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Superior Court No. 13-2-04741-6
Court of Appeals No. 331113-III

COURT OF APPEALS, STATE OF WASHINGTON
DIVISION III

CITY OF SPOKANE,

Respondent.

v.

BLAYNE L. DUTTON,

Appellant,

RESPONDENT'S RESPONSE BRIEF

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I. IDENTITY OF THE RESPONDENT.

The City of Spokane, by and through its counsel, Timothy E. Szambelan, requests this Court affirm the decision as set forth in Section II of this response.

II. DECISION.

Mr. Dutton has appealed the Spokane County Superior Court's decision affirming the findings of the City's Hearing Examiner. Those findings, entered on October 30, 2013, supported the Building Official's determination that Mr. Dutton's property fell within the criteria, under SMC 17F.07.400, to classify it as a sub-standard property . (Case No. AP-13-02.)

The Superior Court affirmed the City Hearing Examiner's decision and held:

1. The administrative record contains evidence that photographs taken by a Code Enforcement officer had been obtained from the right of way, while in open view, where an individual would not have an expectation of privacy. As a result, there had been no Constitutional violation.

2. Mr. Dutton's challenge that his Constitutional rights had been violated failed, because he had been unable to establish the burden of proof necessary.

3. Mr. Dutton had been afforded and provided the opportunity to be heard and present his case, which satisfied the due process rights to which he is entitled (CP- Page 10), and that there had been no violation of RCW 42.56, the Public Records Act.

4. Mr. Dutton's "taking" argument failed on review because RCW 35.22.280 specifically permits cities to levy fines to defray the costs of enforcement.

III. STATEMENT OF THE CASE.

On April 15, 2013, the City of Spokane mailed Notice to Petitioner, Blayne Dutton, notifying him of the setting of a hearing before the Building Official for May 14, 2013, regarding his property located at 1914 East 11th Avenue. Mr. Dutton then requested a continuance and was granted an amended hearing date of June 4, 2013. Mr. Dutton attended the June 4, 2013 hearing, but did not submit a rehabilitation plan, nor any expert testimony, regarding his property to the Building Official. On June 16, 2013, Notice was sent to Mr. Dutton that his property at 1914 East 11th Avenue had been determined, under the facts presented at the June 4, 2013 hearing and pursuant to SMC 17F.070.400, to be a substandard structure and, as such, was to be assessed hearing/processing and monitoring fees.

Mr. Dutton filed an appeal with the City Hearing Examiner on July 11, 2013 claiming to have been denied his due process rights on the appeal form, but failed to identify which due process he felt he had been denied. His original Memorandum, filed by his attorney, had identified a single allegation that City officials had illegally entered onto Mr. Dutton's property, without his consent, and conducted an investigation. At the September 24, 2013 hearing, the Appellant raised an additional issue, not set forth in his prior briefing, by claiming that the City Hearing Examiner did not have jurisdiction to hear his appeal and that the Building Official's process is barred from imposing fees by the Washington State Constitution.

On October 30, 2013, The City's Hearing Examiner held that he did have jurisdiction to hear Mr. Dutton's appeal of the Building Official's decision and that RCW 35.80 specifically allows municipalities to enact ordinances relating to dilapidated or unfit dwellings or structures and the authority to assess fees to monitor such properties. The Hearing Examiner also concluded that the Building Official's process did not constitute a taking of Mr. Dutton's property, nor violated his Constitutional rights.

Mr. Dutton filed an appeal of the Hearing Examiner's decision to Spokane County Superior Court and a hearing was held before Judge Kathleen O'Conner on November 14, 2014. At that hearing, Judge O'Conner found that the record contained neither evidence of a Fourth Amendment violation nor any evidence of improper entry onto the property. (CP Page 3 Lines 10-24)

Judge O'Conner held that Mr. Dutton's Constitutional challenge had failed to establish the burden of proof necessary when making a constitutional challenge of the Building Official and Hearing Examiner's jurisdiction / authority. (A- Pages 3-10).

Judge O'Conner further held that Mr. Dutton had been afforded the opportunity to be heard and present his case, thereby satisfying his due process requirements. (CP Page 10-11) In addition, there had been no violation of the Public Records Act because Mr. Dutton had failed to make a request for information. (CP Pages 10-11).

Finally, Judge O'Conner agreed with the Hearing Examiner's decision that Mr. Dutton's "taking" argument failed because RCW 35.22.280 specifically allows the city to levy fines to defray the costs of enforcement (CP-Pages 11-14). Mr. Dutton has now appealed the

Superior Court's decision affirming the City Hearing Examiner's decision to this court.

IV. RESPONDENT'S ANSWER TO APPELLANTS BRIEF

Mr. Dutton is appealing Judge O'Connor's decision affirming the City Hearing Examiner's finding that Mr. Dutton's Constitutional rights, under the Fourth Amendment, had not been violated by the Code Enforcement Officer when taking photos of his property from the public right-of-way, while in open-view. In addition, the Superior Court found that the City's Hearing Examiner did have jurisdiction to hear Mr. Dutton's appeal under SMC 17G.050.070. The Court also affirmed that, under RCW 35.80.030, the City had the right to enact such ordinances and to impose property monitoring fees. In addition, the court affirmed that Mr. Dutton was afforded due process and that there had been no valid "taking" argument presented. Both the City Hearing Examiner and the Superior Court's review found that there was substantial evidence to support the Building Official's determination that Mr. Dutton's house is substandard under SMC 17F.040.400 (A-2 Pages, 2-3, A-3 19).

Mr. Dutton failed to meet his burden of proof in the Superior Court appeal and the record is clear that there was no Constitutional violation of Mr. Dutton's rights. In addition, the City is authorized by state statute to enact ordinances that create an administrative process to address

substandard and unfit structures. The Court should reject Mr. Dutton's appeal based on the controlling statutes and case law, which were affirmed by the Superior Court's decision.

V. ARGUMENT

A. The administrative record and the Superior Court's decision to affirm the Hearing Examiner's findings, support the holding that the inspection by City Code Enforcement was not a violation of Mr. Dutton's rights under the Washington State Constitution, (Const. Art. 1, § 7), nor of the similar rights protected under the Fourth Amendment of the U.S. Constitution.

The administrative record in this appeal clearly establishes that Mr. Dutton's rights were not violated when a city code enforcement officer took photographs of Mr. Dutton's property from the public right-of-way, while in open view. (RP- Page, 123-128, RP -53-54).

Mr. Dutton alleges that his Constitutional rights were violated when photographic evidence was obtained by a Code Enforcement Officer without a search warrant. However, the Code Enforcement Officer did not need to obtain a search warrant when taking photographs, while off the premises of the property and while in "open view". In this case, no search occurred within the meaning of the Fourth Amendment of the U.S. Constitution, when the "open view" doctrine is satisfied. *State v. Gardens*, 146 Wn.2d 400, 47 P.3d 127 (2002), *cert. denied*. Under the open view doctrine, a person has no expectation of privacy or a protected

property interest in what is observable from a place open to public view. *State v. Rose*, 128 Wn.2d 388, 909 P.2d 280 (1996).

Where the open view doctrine is satisfied “the object under observation is not subject to any reasonable expectation of privacy and the observation is not within the scope of the Constitution.” *Rose*, at 392, citing, *State v. Seagull*, 95 Wn.2d at 902, 632 P.2d 44 (quoting, *State v. Kaaheena*, 59 Haw. 23, 28-29, 575 P.2d 462 (1978)).

In this appeal, the administrative record clearly indicates that the photographs and the Code Enforcement officer’s observations were taken from the public right-of-way and would be permissible under the open view doctrine. (RP page(s)123-129, RP page 74) Further, Mr. Dutton did not have a reasonable expectation of privacy from any individual observing his property from a public street. Mr. Dutton’s reliance on *Bosteder v. City of Renton*, 155 Wn. 2d 18, 117 P.3d 366 (2005) is misplaced, because that case involved a city inspector who obtained an administrative search warrant and entered the individual’s property. In the present case, the City’s Code Enforcement Officer did not enter onto Mr. Dutton’s property. Further, Mr. Dutton’s reliance on *Conner v. City of Santa Anna*, 897 F. 2d. 1487 (9th Cir. 1990) is also misplaced and distinguishable. In *Conner*, the police *scaled the fence* of the Conner property, *inspected* their automobiles, and recorded the identification

numbers (VIN) and license plate numbers from these vehicles. Even further, the fence was taken down and the cars removed without Conner's consent. Mr. Dutton's reliance on *Conner* is misplaced because that case is clearly distinguishable and far different in its factual background from this case. This Court should deny Mr. Dutton's appeal because Mr. Dutton's Constitutional rights were never violated by the City, as evidenced by the record and as affirmed by Judge O'Connor's decision.

Mr. Dutton filed "Exhibit D" in his opening brief with this Court which was not a part of the administrative record appealed to Superior Court. In addition, the events contained in "Exhibit D" occurred after the October 30, 2013 decision by the Hearing Examiner. Therefore, the Court should not include "Exhibit D" in its deliberations, because it cannot be relevant to Mr. Dutton's appeal. The date of the event occurred after the City Hearing Examiner's decision and was not included in any part of the administrative record appealed to Superior Court.

B. The Superior Court's decision should be affirmed because the Building Official and the City Hearing Examiner have jurisdiction to conduct administrative hearings and appeals, as provided by RCW 35.80, which authorizes local jurisdictions to enact ordinances to address dilapidated buildings and structures.

Mr. Dutton argues that the Building Official and City Hearing Examiner do not have jurisdiction to hear the matter under the Washington State Constitution and that the matter should have been filed in Superior Court as a nuisance action under RCW 7.48. Mr. Dutton does have the burden in making a constitutional challenge and has failed to meet that burden in his appeal. (CP Page 4, Lines 22-25, Page 9, Line 25, Page 10, Line 1-3).

In addition, Mr. Dutton's argument ignores RCW 35.80¹ which specifically authorizes municipalities the ability to enact ordinances and procedures that pertain to unfit dwellings, buildings and structures within the City. The ordinances adopted by the City set forth the guidelines for the Building Official's hearing process on substandard structures. It also provides for the notification to the property owner and an opportunity to respond to the City's concerns regarding the conditions of the property.² The Building Official's hearing process for substandard structures specifically references RCW 35.80 in SMC 17F.070.010 (c).

The Washington State Legislature specifically created RCW 35.80 over fifty years ago to permit municipalities to conduct administrative hearing processes to address substandard conditions on properties within

¹ RCW 35.80 Enacted by the State Legislature in 1967.

² SMC17F.070

their jurisdiction. If Mr. Dutton's argument/analysis were followed, it would remove all City administrative processes on all substandard and unfit structures to Superior Court in order to determine if the properties are substandard.

In addition, Mr. Dutton ignores controlling Washington case law that addresses the Hearing Examiner's jurisdiction to hear Mr. Dutton's appeal from the City Building Official. The Hearing Examiner's decision (RP 39-41) contained a detailed analysis of *City of Everett v. Unsworth*, 54 Wn.2d 760,762, 344 P.2d 728 (1959). In *Unsworth*, the Washington State Supreme court held "the enactment of reasonable ordinances regulating the inspection of buildings for fire hazards and procedures for enforced elimination of fire hazards are within the police power of the municipality." Here, the Superior Court confirmed the City's authority under *Unsworth* to enact ordinances that involve dilapidated or unfit structures into an administrative process. (CP Page 7, lines 13-19).

C. The Superior Court's decision should be affirmed because the Building Official does have jurisdiction to assess fees on substandard properties. The Spokane Municipal Code provides the City Hearing Examiner with the authority to review such determinations if appealed under SMC 17G.050.070(B)(2) and the assessment of a fee is not a taking of Mr. Dutton's property.

The Building Official process applied to this appeal *does not* involve possession or title to Mr. Dutton's property and, therefore, is not a violation of the Washington State Constitution. (Const. art. IV, § 6). RCW 35.80 specifically authorizes municipalities the ability to enact ordinances and procedures that pertain to unfit "dwellings buildings and structures" within the City (RP- 56, CP Page 9, Lines 19 -23). The administrative fees for annual hearing fees (SMC 08.02.067) and the monitoring fees are both filed as liens against the property (RP-101) Mr. Dutton was provided the opportunity to file a rehabilitation plan to make the property habitable and receive a partial refund if sought within one year of the annual fee being assessed. In addition, RCW 35.22.280 (29) grants first class cities the right to impose fines against parties who create or continue nuisance conditions. RCW 35.22.280(30). (AR-55-56, CP Page 9 line 19).

The Superior Court and the City Hearing Examiner correctly noted that Mr. Dutton has failed to present any legal "taking" analysis at either hearing. (RP-62-63, CP Page 12, lines19-23).

The City Hearing Examiner does have jurisdiction to hear appeals from the Building Official under SMC 17G.050.(B)(2), SMC 17F.070.460(A)(1),(E)(1). The Administrative record correctly states that the City *did not* initiate a nuisance action in any court, but did initiate

an administrative process that is not controlled by the Superior Court. (RP 12-13, CP Page 7 lines 22-25, Page 8, Lines 1-14) .

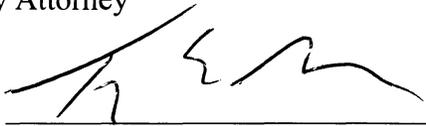
The administrative record clearly shows that Mr. Dutton was provided due process at each hearing. An individual receives sufficient “due process when the parties are provided a full and fair opportunity to be heard on the merits of their claim.” Jacquins v. Dept. of Social & Health Servs., 69 Wn.App. 21, 27-31, 847 P.2d 513 (1993); State v. Malone, 9 Wn.App. 122, 128, 511 P.2d 67 (1973). Here, the Superior Court’s ruling and the administrative record contain substantial evidence that demonstrate Mr. Dutton was provided a full and fair opportunity to present his appeal to the Building Official and then to the Hearing Examiner. (RP-68-93, 129 page 15),(CP Page 11 lines 116-17). The Superior Court also took notice that Mr. Dutton’s attorney was granted a continuance when a conflict arose on the morning of the City Hearing Examiner’s hearing date.(CP Page 10 lines 4-11) The administrative record establishes that Mr. Dutton was afforded sufficient due process at each hearing and appeal.

VI. CONCLUSION

This Court should affirm the Superior Court's decision. The administrative record and the Superior Court's LUPA decision contain substantial evidence that support the position that the Building Official and City Hearing Examiner did have jurisdiction to hear the appeal and to assess liens. The Superior Court correctly held that there was no Constitutional violation because the evidence was obtained in open view from the public right-of-way.

