BEFORE the HEARING EXAMINER for the CITY of MERCER ISLAND

DECISION and ORDER

FILE NUMBER:	APL23-002 (Ref. Code Compliance Case CE23-0005)
APPELLANT:	Cushman & Wakefield C/o Andor Law ATTN: William J. Edgar P.O. Box 8441 Portland, OR 97207 william.edgar@andor-law.com
RESPONDENT:	City of Mercer Island Don Cole, Building Official C/o Madrona Law Group, PLLC ATTN: Eileen M. Keiffer 14205 SE 36th Street Suite 100, PMB 440 Bellevue, WA 98006 eileen@madronalaw.com and Bio Park, City Attorney 9611 SE 36th Street Mercer Island, WA 98040 bio.park@mercerisland.gov
TYPE OF CASE:	Appeal from a Notice of Violation & Civil Penalties
EXAMINER DECISION:	SUSTAIN with revised compliance date
DATE OF DECISION:	May 3, 2023

INTRODUCTION [1]

Cushman & Wakefield ("C&W") appeals from a Revised Notice of Violation ("Revised NOV") issued by the City of Mercer Island ("City") Department of Planning & Development's ("Department's") Building Official ("Cole") on March 3, 2023. (Exhibit 28 – or Exhibit 9001 [2])

C&W filed the appeal, signed by by Misty Cozzitorto, Managing Director, Asset Services-Multifamily, Americas ("Cozzitorto"), on March 14, 2023. [3] (Exhibit 34 – or Exhibit 9002)

The subject property is located at 2630 77th Avenue SE, Mercer Island, WA 98040. Its Assessor's Parcel Number is 5315101626. (Exhibit 28)

The Hearing Examiner ("Examiner") held a remote predecision open record hearing pursuant to MICC 3.40.060 on April 26, 2023, using the "Zoom" platform. The City gave notice of the hearing as required by the MICC. (Exhibit 60)

Pursuant to Hearing Examiner Rule of Procedure ("RoP") 224(c), the Examiner entered the following administrative exhibits into the hearing record:

Exhibit 9001:	Revised Notice of Violation, CE23-0005, issued March 3, 2023
Exhibit 9002:	Appeal, filed March 14, 2023, by Cozzitorto
Exhibit 9002.1:	Email, Cole to Cozzitorto, March 16, 2023, at 4:57 p.m.
Exhibit 9002.2:	Email, Cozzitorto to Cole, March 16, 2023, at 4:59 p.m.
Exhibit 9003:	Letter, Examiner to Principal Parties, March 22, 2023 (Scheduling guidance)
Exhibit 9003.1:	Email, Examiner to Principal Parties, March 22, 2023, at 9:44 a.m. (Transmittal of Exhibit 9003)
Exhibit 9004:	Notice of Appearance for Respondent, Madrona Law Group, PLLC ("Keiffer") and City Attorney ("Park"), March 22, 2023
Exhibit 9004.1:	Email, Harris to Examiner, March 22, 2023, at 1:31 p.m. (Transmittal of Exhibit 9004)
Exhibit 9005:	Email, Keiffer to Examiner, March 23, 2023, at 10:45 a.m. (Scheduling)
Exhibit 9006:	Email, Examiner to Cozzitorto, March 28, 2023, at 9:46 a.m. (Scheduling)
Exhibit 9007:	Email, Cozzitorto to Examiner, March 28, 2023, at 10:02 a.m. (Scheduling)

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1 Any statement in this section deemed to be either a Finding of Fact or a Conclusion of Law is hereby adopted as such.

2 Exhibit citations are provided for the reader's benefit and indicate: 1) The source of a quote or specific fact; and/or 2) The major document(s) upon which a stated fact is based. Citations to exhibits that are available electronically in PDF use PDF page numbers, not source document page numbers. While the Examiner considers all relevant documents in the record, typically only major documents are cited. The Examiner's Decision is based upon all documents in the record.

