	=	\$30,624.11
Upper floor	1410 sq. ft. x 103.39 =	145,779.90	x 20%	=	29,155.98
Tower	225 sq. ft. x 103.39 =				23,262.75
Basement	943 sq. ft. x 103.39 =	97,496.77	x 20%	=	19,499.35
Uncovered decks	203 sq. ft. x 13.21 =				2,681.63

Valuation total = \$ 105,223.82

Building permit	\$1027.35
Plan Check	667.78
Plumbing fee	63.00
Investigation fee	1027.35
Archive fee	10.00
State fee	4.50

Total fees \$ 2799.98

These should be the total fees for the above subject project as of 9/7/2011.

Jerry Shiner

9/16/2011

Appendix
D

R105.2.2 Repairs. Application or notice to the *building official* is not required for ordinary repairs to structures, replacement of lamps or the connection of *approved* portable electrical *equipment* to *approved* permanently installed receptacles. Such repairs shall not include the cutting away of any wall, partition or portion thereof, the removal or cutting of any structural beam or load-bearing support, or the removal or change of any required means of egress, or rearrangement of parts of a structure affecting the egress requirements; nor shall ordinary repairs include *addition* to, *alteration* of, replacement or relocation of any water supply, sewer, drainage, drain leader, gas, soil, waste, vent or similar piping, electric wiring or mechanical or other work affecting public health or general safety.

R105.2.3 Public service agencies. A *permit* shall not be required for the installation, alteration or repair of generation, transmission, distribution, metering or other related *equipment* that is under the ownership and control of public service agencies by established right.

R105.3 Application for permit. To obtain a *permit*, the applicant shall first file an application therefor in writing on a form furnished by the department of building safety for that purpose. Such application shall:

1. Identify and describe the work to be covered by the *permit* for which application is made.
2. Describe the land on which the proposed work is to be done by legal description, street address or similar description that will readily identify and definitely locate the proposed building or work.
3. Indicate the use and occupancy for which the proposed work is intended.
4. Be accompanied by *construction documents* and other information as required in Section R106.1.
5. State the valuation of the proposed work.
6. Be signed by the applicant or the applicant's authorized agent.
7. Give such other data and information as required by the *building official*.

R105.3.1 Action on application. The *building official* shall examine or cause to be examined applications for permits and amendments thereto within a reasonable time after filing. If the application or the *construction documents* do not conform to the requirements of pertinent laws, the *building official* shall reject such application in writing stating the reasons therefor. If the *building official* is satisfied that the proposed work conforms to the requirements of this code and laws and ordinances applicable thereto, the *building official* shall issue a *permit* therefor as soon as practicable.

R105.3.1.1 Determination of substantially improved or substantially damaged existing buildings in flood hazard areas. For applications for reconstruction, rehabilitation, *addition* or other improvement of existing buildings or structures located in an area prone to flooding as established by Table R301.2(1), the *building official* shall examine or cause to be examined the *construction documents* and shall prepare a finding with

regard to the value of the proposed work. For buildings that have sustained damage of any origin, the value of the proposed work shall include the cost to repair the building or structure to its predamaged condition. If the *building official* finds that the value of proposed work equals or exceeds 50 percent of the market value of the building or structure before the damage has occurred or the improvement is started, the finding shall be provided to the board of appeals for a determination of substantial improvement or substantial damage. Applications determined by the board of appeals to constitute substantial improvement or substantial damage shall require all existing portions of the entire building or structure to meet the requirements of Section R322.

R105.3.2 Time limitation of application. An application for a *permit* for any proposed work shall be deemed to have been abandoned 180 days after the date of filing unless such application has been pursued in good faith or a *permit* has been issued; except that the *building official* is authorized to grant one or more extensions of time for additional periods not exceeding 180 days each. The extension shall be requested in writing and justifiable cause demonstrated.

R105.4 Validity of permit. The issuance or granting of a *permit* shall not be construed to be a *permit* for, or an *approval* of, any violation of any of the provisions of this code or of any other ordinance of the *jurisdiction*. Permits presuming to give authority to violate or cancel the provisions of this code or other ordinances of the *jurisdiction* shall not be valid. The issuance of a *permit* based on *construction documents* and other data shall not prevent the *building official* from requiring the correction of errors in the *construction documents* and other data. The *building official* is also authorized to prevent occupancy or use of a structure where in violation of this code or of any other ordinances of this *jurisdiction*.

R105.5 Expiration. Every *permit* issued shall become invalid unless the work authorized by such *permit* is commenced within 180 days after its issuance, or if the work authorized by such *permit* is suspended or abandoned for a period of 180 days after the time the work is commenced. The *building official* is authorized to grant, in writing, one or more extensions of time, for periods not more than 180 days each. The extension shall be requested in writing and justifiable cause demonstrated.

R105.6 Suspension or revocation. The *building official* is authorized to suspend or revoke a *permit* issued under the provisions of this code wherever the *permit* is issued in error or on the basis of incorrect, inaccurate or incomplete information, or in violation of any ordinance or regulation or any of the provisions of this code.

R105.7 Placement of permit. The building *permit* or copy thereof shall be kept on the site of the work until the completion of the project.

