OFFICE OF THE INDEPENDENT
ADMINISTRATIVE HEARING OFFICER
CITY OF FRESNO, CALIFORNIA

In the Matter of Public Hearing on Amended First Administrative Citation No. 15-00007815 2103 N. Angus Ave.	))))))	**DECISION** **OF** **ADMINISTRATIVE HEARING OFFICER** **October 31, 2016**

On September 26, 2016 at 9:00 a.m., at Fresno City Hall, City Council Chambers, a public hearing was conducted for an appeal of the Amended First Administrative Citation no. 15-00007815, dated December 8, 2015 ("Citation"), issued by the Community Revitalization Division of the Development and Resource Management Department of the City of Fresno (hereinafter, "City") to the property owner, 2103 N. Angus, LLC ("Appellant"), for real property located at 2103 N. Angus Ave., more commonly known as the Summerset Village Apartments ("Property"). The Citation primarily alleges violations of the "Building Permits and Regulations" Ordinance of the Fresno Municipal Code ("FMC"), as codified in Chapter 11.

CASE HISTORY

The facts of this case have been widely publicized and are well known to most of the public. However, a brief summary is provided. On November 20, 2015, the City Code Enforcement Division was notified by concerned citizens that the tenants living at the Property were without heat. Several Code enforcement inspectors went to the Property and met with City Manager Bruce Rudd and Code Enforcement Director Del Estabrook on site. The inspectors confirmed that there was no heat as the natural gas lines to the units were in disrepair and were leaking. Since it was becoming dark, it was decided to come back to the Property on November 21, and perform a more thorough inspection. The City also attempted to call the owner of the Property, Chris Henry regarding the condition of the Property and the lack of heat for the tenants. Senior Inspector David Ceballos left a message on November 20, but received no reply.

On November 21, the inspectors found several trenches that contained spots where the rusted and broken gas lines were exposed.

On November 23, 2015, the City began a complete inspection of the Property, including the individual living units. The inspection revealed a large number of violations of the FMC that were eventually included in the First Citation, Amended First Citation and Notice and Order issued by the City. On November 23, representatives of the City, Red Cross and other local charitable institutions met to determine the gravity of the situation as it applied to the tenants and how best to assist them with their immediate needs. Also on November 23, PG&E conducted pressure tests on the natural gas lines at the Property and determined that the lines could not handle the pressure required to provide natural gas to the units. Eventually the Property was without natural gas for

approximately10 days. Also on November 23, the City contacted the Property manager in Sacramento and informed him of the condition of the Property and requested that the Property manager have Mr. Henry contact the City. The Property manager stated that he would do so.

Mr. Henry contacted Senior Inspector Ceballos on November 24, and informed him that a contractor hired by Mr. Henry was on site and was commencing repairs immediately.

On November 25, 2015, a plumbing contractor was hired by Appellant and repairs to the natural gas lines were begun. During the period of November 20 through 24, the City continued to inspect the individual units of the Property, finding numerous violations of the FMC.

On November 25 2015, the City, through the Mayor and City Council declared a, "local state of emergency" pursuant to the California Government Code stemming from the conditions at the Property, and subsequently issued a First Administrative Citation on December 1, 2015 containing approximately 924 violations. No Notice and Order had been issued prior to the issuance of the citation. The Notice and Order would have allowed Appellant a reasonable period of time to repair or correct the violations before a citation could be issued, and fines assessed.

Subsequently, an Amended First Administrative Citation was issued on December 8, 2015, simultaneously with a Notice and Order. The amended citation contained 1450 violations, as additional violations had been discovered on subsequent inspections of units not previously available for inspection.

While repairs to the Property were being done, there were conversations between the newly hired Property manager Brad Hardie, who was supervising the work, and Code Enforcement Director Del Estabrook and City Manager Bruce Rudd, regarding the fines contained in the Amended First Citation. The specific content of those conversations are in contention and were argued at the appeal hearing. In short, Appellant, through Mr. Hardie contended that both Mr. Rudd and Mr. Estabrook informed him that if Appellant invested the dollar amount of the fines (approximately $290,000 for the Amended First Citation) back into the Property for rehabilitation and remodeling of the units, the City would "waive" or "defer" the fines. The City contended that although there was some conversation about a "fine or penalty proposal" to be drafted by Mr. Hardie for possible review, neither he nor Appellant was promised that any such proposal would be accepted, and Mr. Rudd and Mr. Estabrooke could not have waived the fines, because the authority to waive fines greater than $100,000 was limited to the City Council by the City Charter.

Appellant filed a request for appeal of the Amended First Administrative Citation on December 16, 2015.

PROCEDURAL HISTORY

On June 22, 2016 Appellant, through legal counsel, requested that he be allowed to

submit a Motion to Dismiss the Amended First Administrative Citation ("Motion"). The Hearing Officer granted the request. On July 5, 2016, the Motion was submitted. In the Motion's main arguments, Appellant contended that the Citation was issued in violation of FMC section 1-308(e) and California Government Code section 53069.4(a)(2), which require the City to give the Appellant a reasonable period of time to repair or correct any violations unless those violations create an immediate danger to the public health and safety, and that the City's issuance of the Notice and Order and Citation on the same day violated those sections by providing no time to correct the alleged violations before the Citation was issued. Appellant also contended that the Citation should have been dismissed because Appellant had always promptly repaired or corrected any violation or on the property in the past when the City had given him prior notice. By not providing proper notice in this instance, Appellant argued that the City's actions including the assessment of fines were punitive in nature.

The City submitted an Opposition to Appellant's Motion to Dismiss on July 12, 2016 ("Opposition"). In the Opposition, the City argued that because of the extreme danger to the health and safety of the tenants living on the Property caused by the major natural gas leak on the property, the lack of heat, hot water, vermin infestation, and other health and safety issues, the Mayor and the City Council were forced to declare a "Local Emergency" as authorized under Government Code 8558, et seq., commonly known as the "California Emergency Services Act". The City then argued that the Emergency Services Act and FMC section 1-308(e), allowed them to issue the Citation without giving Appellant a reasonable period of time to repair the violations. The City admitted that some of the violations contained in the Citation may not be considered an immediate danger to the health and safety of the tenants when analyzed in isolation, but when "taken as a whole" the violations satisfied the "immediate danger" requirements of section 1-308(e).

Appellant submitted a Reply to the City's Opposition to Appellant's Motion to Dismiss on July 14, 2016 ("Reply"). Appellant in pertinent part contended that the Emergency Services Act did not support the City's actions, the City provided no other legal authority for its simultaneous issuance of the Notice and Order and Citation, and the fines assessed were punitive and not a method of cost recovery as claimed by the City.

In his Decision and Order Regarding Appellant's Request for Dismissal issued on July 20, 2016 ("Decision"), the Hearing Officer held in pertinent part that while the California Emergency Services Act and FMC section 1-308(e) authorized them to issue the Citation and Notice and Order simultaneously without providing time to repair the violations for those violations that fell under the "immediate danger" requirement of section 1-308(e), the City did not provide any authority to include violations that did not meet the 1-308(e) "immediate danger" criteria. The Hearing Officer ruled that the City must allow a reasonable period of time for Appellant to repair or correct those particular violations before they could be included in a citation. The Hearing Officer went on to categorize the different types of violations included in the Citation into three categories; those violations that were clearly an immediate danger to the public health and safety, those that were clearly not an immediate danger to the public health and safety, and those violations that could be argued either way. The Hearing Officer stated that those

violations in the third category or any not stipulated to by the parties could be argued by the parties at the time of the hearing. The Hearing Officer also noted that even if a violation was found not to meet the 1-308(e) "immediate danger" requirement, should the City be able to establish that those violations were not completed by the "target" date set in the Notice and Order, December 26, 2015, then they could arguably be confirmed.

STIPULATED ISSUES FOR HEARING

In the months prior to the hearing, the parties met several times to discuss possible settlement, or in the alternative, a stipulation of the issues to be heard at the time of the hearing. It was hoped that by meeting, the parties could narrow the issues in dispute, resulting in a shorter hearing, and a reduction in the number of violations in dispute.

One of the issues not touched upon in Appellant's Motion to Dismiss, but asserted several times in pre-hearing meetings with the parties and with the Hearing Officer was that of promissory estoppel. In essence, Appellant asserted that in discussions with City Manager Bruce Rudd and Code Enforcement Director Del Estabrook, the Property Manager Brad Hardie was assured that if Appellant made steady progress in repairing the violations listed in the Notice and Order and Citation, and invested the funds that would go to the City as assessed fines in the Property to rehabilitate and improve the Property above and beyond what was required under the Fresno Municipal Code, those fines would be waived or reduced by the amount invested back into the Property. Appellant alleged that City Manager Rudd requested Appellant to draft and submit a proposal outlining his plan. Mr. Hardie provided a written proposal and submitted it to both Mr. Estabrook and Mr. Rudd. Eventually, that proposal was rejected and Appellant and Mr. Hardie were informed that the City would not be waiving the fines assessed. The City argues that neither City Manager Rudd nor Director Estabrook had the authority to waive or reduce the fines assessed in the Citation. Only the City Council has the authority under the City Charter. Further, the City contended that any discussions with Mr. Hardie regarding offers related to the fines dealt solely with the possibility of no further fines being assessed should Appellant continue to make steady progress repairing the violations listed in the Notice and Order and Citation. A more complete recitation of the facts and legal analysis follows below.

The second issue to be contested at hearing involved the 126 "contested" violations the parties could not agree were either clearly an "immediate danger to public health and safety" pursuant to 1-308(e) of the FMC, or clearly not an immediate danger. As discussed above, the Hearing Officer's decision on the Appellant's Motion to Dismiss the Citation put forth the theory that the 1450 violations included in the Notice and Order and Citation could be broken up into three distinct categories; those violations that were clearly an immediate danger to the public health and safety under FMC 1-308(e), those violations clearly not an immediate danger, and those that could be argued either way. Using this analysis, the parties met and stipulated to most of the violations being put into either the "clearly an immediate danger" category, or the "clearly not an immediate danger" category. The parties could not agree upon 126 of the violations, and requested that the Hearing Officer hear argument and make a decision on whether or

not these violations satisfied the 1-308(e) "immediate danger" requirement. The parties further grouped these violations into 6 separate "categories". A complete list, category breakdown and legal analysis of the contested violations will follow below.

In summary, the two issues to be argued at the hearing were:

1. Promissory Estoppel: Whether the City is prevented from collecting the fines assessed in the Amended First Administrative Citation issued December 8, 2016 because City Manager Bruce Rudd and Code Enforcement Director Del Estabrook made a promise binding on the City to waive the fines in return for Appellant's rehabilitation and remodeling of the Property above and beyond what was required under the FMC.

2. Contested Violations: Whether the stipulated list of 126 violations satisfy the "immediate danger to public health and safety" requirement under FMC section 1-308(e), therefore not requiring the City to issue a Notice and Order or provide a reasonable period of time to repair or correct the violations before issuing a citation and assessing fines, or whether the violations did not satisfy section 1-308(e), which would require the City to issue a Notice and Order and provide a reasonable period of time to repair or correct the violations before assessing fines. Alternatively, if the City could prove that the violations not satisfying the 1-308(e) requirement weren't completed on or before the Notice and Order "target" date of December 26, 2015, fines could be assessed and collected for those violations. Conversely, Appellant has contended that the "target" date was not a "reasonable" period of time to complete all listed repairs.

HEARING

Deputy City Attorney Chad Snyder and Deputy City Attorney Jonathon Mott appeared for the City. Stephanie Hamilton-Borchers, Esq., Dowling/Aaron Inc. appeared for the property owner, 2103 N. Angus, LLC ("Appellant").

A hearing packet was served by the City in a timely manner and entered into evidence as City Exhibit #1. At the time of the hearing, several other documents were provided by the City, including a supplemental case history report numbering16 pages, and dated 9/23/16, which was marked as City Exhibit #2, a 13 page packet of photos marked "Summerset Apts. Photos taken by DC Date 06-30-16" marked as City Exhibit #3, a 29 page packet of photos marked "Summerset Apts. Photos taken by DC Date 07-13-16" marked as City Exhibit #4, a 4 page packet of photos marked "Summerset Apts. Photos taken by DC Date 07-20-16" marked as City Exhibit #5, and a 6 page packet of photos marked "Summerset Apts. Photos taken by DC Date 09-21-16" marked as City Exhibit #6, and entered into evidence. Ms. Borchers entered an objection to the late submission of Exhibits #2-6.

Appellant provided several documents to the City and Hearing Officer at the time of the hearing as well. A one page email from Brad Hardie to Bruce Rudd, dated December 23, 2015, entitled, "Subject: Proposal", and an attached one page unsigned document, dated 12/23/15, entitled, "Summerset Fine/Penalty Proposal" on Regency Property

Management letterhead, was marked as Appellant Exhibit #A. A one page email from Bruce Rudd to Brad Hardie dated January 4, 2016, entitled, "Subject: Re: Proposal" was marked as Appellant Exhibit #B. A copy of a Fresno Bee article dated January 13, 2016, 6:28 PM, entitled "Summerset renovations underway, but some still living in substandard apartments." was marked as Appellant Exhibit #C A copy of City of Fresno Web site page entitled, "City Manager Statement on Summerset Village Fines", dated 01/14/16 was marked as Appellant Exhibit #D. A four page copy of Valley Public Radio web site article, dated January 14, 2016, entitled, "Fresno City Manager Responds to Bee Article On 'Suspending' Summerset Village Fees" was marked as Appellant Exhibit #E. All exhibits were entered into evidence.