3 Cole had issued an initial NOV against Cushman & Wakefield *et al.* on February 28, 2023, a copy of which Cozzitorto had attached to her Appeal. On March 3, 2023, Cole replaced the February 28, 2023, NOV with a Revised NOV. On March 16, 2023, Cole and Cozzitorto exchanged emails in which Cole asked if Cozzitorto intended to appeal the Revised NOV and Cozzitorto replied in the affirmative. Therefore, the initial NOV is moot and will be ignored in this proceeding.

Exhibit 9008:	Email, Examiner to Cozzitorto, March 29, 2023, at 9:04 a.m. (Procedural guidance)
Exhibit 9009:	Email, Examiner to Principal Parties, March 29, 2023, at 6:55 p.m. (Setting hearing date)
Exhibit 9010:	Email, Estrada to Examiner, March 30, 2023, at 7:54 a.m. (Respondent's acknowledgment of hearing date)
Exhibit 9011:	Email, Cozzitorto to Examiner and Principal Parties, March 31, 2023, at 9:23 a.m. (Appellant's acknowledgment of hearing date)
Exhibit 9012:	Email, Wood to Estrada, April 6, 2023, at 11:48 a.m. (Submittal of Notice of Appearance and Motion for Continuance)
Exhibit 9012.1:	Notice of Appearance for Appellant, Andor Law ("Edgar"), April 6, 2023
Exhibit 9012.2:	Motion for Continuance by Appellant, April 6, 2023
Exhibit 9013:	Email, Keiffer to Examiner, April 6, 2023, at 2:12 p.m. (Response to Motion for Continuance)
Exhibit 9014:	Email, Edgar to Examiner and Keiffer, April 6, 2023, at 4:09 p.m. (Reply to Response)
Exhibit 9015:	Interlocutory Order Denying Motion for Continuance, April 7, 2023
Exhibit 9016:	City of Mercer Island's Motion to Strike, filed April 24, 2023, at 12:13 p.m.
Exhibit 9017:	Appellant Cushman & Wakefield's Response to Mercer Island's Motion to Strike, filed April 25, 2023, at 11:55 a.m.
Exhibit 9018:	Interlocutory Order Denying Motion to Strike, issued April 25, 2023

Pursuant to RoP 224(d), Respondent Department pre-filed Exhibits 1 - 61 and provided an index listing of those exhibits. Appellant C&W did not object to entry of those exhibits. The Examiner entered those exhibits into the hearing record. Pursuant to RoP 224(i), during the hearing the Examiner accepted additional exhibits from the Respondent as follows:

Exhibit 62:	2018 IBC definition of Dwelling Unit
Exhibit 65: [4]	WAC 51-51-0303
Exhibit 66:	Webster's dictionary definition of facility
Exhibit 67:	Tabular summary of work order requests from tenant Litts

Pursuant to RoP 224(e), Appellant C&W pre-filed Exhibits 1001- 1028 and provided an index listing of those exhibits. Respondent Department objected to entry of proposed Exhibits 1001 – 1004, 1009 – 1011, 1014, and 1017 - 1019. After hearing brief oral argument on the objection, the Examiner overruled the objection and entered Exhibits 1001 - 1028 into the hearing record.

The City has the record copy of the exhibits and the exhibit index lists.

[4] Respondent did not offer Exhibits 63 or 64.

The action taken herein and the requirements, limitations and/or conditions imposed by this decision are, to the best of the Examiner's knowledge or belief, only such as are lawful and within the authority of the Examiner to take pursuant to applicable law and policy.

INTERLOCUTORY ORDERS

On April 6, 2023, C&W filed a Motion for Continuance by Appellant. (Exhibit 9012.2) After receiving a response and a reply to the Motion, the Examiner issued an Interlocutory Order Denying Motion on April 7, 2023. (Exhibits 9013 - 9015)

On April 24, 2023, the Department filed a Motion to Strike. (Exhibit 9016) After receiving a response to the Motion, the Examiner issued an Interlocutory Order Denying Motion to Strike on April 25, 2023. (Exhibits 9017; 9018)

Both Interlocutory Orders are incorporated herein by reference as is set forth in full.