Respectfully submitted this 11th of September, 2015.

THE CITY OF SPOKANE
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By: 

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF SPOKANE

CITY OF SPOKANE,)
Respondent,)
vs.)
BLAYNE DUTTON,)
Appellant.)

NO. 13-2-04741-6

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DEC 16 2014

LUPA DECISION

SPOKANE COUNTY CLERK

BEFORE: The Honorable Kathleen M. O'Connor
DATE: November 14, 2014

APPEARANCES:

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REPORTED BY:
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1 THE COURT: I had an opportunity to read the
2 record and the briefing and I put a few notes together.

3 This matter was not filed under RCW 36.70C
4 because there was no mention of it in any of the
5 paperwork that was filed by the the petitioner. This is
6 a land use decision. The statute is designed to address
7 administrative decisions Subsection 2(c), which is the
8 defitional section, includes enforcing ordinances that
9 regulate the maintenance of property which is
10 essentially what we have here.

11 Irrespective of whether it is a LUPA
12 petition or an administrative review, this court sits as
13 an appellate court and the parties are bound by the
14 record. Although in a LUPA, you can take additional
15 testimony with the permission of the court through the
16 initial hearing process provisions. However, no initial
17 hearing was held in this case. It is pretty uncommon to
18 allow additional testimony. I have done it on a couple
19 of cases, but it is very unlikely. You still have to
20 live and die by the record that is made at the
21 administrative proceedings below.

22 The standards of review for a LUPA decision
23 are not dissimilar to the Administrative Procedures Act,
24 in that is there substantial evidence to support the
25 finding and is there a proper application of the law.

1 The standard under LUPA is whether there is a clearly
2 erroneous application under the law to the facts, which
3 is a little bit different than the APA. But the bottom
4 line is that my view is that you are using a substantial
5 evidence test for the facts. With regard to the
6 application of the law, the court could look at that *de*
7 *novo*, although arguably under a LUPA it is a clearly
8 erroneous decision. This was not technically filed as a
9 LUPA even though it should have been.

10 Counsel has summarized well the issues that
11 were raised in the briefing and have been raised
12 throughout this proceeding. I am not going to spend any
13 more time on the Fourth Amendment claim. There just is
14 no evidence that there has been a Fourth Amendment
15 violation and improper entry onto the property. The
16 individuals involved specifically testified to that
17 fact. There is no controverting evidence. They got
18 some additional information about the property, which
19 they are entitled to get through other sources, such as
20 the utilities department, which does not require entry
21 onto the property, either. I am satisfied there was no
22 illegal entry onto the property. Taking pictures from
23 the public right of way is perfectly permissible, there
24 is no reasonable expectation of privacy in that.

25 The second issue raised by the petitioner is

1 a constitutional challenge. We have to keep a couple of
2 things in mind. Number one, administrative law judges
3 or hearing examiners do not have the authority to
4 determine if a statute is unconstitutional. As a matter
5 of fact, I just finished a state administrative appeal
6 from the Department of Health. A constitutional issue
7 was raised in the proceedings for the sake of, I call
8 it, a placeholder, but not decided. The Hearing
9 Examiner, Mr. McGinn, wrote a number of pages on this
10 because he does not believe the law is unconstitutional,
11 and neither do I, but he could never find a law
12 unconstitutional. He just could not do that, he does
13 not have the authority. This is what this court needs
14 to do.

15 The other thing that I assume did not happen
16 in this case but should have, whenever anyone, a lawyer
17 or a party, wants a law to be declared unconstitutional,
18 they have to notify the Attorney General. Then you
19 usually get a letter from the Attorney General's Office
20 saying that is very nice, let me know what happens. But
21 that is required.

22 Whenever a party challenges the
23 constitutionality of a statute, the burden of proof is
24 unconstitutional beyond a reasonable doubt. That is the
25 burden of proof. None of this is being addressed. I

1 have been around a long time and I have declared a
2 couple laws unconstitutional in my time. I can tell you
3 that the briefing in that regard is usually very
4 significant in depth because the burden beyond a
5 reasonable doubt is so high.

6 I do not see this as an "as-applied"
7 challenge because Mr. Dutton's situation is not
8 particularly different than any other situation to which
9 the statute applies. This is not an as-applied
10 argument, this is a straight up unconstitutional
11 argument.

12 One of the things I looked to for somebody
13 who has such a high burden of proof is some legal
14 authority that might support their position. There is
15 not any in here of any value in terms of whether this
16 statute is unconstitutional. The most extensive
17 discussion is the *The City of Everett v. Unsworth*, 54
18 Wn2d 760. That case talks about police power. Spokane
19 is a first class city and therefore Spokane has the
20 right, if it so chooses, to adopt a Municipal Code to
21 deal with the state of buildings in the community. They
22 have the authority to do that under RCW 35.22. RCW
23 35.80 is where it specifically talks about structures
24 that are unfit and provides both a definition, which
25 does not use the term nuisance in RCW 35.80.010. More

1 importantly, 35.80.030 goes on for pages and talks about
2 what would an appropriate ordinance look like in that
3 regard. The city has the authority, if they so choose,
4 which they have chosen to do, under Municipal Code
5 17F.070.400, to put this in ordinance form.

6 The *Unsworth* case talks about the police
7 powers. A city like Spokane has police powers and they
8 have the ability to adopt these ordinances. The
9 specific issue in that case, and that is an old Supreme
10 Court case, interestingly enough, was that the ordinance
11 for the City of Everett said if you want to appeal the
12 decision from the building inspector, you go to the
13 Municipal Court. *Unsworth* said no, you need to go to
14 the Superior Court because of the nature of what we are
15 talking about. If you read that decision closely, the
16 Supreme Court indicated that it really was not contested
17 by Mr. *Unsworth* that there was authority to do this. In
18 other words he did not raise the constitutional issue
19 except as to what court he was supposed to be in for
20 appeal. The court indicated that the police powers
21 allows cities to adopt this type of ordinance.

22 They are not inherently unconstitutional.
23 So the question becomes whether or not how does that fit
24 into the scheme of things with regard to the Washington
25 State constitution that gives the Superior Court

1 original jurisdiction in cases of nuisance.

2 I think that these statutes could be
3 harmonized easily. First of all, the fact that the
4 court has original jurisdiction does not mean that there
5 cannot be an administrative proceeding by some
6 governmental entity. There has been no citation to
7 authority on the part of the petitioner, who carries the
8 burden on this issue, that there is any case law, even
9 around the country. Sometimes we do not have it. If
10 you are going to really do this and research it, there
11 might be something in some other state that says you
12 cannot have something parallel going on.

13 The fact that a municipality who has the
14 authority, by statute, to create ordinances and enforce
15 ordinances, chooses to do so through administrative
16 process, is not either inherently unfair, or does it
17 necessarily infringe on the Superior Court's
18 jurisdiction. The fact that I have original
19 jurisdiction does not necessarily mean that the
20 administrative agency does not have any jurisdiction.
21 That is what you are trying to get at.

22 One of the points, and Mr. Szambelan picked
23 up on this, is this matter was not commenced as a
24 nuisance action in Superior Court. Essentially that is
25 what the petitioner is arguing. The petitioner is

1 arguing that is what has to happen. In fact, it does
2 not have to happen. You can harmonize these statutes, I
3 think easily, by saying that indeed the first class
4 municipalities do have a right to create an ordinance
5 and create an enforcement mechanism, or a hearings
6 mechanism and an enforcement mechanism, and an appeal
7 which would go to Superior Court. I believe these have
8 all been gathered up now under the Land Use Petition
9 Act, which then moves forward to its own standard of
10 review.

11 To me, that does not offend the
12 constitution. It does not offend the constitution
13 because the constitution does not require the cities to
14 file these cases in Superior Court initially. What it
15 says is ultimately, the Superior Court would have
16 jurisdiction over this if a person like Mr. Dutton were
17 aggrieved and appealed a decision of the city. I have
18 not seen any case law that would support the
19 petitioner's position on this. As I indicate, these can
20 be harmonized. I thought Hearing Examiner McGinn did a
21 really fine job in analyzing this issue and recognizing
22 that it is important to understand the fact that the
23 Superior Court has jurisdiction to do something does not
24 mean that some other process cannot occur.

25 There is quite a bit of discussion about

1 these kinds of things with regard to the Juvenile Court,
2 but that is not analogous because that is court to
3 court. That is not really analogous to what we are
4 talking about today and I respect that. But the reality
5 is that in looking at the constitution, the fact that
6 there is a proceeding going on administratively, does
7 not add, does not subtract, to the Superior Court's
8 original jurisdiction if a nuisance case is filed in the
9 court. That is where it is going to come because we are
10 a constitutional court. It is not going to come to the
11 statutory courts, which are the district courts and
12 municipal courts.

13 You have to understand that municipalities
14 aren't the only people who can file nuisance claims. We
15 have a fair amount of civil nuisance and those come to
16 the Superior Court. The fact that the municipality has
17 an initial administrative process does not change that,
18 does not add or subtract to my jurisdiction as a
19 Superior Court judge. The City of Spokane created it
20 under the authority they have been given by the state
21 legislature under RCW 35.80 and 35.22. It really is a
22 challenge to those state statutes because nobody has
23 argued that there is something inherently
24 unconstitutional about the Spokane Municipal Code.

25 I am satisfied that the petitioner has not

1 met his very high burden of demonstrating, beyond a
2 reasonable doubt, that these statutes in the Spokane
3 Municipal Code are unconstitutional.

4 The last issue is the due process issue.
5 First of all as far as procedural due process is
6 concerned, I do not think anyone can argue that Mr.
7 Dutton did not get an opportunity to be heard. He had
8 an opportunity to have counsel, he was able to present
9 witnesses and testimony. There was at least one
10 continuance to accommodate his lawyer. He had an
11 opportunity to question the people involved.

12 This whole issue about a complaining witness
13 wished to remain confidential, that is not an unusual
14 provision. You see that in other statutes because of
15 the retaliation issue. There are occasions when,
16 depending on the circumstances, they have to be
17 disclosed. In this case Mr. Dutton can make a public
18 records claim, that is not that hard. You write a
19 letter, find out who the public records person is with
20 the City. They have to respond, they get fined if they
21 do not respond. It is not an onerous process at all.
22 But more to the point, there was nothing in the record
23 to indicate that there was any hardship to the
24 petitioner because he did not know who the individual
25 was.

1 All of the evidence was produced by the
2 governmental entities. I do not know if there was a
3 theory that the complainant had damaged the property or
4 what, but there was nothing raised in the record about
5 how knowing the complaining person was relevant to what
6 was happening. In some cases it could be relevant, but
7 you would have to make a showing and you could make your
8 public records request. If the city was going to honor,
9 I take it they checked the box that said they did not
10 want to be disclosed, that was the issue. You could
11 have gotten another continuance, made a public records
12 request, checked it out. But there was no mention in
13 the record of anything other than what Mr. Borzof and
14 Mr. Skindzier did and what they observed. They
15 identified who they contacted as well. That is where
16 the basis of the decision was. My view is there were no
17 procedural due process problems.

18 The last issue is this takings issue. It is
19 clear in reading the statute that RCW 35.22.280 allows a
20 city to levy fines to defer costs of the enforcement.
21 It is a flat fine of \$1500 and they have another fee for
22 monitoring. These situations come up. A property owner
23 can certainly fight it. They can work with the City to
24 try to fix the problem. In this case Mr. Dutton put the
25 property up for sale. I do not know if it still is or

1 if it has been sold. The problem is not going away
2 unless something is done about it. There is a process
3 where there a rehabilitation plan can be proposed to fix
4 the property. I suppose in some cases it may not be
5 able to or it may be prohibitively expensive. Really
6 the ball is in the property owner's court. Here there
7 was no rehabilitation plan.

8 In reading this record, it is clear that the
9 City will work with the owner if the owner will work
10 with the City. But if owner of the property does not
11 want to work with the City, does not want to do what is
12 necessary to get the property back to something that is
13 habitable and rehabilitate the property, then the City
14 has to go forward and do something. Initially,
15 oftentimes fines are kind of the carrot and the stick
16 approach; we are going to fine you if you do not do
17 something. Otherwise there is no point in having a
18 process like this because nothing is going to happen.

19 The fact that a fine is levied after
20 appropriate due process and everybody has had a chance
21 to be heard and the building owner knows and has been
22 told what he needs to do and has chosen not to do it, is
23 not a taking of property. That is exercising the police
24 power to levy a fine. It is coercive in nature. In the
25 sense it is like coercive contempt. It is not there to

1 punish people, it is there to get them to deal with the
2 problem that is not going away.

3 I assume this property is probably uninsured
4 because it is vacant, unless somebody is paying a lot of
5 money for insurance on it. Apparently it has not had
6 water service for years. Nothing is going to be done
7 about it. The City cannot just ignore it, they have a
8 statutory duty to do something about it. The first
9 thing you want to do is work with the property owner.
10 If that does not work, maybe a fine to help defer your
11 costs and to get the owner's attention. It is all in
12 the statute. It is not a large amount of money. If
13 that does not work, eventually they City must continue
14 to move through the process, perhaps even demolish the
15 house. That is a different process and it has its own
16 procedures. But at this level, and at this point, the
17 fact that there is a fine levied is not a taking.

18 This is the first salvo across the bow to
19 try to get the attention of the property owner. I am
20 satisfied that this is not a taking of property. It
21 might lead to a taking of property, but there will be
22 other procedures that will happen before that. Again, a
23 lot of this is in the property owner's court, how much
24 they want to work with the City or what is it they want
25 to accomplish with property that has been determined to

1 be substandard and dangerous to the health and welfare
2 of the community.

3 Counsel, I will affirm the Hearing
4 Examiner's decision. In all respects I think he did a
5 thorough analysis. What do you folks need from me at
6 this point? I think my decision needs to be typed up.

7 MR. SZAMBELAN: Yes, your Honor.

8 THE COURT: Normally I would type it up and
9 I would not require findings and conclusions, generally
10 concludes he is affirmed. Once that is signed and
11 filed, that is the law of the case and then it is up to
12 the petitioner if they want to file an appeal after
13 that. That is what I do. I know I will get it done
14 fairly quickly because my last day at work is December
15 19th so I want to get it out of here before then. I
16 will sign it file it and we will send you a copy. That
17 will take care of it at my level. If you want to go
18 from there, you can file a Notice of Appeal after the
19 decision is actually signed and filed.

20 Thank you very much, counsel, I am going to
21 close off my equipment so you can be excused.

22 (In Recess.)

