

BEFORE THE HEARING EXAMINER OF THE CITY OF MERCER ISLAND

In Re The Appeal of:

No. APL23-002

CUSHMAN & WAKEFIELD

**APPELLANT’S PREHEARING BRIEF
AND MEMORANDUM**

Appellant,

v.

CITY OF MERCER ISLAND, a Washington
State Municipality,

Respondent.

TO: HEARING EXAMINER GALT

AND TO: EILEEN M. KEIFFER and BIO PARK

PREHEARING BRIEF

I. INTRODUCTION

Appellant, Cushman & Wakefield (“C&W”), files this Prehearing Brief in support of its Appeal of the City of Mercer Island’s Revised Notice of Violation issued on March 3, 2023 (“Violation Notice”). The Violation Notice was issued for residential property known as the 77 Central Apartments, located at 2360 77th Ave. SE, Mercer Island, WA 98040 (“77 Central Apts.”). The Violation Notice found violations of various Uniform Housing Codes, which have been adopted by the City of Mercer Island (“City”). The violations are all based on the finding that Appellant did not maintain a “permanent heating system” in each dwelling unit.

1 C&W’s appeal is based on the following: (1) The City held C&W to a standard that is
2 higher than found in the Uniform Housing Code or the Mercer Island City Code; and (2)
3 additional, mitigating facts for consideration by the Hearing Examiner.

4 C&W asserts that the higher standard it was held to, as well as the additional facts, will
5 show the Violation Notice and fines are not warranted. Alternatively, Appellant asserts that if the
6 Violation Notice stands, then the fines should be suspended for additional time or significantly
7 reduced.

8 II. LEGAL ANALYSIS

9 A. The City of Mercer Island has adopted the 1997 Uniform Housing Code

10 Mercer Island City Code (“MICC”) section 17.12 adopts the 1997 Uniform Housing
11 Code. Specifically, MICC section 17.12.010 states “The 1997 Edition of the Uniform Housing
12 Code (“UHC”) as published by the International Council of Building Officials is adopted by
13 reference.”

14 B. The City’s Violation Notice holds Appellant to a standard exceeding that 15 required by the UHC or MICC and should be reversed.

16 The City’s Violation Notice rests solely on the claim that Appellant failed to provide heat
17 to residents pursuant to UHC, section 701.1. However, the City’s Violation Notice citing to
18 UHC 701.1 inserts the word “permanent”, which is not a requirement found in either the UHC or
19 the MICC.

20 The City’s Violation Notice citing to section 701.1 of the UHC, states:

21 Dwelling units, guest rooms and congregate residences shall be provided with
22 **heating facilities** capable of maintaining a room temperature of 70°F at a
23 point 3 feet above the floor in all habitable rooms. Such facilities shall be
24 installed and maintained in a safe condition and in accordance with Section
25 3102 of the Building Code, the Mechanical Code and all other applicable
26 laws. Unvented fuel burning heaters are not permitted. All heating devices or
appliances shall be of an approved type. (emphasis added)

1 However, when compared with the Violation Notice, the City increases the standard
2 under UHC 701.1 by adding language not found in either the UHC or MICC. Exhibit 1021. The
3 Violation Notice states as follows:

4 The failure to maintain the **permanent heating system** within each dwelling
5 unit to be capable of maintaining a room temperature of 70°F at a point 3 feet
6 above the floor in all habitable rooms are violation(s) of Mercer Island City
7 Code as follows: (emphasis added)
8 UCH 701.1 Heating, 202, 204, 1001.1, 1001.2 - The person(s) responsible did
9 not maintain a **permanent heating system** within each dwelling unit that is
10 capable of maintaining a room temperature of 70°F at a point 3 feet above the
11 floor in all habitable rooms. The City has found that 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.
(City’s Ex. 28, MI_0147) (emphasis added)

12 Nowhere in section 701.1 of the UHC is the word “**permanent**” or phrase “**permanent**
13 **heating system**” found. Exhibit 1021. The City would not repeatedly cited to this language if it
14 was not holding Appellant to this standard.

