BEFORE THE HEARING EXAMINER FOR THE CITY OF LAKEWOOD

In re: the Properties Located at 2621 84th St. SW Lakewood, WA.	REVISED/SUPPLEMENTED FINDINGS AND ORDER OF HEARING EXAMINER AFTER RE-OPENING HEARING

Summary

The hearing for the above-captioned matter was re-opened after issuance of a Final Decision[1] in order to address new evidence not reasonably available to the Appellant until after the due date and issuance date of the Final Decision. The new evidence was contained within emails that the City released in response to a records request submitted by the Appellant. As a result of this new evidence, the Final Decision is revised to provide that instead of an investigation of all Karwan septic systems, only about half of the septic systems are subject to investigation and remediation. A potentially inaccurate reference to the existence of unsecured units is stricken from Finding 15 of the Final Decision. The due date for Appellant corrective actions necessitating tenant evictions has been extended to provide additional time for tenant notice of City violations as necessary.

[1] The "Final Decision" refers to the Findings of Fact, Conclusions of Law and Final Decision issued October 9, 2019 for the above-captioned matter.

The Final Decision sustained a corrective action in the Findings and Order[2] requiring that the Appellant investigate and remediate all of the septic systems in the Karwan mobile home park. The only significant revision to the Final Decision by this Order is a reduction in the number of septic systems that must be investigated and remediated. The Appellant was able to show that almost half the septic systems have already passed private inspections. These units will be excluded from the investigative action required by the Findings and Order.

Finding 15 of the Final Decision determined that the mobile home park served as a harbor for vagrants and criminals. Finding 15 included language that there are unsecured units in the mobile home park. The Appellant identified that at least some and potentially all vacant units have been secured. Ultimately, based upon the testimony of police officers, the mobile home park continues to serve as a harbor for vagrants and criminals with or without unsecured units. Consequently, the reference to unsecured units in the Final Decision has been stricken but the determination that the property serves as a harbor for vagrants and criminals remains.

As part of the re-opened hearing process, the Appellant was also authorized to argue that the Administrative Complaint failed to provide sufficient notice of septic failure code violations. The Administrative Complaint[3] that initiated this appeal was arguably defective in that it only identified alleged septic failures for two units while the Findings and Order required assessment of all septic systems. Despite this deficiency in the Administrative Complaint, the Appellant was given reasonable notice as required by procedural due process. The Findings and Order identified that all septic systems in the mobile home park needed to be investigated. The Appellant had a full opportunity to contest this issue in its subsequent appeal. Finally, it is also determined that the Appellant never made any timely objection to the lack of notice in the Administrative Complaint. The Appellant asserts that it made such an objection in its Notice of Appeal to the Administrative Complaint, but that language only focused upon the lack of evidence to support the requirement for septic system investigation and did not state that the issue should have been dismissed due to improper notice.

[2] The "Findings and Order" refers to the July 9, 2019 "Findings and Order" that resulted from the hearing held by the City of Lakewood Building Official on the Administrative Complaint. The Findings and Order was admitted as Ex. E to Ex. 1.

[3] The "Administrative Complaint" refers to the Complaint and Notice of Hearing, File No. A0051, dated May 7, 2019, admitted into the record as Ex. D to Ex. 1.

Exhibits

The Exhibit List to the October 9, 2019 Findings of Fact, Conclusions of Law and Final Decision is supplemented with the following exhibits:

5. Appellant's Supplemental Brief dated September 27, 2019.
6. City's Closing Statement dated September 27, 2019.
7. Appellant's Motion to Re-Open Case and To Supplement and Correct the Record and The Hearing Examiner's Decision dated October 29, 2019.
8. Declaration of Ashton T. Rezayat in Support of Appellant's Motion to Re-open Case and to Supplement and Correct the Record and the Hearing Examiner's Decision, including all attachments[4]
9. City's Response to Appellant's Motion to Re-Open
10. Second Declaration of Alicia O'Flaherty
11. October 30, 2019 Declaration of Jeff Gumm
12. Appellant's Reply in Support of Motion to Re-Open Case and To Supplement and Correct the Record and The Hearing Examiner's Decision
13. Order Re-Opening Hearing dated November 7, 2019
14. Appellant's Supplemental Response Pursuant to Order Re-Opening Hearing dated November 12, 2019
15. City's Response to Appellant's Second Supplemental Brief and Order Requesting Additional Information dated November 13, 2019
16. Third Declaration of Alicia O'Flaherty with attached CAD list
17. November 15, 2019 email from Examiner entitled "*Email Order Admitting New Evidence and Draft Schedule for Response and Argument*"
18. Supplemental Declaration of Jeff Gumm dated November 19, 2019
19. Declaration of Dave Bugher dated November 20, 2019.
20. Declaration of Roy Simmons dated November 18, 2019.
21. "Karwan Pictures" attached to November 27, 2019 email from Alicia Flaherty with subject line "Karwan Declarations."
22. Appellant's Closing Brief dated December 4, 2019.
23. Declaration of Luke Kim dated December 4, 2019.
24. Declaration of B. Tony Branson dated December 4, 2019.

