BEFORE THE HEARING EXAMINER FOR THE CITY OF LAKEWOOD

In the Matter of the Appeal of Cedrona Park LLC Rental Housing Safety Program Determination of Unlawful Occupancy and Reimbursement for Transitional Costs	FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL DECISION

Summary

The appeal is denied. The City's determination under the City's Rental Housing Safety Program (RHSP) that the Appellant's property is Unlawful to Occupy and that the Appellant is liable for relocation costs is upheld.

The Appellant leases out the two units of a duplex (Duplex) it owns in the City of Lakewood that are subject to the RHSP. The RHSP in general requires landlords to acquire a rental-housing complex License (Rental License) prior to leasing rental units in the City of Lakewood. Landlords are further required to have their units pass life-safety inspections a maximum of once every five years at the times specified by the City. RHSP code provisions only authorize the City to declare a rental unit Unlawful to Occupy if the landlord fails to pass inspection once such inspection is required by the City. The RHSP further requires the landlord to pay relocation[1] costs incurred by tenants resulting from City declarations that rental units are Unlawful to Occupy. In this appeal, the Appellant challenges both the determination that the Duplex units are Unlawful to Occupy and that the Appellant must pay relocation costs.

[1] RHSP regulations refer to relocation costs as transitional costs. Relocation and transitional cost terms are used interchangeably in this Decision.

The Appellant's challenge to the RHSP decisions is primarily based upon the position that it didn't receive proper notice of the Unlawful to Occupy determination. In total, the City sent four letters to the Appellant. The first two letters addressed the City's Unlawful to Occupy decision. The next two advised the Appellant of its obligation to pay relocation costs. The Appellant has not challenged the adequacy of service of the relocation cost letters and as outlined in the Findings of Fact, the City clearly properly served the second Unlawful to Occupy letter. The first Unlawful to Occupy letter, however, had some service issues. Those issues are central to resolution of this Decision, because proper service of the first letter was a necessary step in designating the Duplex as Unlawful to Occupy. As previously noted, the City can only declare a rental unit Unlawful to Occupy if a landlord fails inspection after an inspection is required by the City. The only notice sent to the Appellant requiring an inspection while at the same time giving the Appellant an opportunity to schedule an inspection was the first of the four letters.

The first notice ultimately was mailed in a manner that is consistent with the procedural due process rights of the Appellant. The City mailed the first notice by both regular and certified mail to the Appellant. As best as can be ascertained from the record, the regular mail was returned to the City for missing a zip code address. Notice of the certified letter was received by the Appellant. The Appellant chose to not pick up the certified letter from the post office. As outlined in the Conclusions of Law, notice of the certified mail was sufficient to notice of the first Unlawful to Occupy letter. The Appellant cannot avoid the consequences of that letter by choosing to ignore the associated notice of certified mail.

In addition to notice, another major appeal issue is whether this appeal is subject to hearing examiner jurisdiction. The RHSP regulations provide that the City's business license appeal procedures apply to RHSP decisions. The City's business license procedures only authorizes appeals of the denial, revocation or imposition of conditions upon business Licenses. The procedures also limit standing to business license holders or applicants. The City argues that these limitations apply to RHSP appeals. However, the City's position conflicts with the plain language of RHSP regulations, which provide that "*[a]ppeals of actions taken under this chapter*" are subject to the appeal procedures of the business license chapter. The business license procedures cannot be strictly applied to RHSP actions, since applied strictly the business license procedures only apply to actions related to business licenses. The City's position is also in conflict with RCW 59.18.125(8). RCW 59.18.125(8) mandates administrative appeals for the results of inspections authorized by RCW 59.18.125, which includes inspections covered by the RHSP that otherwise don't qualify for appeal under the City's business license appeal procedures. Finally, the failure to provide an administrative appeal for Unlawful to Occupy decisions arguably violates procedural due process as well. For all these reasons, the appeal issues raised by the Appellant are found to have been properly submitted to hearing examiner jurisdiction.

The final major issue of this appeal was the City's position that the Appellant failed to timely appeal the two Unlawful to Occupy letters. The City's business license appeal procedures impose a ten day filing deadline for administrative appeals. However, case law strongly suggests that only final administrative decisions are subject to administrative appeals. The Unlawful to Occupy decisions of this case were not final administrative decisions. They were part of a two-step decision making process that culminated in the final two notices that advised the Appellant of a duty to pay for

transitional costs. Under the terminology of applicable case law, the City's case against the Appellant was not "put to rest" until the final two[2] letters were issued.

Testimony

A computer generated transcript has of the hearing has been prepared to provide an overview of the hearing testimony. The transcript is provided for informational purposes only as Appendix A. Since the transcript is computer generated, it is not 100% accurate, but does provide a very good indication of what was discussed during the hearing. References to the transcript in this Decision are made by the citation "Tr" followed by the transcript page number.

Exhibits

Exhibit 1: Notice of Appeal.
Exhibit 2: Declaration of Jeff Gumm with attachments, dated April 15, 2021
Exhibit 3: City's Pre-Hearing Brief, dated April 14, 2021
Exhibit 4: April 1, 2021 email chain from McKain to Gumm

Findings of Fact

Procedural:

1. Appellant. Cedrona Park LLC, represented by Joseph Harper, Attorney for Appellant, 8310 Park Ave, Tacoma, WA 98408.

2. Hearing. The hearing examiner held a virtual hearing on the application on April 22, 2021 at 10:00 am.

Substantive:

3. Rental Units. The Appellant owns two rental dwelling units comprising a duplex located at 7116 146th St. SW Lakewood. *Declaration of Jeff Gumm, City's Program Manager*, Exhibit #1 and 1-A (Assessor-Treasurer record). According to uncontested testimony of Jeff Gumm, the parcel owned by the Appellant upon which the duplex is located also houses a mobile home park accommodating 40 mobile homes. See Gumm Dec. par. 3. Since the Appellant owns the land upon which the mobile homes are located, it is reasonable to conclude that the Appellant leases out the

[2] Technically, the last of the four letters was not sent until after the Appellant filed its appeal. However, the appeal hearing was held three weeks after the last letter was issued. The last letter did not raise any issues that materially differed from those that arose from issuance of the third letter. For these reasons, the Appellant's appeal is considered to include the four letter.

mobile home spaces and/or the mobile homes themselves to the mobile home occupants[3].

