



CITY OF MERCER ISLAND9611 SE 36th Street • Mercer Island, WA 98040-3732

(206) 275-7605 • FAX (206) 275-7726

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Ex. 61 -STAFF REPORT
APL23-002 – APPEAL OF NOTICE OF VIOLATION (CE23-0005)**April 14, 2023****I. APPEAL SUMMARY**

File Nos.:	APL23-002, CE23-0005
Location:	2630 77 th Avenue SE, Mercer Island WA 98040; King County Assessor tax parcel number 531510-1626
Appellants:	Cushman & Wakefield
Responsible Person or Persons:	T-C 77 Central LLC 730 Third Ave New York, NY 10017 Jenny Richards, Regional Manager, Cushman & Wakefield 11235 SE 6th St, Suite 200A Bellevue, WA 98004 Nora Grant, Property Manager, Cushman & Wakefield 77 Central Apartments 2630 77th Ave SE Mercer Island, WA 98040
Description:	On March 3, 2023, City issued a Revised Notice of Violation (CE23-0005) for the failure of the responsible person(s) to provide minimum heating facilities within multiple dwelling units at the subject property as required by the Mercer Island City Code (“MICC”). Cushman and Wakefield appealed the Revised Notice of Violation. ¹ The Appellant contends that circumstances are beyond their control due to delays in the supply chain for replacement parts. Appellant also alleges it complied fully with the Washington Landlord and Tenant Act.
Recommendation to Hearing Examiner:	Affirm the City’s Revised Notice of Violation and issue a final order with new dates to make corrective actions.

¹ The Appeal documents filed by Appellant attached the original Notice of Violation, dated February 28, 2023. However, City Staff clarified that Appellant meant to appeal the Revised Notice of Violation, which superseded the Notice of Violation.

II. INTRODUCTION

This Staff Report is filed pursuant to Hearing Examiner Rule of Procedure (ROP) 224 in response to an appeal of Revised Notice of Violation (CE23-005) issued for the failure of the responsible person(s) to provide minimum heating facilities within multiple dwelling units at the subject property as required by the MICC. The Appellant is a responsible person (through its agents, including but not limited to Ms. Richards and Ms. Grant) for the facilitation of repairs or the replacement of heating facilities at the subject property. Multiple statements by Appellant's agents that heating facilities would be restored by certain dates were not met. Similarly, despite previous statements made by Appellant's agents that critical parts would be stockpiled to mitigate delays due to parts manufacturing and delivery, the Appellant reports that they are awaiting parts to be manufactured and delivered. At the time of this report, adequate heating facilities have not been operational for at least five months. The Appellant and other responsible parties have failed to provide the minimum heating facilities for multiple dwelling units within a reasonable timeframe. The City seeks corrective action sufficient to both remedy the violations and to deter further code violations.

III. FACTUAL BACKGROUND

1. On or about October 18, 2022, Building Official, Don Cole, was contacted by the code compliance officer, David Henderson, about a complaint received from a tenant living at 77 Central Apartments, located at 2630 77th Ave SE, Mercer Island (hereafter referred to as "77 Central"). Building Official Cole met the tenant at 77-Central. One of the tenant's complaints related to lack of heat, which was confirmed by setting the thermostat to call for heat and verifying that the heating system failed to operate. The tenant informed Building Official Cole that heat was supposed to be restored within a few days, so no further code enforcement action was taken at this time.
2. On November 9, 2022, Building Official Cole, received an email from another tenant at 77-Central Apartments regarding the lack of permanent heating facilities within their unit, stating that they have been without heat since mid-October 2022 and had notified the property manager in writing on October 24, 2022, but their permanent heating system had not been restored. Ex. 38. An exchange of phone messages ensued.
3. Building Official Cole was able to discuss the complaint with the tenant and arrange a site inspection for November 17, 2022. Ex. 46. On or about November 17, 2022, Building Official Cole made an inspection, confirming the permanent heat was not operational. Ex. 46. The tenant and Building Official Cole positioned the thermostat setting to heating mode but the permanent heat did not turn on and was not operational. The tenant stated that the Property Manager informed her the heat would be restored by the first week of December 2022. However, as of November 29, 2022, the same tenant confirmed to Building Official Cole that her understanding was that heat repairs were still ongoing. Ex. 46.
4. Throughout December of 2022, the City continued to receive further tenant reports about the continued lack of heat within their respective dwelling units. Exs. 2, 3, 4. The Building Official called the property manager at 77 Central Apartments, Nora Grant with Cushman & Wakefield on or about December 15, 2022, and she confirmed that there were still units without heat, but that heat should be restored within two weeks (by the end of December).
5. In early January 2023, the City received further tenant reports that the heat had not been restored to their or others' dwelling units. Exs. 42, 44, 50, 52. On or about January 6, 2023, Building Official Cole, called the property manager office and the assistant property manager, Ivy Knapp, informed him that the service company was onsite, had isolated the leak and anticipated all heating systems would be back in service by the end of the workday.
6. However, the City continued to receive further tenant reports that the heat had not been restored. Ex. 49. On January 9, 2023, Building Official Cole called the regional manager for Cushman & Wakefield, Jenny Richards, who stated the heating repairs at the 77 Central Apartment are their top priority and they will continue their repair efforts until all units have their permanent heating