15 **i. City Building Inspector Don Cole consistently held Appellant to the**
16 **higher standard not required by the UHC or MICC throughout the**
17 **investigatory process.**

18 Throughout Mr. Cole’s assessment of the situation at 77 Central Apartments, he
19 consistently held Appellant to standards for a “permanent heating system.” On January 25, 2023,
20 Mr. Cole issued C&W a Voluntary Compliance Notice, wherein he repeatedly references
21 “permanent heating systems.” Exhibit 16, MI_0075, Exhibit 1022.

22 On February 2, 2023, City Building Inspector Don Cole wrote a letter to Bob Gilbert, a
23 resident at 77 Central Apartments. Ex, 26, MI_0126 – 0127. In that letter, Mr. Cole repeatedly
24 cites to “permanent heating system”, including the following passages:

- 25 • “I contacted Nora Grant, the property manager at 77 central apartments, to
26 arrange a site inspection to review your specific listed concern about the lack of
adequate **permanent heat** within your unit. Instead of arranging for an

1 inspection, she confirmed that your unit does not have **permanent heat** at this
2 time period so, an inspection was not necessary to verify the condition.” Ex, 26,
3 MI_0126. (emphasis added)

- 4 • “Therefore, I am able to certify on January 19, 2023, the **permanent heating**
5 **system** at the subject unit was not able to maintain the required 70 degrees
6 Fahrenheit. *Id.* (emphasis added)
- 7 • I discussed the temporary heating situation with the property manager, she stated
8 they have supplied and will continue to make their inventory of temporary heaters
9 available to tenants as necessary to maintain the required 70 degrees F within the
10 units. *Id.* (emphasis added)

11 On November 29, 2022, Mr. Cole also sent an email to Alicia Litts, another resident of 77
12 Central Apartments, wherein he again held C&W to a “permanent heating system” standard, not
13 required by the UHC. Mr. Cole wrote the following:

- 14 • At the time of my inspection, it was confirmed that **permanent** heating system
15 was not operational. Temporary heating was provided and based on the unit’s
16 thermostat reading, **appeared to maintain adequate heat within the unit.** Ex,
17 26, MI_0128. (emphasis added)

18 On January 20, 2023, Mr. Cole again emailed Alicia Litts and again held C&W to the
19 same “permanent heat” standard.

- 20 • “I contacted Nora Grant, the property manager at 77 central apartments, to
21 arrange a site inspection to review your specific listed concern about the lack of
22 adequate **permanent heat** within your unit. Instead of arranging for an
23 inspection, she confirmed that your unit does not have **permanent heat** at this
24 time period so, an inspection was not necessary to verify the condition.” Ex, 26,
25 MI_0133. (emphasis added)

- 1 • Therefore, I am able to certify on January 19, 2023, the **permanent heating**
2 **system** at the subject unit was not able to maintain the required 70 degrees
3 Fahrenheit. *Id.*
- 4 • I discussed the temporary heating situation with the property manager, she stated
5 they have supplied and will continue to make their inventory of temporary heaters
6 available to tenants as necessary to maintain the required 70 degrees F within the
7 units. *Id.*

8 Throughout Mr. Cole’s other correspondence with residents, he continues to repeatedly
9 reference “**permanent heat.**” Exhibits 56 and 57.

10 Appellant provided residents with multiple space heaters. While these were not
11 “**permanent heating systems**”, Mr. Cole was able to verify the temporary heating solutions
12 were able to maintain temperatures of 70 degrees F. In other cases, he only confirmed the
13 permanent heating system was not operational and refused to inspect whether the unit had
14 adequate heating facilities.

15 Appellant asserts the City’s Violation Notice is based solely on the condition of the
16 “permanent heating system”, fails to take into account C&W’s temporary heat solutions and fails
17 to acknowledge whether adequate heat was provided. Accordingly, the Violation Notice should
18 be reversed.