4. Unlawful to Occupy Letters. On February 11, 2021 and March 2, 2021 the City sent letters to the Appellant identifying that the Duplex units were not registered as rental units as required by the RHSP. The February 11, 2021 letter was sent for property addressed as 7110 146th St. SW and the March 2, 2021 letter was sent for property addressed as 7116 146th St. SW. The first letter required the Appellant to register the Duplex units and to schedule an inspection. The letter noted that if the Appellant failed to do so by February 28, 2021 the City would deem the Duplex Unlawful to Occupy. *Gumm Dec.*, Ex. C. The second letter identified the Duplex as Unlawful to Occupy and noted that the Appellant would be responsible for relocation costs if the Duplex were rented without a certificate of compliance[4]. *Gumm Dec*., Ex. D. The Gumm declaration also identifies that the "Property" was posted, although from the poor quality of the photographs submitted into the record, it is unclear if both dwelling units were separately posted. *Gumm Dec*. Ex. E.

5. Proof of Mailing for February 11, 2021 Unlawful to Occupy Letter. The February 11, 2021 letter was addressed to the taxpayer address of the 7110 unit as listed in Pierce County Assessor records, Cedrona Park LLC, PO Box 4438, Tumwater, WA. *See Gumm Dec*., Ex. A. The letter did not include the zip code. *See Gumm Dec., Ex. C.* Ex. C to the *Gumm* declaration includes a certified mail receipt for the February 11, 2021 letter dated February 12, 2021. In the "Sent To" field, the receipt has the same Tumwater address on it as that on the letter itself, but with the zip code added as well.

6. Proof of Mailing for March 2, 2021 Unlawful to Occupy Letter. The March 2, 2021 letter was addressed to the addresses listed by the Secretary of State for the Appellant as a business entity, specifically the mailing address of the company and the mailing address of the registered agent, David Simpson, both located in Mercer Island. *See Gumm Dec*. Ex. A and D. The letter was also mailed to the registered agent for DCI investments, David Clark, to an address in Olympia. The three addresses accurately reflected the addresses in the Secretary of State records from Ex. A in both the addresses identified on the March 2, 2021 letter itself as well as the certified return receipts filled out for the post office. *See Gumm Dec*. Ex. A and D. Mr. Clark testified at the hearing that DCI Investments is a member of the Appellant, Cedrona Park LLC. Tr. 27.

7. March 2, 2021 and notice of February 11, 2021 Letter Received by Appellant. The Appellant disputes that it received either of the two "Unlawful to Occupy" letters. It is determined that the Appellant received the March 2, 2021 letter and received notice of the February 11, 2021 certified letter.

David Clark is the general manager of the Appellant and is also a governor and a registered agent of DCI Investments, which is a member of the Appellant. *See Gumm Dec*. Ex. A; Tr. 27. Mr. Clark

[3] The ownership and leasing of the mobile home parks is material because the RHSP only applies to "rental-housing complexes," which is defined by LMC 5.60.010 as five ore more rental properties owned by the same owner. The mobile homes owned and leased by the Appellant render the duplex part of a "rental-housing complex" subject to the RHSP.

[4] Chapter 5.60 LMC uses the term "certificate of inspection" to denote a passed life-safety inspection. The RHSP administrative rules (available on the City's website) and the Unlawful to Occupy letters use the term "certificate of compliance." This Decision uses the terms interchangeably.

testified that he did not receive a copy of either of the Unlawful to Occupy letters. Tr. 28. Mr. Clark identified that the February 11, 2021 letter was missing the zip code for his address, which was listed on the first page of the February 11, 2021 letter. He noted that Microsoft mailing programs typically use the addresses on the first page of letters to print mailing labels. Tr. 36. He surmised that the reason he didn't receive the February 11, 2021 letter was because of the missing zip code. In cross-examination Mr. Clark acknowledged that the postal receipt for the certified February 11, 2021 letter included his zip code. Mr. Clark pointed out that the post office does not fill out the receipt, that it's filled out by the sender. He theorized that the post office did not use the address on the receipt to mail the February 11, 2021 letter. Tr. 33.

A critical factual issue in this appeal is whether Mr. Clark received notice of the certified February 11, 2021 and chose not to pick it up from the post office. Mr. Clark's testimony on this issue is a little unclear, but from the surrounding circumstances it must be determined that he received notice of the February 11 certified mail. The pertinent testimony went as follows, when Mr. Clark's attorney started questioning him about the "Unlawful to Occupy" notices:

> ***David Clark:***
>
> *The February 11th letter did not have a zip code. The March 2nd letter did have, so I think, had several addresses on it. I'd have to look it up here and see. But that one was addressed to several places. And yeah.*
>
> ***Joseph Harper:***
>
> *And did you ever get that in your P.O. Box?*
>
> ***David Clark:***
>
> *No. I had gotten notice there was a certified letter and I didn't pick it up.*
>
> ***Joseph Harper:***
>
> *Did you ever get any regular mail?*
>
> ***David Clark:***
>
> *No.*

Tr. 29

As shown in Mr. Clark's first response in the exchange above, he was testifying about the February 11 and March 2 "Unlawful to Occupy" letters. The February 11, 2021 letter was addressed to Mr. Clark's post office box and the March 2, 2021 letter was not. Therefore, from the testimony above, it must be determined that Mr. Clark received notice of the certified mailing of the February 11, 2021 letter and refused to pick it up from the post office.

The City's testimony on the mailing of the "Unlawful to Occupy" also had its ambiguities. Mr. Gumm was asked by Ms. McKain about a letter he sent to the Appellant on "March 11." Apparently, Ms. McKain had meant to refer to the February 11 letter. Mr. Gumm responded that he had sent the letter to the property owner as listed in Pierce County Assessor records. Mr. Gumm went on to explain that when he gets a letter back that he sends to a PO Box, he concludes that the "PO Box isn't working" and he does a Secretary of State search to see who runs the LLC that owns the property. Mr. Gumm further noted that when he sends out notices he sends out the notice both certified and first class. Tr. p. 15-16.

