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NO. 701410-1

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

Jeffrey Connell and Joellen Connell,  
Appellants

v.

City of Bothell  
Respondent

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**RESPONSE BRIEF OF THE CITY OF BOTHELL**

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## I. INTRODUCTION

This matter comes before the Court under the Land Use Petition Act (LUPA), RCW Ch. 36.70C, as an appeal by the Connells. In 2008, the Connells replaced 92 windows and sliding glass doors in their Glen Grove Apartments. The Connells failed to apply for, let alone obtain, a building permit for the work. The windows and doors were installed in a manner that did not comply with the Bothell Municipal Code (BMC), the International Building Code (IBC), or the window manufacturer's installation instructions. When the City became aware of the situation as a result of a complaint which expressed concern about severe mold, it issued a Notice of Violation to the Connells. The Connells allowed several years to go by without resolving the situation. They finally attempted to do so when they learned that they could not refinance their apartment building without abating the violation. Because the windows and doors had been installed improperly, the City of Bothell Building Official and then the City of Bothell Board of Appeals both denied the Connells' request for after-the-fact permit approval. The Connells then filed a LUPA Petition, which was denied by King County Superior Court Judge Douglas A. North. This appeal followed.

The City Board of Appeals May 4, 2012 decision denying the Connells' after-the-fact building permit application is clearly supported by

the Bothell Municipal Code and the record in this case. Accordingly, the City of Bothell respectfully requests that the Court affirm the dismissal of the Connells' LUPA Petition, uphold the Board of Appeals decision denying the Connells' permit application, and award the City its attorneys' fees, expenses, and costs.

## **II. RESTATEMENT OF ISSUES**

1. Have the Connells met their burden of demonstrating that the Board of Appeals decision was based on a clearly erroneous application of the law to the facts?
2. Have the Connells met their burden of demonstrating that the Board of Appeals decision was not supported by substantial evidence?
3.
  - a. Is Connells' appearance of fairness argument barred because they failed to assign error in this court to the superior court's ruling that they had not preserved the issue below?
  - b. Did Connells' waive in superior court their purported appearance of fairness issue when, as the superior court ruled, "The issue of appearance of fairness was not adequately preserved and presented in petitioner's brief."?

- c. Did participation by the Bothell Building Official in a Board of Appeals public proceeding as the City's non-voting representative per the process established in BMC 20.02.225 violate the appearance of fairness doctrine ?

### III. RESTATEMENT OF THE CASE

#### A. **The Connells Tear Out and Replace Windows in their Apartment Building Without a Permit and in Violation of the Building Code**

On June 9, 2008, the City of Bothell received a complaint regarding the recent replacement of windows at the Glen Grove Apartments, located at 10295 NE 189<sup>th</sup> Street, in Bothell. AR 0011.<sup>1</sup> The complainant, who wished to remain anonymous, was concerned about "severe mold, water damage and unsafe balconies." AR 0011.

In response to the complaint, the City investigated and determined that a large of number of windows at the Glen Grove Apartments had, in fact, recently been replaced. AR 0011. On June 12, 2008, the City notified the property owners, Jeffrey and JoEllen Connell, that the City Code

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<sup>1</sup> The Administrative Record ("AR") is Sub No. 29 on the Index to Clerk's Papers with the document description "CERTIFIED APPEAL BOARD RECORD SENT AS ORIGINAL." The Administrative Record contains 36 documents that are separately tabbed 1 through 36. Tabs 1 through 35 consist of 193 total pages, which are sequentially Bates stamped AR 0001 through AR 0193. The City will reference these documents by their Bates stamp number only. Tab 36 of the Administrative Record is a 150-page report of proceedings of the April 17, 2012 Board of Appeals hearing, which will be cited as RP \_\_\_\_\_. Per the Connells' Statement of Arrangements dated May 24, 2013, the hearing before the superior court has not been transcribed and is not part of the record on appeal.

required a building permit for the window retrofit work and directed them to apply for a building permit within 15 days. AR 0019; AR 0011.

The Connells failed to apply for a building permit within 15 days and the City issued a Notice of Violation (NOV) on July 30, 2008, citing the Connells' continuing failure to obtain the required permit. AR 0022-0024. The NOV advised, consistent with BMC 11.20.005.B, that to address the violations and avoid further City enforcement action under the NOV, a building permit application had to be submitted within 30 days, and a permit then approved, with required inspections performed, within the timeframe allowed by City Codes. AR 0023. No building permit application was submitted within the 30-day period. AR 0011; AR 0027.<sup>2</sup>

The NOV also advised that any appeal must be filed within 15 days. AR 0023. The Connells received the NOV on August 1, 2008 (AR 0004), but they did not file a timely appeal. AR 0005-0006.

**B. The Connells Finally Submit an After-the-Fact Permit Application.**

On September 10, 2008, the Connells finally submitted their first application for an after-the-fact building permit. AR 0011. On October 2,

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<sup>2</sup> The City sent a follow-up letter to the Connells on September 3, 2008. AR 0027. The September 3, 2008 letter reiterated that the Connells must apply for a permit and informed them that they were now subject to civil penalties in the amount of \$250 per day until they complied with the NOV. AR 0027.

2008, the City concluded that the application was inconsistent with City and State Building Code regulations and, accordingly, the City issued a Determination of Inconsistency. AR 0011; AR 0029; AR 0002. The Determination of Inconsistency directed the Connells to submit additional information in order to complete the review process. AR 0029. The Connells later submitted a proposal for “Alternative Materials, Design and Methods of Construction” based on the installation methodology employed by the Connells and their contractor, Northwest Primeline Exteriors, Inc. (“NW Primeline”). This was essentially a request that the City approve an after-the-fact permit on the theory that the windows’ installation was good enough even though it did not meet Code requirements. The proposal was denied by the City. AR 0002; AR 0033-0035; *see also* CP 4. In response to the City’s denial, on December 30, 2008, counsel for the Connells and NW Primeline filed a request with the City pursuant to BMC 20.02.225 for an appeal hearing before the City Board of Appeals. AR 0031-0035. The City acknowledged receipt of the appeal request by letter dated January 5, 2009. AR 037-0039.

On January 29, 2009, Bothell’s City Code Compliance Officer and Senior Plans Examiner visited Glen Grove Apartments and took photographs of the window installations. AR 0012; AR 0041-0048. A City Staff Report explains with regard to the 2009 photos:

The photos clearly depict the seals have broken on several of the windows allowing condensation to form between the glazing panels. Additionally, there are significant signs of mold on the window blinds and on the interiors of the units apparently as a result of the currently installed windows not being properly installed with required flashing. Also, staff was able to visually look behind the vertical trim boards and see the exposed framing for the window openings, another avenue for continued water intrusion and potential insect infestation.<sup>3</sup>

The Connells' December 30, 2008 appeal was originally scheduled to be heard by the City's Board of Appeals on February 19, 2009. AR 0012. However, on February 17, 2009, counsel for the Connells and NW Primeline requested that the hearing date be continued so that NW Primeline could submit a "proposed method of modifying the window installation, including detail drawings and materials information" and the City could respond to the proposal. AR 0050. The request further stated:

This request for continuance is based upon the progress made during discussions between building code experts retained by Northwest Primeline Exteriors and you which have led us to conclude that a building permit is required for the window installation . . .

AR 0050. The City made several attempts to re-schedule the hearing on the Connells' appeal, however, none of the dates were acceptable to the Connells and the hearing was never convened. AR 0002; *see also* AR 0012. Ultimately in September 2009, the Connells' 2008 after-the-fact

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<sup>3</sup> AR 0012. The Staff Report is dated April 3, 2012 and was submitted to the Board of Appeals prior to its April 17, 2012 hearing. AR 0003.

permit application lapsed and the associated appeal request lapsed with the permit application. AR 0003; AR 0012.

**C. The Connells Sue the Window Installation Company.**

Two and a half years then passed with no action by the Connells to resolve the NOV which remained of record on their property. Then, on September 26, 2011, the Connells, alleging improper installation, filed a lawsuit in King County Superior Court against the company that had installed the windows. Connell v. 2FL Enterprises LLC, f/k/a Northwest Primeline, Inc., d/b/a Northwest Primeline Exteriors, King County Superior Court No. 11-2-32580-6 SEA (hereinafter "Connell v. 2FL/NW Primeline").<sup>4</sup> In this lawsuit, Jeffrey Connell, one of the owners of the Glen Grove Apartments, filed a declaration "under penalty of perjury" in which he testified the following to be "true and correct to the best of [his] knowledge and belief":

4. NW Primline [sic] has ceased doing business. The owners of NW Primline [sic] now do business as 2FL Enterprises LLC ("2FL"). 2FL is the successor entity to NW Primeline and is obligated to pay the debts of NW Primeline as such.