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The Honorable Kathleen M. O'Connor

12/14/2014
Date

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

COS
~~STATE OF WASHINGTON~~)
Respondent)
vs.)
BLAYNE L. DUTTON)
Appellant/Petitioner)
_____)

No. **13204741-6**
LAND USE PETITION/
APPEAL OF BUILDING
OFFICIAL PURSUANT
TO SMC

COMES NOW the Appellants, BLAYNE L. DUTTON, by and through his attorney, Douglas D. Phelps of Phelps & Associates, P.S., and seeks Judicial Review of the Findings, Conclusions, and Decision entered by Brian T. McGinn, City of Spokane Hearing Examiner, on October 30, 2013 (Exhibit A) pursuant to RCW 36.70C and SMC.

Appellants mailing address is 7918 E. Utah, Spokane, WA 99212.

Appellant is represented by Douglas D. Phelps, Attorney at Law, 2903 N. Stout Road, Spokane, WA 99206.

The respondent is the City of Spokane, Office of Neighborhood Service and Code Enforcement, 808 W. Spokane Falls Boulevard, Spokane, WA 99201.

IDENTITY OF THE PARTIES TO THE PETITION/APPEAL

- 1. City of Spokane
808 W. Spokane Falls Boulevard
Spokane, WA 99201

Land Use Petition/
Appeal of Building Official
Pursuant to SMC

000001

PHELPS & ASSOCIATES, PS
Attorneys at Law
2903 N. Stout Rd.
Spokane, WA 99206-4373

1 Superior Court has original jurisdiction in actions based upon nuisance, Article IV § 6
2 of the Washington State Constitution.

3 Mr. Dutton seeks review of all factual and legal conclusions as designated by
4 Building Official Dan Skindzier and then all decisions of City Hearing Examiner Brian
5 T. McGinn found in decision of October 30, 2013. Appellant reserves appeal on other
6 issues as will be designated upon receipt of the record of the hearings conducted
7 administratively leading to the decision of October 30, 2010. (Exhibit A)

8
9 Further, appellant challenges the authority of the City of Spokane to file liens
10 against his property without first filing an action before the Superior Court of the State
11 of Washington. Mr. Dutton challenges the reasonableness of the fees assessed by the
12 City of Spokane against the petitioner/appellant and his property without proper
13 authority of law. Mr. Dutton maintains that the action herein is an unlawful taking of
14 real property without adequate and proper due process of law required under both U.S.
15 and Washington State Constitutions. Appellant reserves the right to appeal such other
16 issues that are identified upon review of the record.
17
18

19 The appellant seeks the following remedies:

- 20
- 21 1. Dismissal of the action against the petitioner Blayne Dutton and his
22 property;
 - 23 2. Attorney's fees and costs incurred in pursuing this action;
 - 24 3. Removal of all fees and charges ordered against Mr. Dutton and his
25 property at 1914 E. 11th Avenue, Spokane, WA. Tax Parcel No.
26

27 Land Use Petition/
28 Appeal of Building Official
Pursuant to SMC

000003

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Attorneys at Law
2903 N. Stout Rd.
Spokane, WA 99206-4373
Email: phelps@phelpsandlaw.com

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Exhibit A
Findings, Conclusions, and Decision
October 30, 2013

000005

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2903 N. Stout Rd.
Spokane, WA 99206-4373
Email: phelps@phelpslaw1.com

Testimony:

Timothy E. Szambelan
Assistant City Attorney
City of Spokane City Attorney's Office
808 West Spokane Falls Boulevard
Spokane, WA 99201

Boris Borisov
Neighborhood and Housing Specialist
Code Enforcement
808 West Spokane Falls Boulevard
Spokane, WA 99201

Dan Skindzier
Deputy Building Official and Inspector
Supervisor
Building Department
808 West Spokane Falls Boulevard
Spokane, WA 99201

Heather Trautman
Director of Neighborhood Services and
Code Enforcement
City of Spokane Office of
Neighborhood Services
808 West Spokane Falls Boulevard
Spokane, WA 99201

Douglas Phelps
Attorney at Law
Phelps and Associates, P.S.
2903 North Stout Road
Spokane Valley, WA 99206

Blayne Dutton
7918 E. Utah
Spokane Valley, WA 99212

Exhibits:

1. Request for Appeal
 - 1A Order of Building Official dated 06-18-13
2. Email dated 07-16-13 to parties of record acknowledging receipt of appeal and suggesting hearing dates
3. Letter dated 07-24-13 to Blayne Dutton setting the hearing date
4. Appellant's Memorandum of Law received on 08-08-13
5. City's Response brief received on 08-15-13 including:
 - 5A Declaration of Dan Skindzier
 - 5B Declaration of Boris Borisov
 - 5C Response to Appeal of Building Official Order
 - 5D 1914 E. 11th Timeline
 - 5E 4 photos of structure located at 1914 E. 11th Ave taken by Dan Skindzier on 04-10-13
 - 5F 10 photos of structures located at 1914 E. 11th Ave taken by Boris Borisov on 03-08-13
 - 5G 6 photos of structures located at 1914 E. 11th Ave taken by Boris Borisov on 06-03-13
6. Letter dated 08-21-13 to Douglas Phelps setting the continued hearing date
7. Appellant's Supplemental brief received on 10-07-13
8. City's Supplemental response brief received on 10-16-13

complaint, staff from Code Enforcement and the Building Department investigated the matter. See id.

Code Enforcement conducted a site visit on March 8, 2013. See Exhibit 5C. (Response to Appeal). At that time, Mr. Boris Borisov made a visual inspection of the Dutton Property, and took photographs to memorialize the condition of the property. See Exhibit 5B (Declaration of B. Borisov ¶ 3). The photographs taken by Mr. Borisov are part of the record. See Exhibit 5F. Mr. Borisov made his observations and took the photographs while standing in the public right-of-way. See id. Mr. Borisov did not enter into the Dutton Property in order to conduct his inspection or gather evidence. *Testimony of B. Borisov.*

On April 10, 2013, the Building Department conducted a site visit at the Dutton Property. See Exhibit 5C (Response to Appeal). Mr. Dan Skindzier, Deputy Building Official, did a visual inspection of the property at that time. See Exhibit 5A (Declaration of D. Skindzier ¶ 3). Mr. Skindzier took photographs of the building, which are part of the record. See Exhibit 5E. All observations of the Dutton Property were made from the public right of way, and the conditions observed were in plain view. See Exhibit 5A (Declaration of D. Skindzier ¶ 3); *Testimony of D. Skindzier.* Mr. Skindzier did not enter into the Dutton Property to inspect the property or gather evidence. *Testimony of D. Skindzier.*

On or about April 15, 2013, the city sent a certified letter to Mr. Dutton, advising him that a complaint was received and specifying the substandard conditions that the city believed existed at the Dutton Property. See Exhibit 5D. Through that same letter, the city scheduled a hearing to provide Mr. Dutton with the opportunity to address the alleged conditions of this property. See id. The letter was also posted at the property. See Exhibit 5D (Timeline).

On April 24, 2013, Code Enforcement received a copy of the certified mail receipt, signed by Mr. Dutton, for the certified letter sent on April 15, 2013. See Exhibit 5D (Timeline).

The hearing before the Building Official was originally scheduled for May 14, 2013. See Exhibit 1 (Order of Building Official, p. 2). However, Mr. Dutton requested and was granted a continuance. See id. As a result, the hearing did not take place until June 2013. See id.

On June 3, 2013, Code Enforcement conducted another site visit of the Dutton Property, in preparation for the hearing scheduled for the next day. See Exhibit 5D (Timeline). Mr. Boris Borisov again visually inspected the premises and took photographs. See Exhibit 5B (Declaration of B. Borisov ¶ 3). The observations were made and the photographs were taken while Mr. Borisov was standing in the public right-of-way. See id. The photographs taken on June 3, 2013 are part of the record of this appeal. See Exhibit 5G. Mr. Borisov did not enter into the Dutton Property in order to conduct the inspection or gather evidence. *Testimony of B. Borisov.*

On or about June 4, 2013, a hearing was conducted by Mr. Dan Skindzier, Deputy Building Official, regarding the complaint of substandard conditions at the Dutton Property. See Exhibit 1A (Order of Building Official). The purpose of the hearing was to determine whether the building on the Dutton Property was substandard within the meaning of SMC 17F.070.400. See id.

At the hearing, Mr. Dutton was represented by Douglas Phelps, Attorney at Law, of Phelps & Associates, P.S. See id. Both the city and Mr. Dutton presented evidence on the matter. See id. Mr. Dutton, through his counsel, also had the opportunity to cross examine witnesses. See id.

On August 15, 2013, the City of Spokane submitted the following materials in response to the appeal: (1) Response Brief; (2) Declaration of Dan Skindzier; (3) Declaration of Boris Borisov; (4) Photographs taken by Mr. Skindzier and Mr. Borisov; (5) Response to Appeal of Building Official; and (6) a timeline of events through the date of appeal. See Exhibits 5 – 5F. In the Response Brief, the city addressed two issues. First, the city denied any violation of the Fourth Amendment. See Exhibit 5. Second, the city contended that Mr. Dutton received all the process he was due. See id. There was no discussion of the takings issue referenced in Mr. Dutton's Request for Appeal. See id.

On August 20, 2013, the parties assembled for the scheduled hearing. However, at the commencement of the proceeding, Mr. Dutton requested a continuance based upon the unavailability of his attorney, Mr. Phelps. Another attorney from Mr. Phelps' office was present and willing to proceed, but this was not satisfactory to Mr. Dutton. The city stipulated to a continuance of the matter to allow Mr. Dutton to arrange to have Mr. Phelps present at the hearing. As a result, the Hearing Examiner rescheduled the hearing for September 24, 2013. See Exhibit 6.

On September 24, 2013, the continued hearing on Mr. Dutton's appeal was conducted. At the hearing, the parties were permitted to present argument, submit evidence, and examine witnesses. Mr. Dutton was represented at the hearing by Mr. Phelps, and the city was represented by Timothy Szambelan, Assistant City Attorney.

During the hearing, Mr. Phelps raised an argument that was not included in the briefing of the parties or previously raised in Mr. Dutton's appeal. Specifically, Mr. Phelps argued that, under the Washington State Constitution, the superior court had original jurisdiction to hear any action to abate a nuisance or involving title or possession to real property, and therefore the administrative process to declare a building substandard, impose fines, and file or enforce liens, was outside of the city's authority. At the conclusion of the hearing, the Hearing Examiner held the record open for a specified period of time to allow the submission briefing from the parties on this jurisdictional question.

On October 7, 2013, Mr. Dutton submitted a Supplemental Brief Regarding Jurisdiction Constitution Violations. See Exhibit 7.

On October 16, 2013, the city filed its Supplemental Response Brief on the jurisdictional questions raised by Mr. Dutton. See Exhibit 8.

D. Discussion of Facts and Law

The Appellant claims that the Building Official's decision was erroneous for numerous reasons. The primary issues raised in this appeal are best considered under the following categories: (1) Fourth Amendment; (2) subject matter jurisdiction; (3) due process; and (4) takings. These, and some other matters raised, are discussed in detail below.

1. *The City of Spokane did not violate Mr. Dutton's Fourth Amendment rights when it investigated the condition of the Dutton Property.*

Appellant argues that the inspection of his property by Code Enforcement was performed in violation of his Fourth Amendment rights. See Memorandum of Law, p. 2. In support of this argument, Appellant asserts that government officials illegally entered onto his

observations. Moreover, the city officials only gathered evidence of conditions that were in open view. It is difficult to conceive of a condition that is more open to public view than the exterior condition of a residential structure. The Hearing Examiner concludes that no warrant was necessary for city officials to visually inspect and photograph the roof, siding, porch, and other openly visible portions of the Dutton Property. Under the open view doctrine, no warrant was required for such activity and no Fourth Amendment violation could arise.

Third, the Hearing Examiner disagrees with Appellant's assertion that Conner v. City of Santa Anna supports his Fourth Amendment claim. As the city notes, the facts in Conner are clearly distinguishable from the situation presented here. In Conner, without a warrant or the property owner's permission, the police scaled a fence on the owner's property in order to inspect vehicles that were believed to constitute a nuisance. See Conner v. City of Santa Ana, 897 F.2d 1487, 1489 (9th Cir. 1990). Subsequently, and again without a warrant, city officials broke down the fence surrounding the Conner's property and removed two vehicles from the property. See id. City officials later destroyed those vehicles. See id. In this case, city officials stood in the public right-of-way and made a record of their observations. The conditions observed were in plain sight. There is no fence at the Dutton Property to demark a private area or shield anything from observation. City officials did not enter into the property at any point. The Hearing Examiner concludes that the facts in Conner bear no resemblance to the situation presented here.

Appellant assumes that city officials walked onto his land to complete their inspections. From that premise, Appellant draws an analogy to Conner, noting that in that case "officials entered onto the curtilage of a property (and not onto the property itself) in order to inspect a potential nuisance in the form of broken-down automobiles on a person's lawn." See Memorandum of Law, p. 2 (emphasis added). The implication of Appellant's argument is that the city violated the Fourth Amendment, even though there was no entry into Appellant's house, because the city trespassed into the "curtilage" of the property, an area which is also protected under the Fourth Amendment. However, there is no evidence that city officials ever crossed the line between the public right-of-way and Appellant's real estate. Thus, the Appellant did not establish that there was, in fact, an entry into the curtilage of his property.

Even if, hypothetically, city officials stood a foot or two into Appellant's land, it is far from clear that this would be considered a Fourth Amendment violation.

The presence of an officer within the curtilage of a residence does not automatically amount to an unconstitutional invasion of privacy. Rather, it must be determined under the facts of each case just how private the particular observation point actually was. It is clear that police with legitimate business may enter areas of the curtilage which are impliedly open, such as access routes to the house. In so doing, they are free to keep their eyes open. ...An officer is permitted to the same license to intrude as a reasonably respectful citizen. ...However, a substantial and unreasonable departure from such an area, or a particularly intrusive method of viewing, will exceed the scope of the implied invitation and intrude upon a constitutionally protected expectation of privacy.

State v. Seagull, 95 Wn.2d 898, 902-3, 632 P.2d 44 (1981); see also Conner v. City of Santa Ana, 897 F.2d 1487, 1489 (9th Cir. 1990) (defining "curtilage" to include "...areas which harbor intimate activities of domestic life, usually to include fenced-in areas of property."). There was no evidence that city officials entered the curtilage of the Dutton Property. Even if the city officials inadvertently were standing in a part of the yard of the Dutton Property, a fact which is

have been granted the power to “declare what shall be a nuisance, and to abate the same, and to impose fines upon parties who may create, continue, or suffer nuisances to exist...” See RCW 35.22.280(30).