Both counsel made opening arguments.

Ms. Borchers presented Appellant's opening argument. In summary, Ms. Borchers stated that the hearing was not about arguing the condition of the Property in November and December of 2015. Appellant had made a mistake in relying on the former property manager, and had replaced him immediately after learning of the problems on the Property. Appellant took responsibility for the condition of the Property, took immediate steps to not only to fix all violations found by the City, but also went above and beyond that responsibility to completely rehabilitate the Property, investing over 1.6 million dollars in doing so. Ms. Borchers stated that the major issue to be argued and decided in this hearing is the discussions and conduct of the City, namely City Manager Bruce Rudd and Code Enforcement Director Del Estabrook, and how those discussions and that conduct influenced the decisions Appellant made regarding the reinvestment of funds back into the Property above and beyond that which was required by the City. Ms. Borchers stated that it has been the custom of the City in similar situations to work with the property owner and allow the property owner to reinvest the money that would have gone to pay the fines, back into the property, and in return the City would waive those fines. Ms. Borchers also stated that the lack of maintenance or condition of the Property did not have an effect on the natural gas pipes that were leaking and were the catalyst for the inspections conducted on the Property. Gas lines deteriorate and eventually leak over time through no fault of the property owner, and there would be evidence regarding other similar conditions on other properties in the City, where the City did not issue a citation. There would also be argument on the speed of which the violations were completed. Ms. Borchers stated that there would be testimony from property manager Hardie that he did everything humanly possible to complete the repairs on the violations as quickly as possible. Ms. Borchers also stated that there would be argument on whether the required repairs as listed on the Notice and Order had been completed. Appellant contended that the City had found all repairs completed in early April or May, but then re-inspected the Property in June and found the repairs were not completed or found new violations not listed on the Citation or Notice and Order. Finally, Ms. Borchers stated that the Hearing Officer would hear argument and decide whether the promises made by City representatives Rudd and Estabrook to Property Manager Hardie would bind the City under the theory of promissory or equitable estoppel, or whether, as contended by the City, the City Charter limited the authority to waive fines to the City Council, thus prohibiting Appellant and Mr. Hardie from legally relying on any alleged promises made. Ms. Borchers stated that modern

law does not exempt governmental agencies from promissory estoppel claims as it did in the past, but instead poses an extra burden on that party making the promissory estoppel assertion, in that they must show the fulfillment of the promise does not unduly burden the public. In this instance, Ms. Borchers argued that while the public has a great interest in safe and affordable housing and anything that is a burden on the City's ability to assist in providing that to the public should be prohibited, Appellant contended that the fines go to the City and not to the public to assist in providing that safe and affordable housing that the public needs.

Deputy Chad Snyder presented the City's opening argument. In summary, Deputy Snyder contended that under the City's Charter, the City Council has the sole authority to handle all legal matters on behalf of the City, and has the sole authority to waive fines. Deputy Snyder stated that the Charter has one specific exception allowing the City Manager to waive fines up to $100,000, for a new owner of the property with code enforcement liens, and only so the new owner can have the funds to complete required repairs and/or improvements on the property. Any agreements, such as an agreement to waive or suspend fines must be in writing approved by the City Council and signed by the City Manager and City Attorney. Deputy Snyder stated that since the fines on Property totaled $290,000, neither City Manager Rudd nor Director Estabrook could have legally waived the fines as claimed by Appellant. Any promises or offers made by anyone at the City could only be to refrain from assessing any further penalties as long as consistent progress was made repairing the violations. Deputy Snyder then stated that there is only one outstanding violation remaining to be repaired, and that is the re-surfacing of the parking lot, which Appellant had been given a one-year extension to finish. Finally, Deputy Snyder contended that there were many violations not repaired at the time of the target date December 26, 2015, and remained unrepaired as late as July of 2016, but the City did not issue additional citations or assess additional fines.

Appellant's first witness was Property Manager Brad Hardie. Mr. Hardie was sworn in by the Hearing Officer. Mr. Hardie testified that he was the President of Regency Property Management located in Fresno, and his company specialized in managing single family and apartment residential dwellings. In summary, Mr. Hardie testified that approximately 60% of the properties managed are low-income properties. Mr. Hardie's first contact with the Property occurred in November of 2015 when contacted by Councilperson Olivier who asked for his assistance at the Property, because the tenants were without heat. Mr. Hardie testified that he went to a Target store and purchased approximately $3500 worth of portable heaters and distributed them to tenants. Mr. Hardie testified that he was hired by Appellant in December of 2015. Appellant's instructions to Mr. Hardie were to get the natural gas lines functional as quickly as possible, make sure the tenants had temporary sources of heat until the lines were repaired and work with the City on all required repairs. Mr. Hardie testified that prior to Appellant hiring him he observed several plumbing companies working to repair the gas lines. When he was hired on December 2, 2015, one of the plumbing companies has ceased work, and Mr. Hardie then was authorized by Appellant to hire additional manpower to fix the lines. Mr. Hardie testified that he hired five plumbing companies at great expense to complete the gas line repairs. The gas lines were repaired and gas restored to the tenants within 5 to 6 days of the 5 companies being hired. Mr. Hardie

then testified that he hired a general contractor for those violations related to the units on December 3, 2015. The contractor set up a mobile office on-site, obtained a list of violations from Senior Inspector David Ceballos, and began repairs "unit by unit". Mr. Hardie then testified that he discovered that in November, the gas line was found to have a leak, and PG&E performed several tests of the lines by running air through the pipes at a high "psi" and found several other leaks. Ultimately, PG&E determined that the gas line would have to be replaced. Mr. Hardie testified that in his experience he had never inspected a gas line when making an initial inspection of a property for purchase, nor had he heard of any one conducting such an inspection. Mr. Hardie testified that he was not aware whether the City had ever issued a citation on any property for a leaking or faulty gas line.

Mr. Hardie then testified that he initially discussed the possibility of making an arrangement with the City regarding waiver of the fines for investment of the fine amount back into the Property with Director Estabrook on December 7, 2015. Mr. Hardie had heard the City would consider that possibility. Mr. Hardie then testified that Director Estabrook told him that he would contact City Manager Rudd to see if that would be possible. Mr. Hardie then contacted Appellant and told him of his conversations in the hope that it would help convince Appellant to make improvements to the Property above and beyond those that were required by the City. Mr. Hardie testified that Appellant, Chris Henry told him that he would agree to the extra improvements for waiver of the fines, but would need the agreement with the City in writing. Mr. Hardie then testified that he had a conversation with City Manager Rudd on December 8 or 9 and talked to him about applying stucco on the exterior of the buildings instead of just painting them if the City would waive the fines for the violations cited. Mr. Hardie testified that City Manager Rudd replied that, "it shouldn't be a problem". Mr. Hardie then testified that on December 10, City Manager Rudd instructed him to provide him with a proposal regarding the waiver of fines for further improvements on the Property. The proposal according to City Manager Rudd was to include a detailed description on what improvements were to done and a timeline for their completion, along with the dollar amount of fines to be waived for each phase of improvements. The proposal was drafted by an employee of Mr. Hardie, Adam Russo. The proposal was completed in a few days and provided to City Manager Rudd on December 23, 2015 (Appellant Exhibit #A). City Manager Rudd responded to Mr. Hardie's requests for updates on the proposal on January 4, 2016 (Appellant Exhibit #B). City Manager Rudd in his response wanted to inspect the Property and stated that the City would not agree to delete the "hard" or administrative costs, but would "consider" waiving the fines. Mr. Hardie then testified that he, City Manager Rudd, Director Estabrook, Development Director Jennifer Clark and a Code Inspector met on January 13 or 14 and again talked about the proposal. Mr. Hardie testified that at the meeting City Manager Rudd said that the City was waiting for a total cost bill from the Red Cross before being able to determine the total administrative cost and then consider the proposal to waive the fines. Mr. Hardie testified that after that meeting on the Property, at least one of the City officials at the meeting spoke with the media. Subsequently, a Fresno Bee article contained a statement attributed to Director Estabrook that alluded to the possibility of fines being waived (Appellant Exhibit #C). Mr. Hardie then testified that the language in the Bee article "concerned" him, but he continued with the added improvements to the

Property. Mr. Hardie then testified that he read the January 14 Fresno Bee Article regarding the public objection to waiving the Appellant's fines (Appellant Exhibit #F). Mr. Hardie testified that he was worried that the City would now be hesitant to agree to waive the fees per the proposal because of the public outcry against Appellant, but repairs and improvements were still being made. Mr. Hardie testified that a meeting was set with him and City Manager Rudd on April 4, 2016. Mr. Hardie testified that at the meeting, City Manager Rudd informed Mr. Hardie that the City would not be waiving the fines as requested in his proposal because of the public outcry, and Appellant would have to file an appeal should they wish to object to the assessment of the fines. Mr. Hardie then testified that he immediately informed Appellant, who was very upset.

Mr. Hardie then testified that the repairs to the Property were prioritized, with the violations listed on the City citation and negatively affecting health and safety having top priority and with the added improvements being less of a priority. Mr. Hardie testified that he didn't feel the parking lot repairs were as important as the other repairs and did not give it a high priority. He testified that he requested and was granted a one year extension, which was about to expire, but believed it would be completed within the allotted time. Mr. Hardie also testified that had he only repaired those violations listed on the Notice and Order and Citation, the Property would have been completed much sooner, as soon as 30-60 days after issuance of the Citation, but would not have been as aesthetically pleasing as it is at present. Mr. Hardie testified that no one in the Code Enforcement Division or the City told him that the repairs were going too slow, or that if the repairs weren't done by the target date of December 26, 2015, additional fines would be assessed, or that he shouldn't do the extra improvements to make sure the repairs were done before December 26. Mr. Hardie testified that he believed that the City mandated repairs were completed sometime in April of 2016. Mr. Hardie testified that Code Enforcement and Building Division had inspected and "signed off" on all interior violations on the units and on the air conditioning and heating systems as well. Mr. Hardie then testified that he was again called out by Senior Inspector Ceballos for inspection of the outside of the buildings in July of 2016. Mr. Hardie testified that the inspection found violations on doors housing the heating units, with dry rot and other problems found. Mr. Hardie testified that he called out workers to immediately fix the problems. He also testified that the violations would have been fixed sooner, but was not part of the list of violations in the Notice and Order and Citation, but was only found at the July inspection. Mr. Hardie also testified that in order to be proactive with needed repairs, his company presently inspects 4 units every week for all problems including tenant caused damage. Later, Senior Inspector Ceballos told Mr. Hardie that the air conditioning units needed to be inspected. Mr. Hardie testified that although he thought Building had already been inspected when the exterior had stucco applied, he called the City Building Division, and they did inspect and sign off on the units. Mr. Hardie testified that most of the subsequent violations found by Code Enforcement represented in City Exhibits #2, 3, 4,5 and 6 were not initially found on the Citation list or found to be in compliance by Building Division and found in violation by Code, or were small and were inadvertently missed. Mr. Hardie testified that in his opinion Appellant could not have reasonably completed the repairs any faster, and the number of workers making repairs on the Property on a given day averaged approximately 20. Mr. Hardie testified that Appellant had spent $1.6 million and was still investing more in the Property every day.

Mr. Hardie then testified that he believed that if Appellant had repaired only those violations listed on the Citation, he would have spent approximately $600,000.

Mr. Hardie was cross-examined by Deputy City Attorney Jonathan Mott. Mr. Hardie testified that he was aware that the December 23, 2015 proposal to City Manager Rudd was an offer for an action plan and not a completed agreement. Mr. Hardie testified that he believed that the proposal was written documentation of an oral agreement already made with City Manager Rudd to waive the fines assessed against the Property if the funds were reinvested back into the Property in the form of improvements. Mr. Hardie also testified that he received an email from City Manager Rudd regarding the proposal on January 4, 2016 (Appellant Exhibit #B), and although he was aware that he didn't have a written acceptance of the proposal at that time, he still believed that there was an oral agreement between the City and Appellant that mirrored the proposal. Mr. Hardie then testified that Appellant had directed him to get any agreement regarding a waiver of the fines in writing, and he believed that some of the emails he received from the City satisfied that requirement from Appellant. Mr. Hardie also testified that Appellant was not angry about the statements made by City Manager Rudd to him at the April 4, 2016 meeting rejecting the proposal, but was angry about the Fresno Bee articles stating that the community was objecting to the City waiving the fines assessed. Mr. Hardie then testified that he did not ask City Manager Rudd for updates on the proposal because he wanted to know if the proposal had been accepted, but to ask City Manager Rudd when the City planned to begin reduction of the fines. Mr. Hardie testified that he believed that there was an agreement with the City in place even though City Manager Rudd asked him to submit a proposal, told him in a subsequent email that he was "considering" the proposal, was told by City Manager Rudd on April 4 that the City could not waive the fines, or never received a written acceptance of the proposal or any agreement with the City to waive fines for reinvestment of those funds back into the Property. Mr. Hardie testified that he believed the acceptance of the agreement was given orally. Mr. Hardie testified that he believed the City didn't require a written agreement to waive the fines. Mr. Hardie also believed that despite the email message from City Manager Rudd informing him that he (Rudd) would contact him regarding the status of the proposal, the City had already agreed to the terms of the proposal.