[4] The November 15, 2019 email order only expressly admitted attachments E-G of the Rezayat Declaration. However, attachments A-D are simply duplicative of exhibits already admitted. Attachment B is the Appellant's Notice of Appeal, which was expressly admitted by the November 15, 2019 email order as well.

25. City's Supplemental Closing Brief dated December 6, 2019

The Ex. 4 "All email correspondence…" includes all email correspondence between the Examiner and hearing parties pertaining to this appeal through the City's Supplemental Closing Brief dated December 6, 2019. All documents identified in the exhibit list include all attachments thereto unless an attachment has been expressly excluded.

Findings of Fact

Post-Hearing Procedural

1. Appellant Raises Incomplete Response to Records Request. The Examiner held a hearing on the subject application on September 19, 2019. At the hearing, Karwan identified that it had not had a reasonable opportunity to present its case because the City had failed to complete its response to a public records request made by the Appellant prior to the hearing. As of the hearing date, only a single document had been produced.

2. Supplemental Briefing in Response to Evidence Revealed by Delayed Records Response Authorized. By oral order during the September 19, 2019 Examiner appeal hearing, the Examiner provided the City until September 24, 2019, five days after the hearing, to produce responsive documents. Karwan would then be permitted to file supplemental briefing on September 27, 2019. The City would be permitted to file a reply on October 2, 2019.

3. Supplemental Briefing Identifies Records Response as Incomplete. The City produced thousands of documents within the six days after the hearing. However, in Karwan's supplemental briefing of September 27, 2019, it asserted that the City's records disclosure was still incomplete. Eventually the City confirmed that, due to a "software glitch," its response was still incomplete.

4. Re-Opening of Hearing Authorized for Completion of Incomplete Records Request Response. Based upon these facts, the Examiner issued an October 2, 2019 email order stating that *"[i]f any released documents warrant it, I will reopen the case if a request is filed prior to expiration of the judicial appeal period*." See Ex. A to Ex. 8, Declaration of Ashton T. Rezayat in Support of Appellant's Motion to Re-

open Case and to Supplement and Correct the Record and the Hearing Examiner's Decision.

5. Final Decision. A final decision on the above-captioned matter was issued on October 9, 2019.

6. Completion of Records Response After Final Decision. The City produced additional documents to complete the record request on October 7, 2019. The Appellant motioned to add the documents to the record on October 29, 2019. The City filed a response brief and the Appellant filed its reply on November 6, 2019.

7. Re-Opening of Hearing Authorized. By email order dated November 15, 2019, Ex. 16, the Examiner authorized the re-opening of the hearing to address two issues: (1) that a substantial portion of the calls for service were from one tenant; and (2) that Tacoma Pierce County Health Department ("TPCHD") had approved several Karwan septic systems. The email order also authorized admission of the Appellant's Notice of Appeal upon Appellant's request and lack of objection from the City. The Notice of Appeal has been admitted as Ex. B to Ex. 8, Declaration of Ashton T. Rezayat in Support of Appellant's Motion to Re-open Case and to Supplement and Correct the Record and the Hearing Examiner's Decision.

8. Paragraph 10 of the Rezayat Declaration notes that the City's production of Appellant requested documents after the close of the hearing deprived the Appellant of the opportunity to cross-examine City witnesses on the contents of the documents. There was no presentation of verbal testimony or cross-examination in the re-opened hearing process. However, the November 15, 2019 email order, Ex. 17, establishing the re-opened hearing format provided a deadline for requests for cross-examination and none were requested by the Appellant. Further, the Appellant expressly waived objection to the review process established by the November 15, 2019 email order by email dated November 17, 2019.

Notice of Septic Deficiencies

9. Final Decision Identifies Lack of Notice of Septic Deficiencies in Administrative Complaint as Issue. Failing septic systems throughout the mobile home park were a major concern and issue addressed by the City during the appeal hearing. The Findings and Order required the "*[c]omplete septic system*" to be

evaluated for deficiencies. However, except for problems with sanitary waste addressed for Units 29 and 34 as identified in FOF No. 10 below, septic system failures were not identified as violations in the Administrative Complaint.

Page 2 of the Final Decision noted that the septic issue had been expanded beyond the scope identified in the Administrative Complaint[5], but concluded that it was properly addressed because the Appellant had received notice of the issue during the hearing before the Building Official on the Administrative Complaint. The Final Decision also noted that the Appellant had not raised lack of notice as an issue such that its right to do so was waived. In response, the Appellant noted that it had allegedly raised the lack of notice in its Notice of Appeal of the Findings and Order. *See* Ex. 7. Neither the Appellant nor the City had presented the Notice of Appeal for admission into the record. Pursuant to the request of the Appellant and no objection from the City, the Notice of Appeal was admitted into the record after issuance of the Final Decision and lack of notice of the septic issue was authorized to be addressed as a post-hearing issue by email order dated November 15, 2019. *See* Ex. 17.