FINDINGS OF FACT

1. The crux of this appeal is interpretation and application of §701.1 of the 1997 edition of the Uniform Housing Code ("UHC"):

> **701.1 Heating.** Dwelling units, guest rooms and congregate residences shall be provided with heating facilities capable of maintaining a room temperature of 70°F (21.1°C) at a point 3 feet (914 mm) above the floor in all habitable rooms. Such facilities shall be installed and maintained in a safe condition and in accordance with Section 3102 of the Building Code, the Mechanical Code and all other applicable laws. Unvented fuel-burning heaters are not permitted. All heating devices or appliances shall be of an approved type.

(Exhibit 1021; bold in original text; yellow highlight in quoted exhibit text)

The City of Mercer Island ("City") adopted and applies the 1997 edition of the UHC. [MICC 17.12.010]

2. The property which is the focus of this appeal is known as 77 Central, located at 2630 77th Avenue SE, Mercer island, WA 98040. (Exhibit 28, PDF 1) 77 Central consists of two, five-story buildings surrounding a central courtyard. The basement and ground floor levels are a combination of parking and commercial spaces. Floors 2 – 5 contain 171 residential dwelling units in a variety of studio and one-, two-, and three-bedroom configurations. 77 Central was built in the early- to mid- 2000s and opened in 2008. Although 77 Central was built to be sold as condominiums, it has been and is currently operated as a mixed-use apartment complex. (Grant and Graham testimony)

3. C&W manages 77 Central for its owners. C&W's representatives who have been involved in this case are: Jenny Richards ("Richards"), was C&W's Managing Director, Asset Services-Multifamily, Americas; Misty Cozzitorto, ("Cozzitorto") succeeded Richards in early 2023; Terry Graham ("Graham") is C&W's Construction Director; and Nora Grant ("Grant") was Property Manager – Multifamily, 77 Apartments.

4. Each residential dwelling unit in 77 Central has an individual electrical breaker box. In general, each apartment room is served by a 15 amp circuit; appliances such as refrigerators and microwaves have individual circuits (that are likely 20 amps each). (Gilbert Testimony)

5. The residential apartments are served by two separate and distinct heating systems. Some 81 of the apartments do not have air conditioning. Each of those apartments is served by an individual, in-wall electrical heating unit. (Graham testimony)

   The remaining 90 apartments are served by a Mitsubishi HVAC system (the "HVAC System"). The HVAC System is divided into seven zones (Zones 1 – 7) with each zone having a roof-mounted compressor which services a number of the apartments. The size of the roof-mounted compressor varies dependent upon the number of apartments served. Each apartment in the HVAC System has one in-wall heat exchange coil. The 90 apartment coils are connected to the seven roof-mounted compressors by some 5,000 linear feet of tubing to carry the refrigerant back and forth between the compressors and the coils. Each apartment has its own thermostat by which the tenant may call for heating or cooling from the system. (Exhibit 30; and Graham testimony)

   The HVAC system was installed when the 77 Central buildings were initially constructed. Thus, the HVAC System is approximately 16 years old. (Graham Testimony)

6. On March 3, 2023, Cole issued the Revised NOV which was timely appealed and is the subject of this appeal. The Revised NOV charged two employees of C&W (Richards and Grant) along with property owner T-C 77 Central LLC with violation of Chapter 17.12 MICC (the UHC violation) and MICC 6.10.020(A) (the public nuisance violation). The UHC violation cited six sections of the UHC, including §701.1. (Exhibit 28, PDF 2) Cole agrees with C&W that all of the cited code violations derive from and depend upon the charged violation of UHC §701.1. (Cole testimony)

   In 15 places throughout the Revised NOV Cole refers to "failure to maintain a permanent heating system" for the apartments at 77 Central as the basis for issuance of the Revised NOV. (Exhibit 28, PDF 3 – 5)

   The Revised NOV imposed two "Corrective Actions:"

   > 1) …[I]mmediately repair the permanent heating system within all dwelling units to effective operation capable of maintaining a temperature of 70 degrees Fahrenheit at a point 3-feet above the floor within all habitable rooms. The responsible person(s)

> shall submit to the City confirmation from the installing contractor that the repair work has been satisfactorily completed. …
>
> 2) … [N]ot allow the occupancy of any vacant dwelling units unless the permanent heating system within the dwelling unit is currently capable of maintaining a temperature of 70 degrees Fahrenheit at a point 3-feet above the floor within all habitable rooms.