Mr. Hardie also testified on cross-examination that the City did not issue any additional citations to Appellant after the Amended First Administrative Citation. Mr. Hardie testified that his method of repairing and rehabilitating each unit one at a time was supported by Code Enforcement. He also testified that he provided the proposal requested by City Manager Rudd to Director Estabrook, and when Mr. Hardie asked Director Estabrook about the proposal status, Estabrook referred him to City Manager Rudd. Mr. Hardie testified that he discussed the plans for repairing and remodeling the units with Director Estabrook and City Manager Rudd almost immediately after being hired by Appellant.

Mr. Hardie was then cross examined by Deputy Snyder. Upon cross examination, Mr. Hardie testified that he never received an executed copy of the proposal or a written acceptance from the City. He also testified that the City informed him that there were

violations remaining on the Property in June of 2016. Mr. Hardie testified that he believed that all violations had been repaired by that time.

On re-direct examination by Ms. Borchers, Mr. Hardie testified that in his experience with the City, he had never been required to enter into a written agreement with them in similar circumstances. The agreements had always been oral. Mr. Hardie also testified that he discussed his idea for reinvesting the fines back into the Property with Director Estabrook in early December of 2015, near the time he was hired by Appellant. Mr. Hardie testified that when he discussed the proposal with Director Estabrook, the Director told him that he would like to see the money for the fines reinvested back into the Property, and would pass the proposal along to City Manager Rudd. Mr. Hardie then testified that he believed that there was an oral agreement for a waiver of the fines and a reinvestment of those funds back into the Property, and the written proposal requested by City Manager Rudd was merely a written memorialization to place in the City's files. Additionally, Mr. Hardie testified that Director Estabrook and City Manager Rudd visited the Property almost daily and were aware and saw that the repairs being made went beyond those listed in the Citation and included the improvements discussed in the proposal. Mr. Hardie then testified that he believed that when Appellant became angry after he told Appellant that the fines would not be waived, Appellant was not angry at him (Mr. Hardie), but angry at the City for not honoring their promise to waive the fines. Mr. Hardie testified that he received an oral agreement for his proposal from City Manager Rudd on January 13, 2016 when he and Rudd were inspecting the Property. The oral agreement was that the City would reduce the fine by $100,000 every 15 days subject to proof that repairs and improvements were continuing to be made. It was also agreed that the City would not waive any "hard" or administrative costs suffered by the City or the Red Cross. Mr. Hardie testified that Appellant was ready to pay those administrative costs, but the City never provided the cost figures to Appellant or Mr. Hardie. Mr. Hardie then reemphasized that Director Estabrook consistently informed him that they were make good progress and never criticized Mr. Hardie's schedule or the order in which repairs were made. Mr. Hardie then testified that he believed they finished the repairs within a reasonable time.

In response to a question by the Hearing Officer, Mr. Hardie testified that the first time the City orally agreed to waive fines for reinvesting them back into the Property was either December 6 or 7, and that the oral agreement came from City Manager Rudd.

In response to a question by Deputy Mott, Mr. Hardie testified that all agreements with the City were oral. Nothing was in writing.

On re-direct by Ms. Borchers, Mr. Hardie testified that he got the idea to propose an agreement when he determined that the structures could use improvements above and beyond what was required by the City. Mr. Hardie also testified that the provision that the City would reduce the fine by $100,000 every 15 days was proposed by City Manager Rudd and Mr. Hardie was directed to include that in the written proposal.

In response to questions by Deputy Snyder, Mr. Hardie testified that he submitted the proposal to City Manager Rudd on or about December 23, 2015, then received an email

from City Manager Rudd in January of 2016 stating that the City is reviewing the proposal, and then became aware of a Fresno Bee article dated January 13, 2015 regarding the outcry by some citizens over the possibility that the City may waive Appellant's fines, and the press release or statement made by City Manager Rudd indicating that the City was pleased with Appellant's progress in making repairs, but was hesitant to waive any fines, but would discuss the fines only when repairs were completed and approved by the City.

In response to further questions by Ms. Borchers, Mr. Hardie testified that there were discussions with City Manager Rudd after the January 14 press release and the terms were similar to if not the same as those terms listed in the December 23 proposal.

Deputy Snyder then called Code Enforcement Director Del Estabrook as a witness. Director Estabrook was sworn in by the Hearing Officer. Director Estabrook testified that his duties for the City include Parking Manager, but his specific duties for the Code Enforcement Division include supervision of individual inspection teams and support staff for housing inspections, zoning violations, public nuisances, conditional use permits, abandoned tires, blight, and a team for demolition of structures designated public nuisances. Director Estabrook testified that he did not as Code Enforcement Director have authority to waive fines. Director Estabrook then testified that he believed that only a City Administrative Hearing Officer and the City Manager had the authority to waive a fine in the City of Fresno. Director Estabrook also testified that he was aware of a "Lien Waiver Program" initiated by the City in which a new owner of real property that had liens for previously unpaid fines attached to it could request that the City Manager waive those liens up to a maximum of $100,000. The program would require the owner or prospective buyer to meet with the Code Enforcement Division, allow an inspection of the property, and formulate and draft a written agreement with the City as to what was required to be repaired on the property, a timeline for the repairs to be completed, and the dollar amount to be waived. Then the agreement would be taken to the City Manager for review and eventual approval. Director Estabrook testified that he believed the only persons in the City that could waive a $290,000 fine were the hearing officers or the City Council per the City Charter. Director Estabrook testified that he did not have any discussions with Mr. Hardie or Appellant regarding waiver of the fines. Director Estabrook testified that the discussions with Mr. Hardie and Appellant regarding the fines were related to "suspending" the fines in order to make the required repairs to the units and restoring the basic necessities to the tenants. The discussions also involved the City promising not to assess any additional fines for the violations not completed by the target date of December 25, 2015 set in the Notice and Order.

On cross examination by Ms. Borchers, Director Estabrook testified that he was at the Property on an almost daily basis, and he and Mr. Hardie spoke of many aspects of the repairs and improvements being completed, and he considered himself a "go-between" from Mr. Hardie and the City Manager on issues such as fines. Director Estabrook testified that he known of the "Lien Waiver Program" since he was named Code Enforcement Manager, and had been involved with 8 or 9 instances in which the program was implemented in the past year. He then testified that he did not recall receiving the December 23 proposal from Mr. Hardie, but did not dispute that he did

receive it, nor did Director Estabrook recall his reply to Mr. Hardie stating he would "pitch" the proposal to City Manager Rudd. Again, he did not dispute that he replied in that manner. He just did not recall doing so. Director Estabrook then testified that he was present during a conversation between Appellant Chris Henry and City Manager Rudd at the Property. Director Estabrook testified that at that time he presented Mr. Henry with an administrative citation and a bill listing the cost for administrative time spent by the City on the Property. Also at that time, Director Estabrook heard Mr. Henry ask City Manager Rudd if some kind of arrangement could be made so the fine money could be reinvested in the Property in the form of improvements instead of going to the City. Director Estabrook testified that City Manager Rudd told Mr. Henry that it was too early to discuss any such arrangement, and those types of issues could be discussed later as repairs and improvements progressed. Director Estabrook then testified that he believed there has been an instance where the Code Enforcement division has collected fines from a property owner even after the owner has completed all repairs and Code Enforcement has approved them, although he had not done so for any case since he had become Code Enforcement Manager. Director Estabrook testified that Code Enforcement had previously issued a citation for peeling paint under its Blight Ordinance. Director Estabrook also testified that Code Enforcement has also issued a citation for peeling paint after the violation for peeling paint has been repaired.

Deputy Snyder informed the Hearing Officer that the City had no more witnesses relating the promissory estoppel issue.

Ms. Borchers recalled Brad Hardie. Mr. Hardie was reminded that he was still under oath. Mr. Hardie testified that he was never told by City Manager Rudd or Director Estabrook that they did not have the authority to waive fines. Mr. Hardie further testified that in the past, on other properties he owned or managed, Director Estabrook had either waived the fines under his authority, or had helped to facilitate the waiver of fines. Mr. Hardie testified that in one instance the fine waived was for $45,000.

Upon cross-examination by Deputy Snyder, Mr. Hardie testified that the property Director Estabrook had waived fines for previously, he first received a Notice and Order which gave him 30 days to repair the home which had extensive fire damage, and then he received a citation. He then testified that the fine was waived after the repairs were made but before the owner sold the property to a subsequent buyer.

The parties then provided their closing arguments on the promissory estoppel issue.

Ms. Borchers argued that although neither City Manager Rudd nor Director Estabrook had actual authority to waive the $290,000 in fines, Mr. Hardie's previous dealings with Director Estabrook including waiving fines in past cases, making oral as opposed to written agreements, and the conversations he had with both City Manager Rudd and Director Estabrook would indicate that the legal doctrine of "apparent authority" would apply in this case. Further, the City's course of conduct in talking to Mr. Hardie regarding his proposal, directing him to submit the proposal in writing and consistently informing him over a four month period that the proposal was being studied and considered constitutes a promise that was reasonably relied upon by Mr. Hardie and

Appellant, and relying on that promise, made improvements to the Property above and beyond repairing the violations listed in the Notice and Order and Citation. Ms. Borchers also argued that Appellant made the improvements because they reasonably believed the City was going to waive the fines instead of the fines going to the City. Ms. Borchers noted that in the past, governmental entities such as the City were immune to promissory estoppel, but case law has held that the government can be held liable for the promises of their agents, subject to a "balancing test". The test looks at whether an important public interest is "nullified" when the claim of promissory estoppel is allowed to be asserted and an agreement is established. Ms. Borchers contended that one of the public interests that are affected in this case is the public's right and need for affordable housing. Ms. Borchers argued that the need for affordable housing is very important, but contended that the waiving of fines in this case does not negatively affect that need and under the balancing test, does not nullify that public interest or any other. Ms. Borchers argued that in fact, by finding the there was a valid agreement between Appellant and the City supports and strengthens another important public interest; the public's interest in being able to rely on the word of the government and their agents. Ms. Borchers contented that property owners such as Appellant have an important interest in being able to rely on the promises made by the officials and agents representing the government, and to act upon those promises without fear that those promises will not be kept later. Ms. Borchers also argued that the promise Appellant asks the City to honor is not one that affects all code enforcement cases or set any precedents. It will bind the City to honor their promise for one specific instance for one specific property regarding one specific citation. Finally, Ms. Borchers argued that the pattern of the conversations testified to by Mr. Hardie, City Manager Rudd and Director Estabrook establish that the discussions regarding the payment of "hard" or administrative costs, could reasonably be interpreted by Appellant to mean that the fines, which are not administrative costs, were to be waived.

Deputy Snyder then provided the City's closing argument. Deputy Snyder argued that Appellant's claim that discussions between the City and Appellant regarding the waiver of fines as early as December 7, 2015, is inconsistent with the City's action of issuing an amended citation on December 8, 2015, which included additional violations and an increased fine assessment. Deputy Snyder noted that the only tangible evidence submitted by Appellant on the issue were several emails from City Manager Rudd and Director Estabrook stating that they would review and consider his proposal. Deputy Snyder argued that the January 14, 2016 Fresno Bee article submitted by Appellant quoted Director Estabrook as merely stating that if progress in repairing the violations stopped, the City could then begin to collect the fines assessed under the Citation. Deputy Snyder then argued that Director Estabrook's testimony regarding discussions with Mr. Hardie or Appellant about the fines were limited to an agreement not to assess additional fines if Appellant continued to make steady progress in repairing and improving the Property. Subsequent statements by City Manager Rudd in the form of the press release indicated that any discussions regarding the reduction of the fines would not take place until further progress was made and the Property was up to code standards. The final inspection of the Property did not take place until April 15. Deputy Snyder again pointed out that under the City's Charter, the City Council has the sole authority to deal with legal matters, and unless specifically authorized in the Charter or

the Fresno Municipal Code, or with the approval of the City Council, no City employee has the authority to bind the City to any agreements. The City Manager does have the authority to waive code enforcement fines, but that authority is limited to a maximum of $100,000 and only in the case of a property that has fines attached and is being sold to a new owner in order to help pay for improvements to bring the property up to code standards. Even if that authority is exercised, the City and new property owner must also execute a written agreement signed by the new owner, the City Manager and the City Attorney. In this case, Deputy Snyder argued that the $290,000 fine could only be waived by a majority vote of the City Council. Deputy Snyder then argued that the elements of promissory estoppel, specifically the requirement of a "clear promise" were not met by Appellant. He also argued that even if the oral promises could be construed to promise waiver of the fines, the written evidence contradicts that assertion. Deputy Snyder asserted that the courts have held that promissory estoppel has been applied to a governmental agency in very limited circumstances, and the courts will not allow a claim of promissory estoppel against the government when "it operates to defeat the effective operation of a public policy adopted to protect the public", and there must be "extraordinary circumstances" before a claim of promissory estoppel can be found to establish a valid agreement. Deputy Snyder further argued that under the "balancing test, denying Appellant's claim of promissory estoppel in this case would reinforce the important policy of protecting the public from allowing City employees to arbitrarily bind the City to agreements without approval of the elected body, and the reinforcement of that policy outweighs any perceived harm to the Appellant.