10. Administrative Complaint Only Identifies Units 29 and 34 as Having failed Septic Systems and/or Nonfunctional Bathroom Facilities. The Administrative Complaint only identified two units with failing septic systems. Beyond associating the two units with failed systems, the Administrative Complaint made no other reference to failing septic systems. Under the Background section of the Administrative Complaint, it was identified that on January 8, 2019 City staff observed that Unit No.34 had "*inoperable bathroom facilities with sewage backed up into the unit*." See Administrative Complaint, p. 7. The condition of those bathroom facilities was further documented in the Background section for a second site visit on January 8, 2019, where p. 8 of the Administrative Complaint noted that Unit No. 34 had "*failing bathroom facilities with sewage actively backing up into the unit*." Under the Violations section of the Complaint, the Complaint noted that Unit No. 34 was in violation of LMC 15A.05.090(6), which qualifies a building or premises as building or structure as dangerous if it is "*clearly unsafe for its use and occupancy*." Under this standard, there were several reasons why Unit No. 34 was designated as dangerous, one of those reasons being "*nonfunctional bathroom facilities, sewage backing up into*

[5] The Final Decision erroneously stated that the Administrative Complaint had not identified any violation associated with septic failure. As identified in FOF No. _____, the Administrative Complaint had actually identified violations for two septic systems. Given that the Findings and Order required an investigation of what appears to be all of the septic systems of the mobile home park, the Final Decision correctly identified that notice of the septic issue was deficient, but failed to note that notice was provided for two of the units.

unit." See Administrative Complaint, p. 12. Under the same alleged violation, Unit No. 29 was alleged in the Complaint to have "*nonfunctional bathroom facilities*."

11. Findings and Order Identifies Units 1, 34 and 39 as Having Failed Septic Systems. The Findings and Order identified Units 1, 34 and 39 as having failed septic systems and also made several generalized comments about failing septic systems. It is unclear if the generalized statements were intended to include systems beyond units 1, 34 and 39.

The generalized statements of failing systems were as follows: Finding No. 3 identifies that as a result of the building inspections identified in the Administrative Complaint, a number of code violations were observed including "failing septic/sewage systems." Finding No. 11 of the Findings and Order summarized the testimony of Mr. Gumm, who identified that the mobile home park had "failing septic/sewage systems." Finding No. 11 further summarizes the testimony of Mr. Kim, Appellant, as having noted that "*he had expended $35,000 for engineered drawings, $55,000 in pre-ordered materials for the sewer system, and that none of the septic systems had failed*." Finding No. 13 identified that Karwan had provided an update to the City on June 28, 2019 that noted that it (Karwan) had not received notice from the TPCHD regarding septic system deficiencies. Finding No. 13 noted that the City had notified TPCHD of the deficiencies.

Unit specific references to septic failure were made as follows: Finding 15 identified the IPMC 108.1.5 violations of specific units in the mobile home park. Under IPMC 108.1.5(6), which qualifies a building or premises as building or structure as dangerous if it is "*clearly unsafe for its use and occupancy*," Finding 15 found Unit 34 to qualify for several reasons, including "*nonfunctional bathroom facilities, sewage backing up into unit*." Finding 15 found Unit 29 to also qualify as dangerous under IPMC 108.1.5(6) for several reasons, including "*nonfunctional bathroom facilities*." Finally, Finding 15 found Units No. 1 and 34 to qualify as dangerous under IPMC 15A.05.090(9) because it is "*unfit for habitation due*" to "*failing septic or sanitary systems. Unit # 1 has sewage leaking beneath trailer. Both bathrooms in #34 have failed and have effluent backing into the interior spaces*."

The Order section of the Findings and Order listed detailed corrective actions for 29 structures located in the mobile home park, mostly comprised of manufactured homes and carports. None of the corrective actions for the individual structures specified any septic work. Instead, a section entitled "*Karwan Park Septic System*" required that

"*[c]omplete septic system to be evaluated by a licensed and approved Pierce County Department of Health septic service company*" with deadlines set for the correction of deficiencies discovered from the evaluation.

12. Notice of Appeal Addresses Septic System Failure. Appellant filed its Notice of Appeal, Ex. 6, att. B, appealing the Findings and Order on August 9, 2019. The Notice of Appeal addresses the lack of reference to failing septic systems in the Administrative Complaint as follows:

> *Even the Complaint that was entered prior to the Order failed to include any basis of support for the Order's provisions regarding the septic systems, if it bothered to mention septic systems at all. The inclusion of inspecting every septic system in the Park, without any evidence to find that any of the septic systems has failed, is not supported by the record. The City's failure to provide substantial evidence to support its conclusions that the septic systems or carports have failed make its Order arbitrary and capricious as to these issues. Furthermore, given the Park's cooperation with the City, it is unclear why the City continues to "move the goal posts." Despite this, Karwan continues to act in good faith.*

Existence of Septic Deficiencies

13. No Septic Investigation Required for Units that Passed Private Inspection. As a result of newly admitted septic inspection reports ("private reports"), it is determined that the septic system evaluation required by the Findings and Order is not required for systems that have passed the private inspections as detailed in inspection reports presented by the Appellant. The units that do not need to be re-inspected are as follows: Units 1, 3, 4, 6, 7, 8, 9, 11, 12, 13, 19, 20, 21, 22, 23, 24, 26, 27, 28, 33, 35.