(Exhibit 28, PDF 5) The Revised NOV set March 17, 2023 (two weeks after issuance of the Revised NOV) as the compliance date. (Exhibit 28, PDF 5)

If the required corrective actions were not completed by March 17, 2023, the Revised NOV assessed the standard, code-required civil penalty:

> A civil penalty for violation of the terms and conditions of a notice of violation, stop work order or voluntary correction agreement shall be imposed at the rate of $100 per day for each violation, accruing for every day after the compliance date listed in the notice of violation. Thirty days after the compliance date, the penalty will increase to a rate of $250 per day for each violation. Sixty days after the compliance date, the penalty will increase to a rate of $500 per day for each violation, up to a maximum total penalty of $50,000 for each violation.

[MICC 6.10.050(D)(1), emphasis added; see also Exhibit 28, PDF 6] No priority violation penalty, repeat violation multiplier, or deliberate violation multiplier was imposed.

7. On or around October 24, 2002, the HVAC System experienced a series of failures over several of the compressor zones. Tenants began notifying C&W site management that their units lacked heat and required repairs due to the cold exterior temperatures. (Exhibits 39; 41 [5])

8. Cole began receiving email complaints from 77 Central residential tenants about lack of heat in their apartments in or around early November 2022. Cole's initial approach was to provide the complainants with links to the state's Landlord-Tenant Act so that they could process their complaints through that state law process. When requested by a tenant, Cole would inspect their apartment and prepare a letter under RCW 59.18.115 stating that the apartment lacked permanent heat. (Exhibits 1; 2; 4)

9. On November 29, 2022, Cole was informed by C&W management that repairs were underway and should be completed by the second week of December, 2022. He was told that space heaters had been provided to affected tenants. (Exhibit 1) Some apartments were having to use more than one space heater to provide a livable temperature. Even then, affected apartments were not able to

[5] Many exhibits in this record are lengthy email strings, some over a period of a month or more. For simplicity, citations to individual emails withion the string will not be provided.

maintain uniform heat throughout their units nor achieve temperatures much above the low- to mid-60s. Multiple space heaters were causing breakers to trip in some apartments. [6] (Exhibits 2; 4; and Gilbert, Shepherd, Litts testimony) Between October 26, 2022, and January 27, 2023, C&W purchased 109 1500W space heaters at a unit price of about $35.00 for use by the tenants. (Exhibits 1012; 1013; 1016)

10. While this was going on, C&W was communicating to the tenants via tenant broadcast emails. On November 2, 2022, C&W said it was working to fix the HVAC System. On November 9th, C&W said its contractor, Auburn Mechanical, was trouble-shooting the system for leaks and would start repairs on November 14th. Auburn Mechanical found that two of the zones were experiencing coolant leaks. On November 15th, C&W told the tenants that one zone was back up and that Auburn Mechanical was working on the second. On November 16th, C&W told the tenants that the second zone had been fixed, but that Auburn Mechanical had found leaks in other zones. On November 18th, C&W told the tenants that five zones were now down, but that Auburn Mechanical had been able to restart three zones by isolating individual problem units. On November 23rd and 29th and again on December 2nd, C&W told the tenants that coolant leak detection was ongoing in two of the zones. On December 21st, C&W told the tenants that it had nothing further to report at that time. On December 23rd, C&W told the tenants that further coolant leak detection work would continue after the first of the year. On January 3, 2023, C&W reported to the tenants that Auburn Mechanical was then inspecting three down zones. On January 6th, C&W told the tenants that parts to repair one zone had been ordered, that coolant leak detection was still ongoing on two other zones, and that repairs were underway. On January 10th, C&W reported to the tenants that it had restored heat to 10 apartments, but that multiple leaks in two of the zones meant that all apartments in each of those zones would be without heat until replacement parts for all units in each respective zone arrived and had been installed. (Exhibits 1008; 42)

