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BEFORE THE HEARING EXAMINER OF THE CITY OF MERCER ISLAND

In Re The Appeal of:

CUSHMAN AND WAKEFIELD,

Petitioner,

v.

CITY OF MERCER ISLAND,

Respondent.

No. APL23-002

CITY OF MERCER ISLAND’S
MOTION TO STRIKE

I. RELIEF REQUESTED

Pursuant to Hearing Examiner Rules of Procedure (“RoP”) 204, the City of Mercer Island (“City”) respectfully requests that the Hearing Examiner strike portions of Appellant’s brief. Said portions of Appellant’s brief raise a defense not included as a basis for appeal in Appellant’s Notice of Appeal, as required by the Mercer Island Municipal Code (“MICC”) 6.10.090. Accordingly, the issue was not properly preserved for appeal before the Hearing Examiner and the relevant portions of the brief must be stricken. Further, the Hearing Examiner should issue an order precluding Appellant from eliciting testimony on this issue.

II. FACTS

The facts presented are only those relevant to the City’s Motion to Strike. The subject of this appeal proceeding is the City’s Revised Notice of Violation (“Revised NOV”) issued

1 on March 3, 2023. Ex. 28. Appellant filed a Notice of Appeal on March 14, 2023, setting forth
2 the following bases for the appeal:

3
4 According to WA state landlord law RCW 59.18 “The landlord shall
5 commence remedial action after receipt of notice by the tenant as soon as
6 possible but not later than the following time periods, except where
7 circumstances are beyond the landlord’s control.[”] Landlord provided
8 remedial heat for tenants. Landlord has complied with all laws set forth. The
speed at which parts from Japan can be obtained are beyond landlord’s control.
The MICC sections quoted do not specify any time within repairs must be
completed. [sic] We do maintain HVAC but cannot get parts from Japan. That
prevented compliance with the voluntary compliance notice.

9 Ex. 34, bates page 0167.

10 On April 19, 2023, Appellant filed its Prehearing Brief, asserting “C&W’s appeal is
11 based on the following: (1) The City held C&W to a standard that is higher than found in the
12 Uniform Housing Code or the Mercer Island City Code.....” Ex 1028, p. 2. Appellant’s brief
13 discusses this issue at: p. 2, lines 1-2, 4-5, 14-16; and pp. 3-5 in their entirety. Ex. 1028. This
14 issue, raised for the first time in Appellant’s brief, was not listed as a basis for appeal in the
15 Notice of Appeal. Cf. Ex. 102, p. 2 with Ex. 34, bates page 0167.

16 III. EVIDENCE IN SUPPORT OF MOTION

17 The City relies upon the materials on file in this proceeding.

18 IV. DISCUSSION

19 The first stated basis for appeal in Appellant’s brief was not properly preserved for
20 appeal because such basis was not listed in Appellant’s Notice of Appeal. MICC 6.10.090(A)
21 expressly requires a written notice of appeal be in writing, “clearly explaining the basis for
22 the appeal,” among other requirements.

23 Here, Appellant raised three bases for its appeal in its Notice of Appeal: (1) an
24 allegation that Appellant complied with all landlord/tenant statutes; (2) an allegation that
25 Appellant provided remedial heat, and (3) an allegation of impossibility of compliance with
26 the MICC. Ex. 34, bates page 0167. Nowhere in the Notice of Appeal did Appellant raise an

1 allegation that the Revised NOV holds Appellant to a higher standard than required by the
2 Uniform Housing Code (“UHC.”) *Id.* Instead, the Notice of Appeal appears to admit to the
3 violations, stating that delays in getting parts from overseas prevented compliance. *Id.* Any
4 purported bases for appeal not listed in Appellant’s Notice of Appeal are not preserved for
5 appeal and are not properly before the Hearing Examiner in this proceeding per MICC
6 6.10.090. Furthermore, Appellant claiming a new basis for the appeal a mere one week from
7 the hearing date deprives the City of the opportunity to address the issue within its Staff
8 Report, which must be filed first, pursuant to the RoP. Accordingly, the Hearing Examiner
9 should strike p. 2, lines 1-2, 4-5, 14-16; and pp. 3-5 of Appellant’s brief.

10 The City anticipates that Appellant will likely respond that the Notice of Appeal was
11 filed by a layperson, and not Appellant’s counsel. However, the MICC does not provide any
12 exceptions to its requirement that notices of appeal set forth all bases for the appeal. Nor is
13 Appellant an individual, but is a corporate entity, well able to obtain counsel in a timely
14 manner in order to perfect its appeal. Therefore, any argument by Appellant that errors in its
15 Notice of Appeal should be waived or ignored must be dismissed.

16 V. CONCLUSION

17 Appellant’s first stated basis for appeal within its prehearing brief was not properly
18 preserved for appeal, as it was not listed in the Notice of Appeal as required by MICC
19 6.10.090. The City respectfully requests that the Hearing Examiner strike p. 2, lines 1-2, 4-5,
20 14-16; and pp. 3-5 of Appellant’s Prehearing Brief and issue an order preventing the eliciting
21 of testimony on this issue.

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DATED this 24th day of April, 2023.

MADRONA LAW GROUP, PLLC

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Attorneys for the City of Mercer Island

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DECLARATION OF SERVICE

I, Tori Harris, declare and state:

1. I am a citizen of the State of Washington, over the age of eighteen years, not a party to this action, and competent to be a witness herein.

2. On the 24th day of April, 2023, I served a true copy of the foregoing City of Mercer Island’s Motion to Strike on the following counsel of record using the method of service indicated below:

| | |
|--|---|
| <p>William J. Edgar, WSBA No. 46301 Andor Law, PC P.O. Box 8441 Portland, OR 97207</p> <p><i>Attorneys for Appellant</i></p> | <p><input type="checkbox"/> First Class, U.S. Mail, Postage Prepaid <input type="checkbox"/> Legal Messenger <input type="checkbox"/> Overnight Delivery <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-Mail: william.edgar@andor-law.com bill.edgar@andor-law.com <input type="checkbox"/> EService pursuant to LGR</p> |
|--|---|

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

DATED this 24th day of April, 2021, at Seattle, Washington.



 Tori Harris