The units identified above were all found by a private septic system contractor to have no deficiencies. The findings of the contractor were documented in private reports attached as Ex. G to Ex. 8, the Rezayat Declaration. The private reports identified that most of the units assessed required some remediation, the most common being the pumping of the septic tanks. Once those actions were taken, the private reports found no deficiencies. The timing of the issuance of the private reports ranged from June 5, 2017 to August 31, 2017.

In contrast to the findings of no deficiencies in the private reports, in a 12/7/17 report, see Ex. C to Ex. 1, the TPCHD found deficiencies in the following units: Units No. 2, 10, 14, 15, 16, 17, 18, 29, 30, 31A-C, 32, 34 and 37. In the same report TPCHD also determined that there was missing information or there were problems with Units No. 40, 25, 38, 39, and 40. None of the units addressed in the TPCHD report were addressed in the private reports.

With the exception of Units 5 and 36, all of the Karwan mobile home units are accounted for between the private reports and the 12/7/17 TPCHD report. There was also no conflict between the findings made by TPCHD and the private contractor, i.e. all units found to have no deficiencies by the private contractor were not found to have deficiencies by TPCHD and vice-versa. Except for Unit 1, which is further discussed below, the findings of TPCHD and the private inspection reports are consistent with the findings of City staff. Given this consistency and lack of contrary evidence, it is determined by preponderance of evidence that the units that were found to have no deficiencies in the private inspection reports are not failing and no further investigation of those units is required. Given the high incidence of septic failure for units that didn't pass the private inspections, it is also found by preponderance of evidence that at least some of the units not subject to the private inspection reports are likely failing and further investigation is needed[6].

The only septic failure that is put into question by the Appellant's new evidence is Unit No. 1. The City has not met its burden of proof in establishing that Unit 1 is in failure or needs further investigation. The private report for the septic system to Unit No. 1 identified that "*property owner dug up and section of the drain field was made repairs as needed…*" As noted in FOF No. 20 of the Final Decision, Mr. Gumm and Mr. Simmons both testified that they saw the Unit No. 1 septic system fail, but it is unclear when they made this observation. However, as previously noted the 12/7/17 TPCHD report specifically identifies ten units with failing septic systems and Unit No. 1 isn't one of them.

FOF 20 of the Final Decision identified the Unit 1 drain field as a failing system due to a notation to that effect in a October 10, 2017 site plan. See Ex. C to Ex. 1. FOF 20 may have been in error on this fact since the drain field could have been serving Unit

[6] It is understood that the TPCHD Report of Septic System Status, Ex. 2 to Gumm Declaration, only required confirmation of sewer hookup for Units 38, 39 and 40. Clearly, no septic evaluation is necessary for these units if they are connected to sewer.

No. 2 (which is identified as one of the ten failing systems in the 12/7/17 TPCHD report) instead of Unit No. 1, because the drain field is located between Units 1 and 2. The drain field could be associated with Unit 2 instead of Unit 1, although given the location of Unit 1 on the perimeter of the mobile home park it is difficult to see where the Unit 1 drain field could be located if not between Units 1 and 2. In any event, given the express reference of Unit 2 as opposed to Unit 1 as having a failed septic system in the 12/7/17 TPCHD report, along with the private report confirming that the Unit 1 drain field has been repaired, it is determined under the preponderance of evidence standard that the Unit 1 drain field is not failing.

It is acknowledged that the TPCHD report requires location information on drain fields potentially located within 100 feet of surface water, specifically units 2, 10, 14, 15, 16, 17 18, 29, 30, 31A-C, 32, 24 and 37. The need for this information is not probative of whether the associated septic systems are failing. For that reason, the TPCHD request for information on these systems is not found pertinent to what units are subject to further evaluation.

Harbor for Vagrants and Criminals

14. Repeat Caller Doesn't Affect Finding that Park is Harbor for Vagrants and Criminals. With new evidence admitted after close of the hearing, the Appellant contests Finding 15 of the Final Decision, which determines that the Karwan mobile home park serves as a harbor for vagrants and criminals. The Appellant cites to the fact that all of the units are now secured and that the Final Decision erroneously identifies some units as still unsecured. The Appellant also argues that the disproportionate calls for service alleged by the City for the park is skewed by the fact that a large proportion of the calls for service are made by one Karwan mobile home park resident. The argument and evidence presented by the Appellant on this issue only warrants a minor modification to Finding 15 to recognize that there may no longer be any unsecured units at the park. The new evidence does not change the determination of Finding 15 that the Karwan park serves as a harbor for vagrants and criminals.