5. Prior to installation of the retrofit windows, 2FL/NW Primeline failed to procure a building permit

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<sup>4</sup> The Complaint in Connell v. 2FL/NW Primeline is Attachment A to Respondent City of Bothell's Response Brief (Sub No. 31) below. This document has not yet been assigned an index number by the clerk, but has been listed for inclusion in the clerk's papers on the City's supplemental designation filed concurrently with this brief.

from the City of Bothell for the construction services.

6. Prior to installation of the retrofit windows, 2FL/NW Primeline failed to obtain drawings stamped by a licensed architect or engineer depicting the proposed method of installation.

7. During the removal of the original windows or installation of the retrofit windows, 2FL/NW Primeline or its subcontractors damaged the building's weather seal.

8. During installation, 2FL/NW Primeline and/or its subcontractor cut away the nail flange of the retrofit window resulting in damage to the window opening and damage to the weather seal.

9. 2FL/NW Primeline and/or its subcontractor installed the retrofit windows without the flashing required by applicable building code and applicable energy code resulting in damage to the window opening and damage to the weather seal. The retrofit windows installed by 2FL/NW Primeline cannot be re-used or re-installed because the window flange has been cut off.

10. 2FL/NW Primeline failed to install the retrofit windows in accordance with the manufacturer's specifications and installation instructions and failed to comply with applicable building code and applicable energy code.

...

14. Attached hereto as Exhibit 3 is a true and correct copy of the estimate obtained from Capitol Home Improvement for removal of the existing windows and doors and replacement with comparable windows and doors utilizing installation specifications approved by the City of Bothell Building Department. The cost of materials and the construction services is \$59,130.00.<sup>5</sup>

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<sup>5</sup> See Declaration of Jeffrey K. Connell in Support of Motion for Order of Default and Default Judgment at 2-3, filed in Connell v. 2FL/NW Primeline, September 28, 2011. The declaration is Attachment B to Respondent City of Bothell's Response Brief (Sub

**D. The Connells Apply Again For An After-the-Fact Permit.**

After initiating their lawsuit against the window installation company for improper installation of the windows, the Connells, on October 21, 2011, submitted to the City a new building permit application (BMF20011-01044/ Plan MF2011-00961), in which they again sought after-the-fact approval of that same 2008 installation. AR 0053-0077.<sup>6</sup> Under the description of the proposed use and permit sought, the application indicates that the Connells were again seeking an Alternate Materials, Design and Methods of Construction and Equipment approval pursuant to BMC 20.02.090. AR 0054. Attached to their permit application is a letter from their consultant, Mr. Matt Lawless,<sup>7</sup> stating:

We are submitting the permit application utilizing Bothell Municipal Code provision 20.02.090 subparts K and L. Parts K and L are associated with modifications to existing openings and installation using an alternative method and design.

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No. 31) below, which has not yet been assigned an index number by the clerk. Attachment C to Respondent City of Bothell's Response Brief (Sub No. 31) is a copy of the Connells' Motion for Order of Default and Default Judgment filed on September 28, 2011 in Connell v. 2FL/NW Primeline. The Complaint (Attachment A) and the Motion for Order of Default (Attachment C) both contain allegations analogous to those made in Attachment B, Mr. Connell's sworn declaration.

<sup>6</sup> The new application was submitted after the Connells learned that they could not refinance the Glen Grove Apartments property because the 2008 NOV was still in effect and of record, and a building permit was still needed. CP 5.

<sup>7</sup> The Connells utilized the services of father and son consultants named Mark Lawless and Matt Lawless, respectively. RP 2 (identifying witnesses Mark Lawless and Matt Lawless). To avoid confusion, the City will use their full names when referring to them.

AR 0068. In other words, both the permit application itself and the accompanying correspondence acknowledged to the City that the Connells were seeking special dispensation — approval of an alternative installation method and design not authorized under the Bothell Municipal Code.

A September 27, 2011 Water Leakage Field Test Report submitted with the October 21, 2011 application reported the results from testing performed for the Connells' on four of the windows at the Glen Grove Apartments on September 23, 2011. AR 0055-0062. Two of the windows tested were in Unit 102; the other two tests were performed on windows in Unit 302 and Unit 107. AR 0058-0061. Of the 92 windows and sliding glass doors installed,<sup>8</sup> only 4 % of the total were tested for water leakage — and those windows were only in three of the 24 total rental units.<sup>9</sup> The Water Leakage Field Test Report indicates that of the four windows tested on September 23, 2011, one of the windows, representing 25% of those tested, "**Failed**" the leakage test. AR 0059 (emphasis in original). Stated differently, 33% of the three units in which windows were tested failed a

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<sup>8</sup> The Connells and their agents erroneously refer to 96 windows and sliding glass doors rather than 92 in certain portions of the record. *See e.g.* AR 106 and AR 0118 which are narrative documents submitted to the Board of Appeals by the Connells and their agents. However, during the April 17, 2012 Board of Appeals hearing, the Connell's counsel confirmed that there were 92 windows and sliding glass doors installed, i.e. "44 sliders, 48 windows." RP at 146. This is consistent with the Empire Pacific Windows order which indicates that 48 windows and 44 sliding glass doors (20+24) were ordered. AR 0120; AR 0065. The Board of Appeals decision correctly refers to 92 windows and sliding glass doors. AR 0002.

<sup>9</sup> *See* CP 3 ("The Premises consists of 24 rental units. . .").

leakage test.<sup>10</sup> The narrative description under “**TEST RESULTS**” for the window that “**Failed**” in Unit 102 acknowledges unequivocally:

Water was observed coming through a void in the sealant at the head. This leakage occurred four minutes and thirty seconds into the second of three 5-minute cycles at a test pressure of 2.86 PSF.

AR 0059 (emphasis in original); *see* AR 0068 (“Three out of four windows passed. One window allowed water at the head of the window in the drywall liner. The cause of the failure was determined to be due to sealant joint maintenance and was an installation or window failure.”). In addition to water that leaked through “a void in the sealant” resulting in the “**Failed**” test result, “**A small amount of water was noted percolating through where the interlock and the sill meet.**” AR 0059 (emphasis in original). The window that failed the test was never repaired or retested. RP 101.

Despite the “**Failed**” water leakage test which he himself submitted to the City, Connell consultant Matt Lawless’ October 19, 2011

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<sup>10</sup> At the April 17, 2012 Board of Appeals Hearing, Connell consultant Mark Lawless confirmed that the testing focused on the window assembly as a whole and did not specifically isolate the window fenestration product from the building envelope. RP 107. Accordingly, the testing performed would not reveal the extent to which water might be intruding into the wall cavity. *See* RP 107. Moreover, Connell consultant Matt Lawless testified that the windows selected for testing were chosen because they were “available”. RP 113. Bothell Building Official Mr. DeLack pointed out that “it appears that the windows that looked to be in the best condition” were selected for the test commissioned by Connells as opposed to those observed and photographed by the City which had heavy mold growth and evidence that “could lead one to believe that they were leaking.” RP 114.

letter submitted with the Connell October 21 application incorrectly asserts “that since the windows were installed in 2008 there has not been one reported failure or water intrusion at any window.” AR 0069.

The Connells’ October 21, 2011 application also included a document titled “Suggested and Approved Method of Installing Finless (Pocket) Windows”, which Matt Lawless described as the manufacturer’s “Retrofit Installation Instructions”. AR 68; AR 0070-0077.<sup>11</sup> The instructions state at the outset:

***Any local building code requirements and installations designed specifically for the structure by a structural engineer or an architect supercede [sic] these recommended installation instructions.***

AR 0070 (emphasis in original). The instructions further make clear that when retrofitting a building with finless vinyl windows -- the type used by Connells — the product must be installed into an existing, water-tight, window frame:

The finless vinyl window as a retro-fit product is installed into an existing wood (includes double-hungs) or aluminum window frame. The installation assumes the existing window frame is installed water-tight into the structure. Damage due to leaks in the existing window frame is not a warranty issue.

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<sup>11</sup> This same document also appears in the record at AR 0141-0148.