On January 20, 2023, C&W provided a status report to the tenants: 38 replacement coils had been received, parts for the repairs to Zones 2, 3, and 7 had been ordered and were expected to be delivered in two to three weeks. The entire unit in 9 – 10 apartments would have to be replaced as parts for those units were no longer available; that work would be 42 to 90 days out. C&W also said that it would have taken 18 to 24 months if it had opted to replace the entire HVAC System. (Exhibit 1007)

11. On January 25, 2023, Cole issued a Voluntary Compliance Agreement ("VCA") to C&W stating that: the UHC requires a uniform temperature of at least 70° in each apartment; 27 apartments were out of compliance as of that date; and management had told him the repairs would be completed by

[6] The space heaters that C&W had purchased were rated at 1500 watts ("1500W"). (Exhibit 1016) The fundamental electrical circuit formula is V x A = W, where V = volt, A = amp, and W = watt. Given a standard 120 V circuit, the formula for determining amperage is W/V = A. Substituting the known values in this case, each space heater was using 12.5 amps: 1500W/120V = 12.5A. Using two space heaters on one 15A circuit would exceed the circuit's load limit, tripping the breaker. Operating one space heater in conjunction with another major power user (such as a hair dryer, toaster, curling iron, electric iron, etc.) on a single 15A circuit would also likely exceed the circuit's load limit and trip the breaker.

mid-February. Based on those facts, Cole set a compliance date of February 17, 2023, for restoration of the entire heating system to full operational mode. Cole stated that if C&W failed to comply with the VCA completion date, code enforcement action would be taken. (Exhibit 16)

12. On January 27, 2023, Grant advised one tenant (Gilbert) that 28 apartments were without heat as of that date. Grant advised that repairs were difficult because some of the needed parts were no longer available and were being custom made in Thailand. (Exhibit 20)

13. On February 15 and 16, 2023, eight tenants emailed notices to Cole that their units still had no heat; many had been without heat (except for the space heaters) since late October. [7] (Exhibits 36; 37; 41; 43; 47; 48; 58; 59)

On February 18 and 19, 2023, Cole communicated with nine tenants, each of whom stated that they had no heat in their apartment. (Exhibits 32; 53; 54; 55; 56; 57; 58; 59)

14. On February 21, 2023, Cole asked Grant for a status report on the heating situation. Grant responded on February 22nd that 26 apartments in two of the zones were still without heat and that C&W was awaiting repair/replacement parts. On February 28, 2023, Cole asked Grant when the parts would arrive and be installed. On February 28th, Richards replied that the parts were still being manufactured; Richards did not directly answer Cole's question. (Exhibits 23; 25)

15. On March 3, 2023, the day the Revised NOV was issued, C&W advised the tenants that: 17 replacement coils should arrive in two to three weeks with 11 more due to arrive in three to four weeks; four replacement air handlers should arrive in about eight weeks with six more air handlers to arrive around the end of May. Installation would follow shortly thereafter. (Exhibit 29)

16. On March 6, 2023, Terry Graham ("Graham"), C&W's off-site construction manager, sent a detailed email to Cole. In that email Graham said that: Auburn mechanical had advised C&W about a year prior that the HVAC System was leaking coolant; five of the seven zones are leaking; they had determined it quicker and cheaper to replace 38 heat exchangers in three of the zones than to try to repair them, but that the building owners had decided to replace 28 coils and 10 entire units instead; Auburn Mechanical had been awarded the contract to do that replacement work; 28 coils were out of stock and 10 units had to be custom made. Graham provided the same repair schedule as C&W had communicated to the tenants on March 3rd. (Exhibit 30)

