

64749-1

64749-1

No. 64749-1-1

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

NO BOUNDARIES, LTD., a Washington corporation, and
NBL II, LLC,
A Washington limited liability company,

Petitioners

v.

PACIFIC INDEMNITY COMPANY
(a member of the CHUBB GROUP OF INSURANCE COMPANIES),
an insurer authorized by the Washington Insurance Commissioner,

Respondent.

BRIEF OF RESPONDENT
PACIFIC INDEMNITY COMPANY

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APPENDIX A

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I. INTRODUCTION

This is an interlocutory appeal, under RAP 2.3(b)(4), from the trial court's order granting partial summary judgment in favor of the Defendant/Respondent, Pacific Indemnity Company ("Pacific").

The underlying trial court action arises out of a claim for insurance coverage for a partial collapse resulting from water intrusion at the Metropole Building, a property owned by Plaintiffs/Petitioners No Boundaries, Ltd., and NBL II, LLC (referred to collectively herein as "NBL"). Pacific issued a first party property insurance policy covering the Metropole Building. The damage occurred in June 2005. The policy provides coverage for the increased costs of repair that an insured has actually incurred to comply with applicable building codes or ordinances.

The policy provides coverage on a "Replacement Cost Basis" for the amount the insured actually spends to repair covered property damage:

Lost or damaged covered property will be valued at the cost to repair or replace such property at the time of loss or damage, but not more than you actually spend to repair or replace such property at the same or another location for the same use or occupancy.¹

In addition, the policy includes an "Ordinance or Law" provision which provides coverage for the cost of compliance with building codes that "affect" the cost of repair:

¹ CP 128.

If there is an ordinance or law in effect at the time of loss or damage that regulates zoning, land use or construction of a building or personal property, **and if that ordinance or law affects the repair or replacement of the lost or damaged building or personal property**, and if you:

- A. repair or replace the building or personal property as soon as reasonably possible, the valuation will include:

- 3. the increased cost to repair or replace the building to the same general size at the same site or personal property for the same general use, to the minimum standards of such ordinance or law. ...²

NBL claims that Pacific should be required to pay for the scope and estimated cost of repair under the 2003 Seattle Building Code (“the 2003 Code”) in effect at the time the Metropole Building was damaged in June 2005. However, no one disputes that the 2003 Code was repealed in November 2007 and replaced with the 2006 Seattle Building Code (“the 2006 Code”). No one disputes that scope of work required to repair the June 2005 damage to meet the requirements of the newer Code will result in a smaller estimated cost of repair and a smaller valuation of NBL’s loss.

Pacific moved for partial summary judgment, asking the trial court to rule, as a matter of law, that the 2003 Code did not apply because NBL had not repaired the Metropole Building while that Code was in effect; and thus, the 2003 Code never “affected” the repair. NBL cross-

² CP 129 (emphasis added).

moved for summary judgment, arguing that the 2003 Code in effect at the time the damage occurred in June 2005 must still be used to determine the amount of NBL's recovery under the policy – despite the undisputed fact that NBL never performed repairs subject to the 2003 Code between June 2005 and the Code was repealed in November 2007.³

On cross-motions for summary judgment, NBL failed to produce any evidence that the 2003 Seattle Building Code had “affected” the scope and cost of repair for the June 2005 damage to the Metropole Building – or that the repealed 2003 Code ever could affect the scope or cost of repairs in the future. It was undisputed that NBL had not repaired the damage within the more than two years between the June 2005 loss and November 2007, when the 2003 Code was *repealed* and replaced by the 2006 Code.

On those undisputed facts, the trial court held, as a matter of law, that NBL could not obtain recovery based on the estimated scope and cost of repair under the repealed 2003 Code.

³ Pacific could have argued that NBL had forfeited its coverage for increased costs of compliance with applicable building codes, because it had not performed repairs for over two years. Instead, Pacific agreed that it would still provide enhanced coverage under the “Ordinance or Law” provisions of the policy, using the current Seattle Building Code as the guide for the scope and cost of repair. (CP 78:21-23).