AR 0070 (emphasis added); *see* AR 0071 (“The existing (wood or aluminum) frame serves as the rough opening for the new finless vinyl window. The existing frame must be square, level, and plumb and installed water-tight to the structure.”); AR 0073 (instructions on how to prepare the existing window frame).<sup>12</sup> This requirement for installation of retrofit windows into existing window frames is generally consistent with AAMA 2410-03, “Standard Practice for Installation of Windows with an Exterior Flush Fin Over an Existing Window Frame,” promulgated by the American Architectural Manufacturers Association.<sup>13</sup>

**E. Bothell Building Official Denies the Connells’ Second Application.**

On November 23, 2011, after carefully reviewing the materials submitted by the Connells, the City’s Building Official, Michael L. DeLack, denied the Connells’ second application pursuant to BMC 20.02.090(K)<sup>14</sup> and (L)<sup>15</sup> for approval of “Alternate Materials, Design and Methods of Construction and Equipment.” AR 0079-0082.

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<sup>12</sup> The manufacturer’s instructions also allow for installation of the windows in new construction where the windows are installed into a rough opening rather than into an existing frame. AR 0074-0076. Per the manufacturer’s instructions, in a new construction context, installation of the windows into a rough opening requires substantial flashing and other preparations, none of which were done in this case. *See* AR 0074-0076.

<sup>13</sup> A copy of AAMA 2410-03 appears in the record at AR 0096-0104.

<sup>14</sup> BMC 20.02.090(K) provides:

K. Modifications. Wherever there are practical difficulties involved in carrying out the provisions of this code, the building official shall have the authority to grant modifications for individual cases, upon application of the owner or owner’s representative; provided, the building official shall

The Building Official's denial describes how the windows were installed without flashing and with only a bead of caulk protecting against moisture penetration:

The existing window and door assemblies were removed and the new assemblies were altered (nailing flanges removed) and set into the existi[s]ting framed openings<sup>16</sup> without flashing. The applicant is claiming this to be a typical "finless" or "collapse" type of installation. However the non-permitted installations are relying solely on sealant (caulk) placed between the framed opening and the window and door assemblies to prevent moisture intrusion into the building.

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first find that special individual reason makes the strict letter of this code impractical and the modification is in compliance with the intent and purpose of this code and that such modification does not lessen health, accessibility, life and fire safety, or structural requirements. The details of action granting modifications shall be recorded and entered in the files of the department. The building official is authorized to charge an additional fee to evaluate any proposed modification under the provisions of this section.

<sup>15</sup> BMC 20.02.090(L) provides:

L. Alternative Materials, Design and Methods of Construction and Equipment. The provisions of this code are not intended to prevent the installation of any material or to prohibit any design or method of construction not specifically prescribed by this code; provided, that any such alternative has been approved. An alternative material, design or method of construction shall be approved where the building official finds that the proposed design is satisfactory and complies with the intent of the provisions of this code, and that the material, method or work offered is, for the purpose intended, at least the equivalent of that prescribed in this code in quality, strength, effectiveness, fire resistance, durability and safety. Requests for approval of proposed alternative materials, designs, methods of construction and equipment which would qualify for credit towards green building certification under the Leadership in Energy and Environmental Design, National Green Building Standard, Built Green (Three Star level or higher), or other certification program as approved by the community development director shall be assigned the highest priority for evaluation and determination by the building official. The building official is authorized to charge an additional fee to evaluate any proposed alternate material, design and/or method of construction and equipment under the provisions of this section.

<sup>16</sup> The Building Official is referring here to the fact that the replacements were set into the openings where the original windows and original window frames once were. As discussed further below, the original windows and the original frames were all removed, leaving nothing more than a rough opening.

AR 0080. The decision then goes on to explain, “In order to prevent moisture intrusion into a structure the assemblies are required to comply with AAMA Standard 2410-03, in the case of a “finless” or “collapse” type of installation, or the following sections of the International Building Code (IBC) for “typical” installations. . .” AR 0080. The decision then quotes IBC sections 1403.2, 1405.4, and 1715.5.1 which require, *inter alia*, “a weather resistant exterior wall envelope” and that “[f]lashing shall be installed at the perimeters of exterior door and window assemblies, penetrations and terminations of exterior wall assemblies, exterior wall intersections with roofs, chimneys, porches, decks, balconies and similar locations where moisture could enter the wall.” AR 0080. The Building Official’s decision further notes that the Connells’ own test results indicate that one of the four windows tested for water leakage failed. AR 0081.

Accordingly, the Building Official determined that the window and door assemblies did not comply with IBC sections 1403.2, 1504.4, 1715.5.1 or AAMA Standard 2410-03. The Building Official also found that the “Applicant is proposing to rely on an impractical and on-going maintenance program of re-applying sealant to maintain some 100 window and door assemblies” and that the water leakage test information submitted by the applicant utilized an incorrect testing standard. AR 0081.

With respect to BMC 20.20.090(K) (“Modifications”), the Building Official’s decision concludes:

I find no special reason was provided by the applicant to justify the existing installation of the non-permitted window and door assemblies. No compelling reason was provided to demonstrate that compliance with the strict letter of the code would be impractical. In addition, no basis was provided to support a determination that the proposal would be in compliance with the intent and purposes of the applicable IBC sections and AAMA standards.

AR 0082.<sup>17</sup>

And, with respect to BMC 20.02.090(L) (“Alternative Materials, Design and Methods of Construction and Equipment”), the decision concludes “the existing installation does not satisfactorily comply with the intent and provisions of the applicable IBC sections or the applicable AAMA standard. Nor is the proposed alternative equivalent to that prescribed in the referenced codes and standards in quality, durability, or effectiveness.” AR 0082.

**F. Board of Appeals Also Denies the Connells’ Second Application.**

On December 6, 2011, the Connells, through attorney Shane Yelish, appealed the Building Official’s November 23, 2011 denial

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<sup>17</sup> The decision notes that, while the City is sympathetic to the costs associated with correcting the non-compliant installations, cost is not a basis for approval of a modification. AR 0082.

decision to the City of Bothell Board of Appeals established pursuant to BMC 20.02.225. AR 0084-0086.<sup>18</sup> The appeal attempted to make the issue personal as if the Building Official's enforcement of requirements intended to prevent water penetration, mold, and other public health impacts was a matter of personal preference:

The as-built construction complies with all applicable Code provisions. The Connells believe they are being unjustifiably singled out by Mr. DeLack as a result of personal distaste for this method of installation irrespective of its compliance with the Code and acceptance as an industry standard. The Connells have incurred great expense in responding to the City's demands and have now retained this office and construction experts to exhaust all legal channels available.

AR 0086 (emphasis added).

On March 30, 2012, Bothell Code Enforcement Officer Debbie Blessington and Building Official Michael DeLack visited the Glen Grove Apartments and photographed a sampling of the windows. AR 0088-0094. Mold is prevalent in the photographs. AR 0088-0094.

On April 17, 2012, the City convened a Board of Appeals to hear the Connells' appeal. The three member Board was constituted per BMC

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<sup>18</sup> The 2011 appeal also purported to challenge City decisions made in connection with the 2008 permit application. AR 0085.

20.02.225: all of the Board members had substantial expertise in building construction and none of the three were employed by the City of Bothell.<sup>19</sup>

Connell's consultant, Mark Lawless, testified in the hearing that installation of the Empire Pacific ("EPI"<sup>20</sup>) windows involved removing the fin or flange of the vinyl window "that constitutes the flange for nailing the window when you're applying the window in that way." RP 58. He further testified, "So essentially that was the scope; cut out the old, retrofit the EPI windows, slip them into the old space." RP 60. When asked by Board of Appeals Member Tinner whether "the entire aluminum frame was removed in every case", Mark Lawless answered unequivocally "[i]t was." RP 60. Mark Lawless was also asked whether the nailing flange or fin on the preexisting aluminum window was left in place and he responded, "No that was cut from the window because it — the new window was designed to slip into the existing size of the rough opening whereupon it was screwed." RP 61.

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<sup>19</sup> The City of Bothell Board of Appeals has specialized expertise in interpreting and applying the Bothell Municipal Code. Pursuant to BMC 20.02.225(C), "[t]he board of appeals shall consist of three members who are qualified by experience and training to pass on matters pertaining to building construction and are not employees of the jurisdiction." Board of Appeals Member Gregory H. Schrader at the time of the hearing was the Building Division Director and Building Official for the City of Bellevue. Board of Appeals Member James Tinner at the time of the hearing was the Building Official for the City of Bellingham. Board of Appeals Member Trace Justice at the time of the hearing was the Building Official for Snohomish County.