On the issue of disproportionate calls for service, the Appellant references an email from Officer Shawn Noble that provides a comparison of calls for service between the Karwan mobile home park and other residential complexes with similar demographics. See Ex. D to Ex. 8 Rezayat Declaration. Officer Noble's analysis covered calls of service for 2019, apparently through the date of the email, September 26, 2019. Of the

130 calls tabulated for the Karwan park in 2019, 38 of the 130 calls, 29%, were made from one repeat caller. In a November 19, 2019 declaration, Jeff Gumm identified that there were 13 additional calls for service from the Karwan park in October 2019 with none originating from the repeat caller. Mr. Gumm further identified that two arrests had also recently been made at the park, one in August and one in September. The Appellant argued that the repeat caller skewered the data. However, even if the calls from the repeat caller are discounted entirely, the total calls per unit would still be 2.14, which is still more than twice the 0.8 calls per unit of the comparable park with the second most calls per unit listed in Officer Noble's analysis, the Crossing Apartments. *See* Ex. D to Ex. 8 Rezayat Declaration.

As to the issue of unsecured units, the Appellant points to a statement in Finding 15 that "*squatters and vagrants continue to be a problem in unsecured units and storage buildings throughout the park leaving behind garbage, debris and unsanitary conditions*." The Appellant asserts that all vacant units have been secured, relying in part upon Finding 19 of the Final Decision, which determines that Units 29, 34 and 39 have been secured. Whether or not all vacant units of the park are secured is unclear, but even if that is the case, the elimination of unsecured units doesn't change the primary focus of Finding 19, which is that the Karwan property serves as a harbor for vagrants and criminals. As outlined in Finding 15, testimony of current (at the time of the hearing) conditions revealed that Units 1, 4, 30 and 28 continue to generate calls for service. Officer Noble testified that he continued to make arrests of people associated with those units. He added that there continue to be code related issues with junk vehicles, people living in cars, and homeless camps being set up in the back yards of Units 28 and 30. Given this testimony and Mr. Gumm's declaration identifying continuing calls for service and arrests, it's concluded that the Karwan park is a harbor for vagrants and criminals with or without unsecured units. The sentence from Finding 15 quoted above is modified to provide that "*squatters and vagrants continue to be a problem ~~in unsecured units and storage buildings~~ throughout the park leaving behind garbage, debris and unsanitary conditions*."

Conclusions of Law

1. Septic Corrective Action within Scope of Abatement Action. The condition of the septic systems in the mobile home park is within the scope of the abatement action set by the Administrative Complaint. The scope of septic abatement is an issue in this appeal because the Administrative Complaint only alleged two mobile home units as having failing septic systems, whereas the Findings and Order required an evaluation of what appears to be all septic systems in the mobile home park. For these reasons, the notice in the Administrative Complaint was arguably

defective. However, the Applicant was given a full opportunity to address the septic issue by its opportunity for a second hearing in front of the Hearing Examiner. Further, the Applicant waived objection to defective notice by failing to raise it as an issue prior to issuance of the Final Decision.

Adequate notice of all alleged violations was required in the Administrative Complaint by applicable state statute as applied pursuant to the requirements of procedural due process. The Administrative Complaint identifies at page 20 that it is issued in part pursuant to the authority granted by Chapter 35.80 RCW. RCW 35.80.030(1)(c) requires that a complaint alleging unfit buildings and premises state "*in what respects such dwelling, building, structure or premises is unfit for human habitation*." Statutes should be construed to uphold their constitutionality. *United States v. Vuitch*, 402 U.S. 62, 69 (1972*), Ino, Inc. v. City of Bellevue*, 132 Wash. 2d 103, 137 (1997). RCW 35.80.030(1)(c) reflects the notice requirements required by procedural due process. The notice required to satisfy procedural due process requirements was recently addressed in *Miller v. City of Sammamish*, No. 78528-1-I (Wash. Ct. App. Aug. 19, 2019). *Miller* involved a code enforcement action with a Notice and Order levying a $15,000 fine for the illegal filling of a wetland. The defendants asserted that their Notice and Order was unconstitutionally vague. The defendants were raising their procedural due process rights, which provides that an elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *City of Redmond v. Arroyo-Murillo*, 149 Wn.2d 607, 617 (2003). Based upon these principles, the *Miller* court noted that under procedural due process. penalty orders must be specific about the asserted violations, about the government's authority, and about the requirements it imposes. *Miller* at 14. The *Miller* court went on to conclude that the Notice and Order of that case met this procedural due process standard as follows:

> *Here, the notice was specific about the asserted violations and the City's authority. The notice precisely detailed all of the actions that Hankins and the City had taken up to that point. The notice detailed how the City came to believe that the Millers had violated the SMC, what investigation materials the City relied upon, and all of the efforts the City made to address these issues before assessing a penalty. The notice then specifically cited what sections of the SMC the Millers had violated.*

Id.