Ms. Borchers responded to the City's arguments by stating that although she had attempted not to put Director Estabrook "on the spot", Deputy Snyder's statements had made Director Estabrook's credibility an issue. Director Estabrook's oral testimony contradicted his emails to Mr. Hardie and the Hearing Officer would have to determine the witness's credibility. Ms. Borchers further argued that the evidence established that the City did in fact agree to waive the fines in return for a reinvestment of those fines back into the Property, but because of statements made by Director Estabrook to the Fresno Bee printed in the January 14 article and the public outcry criticizing that apparent agreement, the City felt compelled to change its position and refused to waive the fines. While Appellant made a mistake by relying on a property manager who neglected the Property for a long period of time, Appellant "stepped up" and worked quickly to make the required repairs and additional improvements above and beyond what was required by the City. Appellant's actions were of the type that the City would want all property owners to follow, and the public policy of rewarding those property owners who cooperate with the City in quickly repairing and improving affordable housing is the public policy to be weighed and reinforced under the promissory estoppel "balancing test".

The second part of the hearing concerned the 126 "contested" violations that were part of the 1450 violations contained in the Notice and Order and Citation. As noted above, the parties have met several times in order to narrow down the issues in the case, and shorten the number issues to be determined by the Hearing Officer at the hearing. One of the major issues in contention was whether the City was justified in issuing the Notice and Order and Amended First Administrative Citation simultaneously on December 8,

2015. The City has argued that the violations taken as a whole, were an immediate danger to the public health and safety, and pursuant FMC 1-308(e), no Notice and Order or reasonable time to repair the violations was necessary. The Appellant argues that no citation and the fines assessed with the citation is valid without first issuing a Notice and Order and giving the Appellant a reasonable period of time to correct or repair the violations. The parties were able to agree upon the great majority of the 1450 violations contained in the Citation, with some of the violations being stipulated to as those which satisfied the FMC 1-308(e) "immediate danger to public health and safety" criteria, which would not require issuance of a Notice and Order and a reasonable period of time to repair the violations, resulting in a $200 fine for each violation, and some violations being stipulated to as not satisfying the FMC 1-308(e) requirement, requiring a Notice and Order and reasonable time period to repair or otherwise correct before the $200 fine could be assessed. The City also argued that Appellant should still be fined for those violations that did not meet the 1-308(e) requirement, because they were not completed by the target date of December 26, 2015, as noted in the December 8 Notice and Order. The Appellant argued that the target date of December 8 was not a "reasonable period of time" because of the large number of violations to be corrected.

The parties jointly submitted a list of 126 violations they asked the Hearing Officer to review and determine whether they met the FMC 1-308(e) "immediate danger" requirement. The parties also requested that the issue of whether the December 8 target date contained in the Notice and Order was a "reasonable" period of time to correct the violations. The violations were grouped in 6 separate categories, with a number of violations, varying from 4 to 30, in each category. The entire list will be provided below.

Before the Hearing Officer questioned the City regarding the contested violations, the parties discussed the "reasonable time period issue". Deputy Snyder contended that the consequences of not completing the repairs by the target date of December 26 was that Appellant would be subject to additional citations and higher fines. Ms. Borchers contended again that the City's position was inconsistent with the evidence submitted. If the consequences of not completing repairs by the target date were additional citations and fines, it did not make sense to have conversations with Mr. Hardie regarding his proposal to have the fines waived in exchange for reinvestment of the fine money back into the Property in the form of improvements. The Hearing Officer stated that his belief was that the reasonable time issue as it related to the contested violations was whether the time period from December 8 to December 26 was a reasonable time to repair or correct 1450 violations, and if not, then the fines from the violations not satisfying the 1-308(e) "immediate danger" requirement could not be assessed or collected.

The Hearing Officer then asked Senior Inspector David Ceballos to take the witness stand. Inspector Ceballos was sworn in. In response to the Hearing Officer's question, Inspector Ceballos testified that the termite damage found in the exterior trim of the some of the buildings did in some cases extend to the drywall of the individual units, which could compromise the structural integrity of the building. Inspector Ceballos

added that this condition affects the studs and walls of the unit. He then testified that in these types of cases, the City requires the property owner to hire a certified pest control agent to inspect and provide a report on the damage. In response to the Hearing Officer's question, Inspector Ceballos testified that, of the buildings which had exterior termite damage, 80% of those buildings also had interior termite damage, including damage in the units. Inspector Ceballos also testified that Appellant did provide the reports as required and those reports were reviewed and no structural damage was found. Further, Inspector Ceballos testified that the reports also showed that the termite infestation had been abated previously, and there was no danger to the structure at the time the City's inspection took place. In response to the Hearing Officer's question, Inspector Ceballos testified that the City requires that a property owner immediately repair an improperly installed or broken window when it is jammed and cannot be opened because that window may be the only means of escape during a fire. Also, a window with cracked or broken glass may be an immediate physical danger to a person, especially a child. There may also be a sharp object, possibly a metal part of the window frame that may be missing or stick out of the frame that could cause physical injury as well. Inspector Ceballos also testified that improperly installed windows frequently have cracks or spaces evident to visual inspection and let in cold air or let out heat and usually require immediate repair. In response to the Hearing Officer's question, Inspector Ceballos testified that evidence of a large or concentrated insect or rat infestation requires an immediate correction by the City because of the potential for disease and other health issues. Inspector Ceballos also testified that the violations for insect and rodent infestation at the Property were of the kind that needed to be corrected immediately because of the high probability of the spread of disease. In response to the Hearing Officer's question, Inspector Ceballos testified that the City requires a property owner to replace broken or missing window screens within three days because of the threat of insect and rodent infestation, and the threat of mosquitos carrying the Zika and West Nile viruses, and more potentially dangerous insects such as black widow spiders. In response to the Hearing Officer's question, Inspector Ceballos testified that the manager's office was originally a normal living unit that was converted to a combination office/living unit. Upon inspection, Inspector Ceballos believed that such a conversion required separate plans and permits because it would be considered a change of use. However, when City inspectors from the Building Division inspected the structure, it was determined that only a firewall was required, and no submittal of plans or permits was necessary.

In response to a question asked by Ms. Borchers, Inspector Ceballos testified that the citation issued to Appellant was the first citation for housing violations he had ever issued without first issuing a Notice and Order.

In response to question posed by Deputy Mott, Inspector Ceballos testified that due to the large number of living units involved, the large number of tenants and the severity of the violations, he decided, after consulting with Director Estabrook, that he could issue a citation without first issuing a Notice and Order.

In closing, Ms. Borchers stated that she had understood the City's position on the issue regarding the timely completion of repairs of the violations differently now than before

the hearing, and emphasized again the City never communicated to Appellant or Mr. Hardie that the repairs were taking too long or they were "dragging their feet" in any way. Ms. Borchers stated that in fact, the City praised Appellant's efforts and told Mr. Hardie many times that they were doing a very good job, and never once stated that the December 26 target date was a factor. Additionally, Ms. Borchers stated that the small number of contested violations was the result of several meetings between she and Deputy Snyder and Appellant had shown their good faith by conceding that some of the violations were in fact based on an immediate danger pursuant to FMC 1-308(e), and did not contest each violation as Appellant could have. Ms. Borchers contended that some of the contested violations clearly did not meet the 1-308(e) requirements as they are too far removed from direct causation of potential danger. Finally, Ms. Borchers stated that she believed the arguments provided in the jointly submitted document listing the contested violations and the arguments provided would establish that those violations would not be found an immediate danger to public health and safety and would not be confirmed by the Hearing Officer.

Deputy Snyder stated that in some circumstances the 126 contested violations may not be considered an immediate danger as required under FMC 1-308(e), however, in this case, considering the totality of the circumstances, the City believed that all the violations met the requirements of FMC 1-308(e), and should be confirmed even though no Notice and Order was issued and no reasonable time period was provided for Appellant to repair or correct the violations.

The Hearing Officer then opened the hearing to the public for comments or statements pursuant to FMC section 1-408(g). There were no public speakers.

The hearing was then adjourned at approximately 2:40 p.m.

POST-HEARING BRIEFS

After the hearing, both legal counsel were directed by the Hearing Officer to submit briefs summarizing their respective arguments regarding the promissory estoppel issue, and if desired, their arguments regarding the 126 "contested" violations. Additionally, both counsel were given the opportunity to submit a response to the other party's brief. Both counsels timely submitted their briefs and responses. The pertinent parts of those documents will be cited where appropriate in the analysis below.

STIPULATED ISSUES

A. Promissory/Equitable Estoppel: Appellant has consistently asserted that the City should be estopped from collecting the fines assessed against the Property because the City, through Director Estabrook and City Manager Rudd had agreed to waive those fines in exchange for Appellant reinvesting them into the Property in the form of improvements to the individual units and structures above and beyond what was required by the Notice and Order and Citation. The City has contended that no such agreement was made by either Estabrook or Rudd, and at the most, City Manager Rudd agreed to consider any proposal Appellant wanted to submit to the City. The City

further argued that it couldn't have agreed to waive the $290,000 fines because the City Charter authorized only the City Council to do so. The City also contended that all it did agree to do was refrain for taking any further action against the Property, such as issuing additional citations and fines for continuing violations as long as repairs to the Property were progressing at a steady pace.

In order to determine whether Appellant's claim has merit, the elements of promissory or equitable estoppel must be established and analyzed. For purposes of this case, the terms "promissory" and "equitable" can be used interchangeably.

1. Required Elements- It is interesting to note that the parties do not completely agree on the specific elements of promissory estoppel.

   In its post-hearing brief, the City cites the 2004 case of Toscano v. Greene Music (124, Cal.App.4th 685, 692) that held the elements of promissory estoppel are, 1) a clear promise, 2) reliance on that promise, 3) substantial detriment resulting from the reliance, and 4) damages. (City of Fresno Post-Hearing Brief, Dated October 7, 2016, "City Brief" pg. 2)

   In his post-hearing brief, Appellant contends that the elements are, 1) a representation made with knowledge of the facts, 2) to another party who does not have that same knowledge, and 3) the other party relies on those facts to his detriment. (City of Long Beach v. Mansell (1970), 3 Cal.3d 462, 488-489) (Appellant's Post-Hearing Brief Dated October 7, 2016 "Appellant's Brief", pp. 1-2)

   In his well-known and well regarded treatise on contracts, E. Allen Farnsworth defines the elements of promissory estoppel as, 1) a clear, definite and unambiguous promise, 2) a reason for the person who gave the promise to expect reliance on the promise, 3) the promise must have actually induced that reliance, and a consequential detrimental change in the position of the person receiving the promise, and 4) that injustice can be avoided only by enforcement of that promise. (Farnsworth, Sect. 2.19, 3d ed., 2004).

2. Promise/Representation- The major difference between the two parties' definition is the definition of the first element. The City's authority holds that there must be a "clear promise", while Appellant's authority requires a mere "representation" be made by the one making the promise. While the two words, "promise" and "representation" are very similar in meaning, especially in this context, the difference seems to be a matter of degree. The City argues that the promise must be clear, certain and unambiguous. Their argument seems to require a that a formal, written offer with specific terms must be submitted and formally accepted. The Appellant argues that the promise doesn't have to meet any formal requirements; it can be inferred by the parties' discussions, written communications, and most importantly, their actions.

   In reviewing recent California case law regarding promissory estoppel, the

Hearing Officer has found that when the courts have defined the elements of estoppel, the have used the terms, "clear promise" or "clear and unambiguous promise in its terms" when describing the first element. (*See*, Aceves v. U.S. Bank N.A. (2011) 192 Cal.App.4th 218, 225; Garcia v. World Savings, FSB (2010) 183 Cal.App.4th 1031, 1040–1041). It would seem that of the two terms, "representation" vs. "promise" or "clear promise", recent California case law favors the latter over the former. While the case Appellant cites in his brief is valid, it does not seem to be the majority opinion in California.