<sup>20</sup> Empire Pacific Windows is also known as Empire Pacific Industries.

When questioned at length about the manufacturer's retrofit installation instruction requiring that the windows be set inside the preexisting aluminum frame, Mark Lawless ultimately confirmed that the window installation did not comply with the manufacturer's retrofit installation instructions because Connells contractor had removed the preexisting aluminum frames. *See generally* RP 80-88. During the questioning, Mark Lawless attempted to direct the Board of Appeals to the manufacturer's installation instructions for new construction (as opposed to retrofitting in an existing structure) and the requirements for flashing when the windows are installed in new construction. RP 83-84. Because appropriate flashing for new construction was not installed, Board Member Tinner suggested to Mark Lawless, "That's probably not a – probably not an area you really want to go." RP 84.<sup>21</sup> Mr. Lawless then again confirmed in response to questions from Board Member Justice that the entire preexisting aluminum frames were taken out and the new windows were set into a rough opening. RP 84.

Mr. Connell was also asked if the windows were installed per the manufacturer's installation instructions and whether the manufacturer would stand behind them as they were installed. RP 90. Mr. Connell

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<sup>21</sup> The Board Members expressed concern that removing the preexisting window frame and installing the replacement windows into the rough opening could result in water intrusion. *See* RP 84-88.

answered, *inter alia*: “Well, I don’t think anybody can answer that. I certainly can’t. I’m not an expert. I just hired a company to do it and they claimed that they did do it that way.” RP 90.

The Board issued its decision on the Connells’ appeal on May 4, 2012. AR 0002-0006. The decision affirmed the City’s 2011 building permit denial. Id. The Board based its decision on a determination that the windows and doors had not been installed in compliance with the language and intent of the Code:

IBC Section 1405.13.1 states that exterior windows and doors shall be installed per the manufacturer’s installation instructions. During his testimony, Mr. Lawless stated that the existing aluminum window and door frames had been removed prior to installation of the new windows and doors.

City exhibit #9 includes what has been stated as being the window manufacturer’s installation instructions.<sup>22</sup> As part of those instructions, a “finless” window is to be installed within the existing aluminum or wood window frame. Mr. Lawless testified that the existing aluminum frames had been removed and the new windows installed directly into the rough wall opening.

When questioned about this method not meeting the installation requirements of the manufacturer, Mr. Lawless testified that there were also manufacturer’s installation methods for new construction and that the windows as installed would meet those requirements. Upon further questioning by the Board, Mr. Lawless stated that the flashing and sealants required by the manufacturer for new

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<sup>22</sup> This is a reference to a document now Bates stamped AR 0070-AR 0077.

construction had not been installed, but instead the building's vinyl siding would, in his opinion, accomplish the same task as the prescribed flashing.

AR 0005. And, the Board concluded, *inter alia*:

2. The windows and doors, as installed, do not comply with the IBC (sections 1403.2, 1405.4 or 1405.13.1), the manufacturer's installation instructions, or the AAMA Standard 2410-03 that the manufacturer's installation instructions appear to be modeled on.

**In regard to relief sought by the Appellant's request number 2, the Board has determined that the windows and doors have not been installed in compliance with the language and intent of the Code and finds for the City.**

AR 0006 (emphasis in original).

The Board's decision also concluded that a building permit was required and that the Connells had not timely challenged the City's 2008 NOV. AR 0005-0006.

**G. Superior Court Affirms Board of Appeals Decision.**

On May 14, 2012 the Connells appealed the Board's decision to superior court by filing their LUPA Petition challenging the Board's findings and conclusions with regard to whether the windows and doors were installed consistent with the language and intent of the BMC. CP 1-15.

The Connells' 2012 LUPA Petition also attempted to raise two additional issues. First, it sought review of the City's July 30, 2008 NOV

issued in response to the Connells' failure to apply for a building permit for the work performed. And, second, the Connells also alleged that the City had violated the Washington Administrative Procedures Act, which does not apply to local land use and building permit decisions. However, after hearing oral argument, the superior court dismissed these additional claims in September 13, 2012 orders that the Connells have not appealed. CP 95-97, 98-99. As a result, it is settled that a building permit is required.<sup>23</sup>

On November 21, 2012, the Connells filed with the superior court an eleven-page opening brief on the merits of their LUPA petition.<sup>24</sup> The Connells' brief included a one-paragraph, eight-line argument, with no citations to the record or applicable authority, that the Board of Appeals proceeding somehow violated their right to a fair hearing by impartial

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<sup>23</sup> The superior court's order held:

. . . that any and all claims brought under Petitioners' LUPA petition that relate to the City's 2008 Notice of Violation determination that a building permit was required which was never appealed and therefore is a final decision, in repose for four years, are hereby dismissed for lack of standing and failure to exhaust administrative remedies.

CP 98-99. Nonetheless, the Connells refer in their Statement of Case here to correspondence from the International Code Council which they apparently believe supports their earlier 2008 position that a permit was not required. Opening Brief of Appellants at 5. However, that issue is not before the Court. In any event, the Board of Appeals May 4, 2012 decision explains why the Connells' reliance on the correspondence from the International Code Council is misplaced. *See* AR 0004.

<sup>24</sup> Petitioners' Opening Brief, Sub No. 30. This document has not yet been assigned an index number by the clerk, but has been listed for inclusion in the clerk's papers on the City's supplemental designation filed concurrently with this brief.

decision makers.<sup>25</sup> On December 21, 2012, the City filed its response brief which included, *inter alia*, a three-page argument that the Connells' had failed to present a colorable due process or appearance of fairness argument.<sup>26</sup> The Connells filed no reply brief. A LUPA hearing on the merits was subsequently held on March 1, 2013 and the Court entered an Order Denying LUPA Petition in its entirety at that time. CP 100-101; CP 102.

On March 11, 2013, the Connells filed an eight-page motion for reconsideration focused on the appearance of fairness issue to which they had previously devoted only one throwaway paragraph in their opening brief and on which they had not bothered to file a reply brief at all. CP 103-110. The superior court denied the Connells' motion for reconsideration on March 22, 2013, explaining, "The issue of appearance of fairness was not adequately preserved and presented in petitioner's brief." CP 118-119. The Connells have not assigned error to this ruling by the superior court.

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<sup>25</sup> *Id.* at 7-8.

<sup>26</sup> Respondent City of Bothell's Response Brief, Sub No. 31 at 32-34. Again, this document has not yet been assigned an index number by the clerk.

#### IV. ARGUMENT

##### A. **The Connells Have the Burden of Proof and the Board of Appeals Decision is Entitled to Deference.**

In reviewing an administrative decision under the Land Use Petition Act (“LUPA”), RCW Chapter 36.70C, this Court stands in the same position as the superior court and bases its review on the administrative record before the body that made the local jurisdiction’s final decision, here, the City of Bothell Board of Appeals. Girton v. City of Seattle, 97 Wn. App. 360, 363, 938 P.2d 1135 (Div. 1 1999), rev. denied, 140 Wn.2d 1007, 999 P.2d 1259 (2000).

Per LUPA, a petitioner challenging the validity of an agency decision has the burden of demonstrating its invalidity. RCW 36.70C.130; Weyerhaeuser v. Pierce County, 95 Wn. App. 883, 889, 976 P.2d 1279 (Div. 2 1999). To do so, a petitioner must prove one of the following: (a) the decision was based upon unlawful or erroneously applied procedure which cannot be characterized as harmless error; (b) the decision involved erroneous interpretations or applications of law; (c) the decision was not supported by substantial evidence; (d) the decision was based upon a clearly erroneous application of the law to the facts; (e) the decision exceeded the agency’s authority; or (f) the decision violated the petitioner’s constitutional rights. RCW 36.70C.130 (1); Abbey Road

Group, LLC v. City of Bonney Lake, 167 Wn.2d 242, 249, 218 P.3d 180 (2009).