17. On March 8, 2023, Auburn Mechanical told Cole that: the HVAC System was nearing the end of its useful life; it had never taken this long to repair any other system it had worked on; and it needed more time to complete the repairs. (Exhibit 31)

Auburn Mechanical started replacement/repair work in April, 2023. As of April 26, 2023, Auburn mechanical had repaired the units serving 13 apartments, but couldn't pressure test those units until

[7] These tenants apparently thought the VCA compliance deadline was February 15th. (Exhibit 59)

all units in a given zone had been fixed. Graham could not offer any updated completion schedule. He "guessed" that all systems should be operational by June 1, 2023. (Graham testimony)

18. On March 30, 2023, tenant Casserd informed Cole that C&W had just rented apartment 521 to a new tenant. Apartment 521 had previously been occupied by tenant Gilbert who had moved out due to the lack of heat in his unit. (Exhibit 33; and Gilbert testimony)

19. The problems with the HVAC System started before October, 2022. In the Fall of 2021, C&W purchased seven 1500W portable space heaters. (Exhibit 1016) Between May and July, 2022, C&W paid Hermanson Company, LLP ("Hermanson"), a mechanical contractor, $79,022.79 for work on the HVAC System. Hermanson checked for leaks in zones 1 and 4 and repaired the leaks found in them. (Exhibits 1014; 1017 – 1019; and Graham testimony)

20. Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such.

LEGAL FRAMEWORK [8]

The Examiner is legally required to decide this case within the framework created by the following principles:

Authority

The Examiner is charged with hearing timely appeals of Notices of Violation. [MICC 6.10.090(B)] The Examiner holds an open record hearing after which he issues a written decision. The Examiner's Decision is a final decision for the City subject to the right of reconsideration and appeal to a court of competent jurisdiction. [MICC 6.10.090(D); MICC 3.40.110]

Review Criteria

1. Following review of the evidence submitted, if the examiner finds that no violation has occurred, the hearing examiner shall uphold the appeal and reverse the notice of violation or stop order. If the hearing examiner finds that a violation has occurred, the hearing examiner shall issue an order to the person responsible for the violation which includes the following information:
   a. The decision regarding the alleged violation including findings of fact and conclusions based thereon in support of the decision;
   b. The required corrective action;
   c. The date by which the correction must be completed; and
   d. The civil penalties assessed based on the provisions of this chapter and the fee resolution;
2. If an owner of property where a violation has occurred has affirmatively demonstrated that the violation was caused by another person or entity not the agent of the property owner

[8] Any statement in this section deemed to be either a Finding of Fact or a Conclusion of Law is hereby adopted as such.

and without the property owner's knowledge or consent, such property owner shall be responsible only for abatement of the violation.

[MICC 6.10.090(C)]

Standard of Review
The standard of review is preponderance of the evidence. The respondent has the burden to prove the violation. [MICC 6.10.090(B)(1); MICC 3.40.080(B); Hearing Examiner Rule of Procedure 316(a)]

Scope of Consideration
The Examiner has considered: all of the evidence and testimony; applicable adopted laws, ordinances, plans, and policies; and the pleadings, positions, and arguments of the parties of record.

CONCLUSIONS OF LAW

1. The basic issue in this appeal is provision of heat to the dwelling units in the 77 Central apartment complex. The Revised NOV charged C&W with failing to "maintain a permanent heating system within each dwelling unit that is capable of maintaining" heat levels as specified in UHC §701.1.

2. C&W's appeal asserted that it : 1) "provided remedial heat for tenants"; 2) "complied with all laws set forth"; and 3) could not complete needed repairs due to circumstances beyond its control. (Exhibit 9002) C&W's Prehearing Brief expanded/restated those issues: 4) "The City held C&W to a standard that is" not required under the UHC or the MICC (objecting to the adjective "permanent" as used in the Revised NOV); and 5) "additional, mitigating facts for consideration by the Hearing Examiner." (Exhibit 1028, PDF 2, ll. 1 – 3)

   Each of those defenses will be addressed in the following Conclusions of Law.