R105.8 Responsibility. It shall be the duty of every person who performs work for the installation or repair of building, structure, electrical, gas, mechanical or plumbing systems, for which this code is applicable, to comply with this code.

R105.9 Preliminary inspection. Before issuing a *permit*, the *building official* is authorized to examine or cause to be examined buildings, structures and sites for which an application has been filed.

SECTION R106 CONSTRUCTION DOCUMENTS

R106.1 Submittal documents. Submittal documents consisting of *construction documents*, and other data shall be submitted in two or more sets with each application for a *permit*. The *construction documents* shall be prepared by a registered *design professional* where required by the statutes of the *jurisdiction* in which the project is to be constructed. Where special conditions exist, the *building official* is authorized to require additional *construction documents* to be prepared by a registered *design professional*.

Exception: The *building official* is authorized to waive the submission of *construction documents* and other data not required to be prepared by a registered *design professional* if it is found that the nature of the work applied for is such that reviewing of *construction documents* is not necessary to obtain compliance with this code.

R106.1.1 Information on construction documents. *Construction documents* shall be drawn upon suitable material. Electronic media documents are permitted to be submitted when approved by the *building official*. *Construction documents* shall be of sufficient clarity to indicate the location, nature and extent of the work proposed and show in detail that it will conform to the provisions of this code and relevant laws, ordinances, rules and regulations, as determined by the *building official*. Where required by the *building official*, all braced wall lines, shall be identified on the *construction documents* and all pertinent information including, but not limited to, bracing methods, location and length of braced wall panels, foundation requirements of braced wall panels at top and bottom shall be provided.

R106.1.2 Manufacturer's installation instructions. Manufacturer's installation instructions, as required by this code, shall be available on the job site at the time of inspection.

R106.1.3 Information for construction in flood hazard areas. For buildings and structures located in whole or in part in flood hazard areas as established by Table R301.2(1), *construction documents* shall include:

1. Delineation of flood hazard areas, floodway boundaries and flood zones and the design flood elevation, as appropriate;
2. The elevation of the proposed lowest floor, including *basement*; in areas of shallow flooding (AO Zones), the height of the proposed lowest floor, including *basement*, above the highest adjacent *grade*;
3. The elevation of the bottom of the lowest horizontal structural member in coastal high hazard areas (V Zone); and
4. If design flood elevations are not included on the community's Flood Insurance Rate Map (FIRM), the

building official and the applicant shall obtain and reasonably utilize any design flood elevation and floodway data available from other sources.

R106.2 Site plan or plot plan. The *construction documents* submitted with the application for *permit* shall be accompanied by a site plan showing the size and location of new construction and existing structures on the site and distances from *lot lines*. In the case of demolition, the site plan shall show construction to be demolished and the location and size of existing structures and construction that are to remain on the site or plot. The *building official* is authorized to waive or modify the requirement for a site plan when the application for *permit* is for alteration or repair or when otherwise warranted.

R106.3 Examination of documents. The *building official* shall examine or cause to be examined *construction documents* for code compliance.

R106.3.1 Approval of construction documents. When the *building official* issues a *permit*, the *construction documents* shall be approved in writing or by a stamp which states "REVIEWED FOR CODE COMPLIANCE." One set of *construction documents* so reviewed shall be retained by the *building official*. The other set shall be returned to the applicant, shall be kept at the site of work and shall be open to inspection by the *building official* or his or her authorized representative.

R106.3.2 Previous approvals. This code shall not require changes in the *construction documents*, construction or designated occupancy of a structure for which a lawful *permit* has been heretofore issued or otherwise lawfully authorized, and the construction of which has been pursued in good faith within 180 days after the effective date of this code and has not been abandoned.

R106.3.3 Phased approval. The *building official* is authorized to issue a *permit* for the construction of foundations or any other part of a building or structure before the *construction documents* for the whole building or structure have been submitted, provided that adequate information and detailed statements have been filed complying with pertinent requirements of this code. The holder of such *permit* for the foundation or other parts of a building or structure shall proceed at the holder's own risk with the building operation and without assurance that a *permit* for the entire structure will be granted.

R106.4 Amended construction documents. Work shall be installed in accordance with the approved *construction documents*, and any changes made during construction that are not in compliance with the approved *construction documents* shall be resubmitted for approval as an amended set of *construction documents*.

R106.5 Retention of construction documents. One set of approved *construction documents* shall be retained by the *building official* for a period of not less than 180 days from date of completion of the permitted work, or as required by state or local laws.

No. 69259-3-1

COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON

ARTUR ROJSZA,

Respondent,

v.

CITY OF FERNDALE,

Appellants.

DECLARATION OF
SERVICE

I, Mylissa R. Bode, hereby certify as follows:

I am employed in the County of Whatcom, State of Washington. I am over the age of 18 and not a party to the within action. My business and place of employment is Belcher Swanson Law Firm, PLLC, 900 Dupont Street, Bellingham, Washington 98225.

On April 22, 2013, I served Respondent's Brief on Carol A. Morris Morris Law, PC, P.O. Box 948, 7223 Seawitch Lane NW, Seabeck, WA 98380, Carol_a_morris@msn.com via email and regular mail.

ORIGINAL


MYLISSA BODE