The Appellant's property interest in the alleged failing septic systems is at least as great as the property interest involved in the $15,000 fine of the Miller case. For this reason, the procedural due process requirements of *Miller* are found to apply to the Administrative Complaint. The notice for septic issues identified in the Administrative Complaint does not meet the *Miller* procedural due process standard for adequate notice. As outlined in FOF 10 of this Order, the Administrative Complaint identified only two failing septic systems associated with two mobile home units. Despite this, as identified in FOF 11 of this Order, the Findings and Order determined that there were multiple failing septic systems and accordingly mandated corrective action requiring the "*complete septic system*" to be evaluated for deficiencies.

In short, the Administrative Complaint would reasonably have lead the Appellant to believe that the City would only be presenting evidence on two septic systems for two mobile home units when in

point of fact, as outlined in Finding of Fact No. 11, the City presented evidence on numerous failing systems and the Findings and Order ultimately required review of the septic systems for all units instead of just the two identified in the Administrative complaint.

Although the Administrative Complaint did not provide fair notice of the scope of septic failures, the Appellant was still given a full and fair opportunity to address the issue in its appeal to the Examiner. The appeal hearing before the Examiner was de novo and the Appellant had 72 days between the July 9, 2019 issuance of the Findings and Order and the September 19, 2019 appeal hearing to prepare its response to the septic findings and requirements adopted by the Findings and Order. This is in fact was more time than the Appellant had to prepare for the hearing set for the May 7, 2019 Administrative Complaint before the Building Official held on June 3, 2019, which totaled 27 days

In addition to ultimately having a full opportunity to be heard after adequate notice, the Appellant also failed to make any timely objection to the scope of the septic issue. Issues not raised during administrative review may not be brought up during judicial review due to failure to exhaust remedies. *See AHO Constr. I, Inc. v. City of Moxee*, 430 P.3d 1131 (2018). For this appeal, the only "objection" that Appellant claims to have made regarding the expanded scope of the septic issue prior to issuance of the Final Decision was written into its Notice of Appeal. As identified in FOF 12 of this Order, the Appellant identified that the Administrative Complaint "*failed to include any basis of support*" for the comprehensive septic system evaluation required by the Findings and Order and that the City "*continues to move the goal posts*" as the Appellant tries to resolve its issues with the City. The Appellant presented these facts to ultimately conclude that the record lacked substantial evidence to support the need for a comprehensive septic evaluation. At no point did the Appellant state that the lack of specificity in the Administrative Complaint violated statutory notice requirements or that the Appellant's procedural due process rights were violated and that the septic requirements should be stricken on that basis. Rather, the Appellant's reference to the lack of specificity in the Administrative Complaint was provided solely to support its position that there was no basis to require a septic evaluation, twice making the point that the record was lacking substantial evidence to make such a request.

The Appellant's failure to be more specific about its alleged objection to lack of notice is not a technical issue. The Appellant's focus upon lack of evidence on the sewer issue is probably precisely why the City, in its presentation in the Examiner appeal, focused on septic issues to provide the evidence the Appellant asserted was lacking. Had the Appellant focused its "objection" on lack of notice as opposed to lack of evidence, the City would have had the opportunity to correct the situation by issuing an amended Administrative Complaint or taking some other proactive measure to remedy the lack of notice. Of course, notice works both ways. The Appellant's failure to provide proper notice on the basis of its objection prejudiced public health and safety, as defended by the City. For this reason, the Appellant is deemed to have waived objection to inadequate notice of the septic issue under the due process principles of the *Aho* decision.

2. <u>City not Preempted from Septic Abatement</u>. The Appellant's closing brief asserts that the Finding and Order provisions regarding septic systems "*are unnecessary since the Tacoma-Pierce County Health Department ("TPHD") is exercising its regulatory authority*." The Appellant doesn't identify any legal basis for such a position. As best as can be ascertained, in legal terms the

Appellant is arguing either that the City is preempted by health district regulations from abating septic nuisances and/or that the City is precluded from enforcement because the health district acted first. Both positions are rejected. The City is not preempted from abating septic nuisance because there is no clear legislative intent evidencing such preemption. The City is also not precluded from abating the nuisance due to first in time TPCHD enforcement action because (1) the City was actually the first to institute an enforcement action; and (2) first in time preclusion only applies to judicial tribunals, not code enforcement staff.

One of the more directly applicable cases applying preemption principles is *State v. Kirwin*, 165 Wn. 2d 818 (2009). Kirwin addressed the validity of an anti-littering ordinance. The ordinance prohibited littering conduct almost identical to the same conduct prohibited under a state law. The only difference between the two laws was the degree of punishment. The court found no preemption.