One of the reasons Mr. Gumm's testimony "had its ambiguities" was because his testimony alternated between statements of what he does as a matter of course and what he did specifically with the Appellant's notice. One significant example, he noted that

> *So, when we get the letter back, now, I'm in a position where I say, "All right. I need to figure out who can actually get this letter." So, when we get a letter back, now, it's my understanding, guess what? Now, I need to actually find out a way to get this thing to these people, because clearly the P.O. Box isn't working.*

Tr. p. 16.

In the transcript quotation above and in the rest of his testimony, Mr. Gumm never actually stated that the Appellant's February 11, 2021 "Unlawful to Occupy" letter came back. However, in his subsequent comments Mr. Gumm noted that he did a corporate search for the persons running the Appellant LLC and sent out a second letter. From this it's concluded that the February 11, 2021 letter was returned to Mr. Gumm. Unfortunately, Mr. Gumm also did not identify whether both the certified letter and the first class letter were returned. Mr. Gumm further testified that the "letter" was mailed with a zip code on it, not specifying if it was the certified letter or first class letter or both. Tr. 15.

Another problem with the two "Unlawful to Occupy" letters is they reference two different addresses for the Duplex. The February 11, 2021 letter was written for the for property located at 7110 146th St. SW unit and the March 2, 2021 letter was sent for property addressed as 7116 146th St. SW. It appears that both addresses work for the Duplex. In his declaration Mr. Gumm noted that both addresses are assigned to the same parcel number and that the Duplex is located on the same parcel as a mobile home park. Gumm Dec. par. 3. In that same declaration, Mr. Gumm also noted that the duplex is addressed as 7116 146th St. SW and the adjacent mobile home park is assigned the 7110 146th St. SW address. The Pierce County Assessor property record that Mr. Gumm appended to this declaration as the source of the Appellant's mailing address is for the 7110 146th St. SW mobile home address. Gumm Dec. Ex. A.

As outlined in Conclusion of Law No. 3, once proof of mailing has been provided, the Appellant has the burden of proof to establish that the mail was not received and a sworn statement to that effect is not sufficient. Findings of Fact No. 5 and 6 provide the requisite proof of mailing an shift the burden of proof to the Appellant. Given the testimony and evidence of this Finding, it is reasonable to determine that notice of the certified February 11, 2021 letter made it to Mr. Clark's Tukwila post office address and the uncertified letter did not. The evidence establishes that the certified letter made

it to Mr. Clark because the post office could have used the zip code printed on the certified receipt. The uncertified letter did not make it to the Tukwila post office box because Mr. Gumm testified the letter was returned to him and the mailing label for that letter could have been based upon the address on the letter itself, which was missing Mr. Clark's zip code.

Unlike the February 11, 2021 letter, there is no basis to dispute that the Appellant did not receive the March 2, 2021 letter. As previously noted, once proof of mailing is provided the presumption of proper mailing cannot be rebutted by a sworn statement to the contrary. That's all the Appellant provides for the March 2, 2021 letter. There is no missing zip code in the letter itself and there is no testimony from the City that the March 2, 2021 letter was returned. The Appellant's testimony is particularly unpersuasive given that he admits[5] to receiving the March 23, 2021 relocation letter, addressed below. Tr. p. 28. The March 23, 2021 letter was mailed to the same addresses as the March 2, 2021 letter.

8. Notice of Relocation Assistance. On March 23, 2021 and March 31, 2021 the City sent the Appellant notices providing in its first paragraph as follows:

> *The purpose of this letter is twofold; first to officially notify you that on February 11, 2021 and March 2, 2021, the City of Lakewood officially notified you of your noncompliant rental unit located at 7116 146th St. SW, Lakewood, WA, and second to notify you of your responsibility to provide relocation assistance pursuant to Lakewood Municipal Code (LMC) 5.60.170 and Revised Code of Washington (RCW) 59.18.085 to the tenants of this unit….*

The March 23, 2021 notice and March 31, 2021 letters were sent to the same addresses as the March 2, 2021 "Unlawful to Occupy" letter in addition to the PO Box 4438 Tumwater property address used for the February 11, 2021 "Unlawful to Occupy" letter. *See Gumm Dec*. Ex. F and H. Mr. Clark admitted to receiving the March 23, 2021 letter and did not contest receiving the March 31, 2021 letter. The March 23, 2021 letter notifies the Appellant that it must pay relocation assistance to Duplex tenant Curtis Pollard in the amount of $4,050.00. *Gumm Dec*. Ex. F. The Mach 31, 2021 letter notified the Appellant that it had to pay Duplex tenant Josiah Anderson $2,000.00 in relocation assistance. *Gumm Dec*. Ex. H.

9. Appellant Filed First Time for Rental License on March 30, 2021. The Appellant applied for a Rental License for the Duplex for the first time on March 30, 2021. Tr. p. 14; *Gumm Dec*. par. 13. As acknowledged by Mr. Clark, he failed to apply earlier because "*it fell through the cracks*." Tr. p. 35.

10. Notice of Appeal. The Appellant filed the subject appeal on March 31, 2021. The appeal seeks review of three decisions: 1) the decision designating the identified property as unlawful to rent; 2) the relocation of the affected tenants; and 3) the imposition of any fines. The Appellant has not at any point in this proceeding identified any fines that were imposed upon the Appellant and none are

[5] The March 31, 2021 relocation letter was sent to the same addresses as the March 23, 2021 letter. The Appellant did not at any point in the appeal proceedings dispute the adequacy of service of the March 31, 2021 letter.

apparent from the administrative record[6]. Consequently, the appeal is construed as limited to the City's determination that the property is unlawful to rent and that the tenants should be relocated.

11. Inspection Shows Duplex Units Unsafe for Occupancy. The Duplex units have life-safety issues that renders it unfit for occupancy.