In addition, State statute specifically authorizes the city to enact an ordinance setting forth the administrative process to address substandard buildings and structures. See RCW 35.80.010 et seq. The statute describes the initiation of the administrative process; the scheduling of hearing before the appropriate city official; the issuance of the officer’s order to take corrective action; and the filing of appeals, among other matters. See RCW 35.80.030. As authorized by this statute², the City of Spokane adopted its substandard building ordinance, entitled the “Existing Building and Conservation Code.” See SMC 17F.070.010 et seq.

3.2 The Hearing Examiner and the Building Official have express authority to conduct quasi-judicial hearings pursuant to the substandard building ordinance.

The substandard building ordinance establishes the Building Official’s authority to respond to a claim that a building or structure is substandard. Initially, a building inspector prepares a written complaint whenever he or she determines that a building is in violation of the substandard building ordinance. See SMC 17F.070.420(A). The complaint includes a notice of a hearing before the director³ of building services, stating a time and place for hearing, and advising that any interested party may file an answer to the complaint and appear and be heard at the hearing. See SMC 17F.070.420(A)(3)-(4). Based upon the complaint, any answer, and the evidence presented at the hearing, the director of building services “...determines whether the building is boarded up, substandard, unfit, abandoned, or otherwise a nuisance...” See SMC 17F.070.440(A)(1). Following the hearing, the director prepares writing findings and an order directing the owner to take corrective action within a specified time period. See SMC 17F.070.440(A)(3).

The ordinance also explicitly sets forth the Hearing Examiner’s role in any appeals of the Building Official’s decisions. Thus, an interested party may appeal the director’s order regarding a boarded-up, substandard, or unfit building to the Hearing Examiner. See SMC 17F.070.460(A)(1); see also SMC 17F.070.480(E)(1) (providing that the Hearing Examiner hears appeals from proceedings and orders of the director). The Hearing Examiner, following a hearing, is authorized to affirm, vacate, or modify the director’s order. See SMC 17F.070.460(B); see also SMC 17G.050.070(B)(2) (stating that the Hearing Examiner has jurisdiction over appeals from decisions of the building official).

3.3 The original jurisdiction of the superior court does not preclude the city from following the administrative process established by the substandard building ordinance.

The Appellant correctly recites that the Washington State constitution confers “original jurisdiction” upon the superior court over “actions to prevent or abate a nuisance.” See Const.

² See SMC 17F.070.010(C)(1).

³ “The director is the building official or a designated employee.” See SMC 17F.070.480(A).

It is well settled that the enactment of **reasonable ordinances of this kind are well within the police power of a municipality. ...**

The appellant may be correct in his contention that an action to abate a nuisance must be brought in the superior court; however, the provisions in question do not purport to authorize the bringing in the justice court of actions to abate conditions which are fire hazards, and therefore nuisances, but **merely set up an administrative procedure under which the existence of dangerous conditions can be ascertained and remedied. ...**

There can be no doubt that the city, in the exercise of its police power, may declare a nuisance, may abate the same without resort to the courts, and may impose fines upon parties who create, continue or suffer nuisances to exist. RCW 35.22.280(31); Davison v. City of Walla Walla, 52 Wash. 453, 100 P. 981, 21 L.R.A., N.S., 454.

See Unsworth, 54 Wn.2d at 763-64 (emphasis added)

The Appellant's challenge to jurisdiction, at its core, implies that the administrative process for the remediation of substandard buildings is extra-constitutional. However, the Appellant fails to cite any authority concluding that Article IV § 6 of the constitution precludes the city from enacting and enforcing its administrative regulations. In reality, the city has broad constitutional and statutory authority, founded on its police power, to regulate and abate nuisance conditions on real property within the city. The result reached in Unsworth confirms that the Washington State constitution does not operate in the manner claimed by the Appellant.

3.4 The administrative process under the substandard building ordinance is not an action concerning title or possession of real property under Article IV § 6.

The Appellant maintains that because the superior court has original jurisdiction over cases that "involve the title or possession of real property," the Building Official and the Hearing Examiner lack subject matter jurisdiction in this matter. The Hearing Examiner disagrees with this argument, for the reasons that follow.

This matter does not concern title or possession of real property. This case does not present a claim for quiet title, unlawful detainer, or some other cause of action that clearly concerns title or possession to real property. The validity of Appellant's title has not been questioned. The Appellant's right to continue to control his property is not in controversy. No question of title or possession has been adjudicated by an administrative decision-maker. The administrative process is not designed or intended to settle controversies over the title to or possession of real estate. Rather, the administrative determination revolves around whether an owner properly cares for his real property, to ensure that no unsafe or unhealthy conditions are allowed to persist.

At oral argument, the Appellant asserted that because the city's fees under the substandard building ordinance were filed as liens, his title to the real property was at issue in the case. The Appellant also claimed that if the lien was enforced, he would lose his property to the city, implicating both his rights to title and possession. The Hearing Examiner does not agree that the existence of a lien transforms the case into one concerning the "title or possession of real property" within the meaning of Article IV § 6.

Based upon the briefing and oral argument, the Hearing Examiner believes⁵ that Appellant's due process claim boils down to three assertions. First, Appellant broadly asserts he was denied some process that he was entitled to, prejudicing his property rights. Second, Appellant asserts that the superior court is the only proper forum to consider any claim that nuisance conditions exist on the Dutton Property, and therefore due process requires that only the superior court may adjudicate the matter. Third, Appellant asserts that the fees imposed by the city exceeded constitutional limits under the due process clause. Each of these assertions will be addressed below.

4.1 The administrative process did not violate the Appellant's right to procedural due process.

Appellant's first two claims are that he was deprived of some process owed to him, and that he has a right to a process other than an administrative adjudication. These assertions suggest that Appellant is making a claim that his *procedural due process* rights have been violated.

Procedural due process requires, in essence, that interested parties be given reasonable notice of a proposed governmental action and an opportunity to be heard. See Motley-Motley, Inc. v. State of Washington, 127 Wn.App. 62, 81, 110 P.3d 812 (2005). Procedural due process is designed to guarantee that the parties receive all the process that is due. This constitutional principle ensures a fair process; it does not guarantee that the parties will agree with the outcome.

The Hearing Examiner rejects Appellant's general allegation that some other or additional process was due to him. The city has followed all the applicable procedures in prosecuting the administrative complaint against him. See e.g. SMC 17F.070.400-510. Appellant has been properly notified of the city's determinations, and has taken advantage of his right to pursue two appeal hearings, one before the Building Official and one before the Hearing Examiner. At no point has the Appellant identified any specific facts demonstrating that he did not receive adequate notice, that he was deprived of an opportunity to be heard, or that the hearings were conducted in a manner that was fundamentally unfair. In fact, the city stipulated to two continuances to allow Appellant additional opportunity to retain and consult with counsel, as well as to better prepare and formulate his arguments. Appellant has not identified any process that was lacking, let alone proven that he was denied the available procedures.

Appellant also asserts, however, that he was entitled to "a specific form of due process"—namely a court adjudication of any nuisance or abatement claims. See Supplemental Brief, pp. 3-4. The Hearing Examiner rejects this claim as a reformulation of his contention that

⁵ The Hearing Examiner has not been able to determine, at least without speculation, precisely how Mr. Dutton's due process rights were implicated in this case. It is not even clear what type of due process claim Mr. Dutton is advancing. There are two distinct types of due process claims: (1) procedural due process; and (2) substantive due process. Each of these concepts applies in different situations. Each claim has its own elements, and separate lines of authority. Except for a very brief reference to Robinson v. Seattle, Mr. Dutton failed to cite to any of the relevant authorities or explain how the facts presented fit within the parameters of either of these two concepts. This fact alone is probably enough to reject Mr. Dutton's due process claims. Even so, the Hearing Examiner endeavored to determine, despite the somewhat cryptic arguments of the Appellant, whether due process concerns are genuinely at issue in this case.

The Appellant overlooks an important caveat to asserting this claim at the administrative level, i.e. the remedy for a substantive due process violation is beyond the Hearing Examiner's jurisdictional authority. The Hearing Examiner can certainly determine whether the procedures set forth in an ordinance were followed, and remand a matter for compliance in appropriate cases. The Hearing Examiner can interpret an ordinance as written, in order to decide whether it applies to a given set of circumstances. What the Hearing Examiner cannot do is waive regulatory requirements, change duly adopted procedures, or to hold that an ordinance cannot be enforced because it is unconstitutional. See e.g. Chaussee v. Snohomish County Council, 38 Wn. App. 630, 638, 689 P.2d 1084 (1984) (holding that a hearing examiner had no jurisdiction to exempt a landowner from the adopted road standards). As a result, the Hearing Examiner must deny this basis for appeal.

5. *The Hearing Examiner declines to consider the Appellant's claim that the administrative process resulted in an unlawful taking of his real property.*

The Hearing Examiner will not consider the Appellant's taking claim for two reasons. First, the Hearing Examiner does not have jurisdiction to grant the applicable remedy when an unlawful taking occurs. Second, the Appellant did not sufficiently explain or brief its takings challenge, and therefore the Hearing Examiner was unable to give the matter proper consideration.

The Hearing Examiner's jurisdiction is limited to the powers delegated to it. See HJS Development, Inc. v. Pierce County, 148 Wn.2d 451, 61 P.3d 1141 (2003). Those powers do not include the discretion to award compensatory damages. See SMC 17G.050.010 et seq. However, compensation is precisely what is given to a property owner who establishes that his property has been taken by government action. See Robinson, 119 Wn.2d at 49 (stating that when a regulation results in a taking, the remedy is just compensation). Because the Hearing Examiner lacks jurisdiction to grant the applicable remedy, the Hearing Examiner cannot consider the Appellant's takings challenge.

Even if some authority to consider the takings claim could be inferred, the Appellant's claim has not been sufficiently presented to consider the issue. The takings jurisprudence sets forth a detailed and complex test for analyzing a takings claim. The Appellant did not address any part of the required analysis. In his Request for Appeal, for example, the Appellant asserted that the city had unlawfully taken his property without due process. He also stated that the fees and assessments imposed by the city constituted a taking. No further written submissions serve to explain the Appellant's position, cite to relevant authorities, or describe how the law supports his takings claims given the facts of this case. The Hearing Examiner declines to consider the matter, given that he can only guess how the Appellant would address the multi-step analysis under takings case law.

It should be acknowledged that the Appellant's counsel did briefly make reference to Robinson v. Seattle, 119 Wn.2d 34, 830 P.2d 318 (1992) in oral argument. That case does set forth the applicable takings analysis. However, the Appellant did not actually apply that takings analysis to the facts presented, or demonstrate, through the example of Robinson, how an unlawful taking occurred. Presumably, based upon the limited oral argument, the Appellant cited to the case for the proposition that excessive government fees may constitute an unlawful taking. While that may be true in some circumstances, the Washington Supreme Court in

IV. DECISION

Based upon the findings and conclusions above, as well as the fact that the Director's decision is presumptively correct, the Hearing Examiner finds that the Building Official's decision was correct and therefore should stand.

DATED this 30th day of October 2013.



Brian T. McGinn
City of Spokane Hearing Examiner

NOTICE OF RIGHT TO APPEAL

Appeals of decisions by the Hearing Examiner are governed by Spokane Municipal Code 17G.060.210 and 17G.050.

Decisions by the Hearing Examiner regarding administrative appeals are final. They may be appealed by any party of record by filing a Land Use Petition with the Superior Court of Spokane County. **THE LAND USE PETITION MUST BE FILED AND THE CITY OF SPOKANE MUST BE SERVED WITHIN TWENTY-ONE (21) CALENDAR DAYS OF THE DATE OF THE DECISION SET OUT ABOVE.** The date of the decision is the 30th day of October 2013. **THE DATE OF THE LAST DAY TO APPEAL IS THE 20th DAY OF NOVEMBER 2013.**

In addition to paying any Court costs to appeal the decision, you may be required to pay a transcript fee to the City of Spokane to cover the costs of preparing a verbatim transcript and otherwise preparing a full record for the Court.

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CITY CLERK'S OFFICE
SPOKANE, WA

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HEARING EXAMINER

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

BLAYNE L. DUTTON)	
Appellant/Petitioner)	No. 13-2-04741-6
)	AMENDED
vs.)	LAND USE PETITION/ APPEAL OF BUILDING OFFICIAL PURSUANT TO SMC
)	
CITY OF SPOKANE)	
Respondent)	

COMES NOW the Appellants, BLAYNE L. DUTTON, by and through his attorney, Douglas D. Phelps of Phelps & Associates, P.S., and seeks Judicial Review of the Findings, Conclusions, and Decision entered by Brian T. McGinn, City of Spokane Hearing Examiner, on October 30, 2013 (Exhibit A) pursuant to RCW 36.70C and SMC.

Appellants mailing address is 7918 E. Utah, Spokane, WA 99212.

Appellant is represented by Douglas D. Phelps, Attorney at Law, 2903 N. Stout Road, Spokane, WA 99206.

The respondent is the City of Spokane, Office of Neighborhood Service and Code Enforcement, 808 W. Spokane Falls Boulevard, Spokane, WA 99201.

IDENTITY OF THE PARTIES TO THE PETITION/APPEAL

1. City of Spokane
808 W. Spokane Falls Boulevard
Spokane, WA 99201

Land Use Petition/
Appeal of Building Official
Pursuant to SMC

000024

PHELPS & ASSOCIATES, PS
Attorneys at Law
2903 N. Stout Rd.
Spokane, WA 99206-4373
Email: phelps@phelpslaw1.com

1 Superior Court has original jurisdiction in actions based upon nuisance, Article IV § 6
2 of the Washington State Constitution.