The trial court properly applied the plain meaning of the relevant provisions of the policy to the undisputed facts in granting Pacific's motion. This Court should affirm.

II. ASSIGNMENT OF ERROR

In its assignment of error, NBL incorrectly characterizes the trial court ruling presented for review. The trial court did not hold, as NBL asserts, that "the policy's Valuation and Ordinance or Law provisions do not apply to the Seattle commercial building code ordinance in effect at the time of the loss or damage."⁴ Rather, the trial court held that "*the 2003 Seattle Building Code does not apply to Defendant's obligations under the policy of insurance in this matter*" – based on the facts in the record on the parties' cross-motions for partial summary judgment. (CP 192)

There was no dispute that the 2003 Code was in effect on the date of loss, within the meaning of the insurance policy. The question the trial court decided was not whether the Ordinance or Law provisions of the policy specify that the Code in effect at the time of the loss will apply – because that is exactly what the policy says. But the policy *also* says that the enhanced coverage for the cost of compliance with building codes will only apply if the repairs are actually performed. NBL did not perform any

⁴ Appellant's Opening Brief at 2.

repairs while the 2003 Code was in effect; thus, the 2003 Code did not and cannot affect any repairs that may be covered by the policy. In granting Pacific's motion, the trial court agreed this is the proper application of the plain terms of the policy to the undisputed facts in the record on summary judgment.

III. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Did the trial court properly conclude the 2003 Seattle Building Code does not apply to Pacific's obligations with regard to NBL's claim for the June 2005 loss when (1) the policy covers an ordinance or law in effect at the time of the loss *only* if "that ordinance affects the repair or replacement of the lost or damaged property," (2) the 2003 Seattle Building Code was repealed in November 2007, and (3) NBL failed to produce any evidence that the 2003 Seattle Building code had affected or ever could affect the scope and cost of repair of the damaged property?

IV. STATEMENT OF THE CASE

A. NBL's Property Damage Claim and the Policy Provisions at Issue

1. Timeline of Loss and Building Permits

Pacific Indemnity Company issued a policy of property insurance to No Boundaries, Ltd., for the period September 1, 2004, to September 1, 2005. (CP 94:8 – 11; 96 – 135) The Metropole Building, located at 423

2nd Avenue, in Seattle, was one of the buildings covered by the policy. (CP 98) On June 23, 2005, Pacific received notice from NBL of a loss at the Metropole Building. (CP 95:12 – 12; 137 – 38)

The Loss Notice in the Pacific claim file describes the loss as “Water damage to basement – Joist failed / collapse.” (CP 137) A claim note made on the day Pacific received notice of the loss describes the loss as follows:

Called insured and spoke to Sue the prop. mgr. She advised that they discovered in basement of their bldg at 423 2ND AVENUE yesterday, a room in SE corner of the basement had the floor collapse a few feet. Engineer came out and they discovered water under the floor in that area. No plumbing leaks, engineer believes it is groundwater as they are at sea level. Settling occurred and engineer is in process of writing up an assessment and they expect to get it by Monday. They currently have sump pumps going to pump water out in meantime. Floor has not collapsed any more today.

(CP 94:6 – 17; 140)

When it received notice of the damage at the Metropole Building, Pacific undertook an investigation and took steps to place a value on NBL’s claim for property damage insurance.

Public records show that NBL applied for a permit for emergency structural repair of the partial collapse on February 5, 2007. The permit was issued on March 21, 2007. (CP 81:1 – 2; 83) On May 21, 2007, before any work had been done under the recently issued permit, there was

a fire at the Metropole Building. In addition, the public records show the permit that was issued on March 21, 2007 expired on September 21, 2008 (CP 83). *A notation in the public record states “no work was done/see permit 6146798.”* (CP 84 – 86)

NBL applied for a second permit on May 7, 2008. The requested permit was issued on October 23, 2008. (CP 80:3 – 4; 88 – 92) The permit includes the following description of work:

Removing all damaged materials due to fire on 5/21/2007 and broken water main damage to basement. Work also includes the reconstruction of all interior spaces, exterior windows, doors and masonry affected by fire. Project is substantial alteration, includes mechanical, per plan.