On April 3, 2021, a private inspector inspected the Duplex at the request of the Appellant. *Gumm Dec*. par. 18. Although not identified in the record, it is reasonable to conclude that the inspection was performed for the Appellant's Rental License application. The inspector's report was composed of a "Single Family Inspection Checklist" form prepared by the City of Lakewood. *Gumm Dec*. Ex. I. The inspector marked the inspection as "failed" and included a note that "*[t]he place is in pretty rough shape*."

As outlined in Mr. Gumm's declaration, par. 24, from Mr. Gumm's review of the inspection report and personal visits to the Duplex, the Duplex had numerous life-safety issues that needed correction. These issues included siding that is badly deteriorated and due for replacement and not protecting tenants from the elements and weather; the roof which is damaged and due for replacement and not protecting the tenants from the elements and weather; gutters due for replacement; windows which do not open and allow for proper egress; broken windows; bedroom doors which are missing or broken; damaged interior walls; no smoke detectors and carbon monoxide detectors anywhere in the Duplex; damaged and filthy wall heaters that were improperly maintained; damage shower walls enabling water infiltration; water heaters lacking earthquake straps; exposed and improperly protected wiring and components; kitchen outlets lacking proper GFCI electrical protection; dead cockroaches; crawl space that is not properly protected from entry by pests and rodents; and rubbish stored about the Duplex. *Gumm Dec*. par. 24.

At the appeal hearing, Mr. Gumm elaborated on why the issues identified in the inspection report imperiled the health and safety of the Duplex tenants. Mr. Gumm testified that in his expertise as a building official, windows that do not open properly are a significant safety issue since they are the only way out of a building in cases of fire. He noted that the improperly maintained water heater was a fire hazard. He stated that the damaged shower walls enabled water intrusion into the walls, jeopardizing structural integrity. He identified that the lack of electrical grounding in the kitchen area created a risk of electrocution. He stated that the presence of dead cockroaches indicated a health issue. Tr. p. 20-22.

At the hearing, the Appellant's counsel noted that the Appellant didn't contest that the Duplex needs work done, but that the Appellant was contesting that the Duplex was uninhabitable or dangerous. Tr. p. 25. The Appellant did not present any evidence contesting the findings of Mr. Gumm, except to question whether the crawl and attic spaces had been accessed by the inspector to check for animals. Mr. Gumm acknowledged that inspectors often do not access those spaces, that they are just assessing

[6] In its prehearing brief the City, in covering all bases, speculated that the fines could be the late fees imposed for the late Duplex registration. Since the Appellant did not address the late fees or anything else that could qualify as a fine in the course of the appeal, the fine issue is construed as abandoned.

whether such spaces have access points for animals.

Mr. Gumm has assessed building safety for the City of Lakewood in various capacities for over 19 years and has worked in the building and construction trades for over 30 years. *Gumm Dec*. par. 1. Mr. Gumm's expert opinion that the Duplex had numerous conditions that threatened the health and safety of its occupants was based upon credible and compelling evidence, including a detailed inspection by a third party inspector. The Appellant presented no evidence to the contrary. For these reasons, it is determined that Mr. Gumm established that the Duplex was unfit and dangerous to occupy.

12. Duplex Not Licensed through April 22, 2021. At least up to the point that the administrative record on this appeal was closed on April 22, 2021, the Appellant has not acquired a Rental License for the Duplex. There is no direct testimony or evidence in the record on whether the Appellant had secured a license, so that determination must be made circumstantially as outlined below.

As testified by Jeff Gumm, no Rental License permit application was pending prior to March 30, 2021, when the Appellant made its first application. See Tr. p. 14 and 18, *Gumm Dec*. par. 13. The Appellant does not dispute that it has not applied for a license until March 30, 2021. See Tr. p. 27-28. Mr. Gumm testified that after reviewing the inspection report he had notified the Appellant on April 6, 2020 of what corrections/permits were necessary to move forward. Tr. p. 19. Mr. Clark testified that he is currently working on the permits. Tr. p. 31. The February 11, 2021 "Unlawful to Occupy" letter also advised that the Duplex could not be rented until it passed inspection. *Gumm Dec*. Ex. C. From these facts, it is concluded that the Appellant had not acquired his Rental License by the time of the April 22, 2021 hearing.

Conclusions of Law

1. Authority for Appeal. The hearing examiner has the authority to hear the subject appeal pursuant to LMC 5.60.120C, which provides that "*[a]ppeals of actions taken under this chapter…shall be governed by the provisions of Chapter 5.02 LMC*."

The examiner's jurisdiction has been a major issue of dispute amongst the parties. In its prehearing brief, the City argued extensively that the examiner does not have jurisdiction to hear the appeal. As a starting point for assessing this issue, the entire text of LMC 5.60.120C is informative:

> *All such License application denials, suspensions or revocations shall be in writing. Appeals of actions taken under this chapter, except as provided by LMC 5.60.130 or 5.60.150, shall be governed by the provisions of Chapter 5.02 LMC.*

Chapter 5.02 LMC, in turn, provides for an administrative appeals process for "*applicants or Licensees aggrieved by actions of the City pertaining to any denial, revocation of business Licenses, or imposition of any conditions upon a License*…" LMC 5.02.190A.

The City notes that only "applicants or licensees" have standing to bring appeals of rental housing Licenses because of the language quoted above from LMC 5.02.190A. The City notes further that

LMC 5.02.190A only authorizes denial, revocation of business licenses or imposition of conditions upon the license.

At the outset, the City must concede that LMC 5.02.190A cannot be literally applied in a word for word fashion to Rental Licenses. If that were the case, no actions taken under Chapter 5.60 LMC could be appealed under LMC 5.02.190A, because LMC 5.02.190A by its terms applies to actions related to "business Licenses."

LMC 5.02.190A was clearly intended to be applied in a flexible fashion to the administrative actions taken under Chapter 5.60 LMC. Resort must be made to Chapter 5.60 LMC itself to ascertain the scope of Chapter 5.60 administrative actions subject to appeal. As previously noted, the second sentence of LMC 5.60.120C provides that "*[a]ppeals of actions taken under this chapter, except as provided by LMC 5.60.130 or 5.60.150, shall be governed by the provisions of Chapter 5.02 LMC*." The provision does not limit appeals to actions taken by License applicants or License holders and it does not limit appeals to License denial, revocation or conditions.