Under LUPA, questions of law are reviewed *de novo*. Abbey Road Group, 167 Wn.2d at 249; HJS Dev., Inc. v. Pierce County, 148 Wn.2d 451, 468, 61 P.3d 1141 (2003). In doing so, the Court gives substantial weight and deference to the City's expertise in interpreting the law it administers, in this case the Bothell Municipal Code. Habitat Watch v Skagit County, 155 Wn.2d 397, 412, 120 P.3d 56 (2005) ("Local jurisdictions with expertise in land use decisions are afforded an appropriate level of deference in interpretations of law under LUPA."); Mall v. City of Seattle, 108 Wn.2d 369, 377-78, 739 P.2d 668 (1987) ("It is a well-established rule of statutory construction that considerable judicial deference should be given to the construction of an ordinance by those officials charged with its enforcement."), quoted in Meridian Minerals v. King County, 61 Wn. App 195, 209, 810 P.2d 31 (Div. 3 1991), review denied 117 Wn.2d 1017 (1992); *see also* Phoenix Development, Inc. v. City of Woodinville, 171 Wn.2d 820, 828-829, 256 P.3d 1150 (2011) ("Phoenix"); East v. King County, 22 Wn.App. 247, 256, 589 P.2d 805 (Div. 1 1978) ("The interpretations of the zoning adjustor and the Board of Appeals on this question are based on their long familiarity and expertise in interpretation of the King County Zoning

Code. These administrative interpretations should be given great weight by the court.”).

Under the LUPA review standard in RCW 36.70C.130(1)(c), which concerns facts, the Court applies the substantial evidence test. Isla Verde Int’l v. City of Camas, 99 Wn. App. 127, 133, 990 P.2d 429 (Div. 2 1999). A decision supported by substantial evidence in the record must be upheld. Phoenix, supra, 171 Wn.2d at 832-833. This does not require a preponderance of evidence. Only a “sufficient quantum” of evidence in the record to persuade a reasonable person of the truth of the declared premise when viewed in light of the whole record before the Court is required. Id.

Substantial evidence review is deferential and requires the Court to view the evidence and to draw inferences from the evidence in the light most favorable to the City’s decision. Id. (“We do not weigh the evidence or substitute our judgment.”); see Sunderland Family Treatment Services v. City of Pasco, 127 Wn.2d 782, 788, 903 P.2d 986 (1995). This “necessarily entails acceptance of the fact finder’s views regarding the credibility of witnesses and the weight to be given reasonable but competing inferences.” City of University Place v. McGuire, 144 Wn.2d 640, 652, 30 P.3d 453 (2001).

On issues requiring the application of law to facts (RCW 36.70C.130(1)(d)), judicial review is again deferential, requiring that the City be affirmed unless its decision was a “clearly erroneous” application of the law to the facts, i.e. the reviewing Court after giving deference to the City’s factual determinations “is left with the definite and firm conviction that a mistake has been committed”. Phoenix, supra, at 829; Cingular Wireless v. Thurston County, 131 Wn. App. 756, 768, 129 P.3d 300 ( Div. 2 2006); Citizens to Preserve Pioneer Park, L.L.C. v. The City of Mercer Island, 106 Wn. App. 461, 473, 24 P.3d 1079 (Div 1 2001).

Per RAP 10.3(a)(4), an appellant’s brief must include: “A separate concise statement of each error a party contends was made by the trial court, together with the issues pertaining to the assignments of error.”

RAP 10.3(g) further requires:

A separate assignment of error for each finding of fact a party contends was improperly made must be included with reference to the finding by number. The appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto.

In LUPA cases, an appellant assigns error to the factual findings made by the local jurisdiction in its final decision. *See, e.g.,* McMillian v. King County, 161 Wn.App. 581, 588 n.1, 255 P.3d 759 (Div.1 2011) (assignments of error made to hearing examiners factual findings).

Unchallenged findings of fact are considered to be verities on appeal. Anderson v. Pierce County, 86 Wn.App. 290, 307 n.9, 936 P.2d 432 (Div.2 1997).

The Connells generally assert that the “underlying Board of Appeals decision is a clearly erroneous application of the law to the facts” and that the “underlying Board of Appeals decision is not supported by substantial evidence.” Opening Brief of Appellants at 2, Assignments of Error 2 & 3. However, in support of these two very broad and vague assignments of error and the related issue statements, the Connells offer only two and half pages of conclusory briefing.<sup>27</sup> Their generalizations fall far short of meeting their burden on these issues.<sup>28</sup> Meanwhile, the Connells have not assigned error to any of the Board of Appeals’ more specific factual findings. Thus, all findings of fact by the Board of Appeals are verities.

Similarly, the Connells have not assigned error to any findings by

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<sup>27</sup> See Opening Brief of Appellants at 18-20.

<sup>28</sup> The Connells’ LUPA Petition in superior court purported to challenge the City Board of Appeals decision on other grounds as well, including, for example, that the Board erroneously interpreted the law and engaged in unlawful procedure. CP 6-7. However, such issues were not argued by the Connells’ below and are not addressed in their Opening Brief here. Issues not argued in an opening brief are waived. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 808-809, 828 P.2d 549 (1992) (“[a]n issue raised and argued for the first time in a reply brief is too late to warrant consideration.”). The arguments presented by the Connells on the issues they have briefed are extremely narrow in scope. Should the Connells attempt to backfill their Opening Brief on reply, the City will object.

the superior court concerning what occurred in the LUPA proceeding before it, leaving those as verities as well.

The Connells do assign error to the participation of Bothell's Building Official in the Board of Appeals proceeding. Opening Brief of Appellants at 2, Assignment of Error 1. However, this issue, which is the focus of Connells' briefing in this Court, was not preserved below and the Connells have not assigned error to the superior court's ruling to that effect. In any event, the participation of Bothell's Building Official in the Board of Appeals proceeding did not violate the appearance of fairness of doctrine.

**B. The Connells Have Not Met Their Burden of Demonstrating that the Board of Appeals Decision Was Based on a Clearly Erroneous Application of the Law to the Facts.**

**1. The Installation Does Not Comply with the Manufacturer's Instructions or the Bothell Municipal Code.**

The Connells have devoted all of 21 lines (including the heading) to their argument that the Board of Appeals decision is a clearly erroneous application of the law to the facts. Opening Brief of Appellants at 18-19. They cite the record only once and that citation does not support the stated proposition. *Id.* at 19. The Connells' conclusory argument does not begin to meet their burden of demonstrating that the Board of Appeals decision was based on a clearly erroneous application of the law to the facts.

Moreover, to the extent their argument can be understood, the Connells appear to be arguing that too much emphasis was placed on whether the windows leak and that the focus should have been on whether the windows were installed consistent with the manufacturer's instructions. The problem with the Connells' arguments is that the record demonstrates unequivocally that the Board carefully considered the manufacturer's installation instructions and determined that the windows and doors were not installed consistent with the manufacturer's installation instructions, the Bothell Municipal Code, the International Building Code, or AAMA Standard 2410-03, which is also consistent with the manufacturer's installation instructions.

The Bothell Municipal Code adopts the International Building Code. Specifically, BMC 20.04.015 provides, in relevant part:

**20.04.015 International Building Code adopted.**

The 2009 Edition of the International Building Code, as adopted by the State Building Code Council in Chapter 51-50 WAC, as published by the International Code Council, excluding Chapter 1, is adopted.

The 2009 International Existing Building Code (IEBC) is included in the adoption of the International Building Code as provided by IBC Section 3401.5 and amended in WAC 51-50-480000, excluding Chapter 1, Part 2, Administration. The Construction Administrative Code, as set forth in Chapter 20.02 BMC, shall be used in place of IEBC Chapter 1, Part 2, Administration.

The IBC requires flashing to ensure that moisture does not get into exterior walls, doors or windows. Specifically, section 1403.2 of the IBC provides in relevant part:

**1403.2 Weather protection.** Exterior walls shall provide the building with a weather resistant exterior wall envelope. The exterior wall envelope shall include flashing, as described in Section 1405.4. The exterior wall envelope shall be designed and constructed in such a manner as to prevent the accumulation of water within the wall assembly by providing a water- resistive barrier behind the exterior veneer, as described in Section 1404.2, and a means for draining water that enters the assembly to the exterior. An air space cavity is not required under the exterior cladding for an exterior wall clad with lapped or panel siding made of plywood, engineered wood, hardboard or fiber cement. Protection against condensation in the exterior wall assembly shall be provided in accordance with Section 1405.3.

And, Section 1403.4 of the IBC requires in relevant part:

**1405.4 Flashing.** Flashing shall be installed in such a manner so as to prevent moisture from entering the wall or to redirect it to the exterior. Flashing shall be installed at the perimeters of exterior door and window assemblies, penetrations and terminations of exterior wall assemblies, exterior wall intersections with roofs, chimneys, porches, decks, balconies and similar locations where moisture could enter the wall. Flashing with projecting flanges shall be installed on both side and the ends of copings, under sills and continuously above projecting trim.