(CP 88) (emphasis added).

The parties agree that, when the June 2005 water damage and collapse occurred, the 2003 Seattle Building Code was in effect.⁵ The parties also agree that the 2003 Seattle Building Code was repealed, and the 2006 Seattle Building Code superseded the 2003 Code, in November 2007.⁶

⁵ Appellant’s Opening Brief at 5. The specific ordinance at issue is Seattle Ordinance 121519, which adopted provisions of the 2003 International Building Code.

⁶ Ordinance 122528 repealed the sections of Ordinance 121519 that had adopted the 2003 International Building Code and adopted the 2006 International Building Code. *See* Appendix A. Ordinance 122528 was signed on October 11, 2007, and expressly provides in Section 34 and 35 that it shall take effect 30 days after its approval by the mayor. *Id.* NBL has never contended that, following its

Thus, the record on Pacific's motion for summary judgment left no room for dispute. While the 2003 Code had been in effect when the June 2005 loss occurred, NBL had never performed any repairs that were subject to and "affected" by that Code.

2. *Relevant Policy Provisions*

The Loss Payment Basis section of the Pacific policy includes the following Replacement Cost Basis provision:

Lost or damaged covered property will be valued at the cost to repair or replace such property at the time of loss or damage, **but not more than you actually spend to repair or replace such property at the same or another location for the same use or occupancy.** There is no deduction for physical deterioration or depreciation.

If you replace the lost or damaged covered property, the valuation will include customs duties incurred.

If you do not repair or replace the covered property, we will only pay as provided under Actual Cash Value Basis.

If you commence the repair or replacement of the lost or damaged covered property within 24 months from the date of the loss or damage, we will pay you the difference between the actual cash value previously paid and the lesser of the:

- replacement cost at the time of loss or damage;
or
- actual costs you incur to repair or replace.

repeal, the 2003 Seattle Building Code could be enforced with regard to the repairs to the Metropole Building.

Payment under the Replacement Cost Basis will not be made until the completion of the repairs or the replacement of the covered property.

(CP 128) (emphasis added).

The Building and Personal Property form also includes the following “Ordinance or Law” provision:

If there is an ordinance or law in effect at the time of loss or damage that regulates zoning, land use or construction of a building or personal property, and if that ordinance or law affects the repair or replacement of the lost or damaged building or personal property, and if you:

A. **repair or replace the building or personal property as soon as reasonably possible, the valuation will include:**

1. a. the replacement cost of the damaged and undamaged portions of the **building or personal property**; or
- b. the actual cash value of the damaged and undamaged portions of the **building or personal property** (if the applicable Loss Payment Basis shown in the Declarations is Actual Cash Value);
2. the costs to demolish and clear the site of the undamaged portion of the **building or personal property**; and
3. **the increased cost to repair or replace the building to the same general size at the same site or personal property for the same general use, to the minimum standards of such ordinance or law,** except we will not include any costs:

- a. for land, water or air, either inside or outside of a **building**;
 - b. for paved or concrete surfaces, retaining walls, foundations or supports below the surface of the lowest floor or basement, unless specifically covered by this policy, or **outdoor trees, shrubs, plants or lawns**;
 - c. incurred outside the legal property boundary of the premises shown in the Declarations;
 - d. if **building or personal property** is valued on an actual cash value basis; or
 - e. attributable to any ordinance or law that you were required to, but failed to, comply with before the loss; or
- B. do not repair or replace the **building or personal property**, the valuation will include:
- 1. the actual cash value of the damaged and undamaged portions of the **building or personal property**; and
 - 2. the cost to demolish and clear the site of the undamaged portion of the **building or personal property**.

...
 (CP 129) (emphasis added).

B. Procedure Below

Pacific moved for partial summary judgment, requesting that, (1) because NBL could not produce any evidence showing the 2003 Seattle Building Code had affected the cost to repair the damage to the Metropole

Building caused by the June 2005 loss and (2) because the 2003 Seattle Building Code had been repealed and could never affect the cost to repair the damage, the court rule as a matter of law that the 2003 Seattle Building Code did not apply to Pacific's adjustment of NBL's insurance claim. (CP 70 – 79) In its response, NBL agreed that the issue could be decided as a matter of law and requested the trial court hold that the 2003 Seattle Building Code “applies to the Valuation provision and Ordinance or Law provision” (CP 144:13 – 18)

On December 11, 2009, the trial court granted Pacific's motion.