Despite the clear and plain wording of the second sentence LMC 5.60.120C, as previously noted the City takes the position that appeals are limited to license denial, revocation or conditions. This position can be traced to two provisions. The first provision is the first sentence of LMC 5.60.120C, which requires that the City put any License suspensions, denials or revocations in writing. This sentence can be easily harmonized with the second sentence of LMC 5.60.120C – the first sentence addresses how the City must issue specified types of appeals and the second sentence specifies what actions are subject to appeal.

The second provision arguably limiting appeals to License denial, revocation or conditions is LMC 5.02.190A. LMC 5.02.190A provides that *"[t]he City Hearing Examiner is designated to hear appeals by applicants or licensees aggrieved by actions of the City pertaining to any denial, or revocation of business licenses, or imposition of any conditions upon a Licensee, pursuant to Chapter 1.36 LMC*." As previously noted, LMC 5.02.190A must be flexibly applied to Chapter 5.60 LMC actions, since it has no application to Chapter 5.60 LMC if applied strictly and literally. However, unlike LMC5.60.120C, LMC 5.02.190A applies very directly to the jurisdiction of the examiner. Given the express and direct terms of the provision, its significance should not be marginalized unless it directly conflicts with the jurisdiction contemplated in Chapter 5.60 LMC.

In point of fact, limiting appellate authority to licensing actions does directly conflict with the jurisdiction contemplated in Chapter 5.60 LMC. As previously noted, the second sentence of LMC 5.60.120C directs that appeals of all actions taken under the RHSP be appealable, without limitation. Further, LMC 5.60.160 requires that Chapter 5.60 LMC be "*interpreted in a manner that is consistent with the provisions of Chapter 59.18 RCW, and in particular, RCW 59.18.125*." RCW 59.18.125(8) requires that if "*a rental property owner does not agree with the findings of an inspection performed by a local municipality under this section, the local municipality shall offer an appeals process*." RCW 59.18.125 allows city's to require inspections of property owners whether or not they have any Rental License or are applying for a Rental License. LMC 5.60.070 authorizes the City to impose transitional costs upon a landlord if the inspections authorized by RCW 59.18.125 reveal that the property should be vacated for life-safety issues, whether or not those inspections are

conducted under the RHSP. Consequently, if appeals of Chapter 5.60 LMC actions are limited to Rental License denial, revocation or conditions, the City would be failing to provide the appellate process required by RCW 59.18.125. The same reasoning can be applied to the City's position that appeals are limited to Appellants who qualify as Rental License licensees or applicant's for such licenses – such an interpretation precludes appeals that are mandated by RCW 59.18.125(8).

A broad-based interpretation of the Chapter 5.60 LMC actions subject to appeal also helps to ensure the constitutional validity of the administrative appeals process for the City's rental housing licensing program. In construing a statute, every reasonable intendment will be indulged in favor of the construction that is in conformity with the provisions of the constitution. *State ex Rel. Troy v. Martin*, 38 Wn. 2d 501, 506 (1951). This rule of construction is in line with the primary duty of statutory interpretation, which is to ascertain and carry out the legislature's intent. *State v. Elwell*, No. 37528-5-III (Wash. Ct. App. May 4, 2021). It is reasonable to conclude that the Lakewood City Council intends to have its ordinances construed in a manner that maintains its constitutional validity.

Finding that the decisions challenged by the Appellant are subject to administrative appeal may be necessary to conform the City's appeal process to procedural due process. Case law arguably requires that the deprivation of any significant property interest in a code enforcement action must be reviewable under a local administrative appeal process to comport with procedural due process. In *Post v. Tacoma*, 167 Wn.2d 300 (2000), Tacoma's code enforcement process authorizing $250 fines per property per day of violation was found to violate due process because appeal hearings were only available for the first days of violation but not for fines imposed for subsequent days of violation.

The reasoning of *Post* has always been somewhat perplexing, since appellants will presumably always have access to the courts to be heard if deprived of that opportunity at the municipal level. *Post* could be distinguishable on the basis that it addressed an infraction process adopted by Tacoma pursuant to authority granted by Chapter 7.80 RCW, which *Post* found required Tacoma to adopt "*its own system*" of administrative appellate review for infractions if it didn't use the judicial system. Id. at 132. Unlike *Post*, there is no statute that required Lakewood to adopt anything in the nature of a complete administrative review process for RHSP decision making. In point of fact, RCW 59.18.050 expressly gives jurisdiction to district and superior courts to adjudicate any claims made under Chapter 59.18 RCW, which would include claims for reimbursement of relocation assistance authorized by RCW 59.18.125. Further, RCW 59.18.125(3)(g) authorizes cities and counties to recoup attorney fees should it have to take any "legal action" for reimbursement of relocation costs. Unfortunately, *Post* is not the model of clarity on whether Tacoma's infraction system had a judicial review component. As outlined in the Madsen dissent to *Post*, the *Post* majority at contradicted itself by asserting at some points in the decision that Tacoma's daily fines were subject to judicial appeal and other points that it was not.

Ultimately, LMC 5.60.120C is reasonably construed as authorizing appeals of the types of decisions presented by the Appellant with or without consideration of *Post*. The plain and direct language of LMC 5.60.120C authorizes appeals of actions taken pursuant to Chapter 5.60 LMC without any limitation to licensing actions or to Rental License applicants or licensees. LMC 5.02.190A has some fairly direct language on the examiner's jurisdiction, but this language must be applied flexibly to

conform to the broad based language of LMC 5.60.120C as well as to conform to the administrative appeal mandate of RCW 59.18.125(8).

