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6 BEFORE THE HEARING EXAMINER OF THE CITY OF MERCER ISLAND

7 In Re The Appeal of:

No. APL23-002

8 CUSHMAN & WAKEFIELD

**APPELLANT CUSHMAN &
WAKEFIELD'S RESPONSE TO
MERCER ISLAND'S MOTION TO
STRIKE**

9 Appellant,

10 v.

11 CITY OF MERCER ISLAND, a Washington
12 State Municipality,

13 Respondent.

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15 **I. RESPONSE**

16 Appellant Cushman & Wakefield ("C&W") asserts the City of Mercer Island's ("City")
17 Motion to Stike ("Motion") should be denied on the following grounds:

- 18 1. C&W's appeal complied MICC 6.10.090 by asserting C&W provided sufficient heat
19 to residents, which is the sole basis of the City's Notice of Violation ("Violation
20 Notice");
- 21 2. C&W's appeal complied MICC 6.10.090 by asserting that C&W complied with all
22 laws;
- 23 3. Rule of Procedure ("RoP") 316, "Evidence", subsection (a) "Burden of Proof"
24 supports denial of the City's Motion.
- 25 4. Rule of Procedure 316(b), "Admissibility" supports denial of the City's Motion;
- 26

1 5. Equity and justice require a determination of whether the City’s Violation Notice
2 properly held C&W to the correct standard.

3 **A. C&W’s appeal raised the argument that it “provided remedial heat to**
4 **residents” and “complied with all laws” and complies MICC 6.10.090.**

5 The City’s Violation Notice is based on the findings that C&W violated MICC and
6 Uniform Housing Code (“UHC”) 701.1 by failing to “maintain the permanent heating system”
7 and the “lack of adequate heating facilities” at 77 Central Apartments. C&W’s appeal stated,
8 among other things, that it “provided remedial heat to residents.” It further stated that it
9 “complied with all laws.”

10 C&W’s assertion that it provided heat to residents directly addresses the undeniably
11 central issue of both the Violation Notice and this appeal hearing: heat. Further, C&W’s
12 assertion in the appeal, that C&W “complied with all laws”, was not limited to Washington
13 RCWs, other state or federal laws, the MICC or UHC. C&W’s appeal as to whether it either
14 violated or complied with “all laws” includes violation or compliance of the MICC and the UHC.

15 While C&W’s appeal could have arguably been more specific, the content of C&W’s
16 appeal satisfies MICC 6.10.090 and sufficiently puts the City on notice of the basis for appealing
17 the Violation Notice. The City’s Motion is based on an unreasonably narrow and limited
18 interpretation of C&W’s appeal. C&W respectfully requests Hearing Examiner Galt deny the
19 Motion on this basis.

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1 **B. RoP 316(a) sets the burden of proof on the City to prove the violation for**
2 **code enforcement proceedings.**

3 RoP 316, “Evidence”, subsection (a) “Burden of Proof” requires that the burden of proof
4 for code enforcement proceedings is on the City.¹ C&W’s pre-hearing statement merely holds
5 the City to the standard set forth in RoP 316(a). Additionally, C&W’s pre-hearing statement
6 places the City on notice of its position by articulating in greater detail the basis on which the
7 Violation Notice is being challenged.

8 The City’s argument that C&W’s arguments should be limited based their narrow
9 interpretation of C&W’s appeal directly contradicts the language of RoP 316(a). The City issued
10 the Violation Notice to C&W. The RoP places the burden of proving those violations on the
11 City. The City cannot escape its burden under RoP 316(a) by claiming that C&W did not
12 adequately raise the issue in its appeal.

13 **C. RoP 316(b), supports the admissibility of all evidence raised in C&W’s**
14 **appeal.**

15 RoP 316(b) states “The hearing generally will not be conducted according to technical
16 rules relating to evidence and procedure. Any relevant evidence shall be admitted if it is the type
17 that possesses probative value commonly accepted by reasonably prudent people in the conduct
18 of their affairs.”

19 Here, what the City is seeking to strike is any questioning about the very words used in
20 the City’s Violation Notice in comparison to the standards found in the MICC and UHC. The
21 City’s Motion attempts to gloss over the central issue, which is that the City’s Violation Notice
22 uses language and implements a standard not found in either the MICC or UHC. A comparison
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26 ¹ RoP 316(a) Burden of Proof. The applicant/appellant shall have the burden of proof as to
material factual issues **except: in code enforcement proceedings where the City has the burden of proving the
violation**; and except where applicable City code provisions or state law provide otherwise. (Emphasis added)

1 of the Violation Notice to the code language is unquestionably “any relevant evidence.” In fact,
2 a strong argument can be made that there is no evidence more relevant than that which sheds
3 light on whether the Violation Notice was issued using the correct standard.

4 **D. Equity and justice require analysis of whether the City’s Violation Notice**
5 **was issued under the correct standard.**

6 The City’s Violation Notice was issued for violation of multiple UHC sections.
7 However, violation of UHC 701.1 must be found before violations of any other UHC section can
8 follow. Examining whether the City held C&W to the correct standard under UHC 701.1 is not
9 merely equitable and fair but is consistent with RoP 316.

10 Even assuming the City’s argument in its Motion holds water, which C&W argues it does
11 not, the central question then becomes should procedural matters trump C&W’s right to
12 determine whether the City issued the violation notice based on the proper standard? Shouldn’t
13 the City correctly apply its own code before it penalizes an entity for violation of that same
14 code? While the City may disagree, equity and fairness, not to mention logic, requires
15 examination of this issue at the hearing. C&W should not be precluded by raising this critical
16 issue at the appeal.

17 **II. CONCLUSION**

18 Based on the foregoing, C&W respectfully requests the Hearing Examiner deny the
19 City’s Motion in its entirety.

20 Dated: April 25, 2023

21 ANDOR LAW, PC

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I have served a true copy of the foregoing Appellant Cushman & Wakefield's
3 Response to Mercer Island's Motion to Strike upon the following:

4 Eileen M. Keiffer
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9 on the date set forth below by:

10 **mailing** to said person a complete and correct copy thereof, contained in a sealed
11 envelope, addressed as set forth above and deposited in the United States mail in Portland, Oregon, with
12 postage thereon prepaid, on said day.

13 **hand delivering** to said attorneys a complete and correct copy thereof, contained in a
14 sealed envelope, at the address set forth above, on said day, and leaving it with the attorneys' clerk, or
15 person apparently in charge of the office, or in a conspicuous place therein if no one was apparently in
16 charge of the office.

17 **emailing** to said person a complete and correct copy thereof, on said day, and either:

18 the other party has consented to service by e-mail; or

19 I received confirmation of receipt of the email.

20 service by **electronic means** through electronic filing system

21 DATED: April 25, 2023

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