(CP 191 – 92) The court held:

The Court having been fully advised in the premises concludes as a matter of law that the 2003 Seattle Building Code does not apply to Defendant's obligations under the policy of insurance at issue in this matter and, therefore, ORDERS that Defendant's Motion for Partial Summary Judgment Regarding 2003 Seattle Building Code is GRANTED. Non-moving party “Policyholders” request for summary judgment in its favor is DENIED.

(CP 192)

The trial court denied NBL's motion for reconsideration. (CP 217 – 18) In the order denying reconsideration, the court also certified her summary judgment decision as final under CR 54(b) and certified it under RAP 2.3(b)(4). (*Id.*) The court held:

The interpretation of the code upgrade policy language is a controlling question of law. There appears to be no

Washington case squarely addressing the same policy language. There are no factual disputes that require further refinement for this Court or the Court of Appeals to review in order to interpret the policy language.

(CP 218:6 – 9)

On April 15, 2010, this Court honored the trial court’s certification and granted discretionary review under RAP 2.3(b)(4).⁷

V. SUMMARY OF ARGUMENT

There is no dispute that the 2003 Seattle Building was in effect at the time of the June 2005 loss. Likewise, there is no dispute that only those ordinances or laws in effect at the time of a loss are covered by the Ordinance or Law provision. Neither of these issues was before the trial court on Pacific’s motion for partial summary judgment. Yet, NBL devotes its entire opening brief to these two issues. The question that Pacific *did* pose to the trial court is also the issue that NBL ignores entirely in its opening brief: whether the undisputed facts in the record on the parties’ cross-motions for summary judgment established that the 2003 Seattle Building Code had not affected and could never affect NBL’s cost to repair the damage from the June 2005 loss.

The Ordinance or Law provision in the Pacific policy covers the increased cost of repair related to an ordinance or law in effect at the time of the loss if that ordinance or law “affects the repair or replacement” of

⁷ See letter ruling dated April 15, 2010.

the damaged property. The provision also requires that NBL actually complete repair the property “as soon as reasonably possible.” Nothing in the policy provides coverage for the theoretical cost of compliance with an applicable Code – the policy pays for repairs actually performed. If repairs are not performed, there is an entirely different method of valuation of the loss.

NBL failed to produce any evidence that the 2003 Seattle Building Code had affected the scope or cost of repair of the Metropole Building before the Code was repealed. Moreover, because the 2003 Code was repealed before NBL undertook any repairs, the 2003 Code will never affect the scope and cost of any repairs that NBL may perform as a result of the June 2005 damage at the Metropole Building.

As a result, the trial court properly granted Pacific’s motion for partial summary judgment; and properly denied NBL’s cross-motion and motion for reconsideration. This Court should affirm.

VI. ARGUMENT

NBL’s opening brief presents a litany of boilerplate rules of insurance policy construction, most of which are not at issue here. For example, NBL did not argue below, nor does it argue in its opening brief, that the policy is ambiguous. Therefore, Washington rules for resolving ambiguity in an insurance policy provide no guidance here. In addition,

NBL misstates the law when it asserts “Washington law construes policy language strictly against the insurance company.”⁸ While an unresolved ambiguity will be construed against the insurer, our courts consistently apply the plain meaning of unambiguous policy provisions in a manner in harmony with the policy as a whole. “[When] the language of an insurance policy is clear and unambiguous, *the court must enforce it as written and cannot modify the contract or create ambiguity where none exists.*”⁹ Moreover, an important rule of policy interpretation, missing from NBL’s compendium of rules of construction, is the rule most relevant to the issue presented here: “a policy should be construed so as to give effect to each provision” of the insurance policy.¹⁰

Applying the *relevant* rules of construction, the trial court properly concluded that the unambiguous policy language covers the increased cost required to comply with applicable building codes or ordinances *only* if the requirement was in effect at the time of the loss *and* it affected the scope and cost of repairs actually performed by the insured as soon as reasonably possible after the loss. Accordingly, because it is undisputed

⁸ Appellant’s Opening Brief at 10.