2. Unlawful to Occupy Letters Not Subject to Appeal. The City asserts that the findings of the February 11, 2021 and March 2, 2021 "Unlawful to Occupy" letters cannot be challenged in this appeal because the Appellant's appeal as to those letters is untimely. If the City could prevail on this argument, it would render most of the appeal untimely since the Unlawful to Occupy letters find that the Duplex is Unlawful to Occupy and that the Appellant has to pay for the tenant's transitional housing costs. Ultimately however, it is concluded that the letters were not subject to appeal because they do not qualify as final administrative decisions.

As previously concluded, LMC 5.02.190 governs the appeal of City actions taken pursuant to Chapter 5.60 LMC. LMC 5.02.190 requires appeals within ten days of "*a notice of denial of application or of a notice and order*…" As noted in Conclusion of Law No. 1, LMC 5.02.190B must be flexibly construed to govern the appeal of any action taken under Chapter 5.60 LMC, which would include the determinations made in Unlawful to Occupy letters. As determined in Finding of Fact No. 7, the Appellant was properly mailed the second "Unlawful to Occupy" letter on March 2, 2021. The Appellant didn't file its notice of appeal until March 31, 2021. With a three day allowance for mailing as recognized in CR 6e, this means that the appeal was filed 26 days past the appeal deadline.

Although LMC 5.60.120C authorizes "*[a]ppeals of actions taken under this chapter*," it would be unworkable to construe that broad language as authorizing an appeal of every intermediate decision made pursuant to Chapter 5.60 LMC. The City could not effectively and efficiently enforce its codes if every step of a code enforcement action were subject to administrative appeal. There does not appear to be any Washington State case law that addresses whether decisions similar to those made in the RHSP program must be final to qualify for appeal. However, there is extensive case law regarding the need for local land use decisions to be final to qualify for judicial review under the Land Use Petition Act, Chapter 36.70C RCW (LUPA). Although LUPA statutes identify in detail what types of decisions are subject to judicial review, see RCW 36.70C.020(2), the policies regarding judicial economy and finality that underly those statutes apply to RHSP decision making to the same extent.

A case that well summarizes LUPA case law of the degree of finality required of land use decisions for judicial appeal is *WCHS, Inc. v. City of Lynnwood*, 120 Wn. App. 668 (2004). In *Lynnwood*, the City attempted to argue that a letter denial of a building permit could not be judicially challenged because the applicant had failed to exhaust its administrative remedies by filing an administrative appeal of the letter. The court disagreed, holding that:

> *No exhaustion of administrative remedies requirement arises without issuance of a final, appealable order. An agency's letter does not constitute a final order unless the letter clearly fixes a legal relationship as a consummation of the administrative process. The letter must be clearly understandable as a final determination of rights, and doubts as to the finality of such communications must be resolved in favor of the citizen.*

120 Wn. App. at 670.

The status of the "Unlawful to Occupy" letter as a final decision is ambiguous because it is part of a two-step process, with the first step the determination that a property is Unlawful to Occupy and the second step the assessment of relocation expenses (the March 23 and 30 letters issued by the City). A case that sheds some light on this issue is *Durland v. San Juan Cnty*., 298 P.3d 757 (2013). *Durland* addressed the issue of whether zoning code interpretations made in code enforcement compliance plan constituted part of a final land use decision. In *Durland*, San Juan County issued a Notice of Correction for failure to acquire required permits for construction of an accessory dwelling unit (ADU). As a result of the correction notice, the property owner and County entered into a compliance plan and subsequent supplemental compliance plan that specified the correction actions necessary to bring the ADU into compliance. The property owner subsequently obtained approval of a building permit to implement the corrective actions specified in the compliance plans. A neighbor appealed the building permit approval on the basis that the corrective actions identified in the compliance plans were not consistent with the County's development standards.

In the administrative appeal of the building permit approval, the County's hearing examiner ruled that the compliance plans constituted a final land use permit and the determinations in those plans constituted final determinations as to what qualified as compliance with the County's development standards. The *Durland* court held to the contrary. The Court noted the oft repeated judicial principle that a land use decision is considered final for purposes of LUPA review when "*it leaves nothing open to further dispute" and "sets at rest [the] cause of action between the parties*." 298 P.3d at 763. The Court noted that a final land use decision concludes the action by resolving the plaintiff's entitlement to the requested relief. The Court further noted that, in contrast, an interlocutory decision intervenes between the commencement and the end of a suit and decides some point or matter, but is not a final decision of the whole controversy. Id.

Applying the case facts, the *Durland* Court found that the compliance plans failed to meet the criteria for a final land use decision because the compliance plans gave the property owner multiple options for implementing corrective actions, some of which required permit approval. 298 P.3d at 764-765. In this regard, the compliance plans did not put the cause of action between the parties at rest. The Court also found that the plans did not leave "*nothing open to further dispute*," as evidenced by the fact that the property owner was able to negotiate a supplemental compliance plan after the appeal period had expired on the original plan. Id. at 765.

Given *Durland*, it must be concluded that the March 2, 2021 letter was not subject to administrative appeal because it did not set to rest the cause of action between the City and Appellant. It is recognized that the March 2nd letter was more final than the compliance plans in the Durland case – the March 2nd letter did not provide multiple options for compliance and the City did not modify the requirements of the letter after its issuance. However, the March 2 letter did not specify what amount of relocation assistance would be due if the Appellant failed to comply. That was done in the subsequently issued March 23 and March 31 letters. The City's own actions demonstrated that the March 2nd letter did not lock the City into any course of action because its appeal period has passed – Mr. Gumm returned relocation assistance application paperwork to the Duplex tenants and reversed prior statements that the tenants had to relocate because the Appellants had filed their appeal. *See Gumm* Dec. par. 17. The March 2nd letter itself was also not entirely clear that it was intended to

serve as a final determination. The letter did not identify itself as a final determination and did not identify any right of administrative appeal.

3. Presumption of Mailing. Proof of mailing gives rise to a presumption that the mail was received. *Performance Contracting, Inc. v. State*, No. 32377-3-III (Wash. Ct. App. Sep. 22, 2015). To refute a declaration of mailing, an opposing party must do more than swear that the mail never arrived. *Washington Federal Savings v. Klein*, 177 Wn. App. 22 (2013), *review denied*, 179 Wn.2d 1019 (2014). However, the sworn statements of a party plus that of the decision making body that they didn't receive the mail is sufficient to overcome the presumption. *Performance Contracting, Inc.* at p. 16-17.