3 Mr. Dutton seeks review of all factual and legal conclusions as designated by
4 Building Official Dan Skindzier and then all decisions of City Hearing Examiner Brian
5 T. McGinn found in decision of October 30, 2013. Appellant reserves appeal on other
6 issues as will be designated upon receipt of the record of the hearings conducted
7 administratively leading to the decision of October 30, 2010. (Exhibit A)
8

9 Further, appellant challenges the authority of the City of Spokane to file liens
10 against his property without first filing an action before the Superior Court of the State
11 of Washington. Mr. Dutton challenges the reasonableness of the fees assessed by the
12 City of Spokane against the petitioner/appellant and his property without proper
13 authority of law. Mr. Dutton maintains that the action herein is an unlawful taking of
14 real property without adequate and proper due process of law required under both U.S.
15 and Washington State Constitutions. Appellant reserves the right to appeal such other
16 issues that are identified upon review of the record.
17
18

19 The appellant seeks the following remedies:
20

- 21 1. Dismissal of the action against the petitioner Blayne Dutton and his
22 property;
- 23 2. Attorney's fees and costs incurred in pursuing this action;
- 24 3. Removal of all fees and charges ordered against Mr. Dutton and his
25 property at 1914 E. 11th Avenue, Spokane, WA. Tax Parcel No.
26

27 Land Use Petition/
28 Appeal of Building Official
Pursuant to SMC

000026

PHELPS & ASSOCIATES, PS
Attorneys at Law
2903 N. Stout Rd.
Spokane, WA 99206-4373
Email: phelps@phelpslaw1.com

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Exhibit A
Findings, Conclusions, and Decision
October 30, 2013

000028

PHELPS & ASSOCIATES, PS
Attorneys at Law
2903 N. Stout Rd.
Spokane, WA 99206-4373
Email: phelps@phelpslaw1.com

Testimony:

Timothy E. Szambelan
Assistant City Attorney
City of Spokane City Attorney's Office
808 West Spokane Falls Boulevard
Spokane, WA 99201

Boris Borisov
Neighborhood and Housing Specialist
Code Enforcement
808 West Spokane Falls Boulevard
Spokane, WA 99201

Dan Skindzier
Deputy Building Official and Inspector
Supervisor
Building Department
808 West Spokane Falls Boulevard
Spokane, WA 99201

Heather Trautman
Director of Neighborhood Services and
Code Enforcement
City of Spokane Office of
Neighborhood Services
808 West Spokane Falls Boulevard
Spokane, WA 99201

Douglas Phelps
Attorney at Law
Phelps and Associates, P.S.
2903 North Stout Road
Spokane Valley, WA 99206

Blayne Dutton
7918 E. Utah
Spokane Valley, WA 99212

Exhibits:

1. Request for Appeal
 - 1A Order of Building Official dated 06-18-13
2. Email dated 07-16-13 to parties of record acknowledging receipt of appeal and suggesting hearing dates
3. Letter dated 07-24-13 to Blayne Dutton setting the hearing date
4. Appellant's Memorandum of Law received on 08-08-13
5. City's Response brief received on 08-15-13 including:
 - 5A Declaration of Dan Skindzier
 - 5B Declaration of Boris Borisov
 - 5C Response to Appeal of Building Official Order
 - 5D 1914 E. 11th Timeline
 - 5E 4 photos of structure located at 1914 E. 11th Ave taken by Dan Skindzier on 04-10-13
 - 5F 10 photos of structures located at 1914 E. 11th Ave taken by Boris Borisov on 03-08-13
 - 5G 6 photos of structures located at 1914 E. 11th Ave taken by Boris Borisov on 06-03-13
6. Letter dated 08-21-13 to Douglas Phelps setting the continued hearing date
7. Appellant's Supplemental brief received on 10-07-13
8. City's Supplemental response brief received on 10-16-13

complaint, staff from Code Enforcement and the Building Department investigated the matter. See id.

Code Enforcement conducted a site visit on March 8, 2013. See Exhibit 5C. (Response to Appeal). At that time, Mr. Boris Borisov made a visual inspection of the Dutton Property, and took photographs to memorialize the condition of the property. See Exhibit 5B (Declaration of B. Borisov ¶ 3). The photographs taken by Mr. Borisov are part of the record. See Exhibit 5F. Mr. Borisov made his observations and took the photographs while standing in the public right-of-way. See id. Mr. Borisov did not enter into the Dutton Property in order to conduct his inspection or gather evidence. *Testimony of B. Borisov.*

On April 10, 2013, the Building Department conducted a site visit at the Dutton Property. See Exhibit 5C (Response to Appeal). Mr. Dan Skindzier, Deputy Building Official, did a visual inspection of the property at that time. See Exhibit 5A (Declaration of D. Skindzier ¶ 3). Mr. Skindzier took photographs of the building, which are part of the record. See Exhibit 5E. All observations of the Dutton Property were made from the public right of way, and the conditions observed were in plain view. See Exhibit 5A (Declaration of D. Skindzier ¶ 3); *Testimony of D. Skindzier*. Mr. Skindzier did not enter into the Dutton Property to inspect the property or gather evidence. *Testimony of D. Skindzier.*

On or about April 15, 2013, the city sent a certified letter to Mr. Dutton, advising him that a complaint was received and specifying the substandard conditions that the city believed existed at the Dutton Property. See Exhibit 5D. Through that same letter, the city scheduled a hearing to provide Mr. Dutton with the opportunity to address the alleged conditions of this property. See id. The letter was also posted at the property. See Exhibit 5D (Timeline).

On April 24, 2013, Code Enforcement received a copy of the certified mail receipt, signed by Mr. Dutton, for the certified letter sent on April 15, 2013. See Exhibit 5D (Timeline).

The hearing before the Building Official was originally scheduled for May 14, 2013. See Exhibit 1 (Order of Building Official, p. 2). However, Mr. Dutton requested and was granted a continuance. See id. As a result, the hearing did not take place until June 2013. See id.

On June 3, 2013, Code Enforcement conducted another site visit of the Dutton Property, in preparation for the hearing scheduled for the next day. See Exhibit 5D (Timeline). Mr. Boris Borisov again visually inspected the premises and took photographs. See Exhibit 5B (Declaration of B. Borisov ¶ 3). The observations were made and the photographs were taken while Mr. Borisov was standing in the public right-of-way. See id. The photographs taken on June 3, 2013 are part of the record of this appeal. See Exhibit 5G. Mr. Borisov did not enter into the Dutton Property in order to conduct the inspection or gather evidence. *Testimony of B. Borisov.*

On or about June 4, 2013, a hearing was conducted by Mr. Dan Skindzier, Deputy Building Official, regarding the complaint of substandard conditions at the Dutton Property. See Exhibit 1A (Order of Building Official). The purpose of the hearing was to determine whether the building on the Dutton Property was substandard within the meaning of SMC 17F.070.400. See id.

At the hearing, Mr. Dutton was represented by Douglas Phelps, Attorney at Law, of Phelps & Associates, P.S. See id. Both the city and Mr. Dutton presented evidence on the matter. See id. Mr. Dutton, through his counsel, also had the opportunity to cross examine witnesses. See id.

On August 15, 2013, the City of Spokane submitted the following materials in response to the appeal: (1) Response Brief; (2) Declaration of Dan Skindzier; (3) Declaration of Boris Borisov; (4) Photographs taken by Mr. Skindzier and Mr. Borisov; (5) Response to Appeal of Building Official; and (6) a timeline of events through the date of appeal. See Exhibits 5 – 5F. In the Response Brief, the city addressed two issues. First, the city denied any violation of the Fourth Amendment. See Exhibit 5. Second, the city contended that Mr. Dutton received all the process he was due. See id. There was no discussion of the takings issue referenced in Mr. Dutton's Request for Appeal. See id.

On August 20, 2013, the parties assembled for the scheduled hearing. However, at the commencement of the proceeding, Mr. Dutton requested a continuance based upon the unavailability of his attorney, Mr. Phelps. Another attorney from Mr. Phelps' office was present and willing to proceed, but this was not satisfactory to Mr. Dutton. The city stipulated to a continuance of the matter to allow Mr. Dutton to arrange to have Mr. Phelps present at the hearing. As a result, the Hearing Examiner rescheduled the hearing for September 24, 2013. See Exhibit 6.

On September 24, 2013, the continued hearing on Mr. Dutton's appeal was conducted. At the hearing, the parties were permitted to present argument, submit evidence, and examine witnesses. Mr. Dutton was represented at the hearing by Mr. Phelps, and the city was represented by Timothy Szambelan, Assistant City Attorney.

During the hearing, Mr. Phelps raised an argument that was not included in the briefing of the parties or previously raised in Mr. Dutton's appeal. Specifically, Mr. Phelps argued that, under the Washington State Constitution, the superior court had original jurisdiction to hear any action to abate a nuisance or involving title or possession to real property, and therefore the administrative process to declare a building substandard, impose fines, and file or enforce liens, was outside of the city's authority. At the conclusion of the hearing, the Hearing Examiner held the record open for a specified period of time to allow the submission briefing from the parties on this jurisdictional question.

On October 7, 2013, Mr. Dutton submitted a Supplemental Brief Regarding Jurisdiction Constitution Violations. See Exhibit 7.

On October 16, 2013, the city filed its Supplemental Response Brief on the jurisdictional questions raised by Mr. Dutton. See Exhibit 8.

D. Discussion of Facts and Law

The Appellant claims that the Building Official's decision was erroneous for numerous reasons. The primary issues raised in this appeal are best considered under the following categories: (1) Fourth Amendment; (2) subject matter jurisdiction; (3) due process; and (4) takings. These, and some other matters raised, are discussed in detail below.

1. *The City of Spokane did not violate Mr. Dutton's Fourth Amendment rights when it investigated the condition of the Dutton Property.*

Appellant argues that the inspection of his property by Code Enforcement was performed in violation of his Fourth Amendment rights. See Memorandum of Law, p. 2. In support of this argument, Appellant asserts that government officials illegally entered onto his

observations. Moreover, the city officials only gathered evidence of conditions that were in open view. It is difficult to conceive of a condition that is more open to public view than the exterior condition of a residential structure. The Hearing Examiner concludes that no warrant was necessary for city officials to visually inspect and photograph the roof, siding, porch, and other openly visible portions of the Dutton Property. Under the open view doctrine, no warrant was required for such activity and no Fourth Amendment violation could arise.

Third, the Hearing Examiner disagrees with Appellant's assertion that Conner v. City of Santa Anna supports his Fourth Amendment claim. As the city notes, the facts in Conner are clearly distinguishable from the situation presented here. In Conner, without a warrant or the property owner's permission, the police scaled a fence on the owner's property in order to inspect vehicles that were believed to constitute a nuisance. See Conner v. City of Santa Anna, 897 F.2d 1487, 1489 (9th Cir. 1990). Subsequently, and again without a warrant, city officials broke down the fence surrounding the Conner's property and removed two vehicles from the property. See *id.* City officials later destroyed those vehicles. See *id.* In this case, city officials stood in the public right-of-way and made a record of their observations. The conditions observed were in plain sight. There is no fence at the Dutton Property to demark a private area or shield anything from observation. City officials did not enter into the property at any point. The Hearing Examiner concludes that the facts in Conner bear no resemblance to the situation presented here.

Appellant assumes that city officials walked onto his land to complete their inspections. From that premise, Appellant draws an analogy to Conner, noting that in that case "officials entered onto the curtilage of a property (and not onto the property itself) in order to inspect a potential nuisance in the form of broken-down automobiles on a person's lawn." See Memorandum of Law, p. 2 (emphasis added). The implication of Appellant's argument is that the city violated the Fourth Amendment, even though there was no entry into Appellant's house, because the city trespassed into the "curtilage" of the property, an area which is also protected under the Fourth Amendment. However, there is no evidence that city officials ever crossed the line between the public right-of-way and Appellant's real estate. Thus, the Appellant did not establish that there was, in fact, an entry into the curtilage of his property.

Even if, hypothetically, city officials stood a foot or two into Appellant's land, it is far from clear that this would be considered a Fourth Amendment violation.

The presence of an officer within the curtilage of a residence does not automatically amount to an unconstitutional invasion of privacy. Rather, it must be determined under the facts of each case just how private the particular observation point actually was. It is clear that police with legitimate business may enter areas of the curtilage which are impliedly open, such as access routes to the house. In so doing, they are free to keep their eyes open. ...An officer is permitted to the same license to intrude as a reasonably respectful citizen. ...However, a substantial and unreasonable departure from such an area, or a particularly intrusive method of viewing, will exceed the scope of the implied invitation and intrude upon a constitutionally protected expectation of privacy.

State v. Seagull, 95 Wn.2d 898, 902-3, 632 P.2d 44 (1981); see also Conner v. City of Santa Anna, 897 F.2d 1487, 1489 (9th Cir. 1990) (defining "curtilage" to include "...areas which harbor intimate activities of domestic life, usually to include fenced-in areas of property."). There was no evidence that city officials entered the curtilage of the Dutton Property. Even if the city officials inadvertently were standing in a part of the yard of the Dutton Property, a fact which is

have been granted the power to "declare what shall be a nuisance, and to abate the same, and to impose fines upon parties who may create, continue, or suffer nuisances to exist..." See RCW 35.22.280(30).

In addition, State statute specifically authorizes the city to enact an ordinance setting forth the administrative process to address substandard buildings and structures. See RCW 35.80.010 et seq. The statute describes the initiation of the administrative process; the scheduling of hearing before the appropriate city official; the issuance of the officer's order to take corrective action; and the filing of appeals, among other matters. See RCW 35.80.030. As authorized by this statute², the City of Spokane adopted its substandard building ordinance, entitled the "Existing Building and Conservation Code." See SMC 17F.070.010 et seq.

3.2 The Hearing Examiner and the Building Official have express authority to conduct quasi-judicial hearings pursuant to the substandard building ordinance.

The substandard building ordinance establishes the Building Official's authority to respond to a claim that a building or structure is substandard. Initially, a building inspector prepares a written complaint whenever he or she determines that a building is in violation of the substandard building ordinance. See SMC 17F.070.420(A). The complaint includes a notice of a hearing before the director³ of building services, stating a time and place for hearing, and advising that any interested party may file an answer to the complaint and appear and be heard at the hearing. See SMC 17F.070.420(A)(3)-(4). Based upon the complaint, any answer, and the evidence presented at the hearing, the director of building services "...determines whether the building is boarded up, substandard, unfit, abandoned, or otherwise a nuisance..." See SMC 17F.070.440(A)(1). Following the hearing, the director prepares writing findings and an order directing the owner to take corrective action within a specified time period. See SMC 17F.070.440(A)(3).

The ordinance also explicitly sets forth the Hearing Examiner's role in any appeals of the Building Official's decisions. Thus, an interested party may appeal the director's order regarding a boarded-up, substandard, or unfit building to the Hearing Examiner. See SMC 17F.070.460(A)(1); see also SMC 17F.070.480(E)(1) (providing that the Hearing Examiner hears appeals from proceedings and orders of the director). The Hearing Examiner, following a hearing, is authorized to affirm, vacate, or modify the director's order. See SMC 17F.070.460(B); see also SMC 17G.050.070(B)(2) (stating that the Hearing Examiner has jurisdiction over appeals from decisions of the building official).