19 **C. The City’s findings that C&W violated UHC 202, 204, 1001.1 and 1001.2 should**
20 **be reversed as they are based on the erroneously higher standard set by the city.**

21 All of the above violations of the UHC found in the City’s Violation Notice are premised
22 entirely on the finding that C&W violated UHC 701.1. Absent a violation of UHC 701.1,
23 violations of UHC 202, 204, 1001.1 and 1001.2 would not follow. Given the City’s conclusion
24 that C&W violated UHC 701.1 is based on an incorrect reading of the UHC and an erroneously
25 high standard, violations of UHC 202, 204, 1001.1 and 1001.2 should be found invalid.
26

1 **III. FACTUAL ANALYSIS**

2 **A. The heating system at 77 Central Apartments was inspected and maintained**
3 **immediately prior to Winter 2022 and unforeseen heating issues only arose when**
4 **cold temperatures placed high demands on the system.**

5 The HVAC system at the 77 Central Apartments has 7 separate condensing unit zones
6 which provide heat to the different apartments. The units in each zone are maintained
7 independently and provide heat to 93 apartments. Each zone provides heat to between 9-15
8 resident apartments. All systems are manufactured by Mitsubishi, but the model in each zone is
9 not identical.

10 Between April and May 2022, C&W hired Hermanson Company (“Hermanson”) to
11 inspect the HVAC system because condensing units in zones 1 and 4 were without refrigerant.
12 Exhibit 1001 and Exhibit 1002. Hermanson was tasked with repairing any issues or problems
13 found within the variable refrigerant flow (“VRF”) system and to test for leaks within the entire
14 system.

15 Hermanson test all seven systems and refrigerant leaks were found in zones 1 and 4.
16 Hermanson repaired the leaks and also replaced coils in units for four apartments. Hermanson
17 did not find any additional issues in the VRF system. C&W and 77 Central Apartments
18 reasonably relied on Hermanson’s expertise.

19 In October 2022, the drop in temperatures place a large demand on the condensing units.
20 This spike in demand revealed additional leaks. Further, condensing units 1 and 4, which were
21 previously repaired, were found to have new problems.

22 C&W engaged with Auburn Mechanical (“Auburn”) as they carried the preventative
23 maintenance contract for the HVAC equipment at 77 Central Apartments. Auburn confirmed
24 new leak issues in zones 1 and 4. They also discovered 4 coils in those units were beyond repair
25 and needed replacement. While waiting for parts to arrive, condensing units in zones 2, 3 and 7
26 began showing a lack of heat production to resident apartments. Auburn began checking leaks
 for those zones as well.

1 Once the replacement parts for condensing units for zones 1 and 4 arrived, Auburn
2 promptly installed these, returning heat to those units. They then performed a full system check
3 on zones 1 and 4. No additional work was required for these two zones, and they are functioning
4 properly.

5 However, further inspection of condensing units in zones 2, 3 and 7 revealed significant
6 issues, including leaks in the coils. Repairs were made, but substantial leaks continued. Auburn
7 ultimately determined 28 coils needed replacement. Additionally, for 10 of the units, the coils
8 were no longer produced, necessitating replacement of the entire air handling system. This
9 rendered 38 apartments without heat until the replacement parts and/or units were received.

10 Auburn ordered the coils and air handlers. However, all parts are manufactured in Japan,
11 where they were required to undergo quality control testing prior to being shipped to the United
12 States. C&W has been in regular communication with Auburn about the arrival dates of the
13 parts, however Auburn has not been able to provide a shipping or delivery date for all parts.
14 Worldwide supply chain issues also caused substantial delays.

15 Over the last 12 months, C&W and 77 Central Apartments have paid Hermanson
16 \$85,113.52 to repair and maintain the HVAC system at the property. Exhibits 1017, 1018 and
17 1020. Appellant has also paid Auburn \$63,787.85 over the last year for repair work on the
18 system. Exhibits 1001, 1002, 1003, 1004 and 1014. In total, C&W and 77 Central Apartments
19 have paid **\$148,902.37** to maintain, repair or replace portions of the heating system within the
20 last 12 months.

21 Unquestionably, this is not a situation where a landlord has failed to act to address a
22 critical issue. C&W and 77 Central Apartments have committed the needed resources to resolve
23 the problem. This was not a situation caused by neglect or refusal to maintain an aging HVAC
24 system. The fact is, the system breakdowns were unforeseeable, and delays were out of the
25 control of C&W, 77 Central Apartments and/or Auburn.