⁹ *Allstate Ins. Co. v. Peasley*, 131 Wn.2d 420, 424, 932 P.2d 1244 (1997) (citing *Transcontinental Ins. Co. v. Washington Pub. Utils. Dists.’ Util. Sys.*, 111 Wn.2d 452, 456, 760 P.2d 337 (1988) (emphasis added)).

¹⁰ *Peasley*, 131 Wn.2d at 429 (citing *Kish v. Ins. Co. of N. Am.*, 125 Wn.2d 164, 170, 883 P.2d 308 (1994)).

that the 2003 Seattle Building Code did not affect the Metropole Building repairs before it was repealed, and because it can never affect those repairs, the 2003 Seattle Building Code does not apply to Pacific's adjustment of NBL's claim for the June 2005 loss.

The trial court, therefore, properly granted Pacific's motion for partial summary judgment.

A. Standard of Review

The standard of review for a summary judgment order is *de novo*.¹¹

B. The 2003 Seattle Building Code has not affected and can never affect the cost to repair the damage from the June 2005 loss to the Metropole Building.

1. *NBL failed to produce any evidence showing the 2003 Seattle Building code had affected or could ever affect the repair costs.*

Pursuant to the provisions of the Pacific policy, if an insured repairs or replaces damaged property, it is entitled to recover the cost to repair or replace "at the time of the loss or damage." (CP 128) If the insured does not repair or replace the property, then deduction for depreciation is taken and the Actual Cash Value is paid. (*Id.*)

If the insured *does* repair or replace the damaged property, then the Ordinance or Law provision may apply. The first paragraph of that provision states that, "if there is an ordinance or law in effect at the time of

¹¹ *Snohomish County Fire Dist. No. 1 v. Snohomish County*, 128 Wn. App. 418, 422, 115 P.3d 1057 (2005).

loss or damage that regulates . . . construction of a building . . . *and if that ordinance or law affects the repair or replacement* of the lost or damaged building,” the valuation of the loss will include the increased cost to repair if the insured repairs or replaces the building as soon as reasonably possible. (CP 129) (emphasis added). The question before the trial court was, therefore, whether the 2003 Seattle Building Code had affected or ever could affect the cost to repair the damage from the June 2005 loss to the Metropole building.¹²

“A defendant in a civil action is entitled to summary judgment when that party shows that there is an absence of evidence supporting an element essential to plaintiff’s claim.”¹³ In response to Pacific’s motion, NBL produced no evidence to show that the 2003 Seattle Building Code had affected the Metropole Building repair before it was repealed in November 2007. Thus, it was undisputed that the 2003 Code *did not affect* the cost to repair the damage to the Metropole Building while that

¹² The next question might have been whether NBL had forfeited the right to obtain coverage for the increased cost of code compliance at all, since it did not repair the June 2005 damage before the November 2007 repeal of the Code that was in force at the time of the loss. However, Pacific did not take that position – instead Pacific stipulated that it would extend additional coverage for the cost of code compliance based on the Code in force if and when NBL belatedly completes repairs – the 2006 Code. (CP 78:21-23). In this case, the cost of compliance with the 2006 Code will be less than the cost of compliance with the earlier Code – not what might ordinarily be expected. (NBL Opening Brief at 7).

¹³ *Las v. Yellow Fronts Stores, Inc.*, 66 Wn. App. 196, 198, 831 P.2d 744 (1992) (citing *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989)).

Code was in effect. In addition, because the 2003 Code had been repealed before NBL had undertaken any repairs, that Code can never affect the repair of the Metropole Building. Therefore, NBL lacked any evidence supporting an essential element of its claim that the 2003 Seattle Building Code applied to the valuation of its claim and the trial court properly granted Pacific's motion.