3.3 The original jurisdiction of the superior court does not preclude the city from following the administrative process established by the substandard building ordinance.

The Appellant correctly recites that the Washington State constitution confers "original jurisdiction" upon the superior court over "actions to prevent or abate a nuisance." See Const.

² See SMC 17F.070.010(C)(1).

³ "The director is the building official or a designated employee." See SMC 17F.070.480(A).

It is well settled that the enactment of reasonable ordinances of this kind are well within the police power of a municipality. ...

The appellant may be correct in his contention that an action to abate a nuisance must be brought in the superior court; however, the provisions in question do not purport to authorize the bringing in the justice court of actions to abate conditions which are fire hazards, and therefore nuisances, but merely set up an administrative procedure under which the existence of dangerous conditions can be ascertained and remedied. ...

There can be no doubt that the city, in the exercise of its police power, may declare a nuisance, may abate the same without resort to the courts, and may impose fines upon parties who create, continue or suffer nuisances to exist. RCW 35.22.280(31); *Davison v. City of Walla Walla*, 52 Wash. 453, 100 P. 981, 21 L.R.A., N.S., 454.

See Unsworth, 54 Wn.2d at 763-64 (emphasis added)

The Appellant's challenge to jurisdiction, at its core, implies that the administrative process for the remediation of substandard buildings is extra-constitutional. However, the Appellant fails to cite any authority concluding that Article IV § 6 of the constitution precludes the city from enacting and enforcing its administrative regulations. In reality, the city has broad constitutional and statutory authority, founded on its police power, to regulate and abate nuisance conditions on real property within the city. The result reached in Unsworth confirms that the Washington State constitution does not operate in the manner claimed by the Appellant.

3.4 The administrative process under the substandard building ordinance is not an action concerning title or possession of real property under Article IV § 6.

The Appellant maintains that because the superior court has original jurisdiction over cases that "involve the title or possession of real property," the Building Official and the Hearing Examiner lack subject matter jurisdiction in this matter. The Hearing Examiner disagrees with this argument, for the reasons that follow.

This matter does not concern title or possession of real property. This case does not present a claim for quiet title, unlawful detainer, or some other cause of action that clearly concerns title or possession to real property. The validity of Appellant's title has not been questioned. The Appellant's right to continue to control his property is not in controversy. No question of title or possession has been adjudicated by an administrative decision-maker. The administrative process is not designed or intended to settle controversies over the title to or possession of real estate. Rather, the administrative determination revolves around whether an owner properly cares for his real property, to ensure that no unsafe or unhealthy conditions are allowed to persist.

At oral argument, the Appellant asserted that because the city's fees under the substandard building ordinance were filed as liens, his title to the real property was at issue in the case. The Appellant also claimed that if the lien was enforced, he would lose his property to the city, implicating both his rights to title and possession. The Hearing Examiner does not agree that the existence of a lien transforms the case into one concerning the "title or possession of real property" within the meaning of Article IV § 6.

Based upon the briefing and oral argument, the Hearing Examiner believes⁵ that Appellant's due process claim boils down to three assertions. First, Appellant broadly asserts he was denied some process that he was entitled to, prejudicing his property rights. Second, Appellant asserts that the superior court is the only proper forum to consider any claim that nuisance conditions exist on the Dutton Property, and therefore due process requires that only the superior court may adjudicate the matter. Third, Appellant asserts that the fees imposed by the city exceeded constitutional limits under the due process clause. Each of these assertions will be addressed below.

4.1 The administrative process did not violate the Appellant's right to procedural due process.

Appellant's first two claims are that he was deprived of some process owed to him, and that he has a right to a process other than an administrative adjudication. These assertions suggest that Appellant is making a claim that his *procedural due process* rights have been violated.

Procedural due process requires, in essence, that interested parties be given reasonable notice of a proposed governmental action and an opportunity to be heard. See Motley-Motley, Inc. v. State of Washington, 127 Wn.App. 62, 81, 110 P.3d 812 (2005). Procedural due process is designed to guarantee that the parties receive all the process that is due. This constitutional principle ensures a fair process; it does not guarantee that the parties will agree with the outcome.

The Hearing Examiner rejects Appellant's general allegation that some other or additional process was due to him. The city has followed all the applicable procedures in prosecuting the administrative complaint against him. See e.g. SMC 17F.070.400-510. Appellant has been properly notified of the city's determinations, and has taken advantage of his right to pursue two appeal hearings, one before the Building Official and one before the Hearing Examiner. At no point has the Appellant identified any specific facts demonstrating that he did not receive adequate notice, that he was deprived of an opportunity to be heard, or that the hearings were conducted in a manner that was fundamentally unfair. In fact, the city stipulated to two continuances to allow Appellant additional opportunity to retain and consult with counsel, as well as to better prepare and formulate his arguments. Appellant has not identified any process that was lacking, let alone proven that he was denied the available procedures.

Appellant also asserts, however, that he was entitled to "a specific form of due process"—namely a court adjudication of any nuisance or abatement claims. See Supplemental Brief, pp. 3-4. The Hearing Examiner rejects this claim as a reformulation of his contention that

⁵ The Hearing Examiner has not been able to determine, at least without speculation, precisely how Mr. Dutton's due process rights were implicated in this case. It is not even clear what type of due process claim Mr. Dutton is advancing. There are two distinct types of due process claims: (1) procedural due process; and (2) substantive due process. Each of these concepts applies in different situations. Each claim has its own elements, and separate lines of authority. Except for a very brief reference to Robinson v. Seattle, Mr. Dutton failed to cite to any of the relevant authorities or explain how the facts presented fit within the parameters of either of these two concepts. This fact alone is probably enough to reject Mr. Dutton's due process claims. Even so, the Hearing Examiner endeavored to determine, despite the somewhat cryptic arguments of the Appellant, whether due process concerns are genuinely at issue in this case.

The Appellant overlooks an important caveat to asserting this claim at the administrative level, i.e. the remedy for a substantive due process violation is beyond the Hearing Examiner's jurisdictional authority. The Hearing Examiner can certainly determine whether the procedures set forth in an ordinance were followed, and remand a matter for compliance in appropriate cases. The Hearing Examiner can interpret an ordinance as written, in order to decide whether it applies to a given set of circumstances. What the Hearing Examiner cannot do is waive regulatory requirements, change duly adopted procedures, or to hold that an ordinance cannot be enforced because it is unconstitutional. See e.g. Chaussee v. Snohomish County Council, 38 Wn. App. 630, 638, 689 P.2d 1084 (1984) (holding that a hearing examiner had no jurisdiction to exempt a landowner from the adopted road standards). As a result, the Hearing Examiner must deny this basis for appeal.

5. *The Hearing Examiner declines to consider the Appellant's claim that the administrative process resulted in an unlawful taking of his real property.*

The Hearing Examiner will not consider the Appellant's taking claim for two reasons. First, the Hearing Examiner does not have jurisdiction to grant the applicable remedy when an unlawful taking occurs. Second, the Appellant did not sufficiently explain or brief its takings challenge, and therefore the Hearing Examiner was unable to give the matter proper consideration.

The Hearing Examiner's jurisdiction is limited to the powers delegated to it. See HJS Development, Inc. v. Pierce County, 148 Wn.2d 451, 61 P.3d 1141 (2003). Those powers do not include the discretion to award compensatory damages. See SMC 17G.050.010 et seq. However, compensation is precisely what is given to a property owner who establishes that his property has been taken by government action. See Robinson, 119 Wn.2d at 49 (stating that when a regulation results in a taking, the remedy is just compensation). Because the Hearing Examiner lacks jurisdiction to grant the applicable remedy, the Hearing Examiner cannot consider the Appellant's takings challenge.

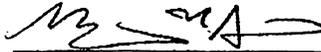
Even if some authority to consider the takings claim could be inferred, the Appellant's claim has not been sufficiently presented to consider the issue. The takings jurisprudence sets forth a detailed and complex test for analyzing a takings claim. The Appellant did not address any part of the required analysis. In his Request for Appeal, for example, the Appellant asserted that the city had unlawfully taken his property without due process. He also stated that the fees and assessments imposed by the city constituted a taking. No further written submissions serve to explain the Appellant's position, cite to relevant authorities, or describe how the law supports his takings claims given the facts of this case. The Hearing Examiner declines to consider the matter, given that he can only guess how the Appellant would address the multi-step analysis under takings case law.

It should be acknowledged that the Appellant's counsel did briefly make reference to Robinson v. Seattle, 119 Wn.2d 34, 830 P.2d 318 (1992) in oral argument. That case does set forth the applicable takings analysis. However, the Appellant did not actually apply that takings analysis to the facts presented, or demonstrate, through the example of Robinson, how an unlawful taking occurred. Presumably, based upon the limited oral argument, the Appellant cited to the case for the proposition that excessive government fees may constitute an unlawful taking. While that may be true in some circumstances, the Washington Supreme Court in

IV. DECISION

Based upon the findings and conclusions above, as well as the fact that the Director's decision is presumptively correct, the Hearing Examiner finds that the Building Official's decision was correct and therefore should stand.

DATED this 30th day of October 2013.



Brian T. McGinn
City of Spokane Hearing Examiner

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CITY OF SPOKANE HEARING EXAMINER

Re: Appeal by Blayne Dutton, Inc. of an) FINDINGS, CONCLUSIONS, AND
Order of the Building Official) DECISION
determining that 1914 E. 11th Avenue)
is a substandard building) FILE NO. AP-13-02

I. SUMMARY OF APPEAL AND DECISION

Summary of Appeal: Blayne Dutton has filed an appeal of a decision by the Building Official concluding that Mr. Dutton's property, located at 1914 E. 11th Avenue, Spokane, Washington, and designated as Tax Parcel No. 35213.1310, is substandard pursuant to SMC 17F.070.400.

Decision: The decision of the Building Official is upheld.

**II. FINDINGS OF FACT
BACKGROUND INFORMATION**

Appellant: Blayne Dutton
7918 E. Utah
Spokane Valley, WA 99212

Represented by: Douglas Phelps, Attorney at Law
Phelps and Associates, P.S.
2903 North Stout Road
Spokane Valley, WA 99206

Respondent: City of Spokane, Office of Neighborhood Services and Code Enforcement
c/o Dan Skindzier, Deputy Building Official
808 West Spokane Falls Boulevard
Spokane, WA 99201

Represented by: Timothy E. Szambelan, Assistant City Attorney
City of Spokane City Attorney's Office
808 West Spokane Falls Boulevard
Spokane, WA 99201

Authorizing Ordinances: SMC 17G.050.010 et seq.; SMC 17F.070.010 et seq.

Date of Decision being Appealed: June 18, 2013

Date of Appeal: July 11, 2013

Hearing Date: May 23, 2013

III. FINDINGS AND CONCLUSIONS

A. *Introduction*

The Building Department received a complaint about the dilapidated condition of the residence located at 1914 E. 11th Avenue. The Building Department investigated the complaint and thereafter initiated the administrative process in order to determine whether the property would be declared to be substandard. The city sent notice of the complaint to the property owner, Mr. Blayne Dutton, identifying the complaint, the defective conditions of the residence, and scheduling a public hearing on the matter.

Mr. Dutton contested the complaint. Mr. Dutton and his attorney attended the hearing and presented evidence and testimony in support of Mr. Dutton's case. After the hearing was concluded, the Deputy Building Official issued his decision concluding that the building was substandard pursuant to several of the factors listed in SMC 17F.070.400. The decision provided that Mr. Dutton was entitled to appeal the matter to the City Hearing Examiner. Mr. Dutton did so within the time frame stated in the Building Official's decision.

A hearing was held on the appeal to the Hearing Examiner on September 24, 2013, in the Conference Room 2B, Spokane City Hall. At that time testimony and arguments were presented and exhibits were entered into the record. Mr. Dutton (the "Appellant") was represented by Douglas Phelps, Attorney at Law, Phelps & Associates, P.S.. The City of Spokane was represented by Timothy E. Szambelan, Assistant City Attorney.

Based upon the record, the testimony at the hearing, and the memoranda submitted by the parties, the Hearing Examiner makes the following findings and conclusions and renders this decision.

B. *Standard of Review*

Review of an administrative decision by the Hearing Examiner is governed by SMC 17G.050.320. Subsections B and C of that section state:

B. The Hearing Examiner may affirm, modify, remand or reverse the decision being appealed. In considering the appeal, the Examiner must act in a manner that is consistent with the criteria for the appropriate category of action being appealed.

C. The original decision being appealed is presumptively correct. The burden of persuasion is upon the appellant to show that the original decision was in error and relief sought in the appeal should be granted.

C. *Background Facts*

On February 4, 2013, the city received a complaint regarding the substandard conditions of the building located at 1914 E. 11th Avenue, Spokane, Washington (the "Dutton Property"), owned by Mr. Blayne Dutton. See Exhibit 1A (Order of Building Official, p. 2). In response to the

On or about June 18, 2013, the Building Official issued its decision on the matter, in the form of an "Order of Building Official." See id. The Building Official's order is also posted at the Dutton Property. See Exhibit 5D (Timeline). In the order, the building official determined as follows:

In conclusion the building(s) is found to be substandard as defined by Section 17F.070.400 of the Spokane Municipal Code, due to dilapidation, structural defects, inoperable plumbing, inadequate weather proofing, no activated utility service for one year, and defects increasing the hazards of fire, accident or other calamity as described above. The building(s) is also found to be abandoned as defined by Section 17F.070.030 of the Spokane Municipal Code in that it gives indications no one is presently in possession such as by disconnection of utilities and disrepair.

See Exhibit 1A (Order of Building Official).

The Building Official's order required Mr. Dutton to prepare a "...rehabilitation plan providing a time line, costs, and estimates from professional tradesmen or contractors and indicate your financial ability to carry out the program." See id.

The Building Official's order also assessed fees against Mr. Dutton. First, the Building Official imposed a hearing processing fee of \$1,500, pursuant to SMC 8.02.067. See id. Second, the Building Official imposed a property monitoring fee of \$300.00, pursuant to SMC 17F.070.040. See id. These fees will be imposed annually as long as the substandard conditions exist. See id. In addition, the fees are filed as a lien against subject property. See id.

On June 24, 2013, Code Enforcement received a copy of the certified mail receipt, signed by Mr. Phelps, verifying delivery of the Order of Building Official to the owner's attorney. See Exhibit 5D (Timeline). On June 25, 2013, Code Enforcement received a copy of the certified mail receipt, signed by Mr. Dutton, verifying delivery of the Order of Building Official to the property owner. See Exhibit 5D (Timeline).