The IBC also mandates installation of windows and doors consistent with the manufacturer's instructions:

**1405.13.1 Installation.** Windows and doors shall be installed in accordance with *approved* manufacturer's instructions.

In this case, the manufacturer's instructions make clear that when installing a finless vinyl window as a retro-fit (as opposed to installing the window in new construction), the product must be installed into an existing, water-tight, window frame:

The finless vinyl window as a retro-fit product is installed into an existing wood (includes double-hungs) or aluminum window frame. The installation assumes the existing window frame is installed water-tight into the structure. Damage due to leaks in the existing window frame is not a warranty issue.

AR 0070 (emphasis added); *see* AR 0071 ("The existing (wood or aluminum) frame serves as the rough opening for the new finless vinyl window. The existing frame must be square, level, and plumb and installed water-tight to the structure."); AR 0073 (instructions on how to prepare the existing window frame). Thus, the manufacturer's instructions assume that the existing frame was properly installed and essentially provides the flashing necessary to ensure that the assembly is water-tight.

During his questioning of Mark Lawless, Appeals Board Member Tinner brought this point home by referring to the "manufacturer's assumption that the frame was providing basically flashing" and that by leaving the existing frame in place "I have not disturbed the perimeter water protected system." RP 85-86. Board Member Tinner went on to explain that when the existing frame is left in place to provide the flashing,

“ . . . the only place I have to be concerned with water intrusion now is the actual joint between the aluminum frame and my new vinyl frame”. RP 87.<sup>29</sup>

These manufacturer’s instructions requiring that the retrofit windows be installed into the existing window frame are generally consistent with AAMA 2410-03, “Standard Practice for Installation of Windows with an Exterior Flush Fin Over an Existing Window Frame” promulgated by the American Architectural Manufacturers Association.<sup>30</sup> AAMA 2410-03, like the manufacturer’s instructions, assumes that the existing frame will be left intact effectively providing flashing:

**NOTE:** *In removing existing materials, it is important not to disturb the pre-existing weather resistant barrier, as it will still be utilized. If the pre-existing weather resistant barrier is damaged, corrective measures shall be taken prior to the installation of the retrofit window.*

AR 0099 (emphasis in original).<sup>31</sup>

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<sup>29</sup> Throughout this line of questioning, Mark Lawless agreed with Board Member Tinner.

<sup>30</sup> A copy of AAMA 2410-03 appears in the record at AR 0096-0104.

<sup>31</sup> The Connells tell this Court that:

The existing opening, structure and interior and exterior finishes were not altered or disturbed with the “collapse method” of installation and the new windows were simply set into the existing framed openings. Exhibit #20. The collapse method is widely used and approved by the American Architectural Manufacturers Association (“AAMA”) and the window manufacturer, Empire. ROP 58-59.

Opening Brief of Appellants at 4. However, these assertions are not supported by the citations provided and are flatly contradicted by the manufacturer’s retrofit installation instructions, AAMA 2410-03 and the hearing testimony of the Connells’ own consultant, Mark Lawless, as discussed below.

Apparently the AAMA does not publish a separate standard for the retrofit installation of finless windows. *See* AR 0139 (e-mail exchange between the Connells' consultant and Mr. Brenden who is identified as an AAMA Technical Services Manager).<sup>32</sup> In any event, though, as explained by Mr. Brenden: "Keep in mind that in accordance with the language contained within the International Building Code, the default answer in all cases is that windows shall be flashed and installed in accordance with the manufacturer's written installation instructions." AR 0139 (emphasis in original).

The manufacturer's instructions in this case also allow for installation of the windows in new construction where the windows are installed into a rough opening rather than into an existing frame. AR 0074-0076. However, per the manufacturer's instructions, in a new construction context, installation of the windows into a rough opening requires substantial flashing and other preparations. *See* AR 0074-0076.

Had the replacement windows and doors at the Glen Grove Apartments been installed consistent with the manufacturer's installation instructions, the flashing requirements of the IBC would have been met. However, the replacement windows and doors installed at the Glen Grove

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<sup>32</sup>Mark Lawless testified that the replacement windows did have a fin/flange on them which was removed prior to installation. RP 58.

Apartments were not installed consistent with the manufacturer's installations instructions.<sup>33</sup>

Mr. Connell's sworn declaration testimony in the Connells' lawsuit against the window installer could not be more clear in confirming that the windows were not installed consistent with the manufacturer's installation instructions or the Bothell Municipal Code:

10. 2FL/NW Primeline failed to install the retrofit windows in accordance with the manufacturer's specifications and installation instructions and failed to comply with applicable building code and applicable energy code.<sup>34</sup>

The testimony of the Connells' consultant, Mark Lawless, also demonstrates that the windows and doors were not installed consistent with the manufacturer's instructions. RP 60 (entire aluminum frame removed); RP 84 (all preexisting aluminum frames were entirely removed and the new windows were set into a rough opening); *see also* AR 0005 ("Mr. Lawless testified that the existing aluminum window and door

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<sup>33</sup> The Connells cite to "Exhibits 19 and 20" for the proposition that "[e]veryone in the proceeding below acknowledged the fact that the contractor complied with his contract and installed the windows as represented." Opening Brief of Appellants at 19. Exhibits 19 and 20 at the Board of Appeals hearing are AR 0126-0127 and AR 0128-0137, respectively. Neither document supports the Connells' assertion. Tabs 19 (AR 0115-0116) and 20 (AR 0117-0118) of the Administrative Record, which were exhibits 14 and 15 at the Board of Appeals hearing, also do not support the Connells' assertion. These documents do demonstrate that the window installer *should have* installed the windows "to manufacturer's specifications." AR 0116. However, as the record here unequivocally confirms, the window installer did not do so.

<sup>34</sup> *See* Declaration of Jeffrey K. Connell in Support of Motion for Order of Default and Default Judgment at 2-3, filed in Connell v. 2FL/NW Primeline, September 28, 2011. The declaration is Attachment B to Respondent City of Bothell's Response Brief (Sub No. 31) below, which has not yet been assigned an index number by the clerk.

frames had been removed prior to installation of the new windows and doors”). And, when questioned at length, Mark Lawless ultimately confirmed that the window installation did not comply with the manufacturer’s retrofit installation instructions because the preexisting aluminum frames were removed. *See generally* RP 80-88; *see also* RP 91-94 (windows not installed per the manufacturer’s retrofit installation instructions or per the manufacturer’s new construction installation instructions).

The Connells’ overlook all of these exchanges and claim that Mark Lawless “testified that in his opinion the windows and doors at issue had been installed per the manufacturer’s instructions and specifications.”<sup>35</sup> This ignores Mark Lawless’ responses, described above, to pointed Board questions in which he confirmed that the windows were not, in fact, installed consistent with the manufacturer’s instructions.

The Connells acknowledge that the existing frames were removed, but argue:

... everyone involved in the hearing agreed that leaving the existing aluminum frames in place would not be a good idea. Mr. Lawless testified and Board Member Tinner agreed that leaving the existing aluminum frames in place would not have accomplished the thermal break

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<sup>35</sup> Opening Brief of Appellants at 8.

characteristic required and would not have been a good idea. ROP 80-84.

Opening Brief of Appellants at 20. This argument depends on testimony taken out of context. If the point in replacing the windows was to get rid of the existing aluminum frame for example, to reduce sweating or increase energy efficiency, then it would not make sense to leave the frame in. However, after removing the existing frame, which had provided the required flashing, the Connells were then required, per the IBC and the manufacturer's instructions, to install new flashing. As the following exchange during the April 17, 2012 Board of Appeals hearing explains, the Connells do not get to pick and choose which instructions they follow and which they do not:

BOARD MEMBER SCHRADER: But to follow the manufacturer's instructions, don't you have to do one of two things? Don't you either need to install it the way that they show where you cut the fin off the new window but you leave the aluminum frame in and seal to it the way Jim was describing or you install it with the fin still left on and --

BOARD MEMBER TINNER: The flashing.

THE WITNESS: But then it's not a retrofit. It's new construction.

BOARD MEMBER SCHRADER: But where in the manufacturer's instructions does it show exactly what was done? It doesn't appear to be one of the options.

BOARD MEMBER TINNER: Right. That's kind of the point I was getting at, Mr. Lawless.

THE WITNESS: Okay.