Throughout his appeal, Appellant has argued that both Director Estabrook and City Manager Rudd had assured his agent Property Manager Brad Hardie that they were in agreement with a proposal submitted by Mr. Hardie in which the City would agree to waive the fines assessed in the Citation as long as Appellant would reinvest the fine money back into the Property in the form of improvements above and beyond those required in the Notice and Order and Citation. To support this argument, Mr. Hardie testified that both City Manager Rudd and Director Estabrook assured him in several oral conversations on the Property that the fines would be waived so the additional improvements could be made. Mr. Hardie's also testified that City Manager Rudd actually assisted him in determining the contents of the written proposal submitted to Rudd for his consideration. Mr. Hardie then testified that in another code enforcement case on another property owned by his company, Director Estabrook had waived the fines assessed on the citation when Mr. Hardie made the required repairs. Appellant also provided documentary evidence at the hearing supporting this argument. A copy of the written proposal dated December 23, 2015, listing in detail the terms of the proposed agreement (Appellant's Exhibit #A). Appellant also submitted at the hearing an email response from Director Estabrook, also dated December 23, 2015, stating that Estabrooke had reviewed the proposal and had sent it to Development Director Jennifer Clark. Estabrook added that he wanted to get the proposal to City Manager Rudd, "so he can decide." , and that he (Estabrook) would "pitch" the proposal to City Manager Rudd (Appellant's Exhibit #E). This email evidences Director Estabrook's support for the proposal, and his belief that City Manager Rudd could approve such an agreement. Appellant also submitted a copy of City Manager Rudd's reply to Mr. Hardie's submission of the proposal in which he states that he would "consider" the proposal, and was waiting for cost figures from Code Enforcement and the Red Cross before a final decision on the proposal could be made (Appellant's Exhibit #B). Appellant also submitted two Fresno Bee articles; one dated January 13, 2016, reporting that Director Estabrook stated he was pleased with the progress of the repairs to Summerset Apartments and that the $290,000 fine had been "suspended" and the fines would continue to be suspended as long as steady progress was being made. The article also quoted City Manager Rudd as saying, that if steady progress was made, there would be no need to fine Appellant (Appellant's Exhibit's #C). Appellant also submitted another Fresno Bee article dated the next day, January 14, 2016, in which City Manager Rudd backs away somewhat from his previous day's statement and is quoted as saying the City was not sure what the total dollar amount Appellant would owe for

the FMC violations until all work was completed on the Property. It is not clear whether Rudd is talking about costs only, fines only or a combination of both. City Manager Rudd was also quoted as saying that the City would need to be reimbursed for its costs related to their enforcement actions. There was no mention from City Manager Rudd whether the fines would be waived.

The City has argued that neither City Manager Rudd nor Director Estabrook agreed to waive the fines in return for added improvements. The City cited its Charter which specifically limits the authority to waive code enforcement fines to the City Council. The City did point out that under a specific circumstance not applicable to Appellant in this case, the City Manager had the authority to waive code enforcement fines, but on up to $100,000. The City contended that the only offer made to Appellant by either City Manager Rudd or Director Estabrook was that if steady progress was made in making the repairs to Property, the City would refrain from taking any further enforcement action against the Appellant, such as second or third administrative citations along with additional fines. In support of that contention, Director Estabrook testified that he did not orally promise Mr. Hardie or anyone else that he would approve the proposal. Director Estabrook testified that he did agree to pass the proposal along to Development Director Clark and City Manager Rudd for their review, and that was his normal procedure for requests of this type. In response to a question from Deputy Snyder, Director Estabrook testified that it was his belief that the only persons who had authority to waive fines were the administrative hearing officers and the City Council. He also testified that he provided Mr. Hardie's proposal to City Manager Rudd, not because he was sure the City Manager had the authority to approve the agreement, but because that was his normal procedure when receiving a similar request. In their Response to Appellant's Post-Hearing Brief, the City also cited case law in which the court held that promissory estoppel could not be applied to enforce an oral contract against a public entity that statutorily required contracts to be in writing (Appellant's Response, p. 2, citing Poway Royal Mobile home Owners Ass'n. v. City of Poway (2007), 149 Cal.App.4th 1460, 1471), and that promissory estoppel could not be applied against a city when the city charter provided for the exclusive means of entering into a contract and those formalities were disregarded (Id., citing Zottman v. City and County of San Francisco (1862), 20 Cal. 96, 105-108).

In reviewing the testimony of Mr. Hardie, and Director Estabrook, and Appellant's documentary evidence, it certainly seems that at a minimum, both Director Estabrook and City Manager Rudd had reviewed Mr. Hardie's proposal on behalf of the Appellant, and Appellant arguably could have believed from their email responses and quotes contained in the Fresno Bee articles that at least City Manager Rudd had the authority to review and "consider" the proposal. The email response from City Manager Rudd clearly states so, and goes on to say that he was only waiting for final cost amounts to be provided to him by the Red Cross, among others. On its face, this email could reasonably lead Mr. Hardie to believe that the City Manager was going to be the person who was going to decide whether the proposal was accepted. The City provided no evidence that

the City specifically told Mr. Hardie or Appellant that only the City Council could waive his fines. There is also a possibility that City Manager Rudd's email could be interpreted to mean that he was considering the proposal to take to the City Council for their review and final decision. But that is mere speculation, as there was no such testimony or evidence provided on that issue. Nor did City Manager Rudd testify at the hearing. Additionally, the Fresno Bee articles do have both Estabrook and Rudd making statements indicating that fines were at that time being suspended, with the possibility of the waiving of fines to come in the future. Again, there was nothing in the Bee articles that would indicate that the proposal for waiving fines would have to be approved by the City Council.

However, there was some testimony that does cast doubt on whether Appellant, through Mr. Hardie did actually believe there was an agreement between Appellant and the City. At the hearing, Mr. Hardie testified that when he contacted Appellant Chris Henry about his idea that was ultimately memorialized in the proposal, Mr. Henry told Mr. Hardie that he would be willing to agree to the proposal, but wanted the agreement to be in writing. Mr. Hardie would certainly be put on notice at that point that Mr. Henry would not consider the agreement to be executed until he was informed or received some kind of signed, written agreement, or some evidence of a formal acceptance. Mr. Hardie also testified that he asked City Manager Rudd for updates on the progress of the proposal several times between December of 2015 and April of 2016, when he was finally told by City Manager Rudd that the City would not be waiving the fines. These requests could be seen by City Manager Rudd as Mr. Hardie's attempt to obtain a formal agreement or confirmation from the City that they had accepted the proposal. There was also testimony from Director Estabrook that when he handed Appellant Chris Henry the Amended First Citation, there was a conversation between Mr. Henry and City Manager Rudd in which Mr. Henry asked Mr. Rudd whether there was a chance that some kind of agreement regarding a reduction of waiver of the fines could be arranged. Director Estabrook then testified that City Manager Rudd told Mr. Henry that it was too early in the case to discuss and reduction or waiver of the fines. This testimony also supports the City's argument. Although less persuasive than the testimony from Mr. Hardie regarding Mr. Henry's directive to get the approval of the agreement in writing, an argument could be made that both Fresno Bee articles quoting Director Estabrook and City Manager Rudd do not specifically state that an agreement was in place and that fines would definitely be waived. The statements made by both Estabrook and Rudd confirm that the fines were at the time suspended, and could or would be waived as long as steady progress on making the repairs to the Property was being done. There was no statement from either Estabrook or Rudd that they had approved an agreement, or that if the fines were to be waived, that they would be waived by Estabrook or Rudd themselves.

The City's sole submission in support of their argument was the citation to the City's Charter. As discussed in more detail above, the Charter vests sole power to handle the City's legal affairs in the City Council. Under that power, the

Council is the only body that can waive code enforcement fines, with the specific exception mentioned previously.

It is clear from the analysis above that the issue of whether the City made a "promise" or "representation" to Appellant regarding the proposal to waive fines for reinvestment of the money back into the Property is not clear cut, and cannot easily be decided in favor of either party. The evidence submitted by Appellant establishes at a minimum that the City Manager was "considering" Appellant's proposal, and the Code Enforcement Director supported the proposal at least enough to take it to the Development Director and City Manager and "pitch" it to them. From the actions taken by City Manager Rudd and Director Estabrook, the Appellant's agent Brad Hardie could have believed that one or both of them had the authority to make a decision regarding the proposal on behalf of the City, even though the City's Charter specifically limits that authority to the City Council.

In fairness, it is easy for the Hearing Officer and others to focus on the actions of Rudd and Estabrook regarding the negotiations of an agreement during the early part of this case, and suggest in hindsight that they might have handled this issue a little better and avoided what seems to be a series of miscommunications and misunderstandings with Appellant and Mr. Hardie. However, no one can know the pressure they were both were under from the Council, Mayor and the public to determine the extent and severity of the problems at the Property, coordinate with City staff and public charitable organizations for immediate assistance to the tenants, strategize and determine the best plan of action to rectify the problems, and then oversee and monitor that plan in the most expedient and efficient manner possible. The pressure had to be enormous. Hopefully, in the next crisis they will avoid any misunderstanding by a property owner and fully inform him or her of their actual authority should there be a request for a similar agreement. Alternatively, City Manager Rudd and Director Estabrook could recommend amending the Charter to allow the City Manager or Code Enforcement Director or both more discretion in reducing or waiving all or part of any fines assessed.

Regardless of their actions, neither City Manager Rudd nor Director Estabrook or any other employee of the City can create an authority that does not exist. In fact, the California courts have held for many years that persons or corporations contracting with a governmental entity or agency has the affirmative duty to educate itself on the rules and regulations governing that contractual relationship. The City in its Response to Appellant's Post-Hearing Brief cited case decisions that held someone entering into a contract with the government has a duty to determine which employees had authority to negotiate and sign agreements. The City argued, "A party contracting with a government agency 'is bound to take notice of limitations on its power to contract and also of the power of the particular officer or agency to make the contract.' (City's Brief, p. 2, citing, G.L. Mezzetta, Inc. V. City of American Canyon (2000) 78 Cal.App.4th 1087, 1094 fn. 4.)", and that, "...promissory estoppel cannot be applied to enforce an oral contract against a public entity that statutorily required contracts to be in writing" (Id., citing Zottman v. City and County of San Francisco (1862) 20 Cal. 96-105).

After reviewing and considering the testimony and documentary evidence submitted by both parties, their post-hearing briefs, and pertinent case and statutory law, the Hearing Officer cannot find that the City made a "clear, unambiguous promise" to Appellant to waive the fines assessed in the Amended First Administrative Citation in return for a reinvestment of those fines back into the Property in the form of improvements. While it is possible that Appellant's agent Brad Hardie could have concluded that either City Manager Rudd or Director Estabrook had authority to waive fines through their oral communications, emails and quotes from the Fresno Bee articles, those communications, emails and articles do not establish by a preponderance of the evidence that they did have such authority. Additionally, Mr. Hardie's testimony that Chris Henry told him that he would agree to the terms of the proposal, but directed Hardie to get the agreement in writing does cast doubt on Appellant's contention that he and Mr. Hardie believed they had a valid oral agreement.

While it has been determined that Appellant has failed to satisfy the "promise" element of their promissory estoppel claim, the Hearing Officer also believes that the City's argument is only slightly more persuasive than Appellant's, and because of that, the Hearing Officer believes that it would be prudent to continue forward and review the remaining elements of promissory estoppel.

3. Reliance- Assuming for the sake of argument that there was a valid promise from the City to agree to the terms of the proposal, the second element to be analyzed under the doctrine of promissory estoppel is that of reliance. In other words, did the Appellant reasonably rely on the promise made by the City to waive the fines in return for Appellant reinvesting those fines back into the Property and act on that promise when it had no other legal obligation to do so, or forebear from acting when he had the legal right not to. In this case, it is clear that Appellant did rely on the promise he believed the City made to waive the fees. The uncontested testimony of Mr. Hardie established that Appellant made improvements above and beyond repairing the violations listed under the Notice and Order and Citation. In addition to the required repairs, Appellant upgraded flooring in the units, replaced and upgraded kitchen appliances, bathroom fixtures, lighting fixtures, carpeting, and made repairs to the outside of the buildings that were stronger and more aesthetically pleasing than what was required. Both the Appellant and the City testified that they were pleased with the results of the added improvements and believed that the tenants' quality of life would be much improved. Although Appellant did not provide any specific breakdown of costs for the required repairs and the added improvements, Mr. Hardie did testify that, as of the time of the hearing, Appellant had invested a total of $1.6 million to repair and improve the Property. Assuming Appellant has satisfied at least the minimum requirements of the agreement it would mean that he would have spent at least $290,000 more than required to bring the Property up to FMC standards.

   Assuming that the element of "promise" had been satisfied, the evidence would show by a preponderance of the evidence that the Appellant could have

reasonably relied on the City's promise to waive the fines in return for additional improvements to the Property.

4. Detrimental Reliance- Although this particular element could arguably be included in the "reliance" element analyzed above, it has been separated for the purposes of analysis To satisfy this element, Appellant must establish that his reliance on the City's promise was detrimental to him in some way. Although not fully argued at the hearing, Appellant argued in the Post-Hearing Brief that the only reason the additional money was spent for added improvements was Appellant's reliance on the City's promise that in return it would waive the fines assessed by the Citation. The Appellant argues that without that promise, the money invested for improvements was not used in a cost effective manner and could have been used or invested more cost effectively in other ways. By reinvesting the fine money without receiving the benefit of the fine waiver by the City, Appellant's use of that money of improvements had a detrimental effect on Appellant (Appellant's Brief, p. 5).