In assessing whether the state law preempted the local littering ordinance, the *Kirwin* court outlined the principles applicable to preemption analysis:

> *We presume an ordinance is valid unless the challenger can prove the ordinance is unconstitutional. An ordinance may be deemed invalid in two ways: (1) the ordinance directly conflicts with a state statute or (2) the legislature has manifested its intent to preempt the field. Article XI, section 11 of our state constitution allows local governments to create such local police, sanitary and other regulations as are not in conflict with general laws. A local regulation conflicts with state law where it permits what state law forbids or forbids what state law permits. The focus of this inquiry, therefore, is on the substantive conduct proscribed by the two laws. A conflict arises when the two provisions are contradictory and cannot coexist. If an ordinance conflicts with a statute, the ordinance is invalid.*
>
> *An ordinance may also be invalid where the legislature has indicated its intent to preempt the field. If the legislature is silent, the court considers both the purposes of the statute and . . . the facts and circumstances upon which the statute was intended to operate. However, we will not interpret a statute to deprive a municipality of the power to legislate on a particular subject unless that clearly is the legislative intent.*

165 Wn. 2d at 826-27 (citations and quotation marks omitted).

Applying the principles quoted above, the *Kirwin* court found no preemption or conflict with health district state regulations. The *Kirwin* court noted that the state and local littering regulations regulated the same behavior and that the difference in penalties was not pertinent because the article XI, section 11 inquiry is on the conduct prescribed and not on the punishment. The *Kirwin* court noted that because there was no direct conflict, there was no article XI, section 11 violation unless the state littering statute expressed intent to preempt local littering ordinances. The court found no such intent and upheld the validity of the local littering ordinance.

The *Kirwin* analysis applies well to the regulations at issue in this appeal. As in *Kirwin*, the regulations at issue in this appeal address the same conduct. Section 10F and G of the TPCHD Environmental Health Code authorizes health officers to abate septic systems that pose a threat to the health, safety of the public or persons or those that constitute nuisances. Similarly[7], IPMC 108.1.5(9) authorizes abatement of dwelling unit conditions that make a dwelling unit unsanitary, unfit for habitation or in such a condition that is likely to cause sickness or disease. As in *Kirwin*, the two provisions identified above can be used to regulate the same conduct, specifically failing septic systems. As in *Kirwin*, there is no conflict between state and local law to the extent they are applied to failing septic systems. Further, there is no legislative intent to preempt the City's abatement of failing septic systems. Nothing in the purpose clause or anywhere else in the TPCHD district regulations or the state statutes that authorize them (Chapter 70.05 RCW) suggest that abatement of failing systems is within the exclusive jurisdiction of the TPHD, certainly nothing that would lead a court to conclude that exclusive health district jurisdiction "*clearly is the legislative intent*" as required by *Kirwin*.

The Appellant's position could also be construed as positing that where two administrative agencies have concurrent enforcement jurisdiction, the first to exercise it precludes the other. There are two problems with this position. First, TPCHD was not the first to exercise any enforcement action. At the hearing the Appellant made the point that the septic design permits issued to the Appellant's predecessor don't expire until 2020. Nothing in the documentation submitted into the record suggests that these expiration dates were any kind of compliance deadline. In fact, TPCHD only recently, as outlined in the Ex. 19 Gumm declaration, issued septic violation notices to the Appellant for some of the same units that have been issued the septic design permits. From the evidence presented in the record, it can only be concluded that TPCHD only took formal enforcement action (via issuance of the violation notices[8]) after the City had issued its Administrative Complaint.

Even if TPCHD would be considered the first to exercise its jurisdiction, that would not preclude the exercise of City jurisdiction. Case law sets a first in time rule, called the priority of action doctrine, for the exercise of administrative jurisdiction, but so far that case law has only applied it to the exercise of judicial review. The priority of action doctrine was well summarized in *State v. Washington Education Association*, 111 Wn. App. 586 (2002), overruled on other grounds, 119 Wn.

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[7] The Final Decision likely erroneously concluded that Hearing Examiner jurisdiction didn't encompass authority over the nuisance claims in the Administrative Complaint. If this was error, it does not materially change the results of the Final Decision or the preemption analysis. Based on argument provided in another case currently under review by the Examiner, the City presented a well-hidden regulation, LMC 1.36.020 authorizes the City Manager to "act in a decision-making role involving administrative matters and such other quasi-judicial matters as may be …. referred to the Hearing Examiner by the City Manager." The Administrative Complaint did not expressly state that the City Manager had referred its nuisance findings to the appellate jurisdiction of the Hearing Examiner, but it may be fair to imply such a delegation in the absence of any other basis for jurisdiction. The preemption analysis applicable to the IPMC septic violation equally applies to the nuisance claims, since the nuisance standards are even more similar to the TPCHD nuisance regulations than the IPMC regulations.

