

LEGAL MEMORANDUM

TO:

FROM: Jamie D. Howsley

DATE: March 26, 2020

RE: Stay Home, Stay Healthy Proclamation (20-25); Interpretative Guidance on Commercial and Residential Construction
File No.

This memorandum specifically analyzes subsection (c) of Governor Jay Inslee's Construction Guidance Memorandum ("Guidance Memorandum"), issued March 25, 2020, which clarifies the scope of the March 23, 2020 Stay Home, Stay Healthy Proclamation (20-25) ("Proclamation") and application of that Proclamation to residential and commercial construction activity. The Guidance Memorandum is attached to this memorandum as Exhibit A.

The Proclamation, which generally prohibits all people in Washington state from participating in gatherings of any kind regardless of size, and prohibits all non-essential businesses from conducting business, designated certain industries and sectors as "essential," including for example healthcare, emergency services, food and agriculture, and government operations. The Proclamation remains in effect until midnight on April 6, 2020, unless extended.

In the Guidance Memorandum, the Governor clarified that "commercial and residential construction is not authorized under the Proclamation because construction is not considered to be an essential activity." The Governor provided limited exceptions to this order for circumstances that construction may be allowed, including:

- (a) Construction related to essential activities as described in the order;
- (b) To further a public purpose related to a public entity or governmental function or facility, including but not limited to publicly financed low-income housing; or
- (c) To prevent spoliation and avoid damage or unsafe conditions, and address emergency repairs at both non-essential businesses and residential structures.**

Exhibit A (emphasis added). Given the inapplicability of the legal term of art "spoliation" in the context of real property development and land use, the distinct but related real property concept of "waste," and the subsection's specific language of "damage or unsafe conditions," subsection (c) should be construed to exempt any residential and commercial construction activity continuing for the purposes

of (1) avoiding breach to real property contracts controlling the performance of construction activities, including scope and timing of performance obligations; (2) avoiding damage to structures, foundations, fixtures, materials, and other associated real or personal property associated with ongoing construction; (3) avoiding the existence of unsafe or dangerous conditions at a construction site; and (4) avoiding intentional action that would destroy potential evidence in an ongoing or future legal action. Generally, if the stoppage of respective construction of residential or commercial development pursuant to the Proclamation will result in potential or actual “damage” to a property owner’s interest in real property—whether it be the use or value of that property—subsection (c) exempts that activity, and construction may proceed to the point at which no further risks of “spoliation” or “damage or unsafe conditions” exist.

Defining “Spoliation” and “Avoid Damage” In Construction Guidance

Foremost, the term “spoliation” is a legal term of art that derives from evidentiary based practice, and has little relevancy in the real property and land use context. Specifically, “spoliation” is defined as the “intentional destruction of evidence,” as in either a civil or criminal trial.¹ Because the Guidance Memorandum does not provide any interpretation of that term, the word must be given its technical meaning.²

Wholly distinct from the evidentiary concept of “spoliation” is the real property concept of “waste.” In the context of real property law, “waste” is the “unreasonable or improper use, abuse, mismanagement, or omission of duty touching real estate by one rightfully in possession which results in its substantial injury.”³ “Waste” is the “violation of an obligation to treat [] premises in such manner that no harm be done to them and that the estate may revert to those having an underlying interest undeteriorated by any willful or negligent act.”⁴ Waste can be both voluntary (e.g., voluntary or deliberately destroying a structure) or permissive, or negligent acts or omissions to prevent injury (e.g., letting home go to decay or disrepair).⁵ The concept of “waste” is clearly implicated in the Guidance Memorandum’s “avoid damage or unsafe conditions” language.

Given that “spoliation” is a legal term of art that traditionally has no applicability in the real property and land use context, the use of that term in subsection (c) must be read within context of the rest of subsection (c): “[t]o prevent spoliation and avoid damage or unsafe conditions.” (Emphasis added.)⁶ Spoliation does contemplate avoidance of “damage,” but strictly in the context of evidentiary burdens of proof and determination of fault in a trial setting. Spoliation, however, certainly does not comprise the consideration of “unsafe conditions” as related to real property value and use. Thus, to accurately read this subsection (c) as a whole, giving effect to all the words employed, one must read “spoliation”

¹ *Henderson v. Tyrrell*, 80 Wn. App. 592, 605, 910 P.2d 522 (1996) (quoting Black’s Law Dictionary 1401 (6th ed. 1990)); *Pier 67, Inc. v. King Cnty.*, 89 Wn.2d 379, 385-86, 573 P.2d 2 (1977).

² See *Swinomish Indian Tribal Comm. V. Wash. State Dep’t of Ecology*, 178 Wn.2d 571, 582, 311 P.3d 6 (2013) (“[W]hen technical terms and terms of art are used, [courts] given these terms their technical meaning.”).

³ *Graffell v. Honeysuckle*, 30 Wn.2d 390, 398, 191 P.2d 858 (1948) (emphasis added).

⁴ *Id.* (emphasis added).

⁵ *Id.*

⁶ See *State v. Polk*, 187 Wn. App. 380, 389, 348 P.3d 1255 (2015) (construing statutes “as a whole to harmonize and give effect to all provisions when possible”); see also *State v. McDonald*, 183 Wn. App. 272, 278, 333 P.3d 451 (2014) (finding the use of conjunctive “and” and disjunctive “or” may be substituted for each other if language in context requires).

and “avoid damage or unsafe conditions” as two unique situations under which construction activity is exempt.⁷

In other words, read as a collective whole, subsection (c) contemplates exempting construction activity that prevents “intentional destruction of evidence” (spoliation) and “avoid[s] damage or unsafe conditions” (real property waste). The exemption applies to intentional or permissive activity that would lead to damage or unsafe conditions for real property.

Subsection (c) of the Guidance Memorandum Exemptions

If residential and commercial construction were required to halt today under the Proclamation, there are countless examples of potential damage, unsafe conditions, or even “spoliation” of real property.

There would be direct and potentially legally actionable damage to real property contracts—both for home purchases and construction contracts that are contingent on timing or fulfillment of specific obligations. Delay or stoppage in performance under a contract may lead to breach, and that would certainly constitute “damage” to real property interests.⁸

There may be direct damage to structures, foundations, fixtures to real property, materials on-site, and other real or personal property elements associated with ongoing construction if work were forced to be stopped immediately.

There may be potentially dangerous or harmful materials left on construction sites, presenting “unsafe conditions.”

In fact, halting construction today may indeed even lead to “spoliation” of evidence relevant to ongoing or potential legal disputes (e.g., breach of contracts discussed above).

Accordingly, subsection (c) comprises a whole host of construction activities that are exempt from the Proclamation’s terms and limitations on non-essential activity. Generally, if the stoppage of respective construction of residential or commercial development pursuant to the Proclamation will result in any potential or actual “damage” to a property owner’s interest in real property—whether it be the use or value of that property—subsection (c) exempts that activity, and construction may proceed to the point at which no further risks of “spoliation” or “damage or unsafe conditions” exist.

⁷ See *McGinnis v. State*, 152 Wn.2d 639, 645, 152 Wn. 2d 639 (2004) (interpretations must avoid ‘strained or absurd results’); *Watness v. City of Seattle*, 457 P.3d 1177, 1190 (2019) (courts do not interpret statutes to “render any portion meaningless or [] result[] in strained meanings or absurd consequences”).

⁸ See *supra* footnote 3.