systems restored. Ex. 31. She apologized for their mistaken predictions about the anticipated restoration dates for the heating systems, citing several factors including their team's unfamiliarity with the repair times for some of the equipment, mentioning delays in the supply chain, holidays and bad weather, limited availability of service technicians, and unfortunately finding that some of the repaired systems needed further repairs. *Id.* Expressing her reluctance to make another prediction given their track record, she believed that permanent heating facilities serving all units would be operational before the end of January 2023. *Id.* The City continued to receive reports from tenants that heat was not operational. Ex. 51.

7. Voluntary Compliance Notice: On January 19, 2023, Building Official Cole contacted the local property manager, Nora Grant. Ex. 31. She confirmed 27 units were currently without heat, and provided an update that testing determined the need for additional parts, further stating that restoration of heat to all units was now delayed until mid-February 2023. *Id.* Building Official Cole further followed up with Jennifer Richards regarding heating status on January 23, 2023. Ex. 10. Based on this information, on January 25, 2023, the City issued a voluntary compliance notice to Jennifer Richards, Regional Manager, Cushman & Wakefield, to restore the permanent heating facilities to all dwelling units by February 17, 2023. Ex. 16.
8. In February 2023, the City received further tenant reports that permanent heating facilities had not been restored to their respective dwelling units. Exs. 21, 36, 37, 41, 43, 47, 53, 54, 55, 56, 57, 58, 59. Building Official Cole emailed the property manager at 77 Central Apartments, Nora Grant. On February 22, 2023, she confirmed that permanent heat had been restored to one dwelling unit, but that 26-dwelling units were currently without heat, stating that the parts were still being manufactured in Thailand and the status of their completion and shipping was not known at that time. Ex. 22. On January 30, 2023, Ms. Grant confirmed to a 77 Central tenant that 28 units were without heat. Ex. 20.
9. On or about late January 2023, Building Official Cole received reports from tenants that even the temporary space heaters provided by 77 Central were not capable of maintaining a temperature of 68 degrees Fahrenheit in their dwelling units. Ex. 13.
10. On or about February 8, 2023, Building Official Cole made a site visit to 77 Central at the request of a tenant, to observe the temperature within her dwelling unit. The tenant and Building Official Cole positioned the thermostat setting to heating mode but the permanent heat did not turn on and was not operational.
11. Between November 2022 and February 2023, the City received several requests for inspections and certifications pursuant to RCW 58.18.115, Substandard and dangerous conditions—Notice to landlord—Government certification—Escrow account. Various certification letters are included as Exhibit 26.
12. On February 28, 2023, after multiple attempts to work with Appellant to achieve voluntary compliance, Building Official Cole issued a Notice of Violation. Exs. 17, 18, 27.
13. On March 3, 2023, Building Official Cole issued a Revised Notice of Violation, superseding the prior Notice of Violation, in order to correct a typographical error in the original Notice of Violation. Exhibit 28.
14. On March 14, 2023, the Appellants appealed the Notice of Violation. Exhibit 34.
15. On March 16, 2023, the Appellants responded to an email inquiry confirming their intention was to appeal the Revised Notice of Violation. Exhibit 35.
16. The City continued to receive correspondence from tenants regarding the heat being nonoperational and that vacated units without heat were being rented to new tenants. Exs. 29, 32, 33.

17. Nora Grant and Jenny Richards were employed by Cushman & Wakefield as the property manager and regional manager, respectively, and represented that they are responsible persons for facilitating repairs to the heating systems at the subject property.
18. On March 8, 2023, telephone log notes by Building Official Cole from a phone conversation with Terry Graham, Director, Construction, Cushman & Wakefield, reflect that Mr. Graham stated there are 39-units without heat and estimated heat would be restore to 28 units between April and Mid-May 2023, and that heating system repairs to the final 10 units would be completed in June or July 2023. Ex. 31.
19. Within the Appeal documents, the email from Terry Graham dated March 6, 2023, estimates that the air handlers should be shipped by May 15, 2023, and delivered within two weeks. At that juncture, the tenants of 77 Central will have been without heat for approximately 7 months. Ex. 34.

IV. CODE VIOLATIONS

a. MICC Ch. 17.12, Uniform Housing Code (UHC) Section 202 – Substandard Buildings.

Building or portions thereof that are determined to be substandard as defined in this code are hereby declared to be public nuisances and shall be abated by repair, rehabilitation, demolition or removal in accordance with the procedure specified in Chapter 11 of this code.

b. MICC Ch. 17.12, UHC Section 204 – Violations.

It shall be unlawful for any person, firm or corporation to erect, construct, enlarge, alter, repair, move, improve, remove, convert or demolish, equip, use occupy, or maintain any building or structure or cause or permit the same to be done in violation of this code.

c. MICC Ch. 17.12, UHC Section 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 at a point 3 feet 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.

d. MICC Ch. 17.12, UHC 1001.1 General.