1 **B. Heat was provided to all residents of 77 Central Apartments.**

2 A critical fact to this appeal is that no resident of 77 Central Apartments went without
3 heat. C&W and 77 Central Apartments went to great lengths to insure not one resident lacked for
4 heat while the central heating system was not operational.

5 C&W purchased 115 space heaters during this time. Exhibits 1012, 1013, and 1016.
6 C&W took every step to ensure that space heaters were readily available to every resident and
7 were prepared to supply as many as necessary.

8 C&W also proactively communicated with residents of 77 Central Apartments about the
9 availability of temporary heating units. They sent 18 separate email blasts to all residents
10 offering space heaters. Additionally, Nora Grant, the property manager personally contacted
11 every resident affected by the system breakdown to offer delivery of space heaters. C&W
12 repeatedly offered to deliver space heaters to every resident who requested one. Every resident
13 was offered more than one space heater and would be provided as many as requested.

14 **C. C&W promptly and regularly communicated with residents during the relevant**
15 **time period.**

16 C&W and 77 Central Apartments' email system allows it to send an email blast that can
17 reach all residents simultaneously. Between late October 2022 and March 3, 2023, C&W sent 26
18 emails to residents in an effort to keep them informed about the progress and repair status of the
19 heating system. Exhibits 1007 and 1008.

20 The email blasts also allowed residents to express their needs or concerns or ask
21 questions. The purpose of the emails was to foster communication about the issue, to remain in
22 contact with residents about how C&W could help and also to alleviate any additional
23 frustrations.

24 On December 2, 2022, C&W even held a town hall style resident meeting to discuss the
25 heat issue, HVAC system and related matters. Exhibit 1020.

1 C&W’s proactive and regular communication with residents shows it was not shirking
2 away from its responsibilities as a landlord, but rather making every effort to directly address
3 them and communicate with residents as effectively as possible on this important issue.

4 **D. C&W and 77 Central Apartments’ conduct does not warrant these violations**
5 **and fines.**

6 Appellant’s conduct, viewed through the lens of a culpability continuum does not warrant
7 the Violation Notice or the fines imposed upon them. Surely, the City of Mercer Island has seen
8 nefarious conduct by landlords who operate rental housing with intentional and purposeful
9 disregard for resident safety and well-being. Often called “slumlords”, these landlords go to
10 great lengths to maximize profits over resident welfare and often operate their housing with gross
11 housing violations. That is not the case here.

12 As Appellant’s brief and supporting documents clearly show, C&W had great concern for
13 the residents of 77 Central Apartments. C&W’s actions show they did everything in their ability
14 to help every resident affected by the situation. Exhibits 1001 – 1021, 1022.

15 The facts here warrant discretion, allowing flexibility in the severity of civil fines
16 associated with these violations. It is inequitable to penalize C&W and 77 Central Apartments
17 based on these facts, on the same level as a landlord who intentionally ignores the rules or
18 otherwise engages in nefarious conduct in purposeful disregard of the public’s well-being.
19 Unquestionably, that is not the situation here.

20 **IV. CONCLUSION**

21 Based on the forgoing, Appellant C&W respectfully requests the Hearing Examiner
22 reverse the City of Mercer Island’s Violation Notice. Alternatively, Appellant requests the
23 Examiner analyze and consider all facts, issues, mitigating circumstances and Appellant’s
24 substantial efforts related to this situation. On the facts present here, C&W reasonably requests
25 full or partial relief from the civil fines imposed in Violation Notice issued by the City of Mercer
26 Island.

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Dated: April 19, 2023

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Attorneys for Appellant

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I have served a true copy of the foregoing Prehearing Brief and
3 Memorandum upon the following:

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7 on the date set forth below by:

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

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

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

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

17 I received confirmation of receipt of the email.

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

19 DATED: April 19, 2023

20 ANDOR LAW

21
22 By: s/ William Edgar
23 William Edgar, WSB #46301
24 *Attorneys for Appellant*