3. Since the Appellant and Respondent agree that six of the seven enumerated code violations (1.a, 1.b, 1.d, 1.e, 1.f, and 2) are dependent on the seventh enumerated violation (1.c), it is initially appropriate to determine what that code provision requires.

   Violation 1.c quotes the 1997 edition of UHC §701.1 which, essentially, requires that all dwelling units must have installed heating facilities capable of maintaining a 70° room temperature three feet above the floor in all habitable rooms. (See Exhibit 1021.) C&W correctly notes that the adjective "permanent," used throughout the Revised NOV to modify "heating system" and "heating facility," is not found in UHC §701.1. The first question that must be answered is: Does the use of "permanent" in the Revised NOV represent a heightening of the standard within UHC §701.1?

4. It does not. The UHC, like its companion International Building, Residential, Electrical, Mechanical, Plumbing, etc. Codes, establishes standards for structures that apply universally within a jurisdiction which has adopted those codes. It defies common sense to argue that the UHC would allow

temporary devices to meet its standards on a routine, continuing basis; no one would argue, for example, that Electrical Code wiring requirements could be met by a collection of extension cords running throughout a structure.

Further, it is a rule of statutory construction that if a term is not defined within a code, it is appropriate to consult a dictionary to determine meaning. [*Peter Schroeder Architects, AIA v. City of Bellevue*, 83 Wn. App. 188, 192, 920 P.2d 1216 (1996)] *Webster's Third New International Dictionary (Unabridged),* defines "facility" as "something (as a hospital, machinery, plumbing) that is built, constructed, installed, or established to perform some particular function or to serve or facilitate some particular end". (Exhibit 66, def. 5.b) The HVAC System is a heating facility: It is an installed system designed to provide heat to the apartments on a routine, regular basis. Space heaters plugged into available electrical outlets are simply not a facility: They are a stop-gap measure when the installed facility breaks down. Cole's use of the modifier "permanent" throughout the discussion portion of the Revised NOV simply makes clear that "heating facilities" required under the UHC are to be a permanent, installed system, not space heaters.

5. C&W has been in violation of UHC §701.1 with respect to a varying number of apartments from at least late October 2022 through to the present. The installed HVAC System has failed to provide room temperatures of at least 70° in up to 38 apartments (based on the evidence in this record). Thirty-eight apartments is more than one-third of the apartments served by the HVAC System. C&W tried to mitigate the absence of code-compliant heating with space heaters. The preponderance of the testimony and evidence indicates that while those efforts cannot be discounted, they failed to provide adequate heat as called for by UHC §701.1.

6. One question that UHC §701.1 does not address is whether an unexpected system outage requires immediate issuance by the Building Official of a code violation notice with it's attendant penalties. It would seem unreasonable to hold that every time a heater broke the management would be immediately in violation of UHC §701.1. The extent of grace period that could be allowed need not be decided in this case because Cole monitored the situation from early November 2022 until January 25, 2023, before taking any formal action. And at that point he only issued a VCA setting a compliance date (which was based on repair timeline information provided to him by C&W) after which, if the heating had not been restored, the City would pursue formal code enforcement action. When the VCA compliance date passed with numerous problems still existing, Cole issued the Revised NOV. Cole provided a significant grace period.

7. C&W did provide some remedial heat for the affected tenants, but as previously noted, the remedial heat (space heaters) was not adequate to provide code-compliant heat to the affected units. In fact, the testimony and evidence show that the space heaters hardly provided a livable situation for the tenants, and then only in the room(s) where a space heater had been placed. The space heaters did not provide a sufficient substitute to obviate the need to issue the Revised NOV.

8. C&W also violated Corrective Action 2 by renting apartment 521 to a new tenant when the HVAC System in that apartment was still not functional.

9. C&W did not comply with all City-enforced laws. Specifically, UHC §701.1 was violated, which led to violations of the other code sections cited in the Revised NOV.

   The Landlord-Tenant Act is not enforced by the City. Therefore, the Examiner has not considered its requirements and offers no opinion on it.