BOARD MEMBER TINNER: Is we don't get to pick and choose pieces, if we pick one system or we pick another system.

THE WITNESS: Right.

BOARD MEMBER TINNER: And which system is it? I'm really confused. I honestly am.

THE WITNESS: Okay.

BOARD MEMBER SCHRADER: I don't see how the manufacturer would stand behind the installation. It isn't further instructions from what I could see.<sup>36</sup>

In short, because the existing aluminum frames were removed, the Connells did not comply with the manufacturer's retrofit installation instructions. The next question, then, is whether the Connells complied with the manufacturer's new construction installation instructions? The answer to this question is also no because the required flashing was not installed. *See* RP 61-62 (Mark Lawless' testimony that header flashing was not installed); RP 63-64 (installation relies on sealant rather than flashing); RP 69 (Mark Lawless confirms that installation relies on sealant); Declaration of Jeffrey K. Connell in Support of Motion for Order of Default and Default Judgment at 2, ¶9, filed in Connell v.

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<sup>36</sup> RP 88-89. The word "further" appears in the transcript but is a transcription error. Mr. Schrader actually said, "It isn't per instructions from what I could see."

2FL/NW Primeline, September 28, 2011 (“2FL/NW Primeline and/or its subcontractor installed the retrofit windows without the flashing required”); AR 0005 (“Mr. Lawless stated that the flashing and sealants required by the manufacturer for new construction had not been installed”); AR 0080 (“the new assemblies were altered (nailing flanges removed) and set into the existi[ng] framed openings without flashing” and “installations are relying solely on sealant(caulk) . . . to prevent moisture intrusion”).

For the above reasons, the windows and doors were clearly not installed consistent with the manufacturer’s instructions, the BMC, the IBC, or AAMA 2410-03.

**2. The Installation Also Does Not Comply with the Intent of the Bothell Municipal Code.**

BMC 20.02.090(K) sets a high bar before a deviation from Code can be approved:

[T]he building official shall first find that special individual reason makes the strict letter of this code impractical and the modification is in compliance with the intent and purpose of this code and that such modification does not lessen health, accessibility, life and fire safety, or structural requirements.

The Connells have demonstrated that some unwise choices were made in their window work, starting with failure to obtain a permit, continuing through removal of all existing frames, and culminating in installation

without flashing. However, the City and the Code are not insurers against foolish choices, with the public interest in proper construction footing the bill for the Connells' errors. Self-inflicted expense and the Code's objective impracticality standard are not synonymous. As stated in Mr. DeLack's November 23, 2011 decision letter, "the costs associated with these regulations is not a basis for" a modification. AR 0082. Were this otherwise, building codes could not be uniformly applied.

BMC 20.02.090(L) adds additional criteria that must be satisfied for approval of an alternative method:

An alternative material, design or method of construction shall be approved where the building official finds that the proposed design is satisfactory and complies with the intent of the provisions of this code, and that the material, method or work offered is, for the purpose intended, at least the equivalent of that prescribed in this code in quality, strength, effectiveness, fire resistance, durability and safety.

The Code requirements that windows and doors must be installed consistent with the manufacturer's instructions and that exterior windows and doors must be installed with flashing are clearly designed to ensure that water/moisture, which can result in rotting and/or mold harmful to citizens' health, does not intrude into walls or living units. This assurance is clearly meant to be systematic, reliable, and consistent, not contingent on periodic stopgaps such as bridging unflashed gaps with caulk.

Recognizing this and that water intrusion is a very significant concern in the Pacific Northwest, the Connells understandably submitted with their application a water leakage test report. However, they now argue that it is not relevant whether the windows leak. *See* Opening Brief of Appellants at 19 (“Respondent City went to great lengths to persuade the Board that the windows leaked and could not withstand certain testing procedures. Neither of which was relevant for the true matter at issue . . .”). And then spinning in another direction, they argue that the windows do not leak, pointing to testimony from Mark Lawless, *Id.* at 20, which ignores the Connells’ own water leakage test results.

The Connells’ leakage testing was limited. RP 114 (windows in best condition were selected for test as opposed to those observed and photographed by the City which had heavy mold growth and evidence that “could lead one to believe that they were leaking”); RP 107 (did not isolate window fenestration product from the building envelope). Despite these limitations, the “Water Leakage Field Test Report” still indicates that one of four windows tested “**Failed**” the leakage test and notes “[w]ater was observed coming through a void in the sealant . . .” AR 0059 (emphasis in original); *see also* AR 0068 (“cause of the failure . . . due to sealant joint maintenance and was an installation or window failure.”).

Contrary to the Connells' argument, what could be more relevant than such test results? As with the many record photographs depicting moisture and mold on windows and blinds<sup>37</sup>, they bear directly — and adversely — on Connells' pretense that their installation method somehow measured up. They show that installation was not only inconsistent with the Code and the manufacturer's installation instructions, but also fell far short of accomplishing the assurance of public health and safety that is the Code's keystone purpose and intent.<sup>38</sup>

In sum, the Connells have failed to demonstrate that the Board's of Appeals decision was based on a clearly erroneous application of the law to the facts.

**C. The Connells Have Not Met Their Burden of Demonstrating that the Board of Appeals Decision Was Not Supported by Substantial Evidence.**

Based on the evidence cited in the preceding sections, the Connells have also failed to meet their burden of demonstrating that the decision is not supported by substantial evidence. Parsing through the Connells'

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<sup>37</sup> See AR 0046-0048, AR 0088-0094. Connells argued to the Board that moisture and mold may have been caused by condensation due to tenant carelessness. RP 44-48. However, Connell consultant Mark Lawless confirmed that water intrusion and condensation can simultaneously occur; the possibility of condensation does not negate the fact of improper non-watertight installation. RP 73.

<sup>38</sup> Per Bothell Municipal Code 20.02.035 ("Intent."), the purpose of the Building Code "is to establish the minimum requirements to safeguard the public health, safety and general welfare..." The Code is designed to prevent public health and safety problems, not to abate them after the fact.

rhetoric and applying the burdens of proof before the Board and before this court, Connells have done little more than demonstrate their disagreement with a Board decision amply supported by the record.

**D. The Connells Failed to Preserve Their Purported Appearance of Fairness Issue When They Failed to Brief the Issue In Superior Court and Failed to Assign Error to the Superior Court's Ruling to that Effect.**

In their opening LUPA brief below, the Connells included a one-paragraph, eight-line argument that the Board of Appeals proceeding somehow violated their right to a fair hearing by impartial decision makers.<sup>39</sup> They never explained how Mr. DeLack violated the appearance of fairness and due process when he simply did his job per Code as the City's Building Official and non-voting ex officio member of the Board of Appeals — itself composed of three voting members who per Code were completely independent of the City. The Connells did not even reference RCW Ch. 42.36 which places limitations on the application of the appearance of fairness doctrine to local land use decisions. The only “authority” the Connells cited was Chrobuck v. Snohomish County, 78 Wn.2d 858, 869, 480 P.2d 489 (1971), a pre-LUPA case in which several planning commission members who voted on a proposed rezone had received benefits from the rezone applicant or had publicly supported the

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<sup>39</sup> Petitioners' Opening Brief, Sub No. 30, at 8. This document has not yet been assigned an index number by the clerk.

application. Id. at 865-867. Connells left the superior court and the city to guess as to the particulars of their appearance of fairness argument until after the superior court had entered an order dismissing their appeal. When they then belatedly tried to make their case after-the-fact, the superior court, understandably, ruled that “The issue of appearance of fairness was not adequately preserved and presented in petitioner’s brief.” CP 118-119.

Issues not raised below cannot be raised on appeal. Harrison v. County of Stevens, 115 Wn.App. 126, 132 n.3, 61 P.3d 1202 (Div. 1 2003); RAP 2.5(a) (“The appellate court may refuse to review any claim of error which was not raised in the trial court.”). The failure to adequately brief an issue is tantamount to not raising it at all. *See, e.g.,* Habitat Watch v. Skagit County, 155 Wn.2d 397, 416, 120 P.3d 56 (2005) (court will not review issues that are inadequately briefed or ones that are only given passing treatment); Amalgamated Transit Union Local 587 v. State, 142 Wn.2d 183, 203, 11 P.3d 762 (2000) (issue not considered where argument consists of conclusory statements and single case citation). Because the Connells did not colorably brief the issue below, this court should not consider the Connells’ appearance of fairness challenge here.