4. Receipt of Certified Mail Notice Adequately Provides Mailed Notice. As determined in Finding of Fact No. 7, the only notice of the City's February 11, 2021 "Unlawful to Occupy" letter that the Appellant received was a notice of certified mail. This certified letter notice was sufficient under procedural due process to apprise the Appellant of the determinations and requirements made in the February 11, 2021 letter.

Case law is a little mixed on the due process implications of returned certified mail. The most directly applicable case law supports the conclusion that unclaimed certified mail qualifies as sufficient notice for purposes of procedural due process.

A useful starting point on the certified mail issue is State v. Vahl, 56 Wash. App. 603 (1990). In *Vahl*, the issue concerned a statute providing for notice of a driver's License revocation by certified mail, former RCW 46.65.065(1). The defendant, a habitual traffic offender, claimed that notice sent by certified mail failed to satisfy due process where the mail was unclaimed. The court rejected the argument. It reasoned that refusing to claim certified mail is analogous to refusing to accept in hand service, and that just as a person cannot defeat notice by refusing tendered process, a person cannot defeat mail by refusing to claim certified mail. Id. at 607.

The findings in *Vahl* were arguably put at odds with the subsequent decision of *State v. Bazan*, 79 Wn. App. 723, *review denied*, 129 Wn.2d 1023 (1996). *Bazan* involved application of the *Striker* speedy trial rule requiring that a constructive arraignment date be set where there has been a long and unnecessary delay in bringing a defendant who is amenable to process to court. *State v. Striker*, 87 Wn.2d 870, 557 P.2d 847 (1976). Any period of delay attributable to the fault or connivance of the defendant is excluded from the time for speedy trial period. The State in *Bazan* argued that the defendants failure to claim certified mail (the summons) excused the State from the necessity of acting with due diligence in bringing the defendant to trial. The Court of Appeals held that the State cannot assume that the failure to pick up certified mail indicates fault or connivance on the part of defendant, excusing the State from taking any further steps to notify the defendant of the pending charges. Id. at 729.

The differing results of the *Bazan* and *Vahl* cases were assessed in *McLean v. McLean*, 132 Wn. 2d 301 (1997). In *McLean*, service by return receipt mail, as prescribed by statute, was deemed adequate for a petition to increase child support. The petitioner in *McLean* served a petition for increased child support by certified mail. The petition in *McLean* was returned by the post office as

unclaimed. The trial court subsequently issued a default judgment against the respondent. The respondent sought to have the default judgment vacated since he didn't have actual receipt of the petition. The *McLean* court ruled denied the vacation request, citing to *Vahl* and other cases as the basis to conclude that the respondent's due process rights weren't violated by respondent failed to claim the certified mail. The court distinguished *Bazan* on the basis that the State in that case had to establish that the defendant had acted by "fault or connivance" in failing to claim his certified mail. *Vahl*, 56 Wn. App. at 607.

As in *McLean*, the *Bazan* case must be regarded as distinguishable because there is no requirement that the City establish that the Appellant failed to acquire notice due to its "fault or connivance." The subject appeal is even more distinguishable because, as determined in Finding of Fact No. 7, Mr. Clark acknowledged that he had received the notice of the certified later and declined to pick it up. Mr. Clark's refusal to pick up the letter may have even validated the certified mail notice in *Bazan* for due process purposes. As noted in *Bazan*:

> *Bazan did not deny that he received the notices of certified mail. As in Williams, however, the notices of certified mail were returned "unclaimed," not "refused." At trial the State acknowledged that there were no facts indicating connivance by Bazan. The record established only that Bazan did not respond to the notices of certified mail and pick up the letters.*

Bazan, 79 Wn. App. at 728-29.

As noted above, the *Bazan* defendant didn't deny that the notices were sent to him, but he didn't acknowledge that he received them either. In this case, Mr. Clark admitted he received the certified letter notice, which is arguably equivalent to having refused to accept the letters as referenced in the *Bazan* quote above.

Given the case law assessed above and the fact that the Appellant was given actual notice that the February 11, 2021 certified letter was available, it is concluded that the mailing of the certified letter did not violate the Appellant's procedural due process rights. Since there is no other statutory or LMC requirement for service of the "Unlawful to Occupy" notice, service by certified mail is also found to be consistent with the requirements of Chapter 5.60 LMC.

5. Duplex Unlawful to Occupy. The City properly designated the Duplex as Unlawful to Occupy in its March 2, 2021 "Unlawful to Occupy" letters pursuant to LMC 5.60.100.

LMC 5.60.100 provides that it is unlawful to allow a tenant to continue to occupy a rental unit that does not satisfy the requirements of LMC 5.60.080. LMC 5.60.080A requires that rental-housing complex owners are required to provide a Certificate of Inspection "*during the year such is required by the City*." As shall be discussed below, a "Certificate of Inspection" is a certification that a rental unit has passed a life-safety inspection. Consequently, for the Duplex to have been Unlawful to Occupy at the time the March 2, 2021 letter was issued, the Appellant must have previously failed to acquire a Certificate of Inspection "during the year" it was required by the City.

The February 11, 2021 "Unlawful to Occupy" letter set the year that an inspection was required[7], by requiring the Appellant to schedule an inspection by February 28, 2021. The February 11, 2021 letter provided that the City "*will determine your property to be Unlawful to Occupy*" if the deadline was not met. One of those deadlines was to schedule an inspection for the Duplex by February 28, 2021. The Appellant clearly failed to meet the February 28 deadline. As determined in Finding of Fact No. 9, the Appellant applied for a Rental License for the first time on March 31, 2021. There is no suggestion in the record that the Appellant had ever attempted to acquire a Certificate of Inspection prior to that date. As determined in Finding of Fact No. 11, the Appellant failed to pass the inspection it had conducted for its March 31, 2021 Rental License application and as determined in Finding of Fact No. 12 David Clark was still working on the permits to pass that inspection on the day of the April 22 appeal hearing. Consequently, the March 2, 2021 accurately advised the Appellant that the Duplex was Unlawful to Occupy because at that point the Appellant had failed to meet the February 28, 2021 inspection deadline.