10. The difficulty in obtaining replacement/repair parts is well documented in the record and has been, at least to some degree, beyond the control of C&W or its heating contractors. However, the Examiner cannot in good conscience say that the problem was entirely beyond C&W's control. The evidence shows that C&W had been advised by Auburn Mechanical in or around March 2022 that the Heating System was leaking refrigerant. The HVAC System is apparently nearing the end of its useful life. C&W decided to try to extend its life rather than replace it in its entirety. That decision has to be considered a factor in the inability to expeditiously restore the system to a working condition.

11. The needed corrective action is exactly what the Revised NOV required: Restore the HVAC System to full working condition. No need exists to change that requirement.

12. A new compliance date must be set, if only because the March 17, 2023, compliance date has passed during the pendency of the appeal. In their closing statements, C&W (through its counsel) asked for an additional 30 days to allow for arrival of the remaining, needed parts and Cole (through his counsel) asked that the new compliance date be set as close to the date of issuance of this Decision as possible.

    The most current statement of repair/replacement status in the record is the testimony of Graham, C&W's Construction Manager. He estimated that the work should be completed by June 1, 2023. (Graham testimony) That timeline is generally consistent with Graham's earlier prediction. (Exhibit 31)

    The Examiner will set Friday, June 2, 2023, as the new compliance date. (The "extra" day beyond Graham's June 1st date is to provide the contractor with the full week of May 29th to complete the job and to recognize that May 29th is a legal holiday.)

13. The Revised NOV set out the code-required civil penalties which will start to accrue on June 3rd if the repairs/replacement have not been completed by June 2nd. There is no need to consider any change to that requirement.

14. Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such.

DECISION and ORDER

Based upon the preceding Findings of Fact and Conclusions of Law, and the testimony and evidence submitted at the open record hearing, the Examiner herewith issues the following Decision and Order:

A. The Revised Notice of Violation issued on March 3, 2023, under City Compliance Case No. CE23-0005 is **SUSTAINED**.

B. Required corrective actions are as set forth in the Revised Notice of Violation issued on March 3, 2023, under City Compliance Case No. CE23-0005.

C. The date by which the required corrective actions must be completed is changed to June 2, 2023.

D. Civil penalties as set forth in the Revised Notice of Violation issued on March 3, 2023, under City Compliance Case No. CE23-0005 are due and payable if the required corrective actions have not been completed by June 2, 2023; civil penalties will begin to accrue on June 3, 2023.

Decision and Order issued May 3, 2023.

\s\ John E. Galt

John E. Galt
Hearing Examiner

HEARING PARTICIPANTS [9]

Eileen Keiffer, unsworn counsel
Robert E. Gilbert
Alicia Litts
Don Cole
Nora Grant
William Edgar, unsworn counsel
Laura Shepherd
Susan Casserd
Terry Graham

NOTICE of RIGHT of RECONSIDERATION

This Decision and Order is final subject to the right of any party of record to file with the Department of Community Planning & Development a written request for reconsideration within ten calendar days following the issuance of this Decision in accordance with the procedures of MICC 3.40.110. Any request

[9] The official Parties of Record register is maintained by the City's Hearing Clerk.

for reconsideration must allege one or more of the following errors: "1. The decision was based in whole or in part on erroneous facts or information; 2. The decision when taken failed to comply with existing laws or regulations applicable thereto; or 3. An error of procedure occurred that prevented consideration of the interests of persons directly affected by the decision." [MICC 3.40.110(A)] See MICC 3.40.110 for additional information and requirements regarding reconsideration.

NOTICE of RIGHT of APPEAL

"Any judicial appeal of the hearing examiner's decision shall be filed in King County superior court pursuant to Chapter 36.70C RCW, the Land Use Petition Act ('LUPA'). The land use petition must be filed within 21 days of the issuance of the hearing examiner's decision." [MICC 3.40.100, ¶ 2]

The following statement is provided pursuant to RCW 36.70B.130: "Affected property owners may request a change in valuation for property tax purposes notwithstanding any program of revaluation."