This court should also not consider Connells’ appearance of fairness argument because the Connells did not assign error to the superior court’s order holding that the issue had not been preserved and presented.

State v. Davis, 175 Wn.2d 287, 343-44, 290 P.3d 43 (2012) (appellate court will not review issue given cursory treatment below, especially when no error is assigned to lower court ruling). As explained in State v. Davis, the purpose of RAP 2.5(a), is to give the “trial court a chance to correct the error and give the opposing party a chance to respond.” Id. at 344.

**E. Participation of Bothell’s Building Official in the Board of Appeals Proceeding Did Not Violate the Appearance of Fairness Doctrine.**

Even if the Court considers the issue, the Connells’ appearance of fairness argument<sup>40</sup> has no support in the record or the law. Per Bothell Code, Mike DeLack acted “ex officio” as City staff during the Board of Appeals hearing. He addressed the Board concerning the City’s position and the appeal process generally, provided limited testimony in response to Board questions, and asked witnesses a few questions. But, per the Code, Mr. DeLack had “no vote on any matter before the board.” BMC 20.02.225.<sup>41</sup> Mr. DeLack fulfilled his nonvoting ex officio role in the presence of and with full parallel participation of the Connells, their

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<sup>40</sup> Opening Brief of Appellants at 11-18.

<sup>41</sup>BMC 20.02.225 provides in relevant part:

A. 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 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. The building official shall be an ex officio member of and shall act as secretary to the board but shall have no vote on any matter before the board. (Emphasis added).

consultants, and their counsel. The Board of Appeals, composed of outside independent experts, after hearing both sides, ruled against the Connells. The Connells cite no evidence that the Board's unanimous rejection of the appeal was affected by bias or an appearance of bias on the part of the voting Board members. While the Connells disagree with the Board's ruling, there are no facts to support an appearance of fairness claim.

The law on appearance of fairness dates back to a vaguely worded doctrine enunciated in Smith v. Skagit County, 75 Wn.2d 715, 741, 453 P.2d 832 (1969) which held:

The test of fairness, we think, in public hearings conducted by law on matters of public interest, vague though it may be, is whether a fair-minded person in attendance at all of the meetings on a given issue, could, at the conclusion thereof, in good conscience say that everyone had been heard who, in all fairness, should have been heard and that the legislative body required by law to hold the hearings gave reasonable faith and credit to all matters presented, according to the weight and force that were in reason entitled to receive.

After twenty plus years of experience in trying to apply the doctrine, the Washington Supreme Court substantially limited it in State v. Post, 118 Wn.2d 596, 826 P.2d 172 (1992). The Post court held that the appearance of fairness doctrine did not apply where an allegedly biased probation officer had written a presentence report considered by the sentencing judge. The key per Post was that the judge — not the probation officer — was the decision-maker; any potential officer bias just went to the weight

given his report but did not demonstrate an appearance of unfairness on the part of the actual decisionmaker:

Past decisions of this court have applied the appearance of fairness doctrine when decision-making procedures have created an appearance of unfairness. *E.g., Smith v. Skagit Cy.*, 75 Wash.2d 715, 453 P.2d 832 (1969). Our decision here does not overrule this line of decisions, but reformulates the threshold that must be met before the doctrine will be applied: evidence of a judge's or decisionmaker's actual or potential bias. This enhanced threshold requirement is more closely related to the evil which the doctrine is designed to prevent.

Id. at 618 and note 8.<sup>42</sup> While the appearance of fairness doctrine still exists, it has not been applied after Post in the way that Connells propose here (even assuming that there was a factual record to support their claim).

The cases relied upon by the Connells pre-date Post. They are also highly distinguishable from this case. In Buell v. City of Bremerton, 80 Wn.2d 518, 495 P.2d 1358 (1972), the chairman of a planning commission financially benefited from a rezone the planning commission recommended to the city council. The Court explained that the chairman's "actual financial gain is sufficient to invalidate the entire proceeding" – notwithstanding the fact that the ultimate decision-maker was the city

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<sup>42</sup> See also Christensen v. Terrell, 51 Wn.App. 621, 631-33, 754 P.2d 1009 (Div.3 1988) (because there was no showing of ulterior motive or actual bias, appearance of fairness doctrine not violated even though the decision-maker had previously participated in making the recommendation under appeal); City of Hoquiam v. Public Employment Relations Commission, 97 Wn.2d 481, 489, 646 P.2d 129 (1982) ("the presumption is that 'public officers will properly and legally perform their duties until the contrary is shown.'").

council. Id. at 525. Buell involved a direct financial conflict of interest.

In Hayden v. City of Port Townsend, 28 Wn.App. 192, 622 P.2d 1291 (Div.2 1981), the chairman of a planning commission considering a rezone worked for Port Angeles Savings and Loan. Port Angeles Savings and Loan had an option to purchase the property that was ultimately rezoned and exercised that option when the rezone was approved by the city council. Although the chairman did not participate of record as chairman of the planning commission during the commission's hearing or vote, he actively advocated in favor of the rezone during both the planning commission hearing and the city council hearing. Id. at 196-97. Further, he "was allowed by the planning commission to question other speakers, a privilege not accorded to any opponent of the rezoning or to anyone else." Id. at 197. Here, Mr. DeLack has no direct interest in the property and the hearing record makes clear that the Connells had and availed themselves of every opportunity to participate in the presentation to the Board.

Unlike Hayden and Buell, there is no financial conflict of interest present here, nor is there any potential one. Moreover, even if the Connells were to show that Mr. DeLack had a conflict of interest (which they have not), Mr. DeLack was not the decision-maker; he had no decision-making authority per BMC 20.02.225 which states that he has "no vote on any matter before the board."

The Connells were given a hearing where they were represented by counsel, where they submitted a hearing brief, where they presented witnesses and evidence and where they cross examined City witnesses. The Connells have failed to make a cognizable argument that the appearance of fairness doctrine was violated. Building official DeLack is simply not the cause of the Connells' troubles, including their failure to demonstrate to the Board that the windows were properly installed. After all, the Connells' own consultants could not support the Connells' claim of "proper installation". Mr. Connell himself has given sworn testimony in his superior court lawsuit against the window installation company that the windows were not properly installed. The three voting Board of Appeals members, independent experts in their own right, did not need to give any weight at all to Mr. DeLack's comments or questions to reach the conclusion that the windows had been improperly installed and presented a risk of moisture intrusion.<sup>43</sup>

**F. The City Should Be Awarded Its Attorneys' Fees.**

The City prevailed before the Board of Appeals and the superior court and therefore is entitled to an award of reasonable attorneys' fees,

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<sup>43</sup> Nor presumably did they need to be persuaded that this shortcoming was more than an economic issue for the Connells. It is common knowledge that mold and other consequences of moisture intrusion are a significant public health threat and topic of concern to building officials.

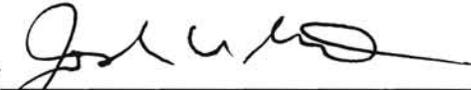
expenses, and costs as a prevailing party. RCW 4.84.370 (1); RCW 4.84.370(2).<sup>44</sup>

**V. CONCLUSION**

The City respectfully requests that this Court affirm the dismissal of the Connells' LUPA Petition, uphold the Board of Appeals decision denying the Connells' permit application, and award the City its attorneys' fees, expenses, and costs.

Respectfully submitted this 18<sup>th</sup> day of November, 2013.

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<sup>44</sup> Jones v. Town of Hunts Point, 166 Wn.App. 452, 463, 272 P.3d 853, 858 (Div. 1 2011 review denied, 174 Wash. 2d 1016, 281 P.3d 687 (2012)); Habitat Watch v. Skagit County, 155 Wn.2d 397, 412-414, 120 P.3d 56 (2005).

**CERTIFICATE OF SERVICE**

I, Fred Schmidt, certify that I am over the age of eighteen, not a party to this lawsuit and am competent to testify as to all matters herein.

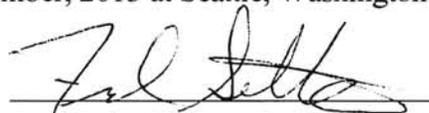
On November 18, 2013, I caused a true and correct copy of the foregoing document to be delivered to the parties listed below in the manner indicated:

Paul A. Spencer  
Roy L. Lundin  
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Via Email and Legal Messenger

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

DATED this 18<sup>th</sup> day of November, 2013 at Seattle, Washington.

  
Fred Schmidt, Legal Assistant