On July 11, 2013, Mr. Dutton filed a Request for Appeal or Reconsideration of the Building Official's decision. See Exhibit 1. In the appeal document, Mr. Dutton primarily asserted that the decision violated his constitutional rights. See id. More specifically, he claimed that the decision constituted an unlawful taking of his property without due process. See id. He also contended that the fees and assessments were an unlawful taking of his property, and would eventually result in the City of Spokane acquiring his property. See id. Mr. Dutton noted that he would "also bring other challenges after review of the entire record." See id.

On or about July 24, 2013, the Hearing Examiner's office notified the parties that the hearing on Mr. Dutton's appeal would be heard on August 20, 2013. See Exhibit 3. The notice also provided a schedule for the submission of briefing by the parties. See id.

On August 8, 2013, Mr. Dutton, through his counsel, submitted a Memorandum of Law in support of his appeal. See Exhibit 4. In his memorandum, Mr. Dutton claimed that city officials trespassed upon his property to inspect the same, and that city officials violated Mr. Dutton's Fourth Amendment rights by entering his property without a warrant. See id. Mr. Dutton claimed that the illegally obtained evidence could not be used against him at the hearing. See id. The memorandum submitted by Mr. Dutton did not address the issues raised in the Request for Appeal, i.e. takings and due process. See id.

property to perform the inspections, and presumably did so without a warrant. See Memorandum of Law, p. 1. Appellant also characterized the inspections as a trespass of his property. See Memorandum of Law, p. 3. Although admittedly no warrant was obtained to search the property, the Hearing Examiner concludes that no Fourth Amendment violations occurred during the city's investigation. The Hearing Examiner reaches this conclusion for the following reasons.

First, there was no "search" of Appellant's property within the meaning of the Fourth Amendment. The mere observation of the condition of the Dutton Property does not necessarily constitute a "search" under the Fourth Amendment. See State v. Seagull, 95 Wn.2d 898, 901, 632 P.2d 44 (1981).

As a general proposition, it is fair to say that when a law enforcement officer is able to detect something by utilization of one or more of his senses while lawfully present at the vantage point where those senses are used, that detection does not constitute a "search" within the meaning of the Fourth Amendment.

See id. (emphasis added). In this case, the city officials completed their visual inspections and took photographs of the Dutton Property while standing in public right-of-way. See Exhibit 5A (Declaration of D. Skindzer ¶ 3); see also Exhibit 5B (Declaration of B. Borisov ¶ 3). Upon cross examination, these witnesses confirmed that they did not enter onto Appellant's property at any time. *Testimony of B. Borisov; Testimony of D. Skindzer*. Appellant offered no contrary evidence or testimony regarding these facts. As a result, the Hearing Examiner concludes there was no "search" of Appellant's property that would give rise to a Fourth Amendment claim.

Second, assuming *arguendo* that a "search" occurred, the Hearing Examiner nonetheless concludes that the city was not required to obtain a search warrant. It is generally true, as the city acknowledges, that a warrantless search by a building inspector or other governmental official is *per se* unreasonable under the Fourth Amendment. See Exhibit 5 (Response Brief, p. 3). However, one of the specific exceptions to the warrant requirement is embodied in the "open view doctrine." This doctrine recognizes that a reasonable expectation of privacy does not exist with respect to conditions that are exposed and open for public observation. The Washington Supreme Court explained it this way:

In the "open view" situation, however, the observation takes place from a non-intrusive vantage point. The governmental agent is either on the outside looking outside or on the outside looking inside to that which is knowingly exposed to the public. ... The object under observation is not subject to any reasonable expectation of privacy and the observation is not within the scope of the constitution.

See id., at 902. The open view doctrine clearly applies to this case. The city's inspections consisted of making visual observations and taking photographs.¹ It was undisputed that all of these inspections were done while standing in the public right-of-way. There was no evidence presented that a government official ever set foot onto the Dutton Property. Therefore, there is no question that the city officials were lawfully present at the vantage point when making the

¹ Mr. Dutton did not object, in briefing or at the hearing, that the city's use of a camera with a telephoto lens transgressed any Fourth Amendment restrictions. In any event, the photographs themselves merely magnify the conditions of the Dutton Property that were in open view. There was no evidence that the technology was used to invade an area that was private in nature.

not in evidence, it would still be necessary to engage in the case-by-case determination as to whether that official had intruded into an area that was private and thus constitutionally protected. Here, there is no evidence warranting such an analysis.

2. *The Appellant did not establish either that city officials trespassed onto the Dutton Property, or that he is entitled to a remedy if such trespass occurred.*

The Appellant stated, in oral argument, that the city trespassed upon his land in violation of Article I § 7 of the state constitution. However, there was no entry by city officials into the Dutton Property, according to the only evidence in this record. Without an entry, there can be no finding of trespass. Moreover, Article I § 7 constitutes the state equivalent of the Fourth Amendment. The Appellant's constitutional claim, based upon an allegedly warrantless entry, has been thoroughly considered and rejected above. The Appellant did not properly raise, discuss, or brief any rights that might exist under the state constitution, over and above those protected by the Fourth Amendment. Therefore, there is no independent basis to sustain the appeal by virtue of Article I § 7.

3. *The Hearing Examiner and Building Official have subject matter jurisdiction over this matter.*

The Appellant claims that the Building Official and the Hearing Examiner lack subject matter jurisdiction because only the superior court has original jurisdiction over any action (1) to prevent or abate a nuisance or (2) involving title or possession to real property, given the provisions of Article IV § 6 of the Washington State constitution. The Appellants also suggests that the nuisance statute, RCW 7.48, precludes any administrative proceeding regarding a nuisance or its abatement. The Hearing Examiner disagrees with the Appellant's contentions, concluding that the city's procedures for addressing substandard buildings, as reflected in the substandard building ordinance, are well within its police power. Further, the Hearing Examiner concludes that both the Hearing Examiner and the Building Official have properly exercised jurisdiction over this matter. These conclusions were reached for the following reasons.

- 3.1 *The City of Spokane was authorized, under state statute and the constitution, to adopt an administrative process to address substandard buildings and structures.*

The City has clear legislative and constitutional authority to regulate substandard buildings and structures within its boundaries. This includes the authority to take the necessary steps, at the administrative level, to regulate and remedy nuisance conditions on real property.

The Washington State constitution provides: "Any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws." Const. art. 11, § 11. This provision is a direct delegation of police powers to municipalities in Washington. See Haas v. Kirkland, 78 Wn.2d 929, 932, 481 P.2d 9 (1971) (quoting Detamore v. Hindley, 83 Wash. 322, 326, 145 P. 462 (1915)). Municipal police power is very broad and roughly equal, within municipal boundaries, to those of the state itself. See 1A, Thompson, Washington Practice: Methods of Practice § 60.5, at 720 (1997).

The City of Spokane, as a city of the first class, has explicit authority to regulate and abate nuisances. The state legislature granted cities of the first class the power "to provide for the prevention and abatement of nuisances." See RCW 35.22.280(29). Further, first class cities

art. 4, § 6. Based upon this language, the Appellant concludes that only the superior court has jurisdiction to consider the allegation that there is a substandard residence on the Dutton Property. Stated another way, no administrative tribunal has subject matter jurisdiction over this case. The Hearing Examiner rejects the Appellant's contentions, for the reasons that follow.

The language of Article IV § 6 does not support the Appellant's claim that the Building Official and Hearing Examiner lack subject matter jurisdiction over these proceedings. The superior court's original jurisdiction concerns "actions" and "cases at law." An "action" or a "case at law" in this context means litigation in the court system. The constitutional provisions do not directly concern the resolution of controversies in administrative proceedings. More specifically, there is no language in Article IV § 6 that clearly operates to preclude quasi-judicial proceedings, at an administrative level, regarding matters that are traditionally within the police power of a municipality to regulate.

The city did not commence a nuisance action in any court. Rather, it initiated an administrative process, based upon a duly enacted ordinance. The Hearing Examiner concludes that the superior court does not have jurisdiction over the Building Official's process under the substandard building ordinance. That process is an administrative one, governed by state and local legislative enactments. As the city points out, the superior court's jurisdiction over this matter is appellate⁴ in nature, i.e. it will arise only if the Hearing Examiner's decision is appealed to superior court. See Supplemental Response Brief, p. 4.

The Appellant overlooked what appears to be the most relevant authority on the jurisdictional issue raised in this case. To reiterate, the Appellant's argument in this appeal is that Article IV § 6 of the state constitution vests the superior court with original jurisdiction and therefore neither the Building Official nor the Hearing Examiner have subject matter jurisdiction to conduct quasi-judicial proceedings under the substandard building ordinance. The Appellant's argument, however, fails to account for the Washington Supreme Court's conclusions in City of Everett v. Unsworth, 54 Wn.2d 760, 762, 344 P.2d 728 (1959).

In that case, the City of Everett adopted an ordinance establishing a bureau of fire prevention. See Unsworth, 54 Wn.2d at 762. The ordinance set forth a procedure for the inspection of buildings. See id. If the government officers determined that a building or structure created fire hazards due to age, lack of repair, or dilapidated condition, they were authorized to order that the dangerous conditions or materials be removed or remedied. See id. This ordinance was enacted as authorized by state statute, which provided that cities of the first class were empowered to enact regulations for the "...erection and maintenance of buildings or other structures within its corporate limits as the safety of persons or property may require, and to cause all such buildings and places as may from any cause be in a dangerous state to be put in safe condition." See id.

In Unsworth, a property owner claimed that the municipal court lacked jurisdiction because, under the Washington State constitution, the *superior court* had exclusive jurisdiction to hear a nuisance abatement case. See id. In addressing this challenge, the Washington Supreme Court made a number of statements that are pertinent here, as follows:

⁴ The superior court's original jurisdiction over nuisance actions is not impinged by this result. If a neighbor filed a complaint for nuisance regarding the poor conditions of the Dutton Property, that litigation could be prosecuted simultaneously with any administrative proceeding conducted by the city.

It is true that a lien, when perfected, does affect title to real property. That does not mean, however, that title or possession is the gravamen of a proceeding to declare a structure substandard. It is also true that a lien, if it remains unpaid and is ultimately enforced, the owner could lose his property. However, the lien would be undoubtedly enforced through a lien foreclosure proceeding in superior court. See SMC 17F.070.500(B) (providing that the lien for administrative costs can be collected in the same manner as property taxes). Thus, there would be no jurisdictional objection to consider. In any case, the Building Official's decision merely imposes administrative fees; it does not order a foreclosure sale or otherwise mandate lien enforcement. There is no lien enforcement action or proceeding pending at this time. Therefore, the issue is raised prematurely.

The fact that liens may exist in support of administrative fees does not establish that the administrative process was tantamount to an action concerning title or possession of real property. As a result, the Hearing Examiner concludes subject matter jurisdiction properly lies at the administrative level.

3.5 RCW 7.48 does not preclude the administrative process adopted under the substandard building ordinance.

The Appellant contends that the nuisance statute of Washington precludes the administrative adjudication of a substandard building complaint. See Supplemental Brief, p. 3. This is true, the Appellant asserts, because the nuisance statute sets forth an exclusive "...method for collecting damages and costs in abating a nuisance..." See id. As a result, the Appellant claims that subject matter jurisdiction is lacking. The Hearing Examiner does not agree with these contentions.

The Appellant cites to RCW 7.48.280 for the proposition that the nuisance statute "...does not allow for an administrative action." See Supplemental Brief, p. 3. However, by the Hearing Examiner's review, that statutory provision contains no language that expressly precludes an administrative process such as the one set forth in the substandard building ordinance. See RCW 7.48.280. The statute is describing one method that is available to collect the costs of nuisance abatement. See id. The statute is not promulgating an exclusive means of remediating all conditions that may qualify as a nuisance. Nor does the statute intend to proscribe municipal authority generally or to limit administrative options specifically. If there are any such intentions, it is certainly not apparent from the bare text of the statute. The Appellant does not explain how that text supports its conclusion. The Appellant also fails to draw attention to any case law or other authority to support its expansive interpretation of the statute.

The Hearing Examiner concludes that the terms of the statute do not support Appellant's contentions. The state nuisance statute does not preclude the city from following its established administrative process to address the conditions existing at the Dutton Property. Therefore, the Hearing Examiner rejects the Appellants contention RCW 7.48 deprives the Hearing Examiner or the Building Official of subject matter jurisdiction.

4. The administrative process followed to determine that the Appellant's property was substandard did not violate the Appellant's right to due process.

the Building Official and the Hearing Examiner lack subject matter jurisdiction to consider the administrative complaint. The question of subject matter jurisdiction is a separate matter, and is thoroughly addressed elsewhere in this decision. If subject matter jurisdiction is lacking, the administrative proceedings are a nullity. This would render it unnecessary to reach the constitutional question, at least as presented here. If subject matter jurisdiction exists, then this particular due process claim must fail, because it is dependent upon the assertion that administrative bodies have no authority to adjudicate a “nuisance” claim under the substandard building ordinance.

It should be noted that the Hearing Examiner can only provide limited remedies in response to a procedural due process claim.⁶ If the Appellant had established that he was deprived of some process, the Hearing Examiner could remand the matter for further proceedings and thereby correct the omission. The Hearing Examiner can interpret and apply the ordinance, as written, and determine its applicability to a particular case. However, the Hearing Examiner cannot change or invalidate the administrative process that currently exists. That authority lies with the legislature or the courts.

4.2 The Hearing Examiner lacks jurisdiction to consider the constitutionality of the substandard building ordinance. Therefore, the Hearing Examiner cannot invalidate the ordinance as violating substantive due process.

Appellant’s third due process claim is that the fines imposed upon him were excessive and likely to lead to the city seizing his property in a lien enforcement proceeding. As pertinent to due process concepts, the Appellants appears to be claiming that the fees exceeded constitutional limits and thereby violated his *substantive due process* rights.

There is no question that the city was authorized, under the applicable ordinances, to impose the maintenance and monitoring fees. See SMC 17F.070.440 & 500; see also SMC 08.02.067. The Appellant did not contest the fact that the fees were expressly authorized by ordinance. Instead, the Appellant generally asserted that the fees were unfair, and would likely lead to the seizure of his property when the city’s liens were enforced. Since Appellant is attacking the fundamental fairness of the imposition of administrative costs, his claim apparently raises a challenge under substantive due process.