To the extent that the Appellant's challenge to the "Unlawful to Occupy" determination could be construed as taking the position that the Appellant should have been granted a Certificate of Inspection by the time of the appeal hearing, that position is equally unavailing. A Certificate of Inspection is defined by LMC 5.60.010 to be a statement made by a qualified inspector that the landlord has not failed to fulfill any substantial obligation imposed by RCW 9A.72.085. LMC 5.60.010 lists those obligations as including exposure of occupants to the weather, hazardous electrical wiring, defective exits that increase the risk of injury to occupants and conditions that increase the risk of fire. As determined in Finding of Fact No. 11, the Appellant's April 3, 2021 inspection revealed numerous conditions of the Duplex that exposed the tenants to the weather, hazardous electrical wiring, defective exits and other fire hazards. The City correctly determined that the Duplex should not be issued a Certificate of Inspection.

[7] At hearing, Ms. McKain appeared to suggest that inspections are required as a condition of Rental License approval. Ms. McKain may have been simply stating that the Appellant in particular, as opposed to all License applicants, was required to obtain a certificate of inspection prior to License approval. However, in her prehearing brief at page 1 she also stated that the City "*requires owners of rental housing to obtain a License for their property and for the property to pass inspection before it is rented*." If an inspection is in fact required for all Rental License approvals, then the first "Unlawful to Occupy" letter may have not been required to designate a time for inspection, since that time would be automatically construed as when a License was required, i.e. before renting out a unit. However, such a requirement is not identified anywhere in Chapter 5.60 LMC. This position is also not consistent with the administrative rules adopted for the RHSP. The administrative rules do not require a certificate of compliance for approval of a Rental License. Quite the opposite, the rules provide that "*[i]ssuance of a Rental Business License does not guarantee a Certificate of Compliance with the RHSP property inspection requirements*." See Admin. Rule IVC. The decoupling of inspections from the Rental Licenses is also inferred from the fact that the administrative rules set up an inspection lottery and require "initial inspections" to be conducted within 9 months of notice. *See* Admin. Rule IVM and IX. These deferred inspections suggest that the City might not have had the resources to inspect and/or review inspections of all of its rental units at once when the RHSP was first adopted in 2016. It's entirely possible that in the five years since the RHSP was adopted the City now has the resources to require inspections of all new Rental License applications, but this policy is not reflected in Chapter 5.60 LMC or its administrative rules.

6. March 23, 2021 and March 31, 2021 Properly Imposed Transitional Costs. The City properly imposed relocation costs for relocation of the tenants due to the "Unlawful to Occupy" status of the Duplex.

The Appellant has not disputed the amount of the relocation assistance or how it was computed, but rather takes the position that no relocation assistance should be required because the Appellant did not receive the "Unlawful to Occupy" notices and because the Duplex units are not unfit to live in. See Notice of Appeal, Section IV; Tr. 25. Those issues have already been resolved in favor of the City for the reasons identified in Conclusions of Law No. 3-5. Since the amount of the relocation costs is not contested, the only remaining issue is whether the City had the authority to require the relocation costs, which is addressed below.

Relocation costs are governed by LMC 5.60.070, which provides in relevant part as follows:

> *In the event that a rental-housing complex is **closed** by the City or any agency acting on behalf of or in coordination with the City **stemming from enforcement of the provisions of this chapter** or any applicable health, building, fire, housing or life-safety code, or other serious violations, it shall be a prerequisite condition for the License to be reinstated and/or the rental-housing complex to be allowed to reopen that the operator of the rental-housing complex reimburse the City for any transitional costs and/or tenant relocation costs incurred by the City that are directly attributable to such closure….*

From the language quoted above, the only pertinent issue as it relates to the Appellant's appeal issues is whether the Duplex has been properly "closed." There is no evidence to suggest that the City has used any process other than Chapter 5.60 LMC to "close" the premises, so the issue is further limited to whether the City properly "closed" the premises "*stemming from enforcement of the provisions of this chapter*…" as referenced in the bolded portions of LMC 5.60.070 as quoted above.

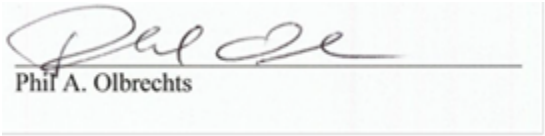
Chapter 5.60 LMC and its associated administrative rules have no express process for closure of a rental-housing complex due to noncompliance. However, a closure process can be cobbled together from the enforcement tools provided within the chapter. As previously discussed, LMC 5.60.100 provides that a rental unit is Unlawful to Occupy if an owner fails to acquire a certificate of inspection for the unit in the year designated by the City. LMC 5.60.150A provides that failure to comply with the requirements of Chapter 5.60 LMC are subject to daily civil fines. Consequently, it is reasonable to conclude that a rental unit is considered closed once a unit owner has received notice that the unit is Unlawful to Occupy under LMC 5.60.100, since at that point the City can start issuing fines if the units continue to be occupied.

In this case, the Duplex can be considered "closed" upon issuance of the March 2, 2021 Unlawful to Occupy letter because at that point the Duplex was "closed" under LMC 5.60.100 because the Appellant had failed to acquire a Certificate of Inspection the year designated by the City as required by LMC 5.60.080. As properly closed, the City properly imposed relocation costs as implemented by its March 23, 2021 and March 31, 2021 letters. The amounts assessed by those letters are not subject to challenge because the amounts were not contested in the Appellant's appeal.

Decision

The appeal is denied. The City's determination under the RHSP that the Duplex is Unlawful to Occupy and that the Appellant is liable for relocation costs is upheld. The City properly mailed notice that the Duplex was "Unlawful to Occupy" for the reasons identified in Findings of Fact No. 4-7 and Conclusions of Law 3-4.

DATED this 10th day of May 2021.



Phil A. Olbrechts

Hearing Examiner for Lakewood