   The City argued at the hearing and in their Response to Appellant's Post-Hearing Brief that by investing his money back into the Property for improvements above and beyond what was required to bring the Property up to FMC standards, the Appellant actually received a benefit "...as the value of the subject property would have increased proportionally with said investment." (City's Response, p. 2) The Appellant disputes that argument by contending in the Post-Hearing Brief that, "While an improvement to high-end property generally results in an increase in property value, because the amount of rent for Section 8 or other low-income housing is relatively stable regardless of the condition of the property, it is not generally in a property owner's interest to substantially improve low-income units." (Appellant's Brief, p. 7, fn. 1)

   Both of these statements are presented without any legal support. Neither party provides any case law, statutory law, studies, reports, opinions, treatises or statistics to support their contentions. While an expert opinion would be very helpful in determining whether improvements of the type and scope of those made by Appellant to the Property would result in added financial value to the Property's worth, and the amount of that increase if any, a layman could reasonably believe that if the units were improved with new appliances, upgraded flooring, etc., and the outside of the structures structurally and aesthetically improved, with stucco instead of just a new coat of paint, and new or improved roofing was provided, the dollar value of the Property would likely increase in some amount, or would at the least not lose any value. Additionally, without expert testimony or evidence establishing that the money reinvested in the Property would have yielded a higher return had it been invested in some other way (e.g., bonds, stock market, other properties, etc.), Appellant cannot prove that he lost money or did not get a maximum return for his investment by using the money to make improvements, that would have resulted in a detriment for estoppel purposes.

In summary, Appellant's argument is that by investing additional money on improvements for the Property above and beyond the requirements of the City without the City waiving the $290,000 in fines, the Appellant suffered a detriment. Appellant contends that the money used for the added improvements could have been used more cost effectively in another way or provided a higher rate of return if invested in some other manner. However, Appellant provides no evidence to support this argument, and without evidence to the contrary, it would be reasonable to believe that the Property's dollar value would increase by at least a small amount or, in the alternative not lose value.

Although in the Hearing Officer's opinion the Appellant has failed to satisfy this element of promissory estoppel, for the sake completely reviewing all elements of promissory estoppel, we will analyze the final element as if the "detriment" element had satisfied.

5. Damages- As with the previous element, this could have been included with the "detriment" element. Suffering a detriment usually also includes damage in the form of lost profit, loss of a contracted-for right, or some other loss of value. Again, the Appellant has the burden to prove that damages were suffered and the amount lost. As discussed previously, the Appellant provided no exact dollar amount he claims was lost, however it can be assumed that that the amount of damages suffered would be at least $290,000, or the amount of fines assessed on the Citation. In most cases the loss of the amount that was anticipated in the agreement would be considered the "benefit of the bargain". Most courts have been hesitant to award damages that reflect the "benefit of the bargain" in promissory estoppel cases, because the courts have found that there is no bargain. The courts have held that the absence of a bargain or agreement is the reason why the doctrine of promissory estoppel is being asserted. For that reason, California courts usually award the amount which would compensate the wronged party for their actual loss. (Wilson v. County of Los Angeles Met. Transportation Auth. 96 Cal.Rptr.2d 747 (Cal. Sup. Ct. 2000)). As discussed above, Appellant provided no evidence to establish the precise amount of funds he has reinvested in the Property to provide the additional improvements above and beyond the repairs required under the Citation. So there is no way to be able to calculate the amount of money the Appellant actually spent on the additional improvements. Appellant has failed to satisfy this element.

6. Application of Promissory/Equitable Estoppel to Governmental Entities: Assuming for the sake of argument that Appellant has satisfied all elements required to sustain a claim of promissory or equitable estoppel, there are some special issues to be analyzed when claims of promissory estoppel are found against a governmental agency or entity such as the City.

   Both Appellant and the City agree for the most part that the courts have required that a "balancing test" must be used before a plaintiff can prevail on a claim of promissory estoppel against a governmental entity. California courts have held that a claim of promissory estoppel will not be allowed against a governmental

entity such as a city, "...if to do so would effectively nullify 'a strong rule of policy, adopted for the benefit of the public...'" (City of Long Beach v. Mansell (1970), 3 Cal.3d 462, 493). (City's Post-Hearing Brief, p. 2.) The Appellant states that, "The law is relatively straight forward that 'an estoppel will not be applied against the government if to do so would effectively nullify a strong rule of policy adopted for the benefit of the public...' (Schafer v. City of Los Angeles (2015) 237 Cal. App. 4th 1250, 1262, citing, Mansell)" (Appellant's Response, p. 4). In essence, the courts have used this test to determine whether to allow a claim of promissory or equitable estoppel against a government agency or entity. If allowing the promissory estoppel would cancel out or "nullify" an important public policy, then the claim will be denied.

The disagreement between the parties here is what public policy is affected by the promissory estoppel claim against the City. Both parties go into great detail in their respective Post-Hearing Briefs and Responses regarding this issue. What follows is a summary of those arguments.

The City's main argument regarding this issue is that Appellant's claim of promissory estoppel against the City because it would in essence nullify the City's policy of allowing only the City Council to waive code enforcement fines greater than $100,000. The City believes that the public has an important interest in being protected against an employee binding the City to an unfair, illegal or unfavorable contract which would arbitrarily injure the general public. Additionally, the public has an important interest in being protected against dishonest City employees such as employees who are susceptible to taking bribes in return for leniency in City matters. The City argues that this public policy would also be fatally compromised if Appellant's promissory estoppel claim is allowed. (City's Brief, pp. 3-4).

Appellant's argues that the claim of promissory estoppel should be allowed against the City because no public policy would be affected as the agreement involves only a one-time waiver of fines on one property. Appellant also contends that fines collected by the City, "go directly to the City, without any immediate or tangible benefit to the public." (Appellant's Brief, p. 5). Appellant also argues that allowing the promissory estoppel claim against the City actually furthers an important public policy and interest in requiring a public official to be held to his word (Id. p. 6). As a final argument on this issue, Appellant points out that the fines assessed in the Citation, like all code enforcement fines are discretionary. Since the City is merely exercising its discretion, not collecting the fines would have no effect on public policy (Id.)

While it is true that, in this instance, the fines that would be collected go to the general fund (unlike other code enforcement related fines and costs, such as fines under the "Blight Ordinance" or costs recovered from the demolition of buildings found to be a public nuisance under the FMC), it would be misleading to say that the fines transferred to the City's general fund have "no immediate or tangible benefit to the public" as argued by Appellant. Although not every dollar

of code enforcement fines comes back to the Code Enforcement Division, some do, which support the City's on-going effort to educate the public regarding code enforcement standards and regulations, pay for personnel to inspect properties throughout the City limits to make sure those standard and regulations are followed, and provide funds to help enforce those regulations when necessary by issuing Notice and Orders, administrative citations and assessing fines. Further, code enforcement fines going to the general fund help to pay for City projects such as infrastructure improvements and maintenance, parks, and many other tangible things which benefit the public on a daily basis. Additionally, the public policies cited by the City are extremely important to the public welfare, and were put in place specifically to prevent abuses of authority and curtail criminal behavior that has happened in the past in governmental entities all over California and the United States. If the City does not affirmatively protect the public against those types of problems, the public will be the ones who will suffer the consequences and pay for the wrongdoers abusive and illegal actions. When compared or "balanced" with the public policies Appellant argues are affected or more accurately, not affected, the policies listed by the City protecting the public against suffering the consequences of illegal or unfair agreements and protecting the public against the actions of public officials participating in corruption, abuse of power and criminal activity, it is clear that the public policies listed by the City are most important.

In summary, when using the balancing test for determining whether Appellant's claim of promissory estoppel should be allowed against the City, the public policies asserted by the City of protecting the public against suffering the consequences of illegal or unfair contracts, and protecting them against potentially illegal or unethical conduct by government officials outweighs the public policy asserted by Appellant of holding a public official to his word. All the public policies asserted by the parties are important. But those asserted by the City protect more crucial public interests and help to prevent more potentially serious consequences.

7. **Conclusion**- Appellant has failed to establish by the barest margin that the City made a clear and unambiguous promise to waive the fines assessed on the Property in exchange for improvements on the Property. And even assuming for the sake of argument that the City did make such a promise, the evidence does not establish that Appellant detrimentally relied on that promise. Finally, using the "balancing test" the public policy protecting the public against suffering the consequences of illegal or unfair contracts entered into by unauthorized government employee and the public policy protecting the public from illegal or unethical behavior by a public official outweighs any potential would be compromised should Appellant be allowed to assert their estoppel claim. For those reasons, Appellant's claim for promissory estoppel against the City relating to an alleged agreement in which the City was to waive the fines assessed in the Amended First Administrative Citation is denied.

B. Contested Violations: Both parties have also requested that the Hearing Officer

determine whether a stipulated portion of the 1450 violations charged in the Amended Citation ("Contested Violations") are an "immediate danger to public health and safety", as required in FMC section 1-308(e). If so, then no Notice and Order was required to be issued, and the City was not required to give Appellant a reasonable period of time to repair or correct those violations and should be confirmed. Though not specifically discussed, it is assumed that any of the Contested Violations found to satisfy section 1-308(e), would, by stipulation, be subject to the $200 fine assessed by the City in the Amended First Citation.

Additionally, the parties have requested that the Hearing Officer determine whether those violations found not to be an immediate danger under section 1-308(e) should still be confirmed because the violation in question was not repaired or corrected on or before the "target" date of December 26, 2015 as listed on the Notice and Order. In a related issue, Appellant has argued that the "target" date was not a reasonable period of time to repair or correct the 1450 violations, as the "target" date was only 18 days after the issuance of the Notice and Order and Amended First Administrative Citation.

1. Background: As noted above, a "First Administrative Citation" was initially issued by the City to Appellant on December 1, 2015, without a Notice and Order. Subsequently, an "Amended First Administrative Citation" ("Citation") and a "Notice and Order to Repair and Rehabilitate a Substandard Building(s)" ("Notice") were issued simultaneously by the City on December 8, 2015, with a "target date" for all violations listed in the Notice to be completed by December 26, 2015.

2. Issues: The stipulated issues in contention are, 1) to determine which Contested Violations stem from conditions that constitute an immediate danger to public health and safety as provided in FMC section 1-308(e), which do not require notice before a citation is issued, and which are not an "immediate danger" under 1-308(e), requiring the City to give Appellant a reasonable period of time to repair or correct the violations before a citation could issue and, 2) whether, given the circumstances, the "target" date of December 26, 2015 set by the City and provided to Appellant in the Notice, was a reasonable period of time to repair or correct those Contested Violations found not to be an "immediate danger" under FMC 1-308(e).

3. Section 1-308(e): The section states, "An administrative citation issued for a continuing violation of a building, plumbing, electrical or other structural or zoning regulation, that does not create an immediate danger to public health or safety, may not be issued until the responsible party has been given a reasonable period of time by the city to correct the violation through a notice of violation, notice and order or other type of corrective notice." In other words, if a violation constitutes an immediate danger to public health and safety, a citation may be issued to the offending property owner with no notice and no time provided to repair that violation, and any fines assessed under the citation would be due and payable. If the violation is not an immediate danger, then the property owner must be given notice, usually through a Notice and Order, and a reasonable period of time to

repair the violation or correct the condition.

4. List of Contested Violations: The Contested Violations were categorized by the parties and submitted to the Hearing Officer in a list the day before the hearing. The list of categorized violations (and the total number of violations throughout the Property for each) was submitted as follows:

   a. Exterior Termite Damage- 30 violations.

   b. Damaged and/or improperly installed windows- 30 violations.

   c. Damaged or missing window screens- 30 violations.

   d. Damaged and/or improperly installed exterior doors (front entry doors) - 30 violations.

   e. Multiple power strips/extension cords- 4 violations.

   f. Additions constructed without permits/inspections- 2 violations (limited to the manager's office building).

   The total number of violations that the parties could not agree upon was 126 out of 1450, or roughly 8.7% of the total violations in the Amended First Administrative Citation. Both parties are to be commended on their hard work prior to the hearing. The list also included a short statement from the City for each violation providing the reason or reasons they contended the violations met the 1-308(e) "immediate danger" requirement. Those statements will be provided below when discussing each individual violation. Appellant did not provide any statements, but merely contended that the contested violations did not meet 1-308(e) requirements.