Any building or portion thereof that is determined to be an unsafe building in accordance with Section 102 of the Building Code, or any building or portion thereof, including any dwelling unit, guest room or suite of rooms, or the premises on which the same is located, in which there exists any of the conditions referenced in this section to an extent that endangers the life, limb, health, property, safety or welfare of the public or the occupants thereof, shall be deemed and hereby are declared to be substandard buildings.

e. MICC Ch. 17.12, UHC 1001.2 Inadequate Sanitation.

Buildings or portions thereof shall be deemed substandard when they are insanitary. Inadequate sanitation shall include, but not be limited to the following:

....

6. Lack of adequate heating facilities

f. MICC 6.10.020, Declaration of Public Nuisance.

All code violations are determined to be detrimental to the public health, safety, welfare and environment and are declared to be public nuisances.

The UHC requires the provision and maintenance of adequate heating facilities within dwelling units. The Appellant did not make repairs or replacement of the heating system sufficient to serve each dwelling unit within a reasonable timeframe (and indeed, lack of operational heat is still an ongoing situation to the best of City staff's knowledge as of the filing of this Staff Report). Due to the lack of adequate heating facilities, each affected dwelling unit is substandard, is a public nuisance, constitutes a code violation, and shall be abated by repair. UHC Sections 701.1 Heating, 202, 204, 1001.1, 1001.2, MICC 6.10.020.

V. CORRECTIVE ACTIONS/PENALTIES

The City's Revised Notice of Violation required the following reasonable corrective actions to restore the heating facilities within the dwelling units to permit lawful occupancy:

1. The responsible person(s) shall immediately 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. The responsible person(s) shall not 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.

The City's Revised Notice of Violation required the completion of the corrective actions by March 17, 2023 and notified Appellant that civil penalties would accrue if the violations were not corrected before the date provided for compliance. Ex. 28.

VI. RESPONSE TO APPEAL

The Appellant, in its Appeal, alleges that:

"According to WA state landlord law RCW 59.18 "The landlord shall commence remedial action after receipt of such notice by the tenant as soon as possible but not later than the following time periods, except where circumstances are beyond the landlord's control." Landlord provided remedial heat for tenants. Landlord has complied with all laws set forth. The speed at which parts from Japan can be obtained are beyond the landlords control. The MICC sections quoted do not specify any time within repairs must be completed. We do maintain HVAC but cannot get parts from Japan. That prevented compliance with the Voluntary Compliance Notice." Ex. 34.

Staff Response:

The Revised Notice of Violation does not reference RCW Ch. 59.18, the Residential Landlord-Tenant Act, because the City of Mercer Island does not regulate landlord/tenant disputes. Whether or not the Appellant violated the Residential Landlord-Tenant Act is not relevant for purposes of the City's code enforcement action.

As previously noted, the Revised Notice of Violation references applicable sections within the Uniform Housing Code as adopted by MICC Ch. 17.12. The UHC clearly establishes that the heating equipment shall be provided and maintained; failure to do so renders a building substandard. While the MICC does not specifically provide an exact compliance timeframe, City staff's past practice is to interpret the UHC to require repairs be made within a reasonable timeframe. At this time, the dwelling units have been without heat for at least five months, perhaps even longer, which is not a reasonable timeframe. Indeed, this timeframe far exceeds the repair timelines compared to restoration times at other properties (which repairs are usually completed within days).

Furthermore, the Appellant indicates that the delays are due to circumstances beyond its control. However, the UHC provides that the owner or their designated agent shall maintain the heating equipment,

regardless of whether delays are within the owner or designated agent's control. Typically, preventative maintenance includes making difficult cost decisions to replace equipment or systems that are near the end of their useful life, may become obsolete, are problematic to repair, have difficulties with parts availability, etc. In such cases, decisions are often made to replace systems with equipment that can be easily repaired, have readily available parts, etc. In addition to planned preventative maintenance that may have minimized delays, there appear to have been other decisions within the control of the landlord that resulted in heating facilities not being restored to the property within a more reasonable timeframe. Within the Appeal documents submitted by the Appellant, there is an email from Terry Graham dated March 6, 2023, which indicates Appellant was aware of the heating issue "almost a year ago," which would have provided many months of additional time for maintenance, repair, or replacement of the heating systems. Ex. 34. As two examples, Appellant could have preemptively stockpiled parts to avoid the long delays due to manufacturing and delivery, or made arrangements for replacement of the system. However, neither of these actions were taken.

At the time of filing this Staff Report, the Appellant has been aware of the heating situation for around a full-year and the dwelling units have been without heat for at least five months, which is not a reasonable timeframe as compared to restoration times at other properties, or as compared to timeframes for the preventatively scheduled replacement of complete systems.

VII. CONCLUSION

The City respectfully requests the Hearing Examiner affirm the issuance of the Revised Notice of Violation and issue a final order with new dates for corrective actions.



Don Cole
Building Official
City of Mercer Island