[8] The "violation notices" still appear to only be warning notices, as they only apprise the Appellant of potential violations and the enforcement mechanisms available to TPCHD to abate them. It may be more correct to conclude that TPCHD still hasn't initiated any code enforcement action against Appellant.

App. 445 (2003) as follows:

> *Under the priority of action doctrine, the forum that first gains jurisdiction over a matter retains exclusive authority over it. This doctrine applies to administrative agencies and the courts. The doctrine only applies if the two cases at issue involve identical (1) subject matter, (2) parties, and (3) relief. The identity of these elements must be such that a decision in one tribunal would bar proceedings in the other tribunal because of res judicata.*

111 Wn. App. at 606-607.

As far as can be seen from the case law, it appears that the priority of action doctrine only applies to judicial or quasi-judicial review and has never been applied to administrative code enforcement. As outlined in Section 13, Chapter 1 of the TPCHD Health Code, the TPCHD has a hearing examiner system to hear appeals regarding failing septic systems. The jurisdiction of the TPCHD examiner has not yet been invoked, thus the priority of action doctrine does not preclude the subject appeal.

3. Notice Arguments Untimely. In its motion to re-open the hearing the Appellant included an argument addressing adequacy of notice to tenants. This issue was not implicated by any of the post-hearing document releases issued by the City and hence was not covered by the Examiner's October 2, 2019 email authorizing the re-opening of the hearing. In this regard, the Appellant's assignment of error to the notice issue was an untimely request for reconsideration. As specified in LMC 1.36.271, requests for reconsideration must be filed within eight days of the issuance of a decision. The Appellant's October 29, 2019 motion to re-open the hearing was filed more than eight days after the October 9, 2019 Final Decision.

Even if the notice issue had been timely raised, it doesn't appear that it would serve as any grounds to invalidate the Final Decision. In its notice issue, the Appellant claimed that the City had failed to provide adequate notice to tenants for code violations for which the City was making the Appellant responsible. The Appellant claimed that it could not legally evict tenants without this prior notice, based upon RCW 59.20.080(1), which only authorizes a landlord to evict a tenant for a code violation "*within a reasonable time after the tenant's receipt of notice of such noncompliance from the appropriate governmental agency*." Appellant cites to three notice statutes, RCW 59.20.150, RCW 35.80.030(1)(c) or RCW 35.80.030(f), as the basis for concluding that proper notice wasn't given to the tenants under RCW 59.20.080(1). But none of these statutes defines notice procedures for RCW 59.20.080(1). RCW 59.20.150 only governs how notice is to be provided by a landlord to a tenant. RCW 35.80.030(1)(c) and RCW 35.80.030(f) govern notice procedures for the City to employ in conducting a code enforcement action against a tenant. RCW 59.20.080(1) doesn't require a City to institute a code enforcement action against a tenant before a landlord can evict for the code violation.

As outlined in Findings 5 and 7 of the Final Decision, both the Administrative Complaint and the Findings and Order were posted in the common mailbox area of the mobile home park. Many tenants were also mailed a copy of the Administrative Complaint and Findings and Order and were specifically named in the Administrative Complaint. There is nothing to suggest that this notice was insufficient to reasonably apprise the tenants of the code violations for which they are responsible as would be required by a procedural due process interpretation of the RCW 59.20.080(1) notice

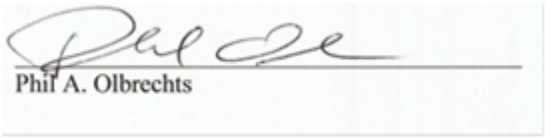
requirement. Further, if any tenant eviction is necessary for a tenant that hasn't received at least mailed notice, this Order requires the City to provide that notice to the tenant and to extend compliance deadlines accordingly.

ORDER

The Final Decision is supplemented with the findings and conclusions of this REVISED/SUPPLEMENTED FINDINGS AND ORDER OF HEARING EXAMINER AFTER RE-OPENING HEARING, subject to the modifications below:

1. Units 1, 3, 4, 6, 7, 8, 9, 11, 12, 13, 19, 20, 21, 22, 23, 24, 26, 27, 28, 33, 35 are excluded from the " complete septic evaluation" required by page 29 of the Findings and Order.
2. Finding 15 of the Final Decision is modified as specified in Finding 14 of this Order.
3. All deadlines set in the Decision section of the Final Decision are extended 90 days. In addition, if the only reasonable manner to achieve compliance involves eviction of a tenant and that tenant has not yet received mailed or actual notice of the violation as of the date of this Order, the correction deadline shall be extended to 90 days from the date notice is mailed and/or delivered to the tenant by the City.
4. This Order shall supersede any conflicting provisions of the Final Decision.
5. This Order constitutes the final decision for purposes of appeal deadlines set by applicable state statute.

DATED this 22nd day of December, 2019.



Phil A. Olbrechts

Hearing Examiner for Lakewood

Appeal Right: This is a final decision of the City of Lakewood appealable to Superior Court within 30 days as governed by RCW 35.80.030(2).