5. Definition- "Immediate danger to public health/safety": As discussed above, section 1-308(e) does not provide a definition of what constitutes an "immediate danger to public health and safety". At the Hearing Officer's direction, both parties legal counsel were tasked to research this issue to see if case law or other legal sources could assist in defining this somewhat broad phrase. Neither counsel had much luck in locating a case decision or treatise that could shed much light, at least as it pertained to the present case. Admittedly, the Hearing Officer's efforts were not any more successful. While the factors that apply to the "public health and safety" aspect of the section's requirement can be determined from the type of violation being analyzed, whether the "danger" to the public's health and safety is "immediate" is much more difficult to determine without some guidance as to its legal meaning in this context. Again, case law and other legal resources were not very helpful. So, when in doubt, go back to the basics. The Merriam-Webster Dictionary's "simple definition" of the word "immediate" is: 1. *Happening or done without delay;* 2. *Happening or existing now;* and, 3. *Important now.* The common theme or connection within these three definitions

seems to be a sense of urgency. So adopting that definition for our purposes, the danger to the public health and safety that the condition causes must occur right at that moment, at any instant or within a very short period of time. Now, or very soon. In other words, for any one of the contested violations to satisfy the 1-308(e) requirement of "immediate danger to public health and safety", the condition must be something that is a danger to the health and/or safety of the tenants of Summerset Village Apartments, or the surrounding neighborhood, and that danger must occur or be occurring at that moment, and not just at another time far in the future.

6. Contested Violations- The violations are analyzed by the categories agreed upon by the parties.

   a. (**Exterior Termite Damage- 30 violations**): The City's argument in favor of this violation meeting the 1-308(e) requirement is described as "*structural concerns*". While this description is not completely clear, at the hearing, Senior Inspector David Ceballos testified that the City's concern was the negative effect on structural integrity of the buildings in which they found the termite damage.

      In response to the Hearing Officer's questions at the hearing, Inspector Ceballos, who was the lead inspector for the City at Summerset for the majority of the time period in question testified that the City was concerned that the damage he discovered due to termites would compromise the strength of the buildings were it was found and could cause damage to foundational core of the buildings possibly causing collapse, and endangering those tenants living in the buildings. However, after further questioning by the Hearing Officer, Inspector Ceballos testified that after the termite damage was discovered, Appellant's Property Manager Brad Hardie was required to contact with termite control experts and obtain a termite damage report for the City's review. Mr. Hardie did so, and provided the reports to Inspector Ceballos. Inspector Ceballos also testified that the reports concluded that the termite damage discovered by the City in its inspection had occurred well in the past, and the termites that had caused the damage had been eradicated long ago. The City provided no evidence that the termite damage found in its inspection had spread, had become more severe, or threatened the structural integrity of the buildings at the time it was discovered.

      The testimony provided by Inspector Ceballos on this issue establishes that the termite damage was not an "immediate" danger to the health and safety to the tenants of Summerset as required under section 1-308(e), and the City should have provided notice to the Appellant of the 30 violations listed on the Amended First Complaint, and given Appellant a reasonable period of time to repair this condition.

   b. (**Damaged/Improperly Installed Windows- 30 violations**): The City argues that this violation, "*...rise[s] to the level of an immediate danger in light of the*

lack of heat [and] the magnitude of the insect/rodent infestation. Additionally, there are egress concerns in the event of fire, the risk of which was heightened given the lack of heat and tenants resorting to unsafe heat sources. Windows were not able to lock with a proper mechanism, and the methods resorted to in order to secure them, would pose a serious impediment to someone needing to escape. They also present concerns regarding heightened potential for someone to break into a unit."

As with the termite damage violations, the Hearing Officer questioned Senior Inspector Ceballos regarding the specific factors causing the damaged or improperly installed windows to be an immediate danger under section 1-308(e). In response to the Hearing Officer's question, Inspector Ceballos testified that the window frames in many of the units cited were either missing metal pieces of the frame, or the frames were broken, resulting in pieces that were "jagged" or "sharp" which he believed could cause physical harm to the tenants, especially the young children living in many of the units. In response to another question from the Hearing Officer, Inspector Ceballos testified that the windows cited in the Amended First Citation either had warped or cracked frames that caused gaps between the window and the frame, or the windows were not properly sealed or not sealed at all. Inspector Ceballos testified that this condition allowed the escape of heat from the unit, and allowed the cold air from outside into the unit, making the tenant's task of keeping the unit warm in the cold of November a big problem. The gaps in the windows or window frames also allowed insects and vermin easier access to the units. When asked by the Hearing Officer whether he had ever issued a citation for the same or similar violations on other properties without first issuing a Notice and Order, or had heard of anyone in the Code Enforcement Division of the City of Fresno doing so, Inspector Ceballos testified that he had never personally issued a citation for violations without first issuing a Notice and Order, but he believed that someone in the Code Enforcement Division probably had done so with some property in the past.

A review of the extensive pictures taken of the violations at the Property and provided by the City in Exhibit #1, do seem to show that the windows that were either damaged or improperly installed did have gaps capable of allowing heat to escape and cold to get in the units. While the cracks and gaps represented by the pictures did not seem large enough or wide enough to allow vermin such as rats or even mice to easily enter the units, they were large enough to allow insects such as cockroaches and ants to find their way into the units. Additionally, the arguments made by the City in the list of contested violations as they apply to the damaged or improperly installed windows have merit, as the tenants without their normal source of heat were forced to use space and other types of portable heaters, which could be accidently knocked over starting a fire, or allowing unburned natural gas to fill the unit which may present a fire hazard or cause health problems should the tenants breathe the gas too long. Should a fire occur, it is reasonably possible that the only way to exit the unit would be through the window, and if

the window does not open properly or at all, the tenant's very life would be in danger.

With the 30 violations in this category, the evidence does support the City's contention that they meet the "immediate danger" requirements of section 1-308(e), and the City was justified in requiring Appellant to repair the damaged or improperly installed windows without first issuing a Notice and Order and allowing a reasonable period of time to repair.

c. (**Damaged/Missing Window Screens- 30 violations**): With this category, the City argues that it satisfies the 1-308(e) "immediate danger" requirement because, "*Missing screens increase the likelihood of insects gaining entrance to the units. Coupled with windows that cannot properly latch, and the concerns raised above, this violation at the subject property was elevated over the usual run of the mill violation for missing or damaged screens.*"

As with the previously analyzed violations, the Hearing Officer questioned Senior Inspector Ceballos at the hearing regarding this violation. In response to the Hearing Officer's question, Inspector Ceballos testified that the primary danger in a missing window screen was the likelihood of insects gaining access to the units. Inspector Ceballos further testified that some insects, such as mosquitos carried very dangerous diseases or viruses, such as "West Nile" virus or the "Zika" virus would be a great threat to the health and safety of the tenants of Summerset.

While it is strong possibility that a damaged or improperly installed windows could be an immediate danger to the health and safety of the tenants of Summerset due to the loss of heat, allowing cold to enter the unit, not allowing emergency egress if required and the possibility of insects and vermin entering through the gaps and cracks, it seems highly unlikely that a missing window screen constitutes the same "immediate danger". While it is true that a window screen does help to keep out insects such as mosquitos, and some mosquitos have been known to carry dangerous viruses and diseases that spread through their bites, the likelihood of mosquitos being present at or near the Summerset apartments in mid-November during what the City has contended was a colder than normal winter period, is very low if not non-existent.

While the installation of window screens is an important part of the window structure, it is highly unlikely that there was an immediate danger to the health and safety of the tenants of Summerset apartments due to missing window screens. The violations in this category do not meet the "immediate danger" requirement of section 1-308(e), so the City should have issued a Notice and Order for the 30 violations, and allowed Appellant a reasonable period of time to repair or replace the window screens.

d. (**Damaged/Improperly Installed Exterior Doors (front entry doors)- 30**

violations): With this category, the City contends that the violations satisfy the 1-308(e) requirement because, "*...the large gaps around the front entry doors allowed heat to escape, cold air to penetrate, and provided easy access for insects and rodents, and also presented security concerns.*"

As with the damaged or improperly installed windows, the gaps in the door frames shown in the pictures provided by the City in Exhibit #1 seem to be wide enough to allow the cold November air to enter the units while also allowing the warm air in the units to escape, which would be a potentially dangerous health hazard for the tenants of the four units. While the gaps could arguably be wide enough to allow very small mice access to the units in question, it would be more probable that cockroaches, ants and other potentially unhealthy insects could enter by this method. Most importantly, the gaps could be a sign that the exterior doors were not properly set in the door frames and would be more vulnerable to a forced entry by kicking the door or using some type of "battering ram" to knock the door down than a properly fitted door or a door set in a tight frame with no gaps. The immediate danger to the tenant's health and safety is clear in this instance.

The violations in this category meet the "immediate danger" requirement of section 1-308(e), and the City was justified in issuing a citation without first issuing a Notice and Order for these violations.

e. (**Multiple Power Strips/Extension Cords- 4 violations**): With this category, the City contends that the violations satisfy the 1-308(e) requirement because, *"[T]his is a major concern and poses a serious fire hazard."*

The City's contention here has merit. The over use of power strips and extension cords can overload a unit's electrical wiring, causing high heat, melted electrical wiring, sparks and eventually a fire. This over use could logically be considered an immediate danger to the health and safety of the tenants of the units in which the violations were found, and the 1-308(e) "immediate danger" requirement would be met. However, in this instance, there must be a determination of the reasons for the use of the strips and cords by the tenants, and whether circumstances required their use. In other words, did substandard conditions, such as non-functioning or defective electrical outlets exist in those units force the tenants to use power strips and/or extension cords? Or did the tenants in those units use the power strips and extension cords on their own volition? If the tenants were forced to use them due to the unavailability of a sufficient number of working electrical outlets in the units, then Appellant would be liable for the violations issued. If not, then the Appellant should not be held responsible in that instance for the acts of the tenants.

The Hearing Officer reviewed the entire Amended First Administrative Citation to determine which units the 4 violations in this category occurred. He then compared those units with the units in which the City found violations such as

non-functioning or defective electrical outlets. The logic being that if a unit was found to have a violation for both non-functioning or defective electrical outlets, and a violation for use of multiple power strips and/or extension cords, one could logically conclude that the tenant of that unit was forced to use those power strips and/or extension cord because of the lack of sufficient useable electrical outlets. In that case, the Appellant would be responsible for that violation, due to the substandard condition of the electrical outlets, which is his responsibility to maintain. After reviewing the Amended First Administrative Citation and Notice and Order, the Hearing Officer found that none of the units in which the 4 violations for use of multiple power strips and/or extension cords coincided with those units found to have non-functioning or defective electrical outlets. That would lead one to believe that the tenants in the 4 units found in violation in this category were using the multiple power strips and/or extension cords for reasons other than the lack of functioning electrical outlets. To assign liability to Appellant for the actions of the tenants in this instance is contrary to the law. There was no evidence presented by the City that the tenants were allowed or encouraged by the Appellant or his agents to use multiple power strips and/or extension cords, nor was any evidence provided by the City that established that there was any reason for using the strips and extension cords due to Appellant's actions or inaction.

In summary, while the City contention that the violations in this category meet the "immediate danger" requirements of section 1-308(e) has merit, there is no evidence that the violations were caused by any action or inaction on the part of Appellant. Therefore the violations for this category should be dismissed.

f. (**Additions [In Manager's Office Building] Constructed Without Permits/Inspections- 2 violations**): With this category, the City contends that the violations satisfy section 1-308(e) because, "*The illegal modifications to the office building, involved the removal of firewalls which increases the rate a fire will spread. This is further compounded by the lack of fire alarms and the need for tenants to utilize unsafe heat sources in light of the gas being out.*"

A building being remodeled that had firewalls removed without replacing them would clearly be an immediate danger under section 1-308(e). However, testimony from Inspector Ceballos at the hearing established that the walls removed by the Appellant when the building was being remodeled, while initially thought to be firewalls by Code Enforcement, were determined not to be firewalls by the Building Division of the City. Since no firewalls were actually removed during the remodeling, there was no danger either immediate or otherwise. Therefore the section 1-308 (e) requirement was not met and the City should have allowed a reasonable time for the Appellant to rectify the modifications made without permits or plans.

7. Reasonable Time Period to Repair/Correct: The other issue related to the Contested Violations that the parties requested the Hearing Officer to determine is whether the City provided Appellant a reasonable period of time to repair or otherwise correct the violations listed on the Amended First Administrative Citation that were not determined to be an immediate danger under FMC section 1-308(e). As discussed previously, the City set a "target" date of December 26, 2015 for Appellant to repair or correct all violations that were not an immediate danger under section 1-308(e). In their Response to Appellant's Post-Hearing Brief, the City argued that the 18 day period between the issuance of the Notice and Order and Amended First Administrative Citation and the "target" date was ample time to fix those violations, and Appellant failed to do so because he did not employ a sufficient number of contractors and workers to complete the repairs in the allotted time. The City stated that many of the non-immediate danger violations were not "finalized" until June or July of 2016. The Appellant contended that the sheer amount of violations made it impossible to fix the violations by December 26, 2015 as required by the City. Further, there was additional time required because of Appellant's work on the additional improvements made in anticipation of the City's waiver of the fines assessed, and the repair time also needed to be extended because the Code inspectors were finding new violations upon re-inspecting the Property which added to the workload.