2. ***NBL's motion for partial summary judgment improperly asked the trial court to rewrite the policy to cover any ordinance or law in effect at the time of the loss, even though NBL never performed any repairs while the Code was in effect.***

NBL asserts that, in reaching its decision on summary judgment, the trial court inserted language into the Ordinance or Law provision so that it would read as follows: “[and if the enforcement] of that ordinance or law [actually] affects the repair” of the damaged building, the increased cost will be covered.¹⁴ However, what the court did was enforce the policy language as written.

The Ordinance or Law provision states that, if an ordinance or law in effect at the time of the loss “affects the repair or replacement” of the damaged building, Pacific will pay for the increased cost of repair. (CP 129) Because the policy does not define “affect” or “affects,” the Court should give it “a fair, reasonable, and sensible construction as would be

¹⁴ Appellant's Opening Brief at 20 – 21.

given by an average insurance purchaser.”¹⁵ The Court may look to a dictionary definition to assist it in this process.¹⁶ A dictionary definition of “affect” is “to act on; produce a change or effect in.”¹⁷ “To act on” and “to actually act on” are identical actions, just as there is no difference between “producing a change or effect in” and “actually producing a change or effect in.” Likewise, there is no difference between a code or ordinance “affecting the repair” and “actually affecting the repair” – they are identical. Thus, there was no need for the court to insert the word “actually” before “affects.”

Moreover, NBL fails to explain how a code or ordinance provision that has not been enforced and can never be enforced with respect to the June 2005 damage to the Metropole Building can “affect” the repair of NBL’s damaged property. “Affects,” as used in the policy’s “Ordinance or Law” provision necessarily encompasses enforcement of a building code with respect to repairs actually made. This is the only construction of the policy that is in harmony with the requirement that the insured must actually complete repairs “as soon as reasonably possible” after a loss; and

¹⁵ *North Pacific Ins. Co. v. Christensen*, 143 Wn.2d 43, 48, 17 P.2d 596 (2001 (citing *Mid-Century Ins. co. v. Henault*, 128 Wn.2d 207, 214, 905 P.2d 379 (1995))).

¹⁶ *Id.*

¹⁷ Reference.dictionary.com/browse/affect (based on RANDOM HOUSE DICTIONARY (2010)).

that Replacement Cost Basis coverage is only applicable to repairs an insured has actually performed. The policy provides enhanced coverage for the insured's actual costs incurred to comply with applicable Codes after a loss. It is not a way for an insured to obtain an enhanced payment for costs the insured has never incurred and will never be required to incur.

NBL's motion for summary judgment asked the trial court to ignore the policy provisions that required NBL to complete repairs to obtain coverage on a "Replacement Cost Basis" and the enhanced coverage available for completed repairs that were required to meet an applicable building code. NBL asserts in its opening brief that its claim should be valued under the 2003 Seattle Building Code because that Code might *potentially* have affected the repair of the building, *if* repairs had been done while the 2003 Code was in force. For example, NBL engages in the academic exercise of setting forth the value of the building and the theoretical cost of repairs that would have been incurred under the 2003 Seattle Building Code -- *if* NBL had ever performed repairs when that Code was in force.¹⁸ NBL is, therefore, asking the Court to rewrite the Ordinance or Law provision so it would read as follows:

¹⁸ Appellant's Opening Brief at 5 – 6.

If there is an ordinance or law in effect at the time of loss or damage that regulates zoning, land use or construction of a building or personal property, and if that ordinance or law ***[potentially]*** affects the repair or replacement of the lost or damaged **building or personal property** . . .

Yet, insertion of the word “potentially” still does not gain NBL the coverage it is seeking. At the time of the June 2005 loss, the 2003 Seattle Building Code was in effect and had the potential to affect the repair or replacement. However, *NBL did not do any repairs while that Code was in force*. The plain intent of the policy is to provide enhanced coverage only for repairs that were actually performed and costs actually incurred by the insured to perform the repairs. Moreover, the 2003 Code’s potential to affect the repair or replacement ceased when that Code was repealed in November 2007. Therefore, *whenever the repairs are completed, as is required to trigger coverage under the Ordinance or Law provision*, the 2003 Seattle Building Code will not even have the *potential* to “affect” those repairs.