   In an effort to support their argument, the City cited California Health and Safety Code section 17980(a) in their Response to Appellant's Post-Hearing Brief. The City contends that the section allows them to set whatever time period they feel is reasonable to repair the violations that do not meet the 1-308(e) requirements, and that, "...the City deemed 18 days as a reasonable time to period to abate violations *not constituting an immediate threat.*" (City's Response, p. 4, emphasis added). However, the language the City quotes from 17980(a) is not consistent with their argument. The City's Response stated, "...Section 17980(a) provides in pertinent part, 'if a nuisance exists in a building or upon the lot on which it is situated, the enforcement agency shall, after 30 days' notice to abate the nuisance or violation, or a *notice to abate with a shorter period of time if deemed necessary by the enforcement agency to prevent or remedy an immediate threat to health and safety of the public* or occupants of the structure, institute appropriate action or proceeding to prevent, restrain, correct, or abate the violation or nuisance'" (Id., p. 4, emphasis added). The language of the section allows the City to set a time period for correcting violations shorter than 30 days only if correction of those violations is deemed necessary to prevent or remedy an immediate threat to public health and safety. Here, the City is contending the 18 day period set to repair violations is for repair of violations that are not an immediate threat to public health and safety. Applying the language of section 17980(a) to the City's Notice and Order, the 18 day time period for abating the violations not constituting an immediate danger is insufficient, and under the section, the Appellant should have been given at least 30 days. Nonetheless, the City also argued that most of those violations were "finalized" no sooner than January 6, 2016, and as late as July 22, 2016. However, it is not clear how the

term, "finalized" is being used by the City in their argument. Under normal circumstances of this type, the term "finalized" usually means the time when the code enforcement or building inspector or other appropriate City employee inspects the particular repair or correction and gives it his or her final approval, or "signs off" on the work done. In many instances the repair or correction had been completed well before the appropriate City employee "finalized" it. In some cases, the City cannot schedule a time to approve or check a repair until several days or even a week has passed. Many times the repair has been completed well before the City inspects and gives it final approval.

The City stipulated that the number of violations that did not constitute an immediate danger under section 1-308(e) was 638 (City's Response, p. 5). While the City argues that Appellant "only" had 20 or so workers on site to work on those repairs, 18 days to repair 638 violations seems to be a very short time to complete the repairs and, if necessary, have the City "finalize" those repairs. In addition, Appellant was simultaneously working on repairing those violations that were an immediate danger under section 1-308(e), and working on "non-immediate danger" violations and additional improvements above and beyond those required by the City, which the City testified knew were being performed at the same time, they supported and were happy to see occur. It is the Hearing Officer's determination that 18 days to repair and when necessary, have "finalized" 638 violations, even if small, easily repairable violations, was not a reasonable time period when the other required repairs and additional improvements were being completed at the same time.

However, the City also argues that many of those violations, some listed specifically by violation number as shown on the Notice and Order, and some grouped together and categorized as, "interior violations" or "exterior violations" in specific buildings were not "finalized" until February or later in 2016. While 18 days is not a reasonable time for completing the "non-immediate danger" violations, those not completed until February 2, approximately 35 days after the "target" date, and those not completed until June or July of 2016, fully 6 or 7 months after the "target" date do support City's argument that Appellant did not complete the repairs in a reasonable period of time.

On this issue, it is the Hearing Officer's determination that although the City's 18 day time period for repair those 638 violations not constituting an immediate danger under section 1-308(e) was not reasonable, the amount of time taken by Appellant to complete the repairs on those same 638 was unreasonable.

Before the determination of whether those Contested Violations should be subject to confirmation of the fines assessed, two statements made by the City in their Response must be identified and discussed. First, the language in the City's Response seems to request that the Hearing Officer "uphold" all 638 violations the parties stipulated to as not constituting an "immediate danger" under section 1-308(e) (City's Response, p. 5). Second, the City's "Conclusion" in their Response asks that the Hearing Officer uphold all 1450 violations

contained in the Amended First Administrative Citation (Id.).

Addressing these issues, both parties informed the Hearing Officer on the record during a Pre-Hearing Conference that they had met and had stipulated to the status of most of the violations either being a violation that was an immediate danger under 1-308(e), or was not. At the hearing, the Hearing Officer made it a point to ask both parties' legal counsel on the record, whether the list of 126 violations provided to the Hearing Officer the day before the hearing contained the only violations not already stipulated to, and the only violations which the parties were requesting that the Hearing Officer review and make a determination as to whether they constituted an immediate danger under section 1-308(e), or did not. Then, when that determination was made, to determine whether those violations found not to be an immediate danger under section 1-308(e) had been repaired or corrected in a reasonable time period. Both legal counsel, on the record, confirmed the Hearing Officer's understanding.

Therefore, in accordance with the stipulation between the parties, the Hearing Officer will determine whether those violations listed in section 6(a)-(d) above and designated as violations that do not constitute an immediate danger under FMC section 1-308(e), **and only those violations so designated**, were repaired or corrected in a reasonable period of time. Those found not repaired within a reasonable time shall be confirmed and subject to the fine assessed in the Citation.

(Designated Violations)- As determined above, the categories of the violations found not to constitute an immediate danger under FMC section 1-308(e), are:

Category "a": Termite Damage.
Category "c": Window Screens.
Category "e": Power Strips/Extension Cords.
Category "f": Additions [Manager's Office]

As to Category "a" termite damage, Senior Inspector Ceballos testified at the hearing that after receiving the termite damage report from Appellant's pest control agent, the City determined that the damage had occurred well in the past, and the termites had been eradicated at that time. Inspector Ceballos also testified that the report indicated that there was no structural damage and therefore no violation. Since there was in fact no violation in this category, no repairs were required. Therefore, issue of whether any repairs regarding termite damage took place after the "target" date is moot.

The same issue affects Category "e" power strips and extension cords. As decided above, none of the units in which illegal use of extension cords and/or power strips was found coincided with the units in which defective or inoperative electrical outlets were found. This would indicate that there was no need to use the power strips or extension cord because of any action or inaction by Appellant, and therefore, in the absence of any evidence to the contrary, the illegal use

would have been voluntary on the part of the tenant, and therefore, their responsibility to correct. Since no violation in this category was proven to be the fault of the Appellant, no determination of whether the violation was corrected before the "target" date is necessary.

To aid in determining whether any of the violations in categories "c" or "f" should be confirmed because they were not repaired in a reasonable time period, the Hearing Officer reviewed Appellant's Exhibits 2-6, which are described in detail at the beginning of this Decision and Order. Special attention was paid to Exhibit #2, which consisted of an updated Case History Report. The notes created after December 26, 2016 were reviewed thoroughly. Most of the re-inspections and continuing violations found at those re-inspections were unfinished window installations, improperly installed or missing water heater doors, and deteriorated rafter tails. None of those violations are included in the pertinent categories.

Appellant's Exhibits #3-6 consisted of photos taken by Senior Inspector Ceballos of the exterior of some of the buildings and the interior of several units at various addresses within the complex on different dates. There was no description provided with the photos, and there was no testimony regarding the photos from the City, so for the most part, the Hearing Officer was left to guess precisely what the photos were intended to depict. Again, most of the photos showed what appeared to be violations relating to improperly installed window frames and front doors, deteriorated rafter tails and roof overhangs, and some unfinished bathroom flooring, unfinished kitchen cabinets, and some unnamed rooms in units that seemed to still have mold on the walls. None of these photos contained evidence that was relevant for making the determination regarding the pertinent categories.

The Hearing Officer also reviewed the information contained in City's Response which specifically listed by number those violations still not repaired as of July 13, 2016 (City's Response, p. 4). This information was the only information provided by the City which contained specific violations that could be used to determine whether a specific violation in that list matched one of the relevant categories. The other similar information provided in the City's Response generalized the violations as "interior violations", not providing the corresponding list number in the Notice and Order. Additionally, the violations were described as not being "finalized" as opposed to not being completed, which is subject to different interpretation as discussed previously. After review of the list of violations corresponding to the list of violations contained in the Notice and Order, the Hearing Officer has determined that none of the violations can be included in categories "c" or "f". Therefore none of the violations in categories "a", "c", "e", or "f" can be confirmed because they were repaired or corrected after the "target" date of December 26, 2015 as provided in the Notice and Order.

D. FMC Section 1-409(f): On April 21, 2016, the Fresno City Council adopted an urgency ordinance taking immediate effect that has may have a bearing on this case. The Ordinance amends section 1-409(f), Hearing Officer Authority, and states:

If the hearing officer finds any nuisance or legal violation set forth in the citation or notice and order is continuing and remains as of the time of the hearing, the hearing officer shall order the record owner and or occupants to repair or otherwise remedy the illegal condition within thirty days from the date of the order. The hearing officer shall set a hearing to occur between thirty and sixty days after the date of the order to confirm whether the record owner and or occupants have made all repairs or remedied all illegal conditions as ordered. If the owner or occupants show at the subsequent hearing they have made substantial progress, but had not been able to complete repairs or remedy all illegal conditions for reasons beyond their control, the hearing shall be continued to a later date to allow sufficient time to complete repairs or remedy all illegal conditions as ordered. If it is shown at a subsequent hearing the record owner and or occupants have failed to fully repair or otherwise remedy the illegal conditions, the hearing officer shall order payment of double the maximum fines permitted in this code, as well as all allowable costs and fees. Additionally, the willful failure of the owner or occupants to timely comply with the hearing officer's order shall be deemed a criminal violation and may be prosecuted as a misdemeanor in superior court, subject to fines and or imprisonment as set forth in Section 1502 of the Charter.

At the hearing and in the Post-Hearing Briefs, the parties stated that the only outstanding violation not completed at the time of the hearing was the replacement of asphalt on the parking lot. Both parties testified that the City had given Appellant a one-year extension for completing the project. The termination date of the extension was not mentioned, except that when testifying, Project Manager Brad Hardie said that he believed the last day of the extension was coming "soon". Mr. Hardie also testified that the project would be completed before the extension deadline. Technically, this outstanding violation would be subject to the 1-409(f) requirements for the setting of a "progress hearing". However, because the City gave Appellant the extra time to repair the parking lot, the Hearing Officer determines that the violation is actually not outstanding, but "suspended", and not subject to section 1-409(f) progress hearing requirements. The Hearing Officer believes that the Appellant's diligent efforts in repairing and correcting the violations on the Property and the fact that out of 1450 violations, only one violation remains, does not merit the additional cost for generation of reports by Code Enforcement, additional time spent for drafting of those reports, additional time spent to re-inspect the Property, additional time spent testifying at the progress hearing and the cost paid by the City for additional time spent on the issue by the Hearing Officer. In addition, should the Appellant fail to complete the repair of the parking lot before the extension period expires, he will be subject to additional administrative citations with progressively higher fines, and all other legal options provided by the Fresno Municipal Code.

DECISION and ORDER

For the reasons provided above, the Hearing Officer finds as follows:

1. The Appellant's claim that promissory estoppel should be asserted against the City of Fresno and a valid agreement between Appellant and the City of Fresno found to

exist in which the City agreed to waive all fines assessed in the Amended First Administrative Citation, in exchange for Appellant reinvesting the fine amount back into the Property in the form of improvements to the Property is **DENIED**.

2. a. Pursuant to the stipulation of the parties, the Hearing Officer finds that the violations contained in the following categories, identified as "Contested Violations", constitute an immediate danger to public health and safety as required under Fresno Municipal Code section 1-308(e), and therefore required no notice to be given and no reasonable time period for repair. As such, those violations in said categories are **CONFIRMED**, and the fines assessed for those violations are due and payable, subject to the stipulation of the parties:

Category "b"- Damaged and/or improperly installed windows- 30 violations.

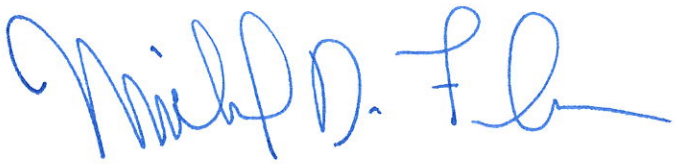
Category "d"- Damaged and/or improperly installed exterior doors (front entry doors) - 30 violations.

b. The Hearing Officer finds that Categories "a", "c", "e" and "f" contain "contested violations" that do not constitute an immediate danger to the public health and safety under section 1-308(e), and therefore required legal notice and a reasonable time to repair before a citation could be issued and fines assessed.

3. The City has failed to prove by a preponderance of the evidence their claim that the repairs or corrections of the violations contained in categories "a", "c", "e" and "f" should be confirmed because they were completed after the target date of December 26, 2015 as provided in the Notice and Order. Therefore their claim is **DENIED,** and all violations in those categories are **DISMISSED**.

NOTICE OF THE RIGHT TO APPEAL THIS DECISION

This is a final administrative decision as to what has herein been decided and ordered. The parties have ninety (90) days from the date of this Decision and Order to file a petition for a writ of administrative mandate of this Decision and Order, pursuant to Code of Civil Procedure section 1094.6. The parties may wish to seek the advice of an attorney in this regard.



Michael D. Flores
Independent Administrative Hearing Officer