Thus, even adding new wording to the Ordinance or Law provision would not give NBL the coverage it seeks. To have its claim valued under the 2003 Code, NBL also must essentially strike the repeatedly stated requirement that NBL must actually complete repairs in order to obtain coverage on a “replacement cost” basis, and must actually complete repairs “as soon as reasonably possible” to obtain additional coverage for

betterments that may be required to meet Code requirements in effect at the time of a loss.

The trial court applied the policy language exactly as it is written. The policy covers only the increased costs of repair incurred to comply with an ordinance or law that *affects* a completed repair. The 2003 Seattle Building Code did not *affect* the repair for the Metropole Building because there *was no repair while that Code was in effect*. After the 2003 Code was repealed in November 2007, it could never again “affect” the repair. The trial court, therefore, properly granted Pacific’s motion for partial summary judgment.

VII. CONCLUSION

For the reasons set forth above, Pacific respectfully asks the Court to affirm the trial court’s orders granting its motion for partial summary

//

judgment, denying NBL's cross-motion for partial summary judgment and denying NBL's motion for reconsideration.

Respectfully submitted this 5th day of August, 2010.

By 

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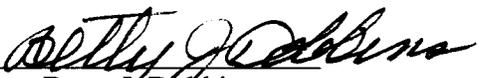
CERTIFICATE OF SERVICE

The undersigned certifies that under penalty of perjury under the laws of the State of Washington, that on the below date I caused to be served and filed with The Court of Appeals of the State of Washington, and arranged for delivery of true and correct copies of the foregoing document upon the following:

HAND DELIVERED:
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Court of Appeals of the State of Washington, Division I
One Union Square
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Seattle WA

DATED at Seattle, Washington this 6th day of August, 2010.


Betty J. Debbins

APPENDIX A

Pages 1 and 521 – 23 of Seattle Ordinance 122528

ORDINANCE 122528

1
2 AN ORDINANCE relating to the Seattle Building Code, amending Section 22.100.010, and
3 adopting by reference Chapters 2 through 28, Chapters 31 through 33, and Chapter 35 of
4 the 2006 International Building Code; and amending certain of those chapters; and
5 adopting a new Chapter 1 for the Seattle Building Code related to administration,
6 permitting and enforcement, a new Chapter 29 related to plumbing systems, a new
Chapter 30 related to elevators and conveying systems, and a new Chapter 34 related to
existing structures; and repealing Sections 3-150, 152, 153, 155, 158, 160-165, 167-189,
191,192, 194-203 of Ordinance 121519 and Sections 1-39 of Ordinance 122049.

7 Section 1. Section 22.100.010 of the Seattle Municipal Code, which Section was last
8 amended by Ordinance 121519, is amended as follows:

9 **SMC 22.100.010 Adoption of the International Building Code.**

10 The Seattle Building Code consists of the following: ~~((are hereby adopted and by this~~
11 ~~reference made a part of this subtitle:))~~ 1) Chapters 2 through 28, 31 through 33, and 35 of the
12 International Building Code, ((2003)) 2006 edition, published by the International Code Council,
13 as amended by City Council ordinance, and all errata published by the International Code
14 Council after February 1, 2006, and ((excepting)) 2) Chapters 1, 29, 30 and 34 adopted by
15 ((this)) ordinance ((as published by the International Code Council)); 3) ASME A17.1-((2000))
16 2004 with ASME A17.1a-((2002)) 2005 ((and ASME A17b-2003)) with Addenda and
17 Appendices A through ((M)) D, F through I, K through M and P, ((and Appendix O,)) Safety
18 Code for Elevators and Escalators, excepting Section 5.10 of ASME A17.1, Elevators Used for
19 Construction; 4) ASME A18.1-((1999)) 2005, ((A18.1a-2001 and A18.1b-2001,)) Safety
20 Standard For Platform Lifts and Stairway Chairlifts; and 5) Washington Administrative Code
21 Chapter 296-96((-)), Safety regulations for all elevators, dumbwaiters, escalators and other
22 conveyances as now exists or as hereafter amended. One copy of each of the above is filed with
23 the City Clerk in C.F. ((306756))308942.



1 Section 31. Sections 3 -150, 152, 153, 155, 158, 160-165, 167-189, 191,192, 194-203
2 of Ordinance 121519 and Sections 1-39 of Ordinance 122049 are repealed.

3 Section 32. The provisions of this ordinance are declared to be separate and severable.
4 The invalidity of any clause, sentence, paragraph, subdivision, section or portion of this
5 ordinance, or the invalidity of the application thereof to any person, owner, or circumstance shall
6 not affect the validity of the remainder of this ordinance, or the validity of its application to other
7 persons, owners, or circumstances.
8

9 Section 33. For a period of 60 days following the effective date of this ordinance, the
10 Director may also accept and thereafter approve applications that are designed to comply with
11 either the requirements of this Ordinance or the requirements of Ordinance 121521 as amended
12 by Ordinance 122047. Applications may be designed to comply with the requirements of
13 Ordinance 121521 as amended by Ordinance 122047 until July 1, 2008 where all of the
14 following conditions are met:
15

- 16 • Structural peer review is required by the Director;
- 17 • The first meeting between DPD, the applicant and the peer reviewer is held no later than
18 August 8, 2007,
- 19 • A complete building permit application for at least the complete structural frame of the
20 building is accepted for intake no later than July 1, 2008; and
- 21 • The peer review is complete at the time of application for the building permit for the
22 structural frame.
23

24 Section 34. The amendments to Sections 704.6 and 705.2 of Chapter 7 of the
25 International Building Code contained in Section 9 of this ordinance shall take effect on the later
26 of: 1) thirty (30) days from and after their approval by the Mayor, but if not approved and
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28

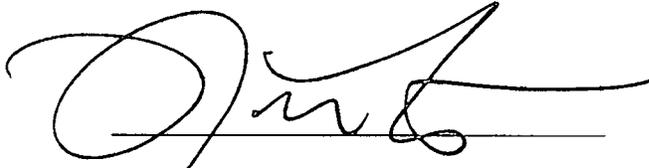


1 returned by the Mayor within ten (10) days after presentation, they shall take effect as provided
2 by Municipal Code Section 1.04.020, or 2) the date of approval of these amendments by the
3 State Building Code Council.
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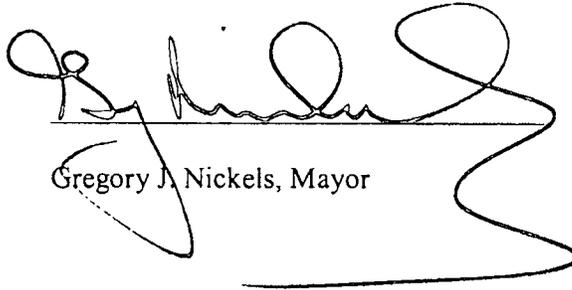
1 Section 35. Except for Sections 704.6 and 705.2 of Chapter 7 of the International
2 Building Code provided in Section 34, this ordinance shall take effect and be in force thirty (30)
3 days from and after its approval by the Mayor, but if not approved and returned by the Mayor
4 within ten (10) days after presentation, it shall take effect as provided by Municipal Code Section
5 1.04.020.

6 Passed by the City Council the 1st day of October, 2007, and signed by me in
7 open session in authentication of its passage this 1st day of October, 2007.

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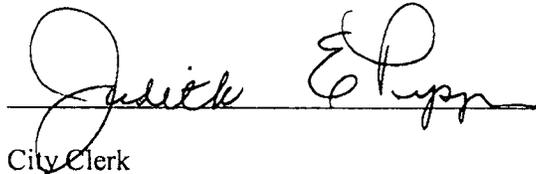
11 President _____ of the City Council

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14 Approved by me this 11th day of October, 2007.

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16 

17 Gregory J. Nickels, Mayor

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20 Filed by me this 11th day of October, 2007.

21
22 

23 City Clerk

24
25
26
27 (Seal)