Substantive due process is focused on whether the exercise of police power has exceeded constitutional limits. In most cases, the test for a violation of substantive due process comes down to whether the subject regulation is “unduly oppressive” on the regulated person. See Robinson v. Seattle, 119 Wn.2d 34, 51, 830 P.2d 318 (1992). Determining whether a regulation is “unduly oppressive” involves the use of a balancing test, applied on a case-by-case basis, which considers nonexclusive factors such as the harm sought to be avoided, the availability and effectiveness of less drastic measures, and the economic loss by the property owner. See Presbytery v. King County, 114 Wn.2d 320, 331, 787 P.2d 907, cert. denied, 498 U.S. 911 (1990). When a regulation violates substantive due process rights, the remedy is invalidation of the regulation. See Robinson, 119 Wn.2d at 54.

⁶ To the extent that Appellant intends to assert that the substandard building ordinance is unenforceable because it violates procedural due process, that claim is outside the Hearing Examiner’s jurisdiction. The Hearing Examiner has no authority to declare an ordinance is unconstitutional.

Robinson rejected the plaintiffs' claim⁷ that Seattle's housing preservation ordinance resulted in an unlawful taking. See Robinson, 119 Wn.2d at 54. Thus, the case does not support the Appellant's claim, at least in its result. Without a more detailed treatment of the issue, it is not clear to the Hearing Examiner how takings law should be applied to this case. Ultimately, the Hearing Examiner concludes that the Appellant did not sufficiently explain its position to allow a reasoned analysis of this difficult area of law.

For the forgoing reasons, the Hearing Examiner declines to consider the Appellant's claim that the city's enforcement of the substandard building ordinance has caused him to suffer an unlawful taking of his real property.

6. *The city's policy against immediately disclosing the identity of the complaining party does not create a defense to a substandard building determination.*

During oral arguments, the Appellant decried the fact that the city refused to disclose the identity of the individual(s) that initially complained about the condition of the Dutton Property. The Appellant suggested that the failure to identify the complainant somehow violated his rights. The Hearing Examiner rejects this contention for the following reasons.

First, the Appellant did not explain how being deprived of the identity of the complaining neighbor prevented him from defending against the complaint. There is no apparent connection between a property owner's responsibility to maintain his property and the identity of a neighbor who complains about the dilapidated conditions. As the city argued, the Appellant did not show that there was any prejudice as a result of the non-disclosure.

Second, the city correctly pointed out that the Appellant could obtain the information, despite the city's policy, by making public records request pursuant to the Public Records Act. See RCW 42.56.010 et seq. Therefore, the identity of the complainant can be obtained in due course, with rather minimal effort. Had the appropriate requests been made, the Appellant would have had the information prior to the hearings in this case, especially given the multiple continuances granted to him.

The Hearing Examiner concludes that the city's nondisclosure policy is irrelevant to this appeal. The identity of a complainant is not germane to the Appellant's defense, and he demonstrated no prejudice arising from the nondisclosure. In any event, the desired information can be obtained with little trouble. The Appellant could have easily addressed his concerns by submitting a records request. As a result, the Appellant's argument is rejected.

⁷ The Court in Robinson did find the Seattle's ordinance to be unduly oppressive and therefore invalid under the substantive due process clause. However, the test under substantive due process is distinct from, and an alternative to, the test under the takings clause. The issue of substantive due process, as applied to this case, is separately addressed in this decision.

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CERTIFICATION OF RECORD

I, Brian McGinn, Hearing Examiner for the City of Spokane, do hereby certify that this is an accurate transcript and record of the matter identified below.

Hearing held on September 24, 2013

**Appeal of the Building Official's Order by Blayne Dutton
for property located at 1914 E. 11th Avenue, Spokane, WA**

Hearing Examiner File No. AP-13-02

DATED this 7th day of January 2014.



Brian T. McGinn
City of Spokane Hearing Examiner

Verbatim transcript of testimony given at hearings held on September 24, 2013

Appeal of the Building Official Decision by Blayne Dutton

Hearing Examiner File No. AP-13-02

McGinn: Good morning everyone. I'm Brian McGinn, the City's Hearing Examiner. My assistant is Lee Ann Reid.

For the record, today is September 24th, 2013. It's about 9:00 a.m. We are located in the Conference Room 2B on the second floor of City Hall. This matter was continued from its original set of August 20th at the request of the Appellant.

The item scheduled to be heard at this time is an appeal of the Building Official Decision declaring structures located at 1914 East 11th Avenue in the City of Spokane, Washington to be substandard and abandoned. The Hearing Examiner File Number is AP-13-02. The appeal was filed by Blayne Dutton with the property owners being represented by Douglas Phelps, Attorney at Law. Respondent is the City of Spokane represented by Timothy Szambelan, Assistant City Attorney, Heather Trautman, Code Enforcement Supervisor, Boris Borisov, Neighborhood and Housing Specialist, and Dan Skindzier, Deputy Building Official. All those folks are here. Okay.

The process we will follow today will be as follows. The Appellant will go first, followed by the Respondents. Rebuttals will be allowed with the Appellant having the last word. This is an open-record hearing, however this is an appeal hearing and as such no public testimony will be taken. The parties may call expert witnesses if they so desire.

I did conduct a site visit before the original schedule. My site visit was on August 19th, and I did have an opportunity to drive around the whole block, with a view from the street the front of the residence, as well as I drove the entire alley, I guess, going west to east so that I could see the premises from the driver's side. So I did have a chance to do that. I haven't been back since then however.

I've reviewed the record and the briefs submitted by the parties, and they're already a part of the record. My decisions are in writing so they're not made at this hearing. Under the Ordinance I have ten days to get them completed. My decisions on this administrative appeal is final unless it's appealed to Superior Court under Municipal Code 17F.010.090(b)(2). You have 21 days from the issuance of my decision to seek relief in the Superior Court.

When testifying for the first time, please state your name and address for the record. And thereafter just state your name. And just take note that the microphones are Omni directional and pretty sensitive, so that if you have sidebar conversations they're likely to be picked up by the microphone.

So that's the process. I assume there aren't any questions at this point? No? All right. Then let's proceed with the Appellant's case. Mr. Phelps?

They had a hearing. Mr. Dutton was able to attend and provide his testimony. And I believe Mr. Phelps was there to assist Mr. Dutton in his hearing before the Building Official. And, further, I believe there was no rehabilitation plan submitted to the Building Official on what Mr. Dutton was going to do with the building to address those substandard conditions that were found in the determination that was made by the Building Official finding it substandard under essentially 17.070.400.

There's sufficient evidence in the record below and by – there will be probably more testimony today that all evidence was obtained in plain view from the public right-of-way, and the Appellant's argument on trespass there is no evidence by any trespass by any City official on this place.

And I'll address the other issues when it's the City's turn.

McGinn: Very good.

Mr. Phelps, do you want to present witness testimony?

Phelps: I would briefly ask that, I think it's – sorry, your name, sir?

Borisov: Boris.

Phelps: Boris. Your last name?

Borisov: Boris Borisov.

Phelps: I'm sorry, Boris Borisov?

Borisov: Yes.

Phelps: Okay. Your Honor, I call Mr. Boris Borisov here for some brief testimony.

McGinn: All right.

Phelps: Mr. Borisov, will you please state your full name for the record?

Borisov: Yes. Boris Borisov, City of Spokane, Neighborhood Services and Code Enforcement.

Phelps: And what are your duties in the City of Spokane?

Borisov: I assist with the Building Control hearing process. I conduct site visits and acquire photographs for the hearing and present staff reports to the Deputy Board Official at the Board Official hearing, photographs and findings for Building Official then to use that information in the process.

Phelps: And when you – you went out and made some photos that have been entered into the record in this case; is that correct?

Phelps: Where were you when you took that picture that shows the ridge line of the property there?

Borisov: So just to clarify, the first two pages we marked, those were taken on June 3rd in preparation for the hearing on June 4th. The page you're talking about was taken, I believe, on April 10th, and that was Dan Skindzier, and that was one of the site visits that was conducted when gathering information to send out the notification letter for the first hearing.

Phelps: Were you present when those photos were taken?

Borisov: I'd have to defer to Mr. Skindzier.

Phelps: My question was were you there?

Borisov: No, but I have my own pictures.

Phelps: Okay. So you wouldn't be able to testify if you weren't there. I'll ask Mr. Skindzier about that.

Do you understand that part of your job is abatement of nuisance-type property? Is that what you understand your job to be?

Borisov: I understand my job to be assisting with administrative Building Official process.

Phelps: Okay. And do you – and when you're looking at these properties, what kind of issues are you looking for?

Borisov: I'm specifically looking for characteristics described under Spokane Municipal Code 17F.070.400, substandard building. There's 12 criteria there.

Phelps: Okay. And what are those?

Borisov: Dilapidation, structural defects, unsanitary conditions, defective inoperable plumbing, inadequate weatherproofing, defects increasing the hazards of fire, accident and calamity, houses that have been boarded with no rehab done for a year, utilities off for a year. Those are just some of the things we look at.

The items that we provided as part of the hearing under that section that were found as part of this process, dilapidation, that's Item A. "D" structural defects. Defective and inoperable plumbing, inadequate weatherproofing, no operating utility service for one year, and then defects increasing hazards of fire, accident or calamity.

Phelps: And so those were issues that you were looking for and you're looking for anytime you go out on these cases; is that correct?

Borisov: Yes.

Phelps: You also look for issues like trash, garbage, that sort of thing?

McGinn: Mr. Szambelan, do you have any questions you want to ask of Mr. Borisov this morning?

Szambelan: Yes.

At any time tell me where all the photos were taken.

Borisov: All of the photographs were taken down the public right-of-way. Specifically the ones where you see the front of the house, those were taken from the sidewalk. I tried to in my Photographs – let's see. You can see in some of my photographs, in the corner of the first one on Exhibit 1, for example, there's a mailbox that's seen in the corner to show that I was taking it from the sidewalk. And then other photos taken from the alley, again I was standing on the public right-of-way. At no point did I actually go onto the property to collect photographs for evidence.

Szambelan: Is it okay for me to ask Mr. Skindzier the same question?

McGinn: Well, he's not been called yet, so let's wait for Mr. Skindzier. You can call him as a witness when you're ready to go.

Mr. Phelps – are you done? I'm sorry, are you finished?

Szambelan: Yes.

McGinn: Okay.

Mr. Phelps?

Phelps: Mr. Skindzier, when you went out to take photos that – we were talking about 3rd page inquiries that (inaudible), where were you when you took the photos that showed the – I guess it's not really a ridge line. It's kind of a valley, V shape on that particular house.

Skindzier: This is Dan Skindzier, Deputy Building Official, City of Spokane Building Department.

In answer to your question for that particular photo I was standing in the alley with my camera with a zoom lens.

Phelps: Okay. And now when you identify the alley, how do you identify the alley where that begins?

Skindzier: Well, it begins at the side street and continues east and west to the next side street behind this property and the property south of this.

Phelps: So there's not really a gravel alley or anything behind this property, is there?

Skindzier: It's been awhile since I've been there, but it seems like it was more of a dirt road.

Phelps: And at no time do you go to Superior Court before you begin the demolition of the property, do you?

Skindzier: No, sir.

Phelps: All right. And that's all accomplished through administrative procedures here in the City; is that correct?

Skindzier: Well, that's the start of it. But, of course, my orders can be appealed up to any level.

Phelps: But anybody that does an appeal has property – has fees assessed against their real property and has potential action taken to demolish the buildings and structures on that property; is that correct?

Skindzier: Well, not every building in our substandard hearing process is subject to demolishing.

Phelps: Eventually that's what could happen in any and all of them if they don't take action.

Skindzier: Only those structures that are unusually unsafe, you know, would probably be ordered to be demolished.

Phelps: And in the case of real property, by the lien of the property you could eventually take control of the property; isn't that correct?

Skindzier: I'm not aware of that process. Our fees are based upon our – the cost to do the hearings.

Phelps: So it's not the cost to monitor the property. It's the cost to have these hearings that we're here for today; is that correct?

Skindzier: The \$300 monitoring fee is the cost to send crews out to monitor the site. The \$1500 Building Official hearing fee is to recover the cost of the hearing process administrative.

Phelps: How often – who are the crews, and who does that monitoring?

Skindzier: Code Enforcement will have to answer that.

Phelps: Okay. We'll ask her when we get there.

So you don't know exactly what is done for that fee that you're assessing?

Skindzier: For the monitoring fee, I do not.

Phelps: All right. How do you determine that the fee should be assessed if you don't know what they do for that fee?

Mr. Phelps?

Phelps: Now, the particular action that you filed in this case, was that the result of a complaint from a citizen?

Skindzier: I believe this came to us as a complaint. On February 4th of 2013 Code Enforcement received a complaint for the substandard building from someone?

Phelps: What was the nature of the complaint? I understand you're not willing to tell us who made the complaint, but what was the nature of the complaint that brought this action?

Skindzier: The checked boxes were broken windows, leaning walls, sagging or holes in the roof.

Phelps: So those were issues they cited?

Skindzier: In addition that they exist – they stated that the problems had existed for several years.

Phelps: And you refused to disclose who it was that filed that complaint; is that correct?

Skindzier: Well, there's a disclosure box on this form to do not disclose, and this is presented to Code Enforcement.

Phelps: And therefore you won't – you've refused to disclose that information to Mr. Dutton; isn't that correct?

Skindzier: By the nature of this form, the property owner has indicated to do not disclose, therefore it won't be disclosed.

Phelps: So apparently it's a property owner. So people can file complaints and insist that their names not be disclosed, and that then becomes part of this action; is that correct?

Skindzier: That's my understanding.

Phelps: And you refuse to disclose that information to people that are the subject of the allegation?

Skindzier: That is correct.

Phelps: All right. And all actions by the department, are they initiated only after a citizen complained; is that correct?

Skindzier: There are other means that the property is going to go through a screening process. We receive complaints by Police Department and Fire Department for burned buildings and other issues.

Phelps: Okay. I don't think I have anything further.

Phelps: And one of those are the prevention and abatement of nuisances in the various neighborhoods; is that correct?

Trautman: That's actually part of the Code Enforcement Program that we're responsible for the City of Spokane related to fire hazard from dry vegetation, as well as solid waste. Those were the two that you referenced; was I mistaken?

Phelps: All right. And you – in this particular case were you involved in it at all?

Trautman: I was not involved in this case reviewing the site or proceeding in hearing.

Phelps: You understand that your department assesses fees as a result of these actions?

Trautman: Yes.

Phelps: And those fees are then filed as liens against the property?

Trautman: Yes.

Phelps: And at any time do you take any action to go before the Superior Court and get permission to file the liens against the real property?

Trautman: No. Actually we follow a process established in the City of Spokane's Municipal Code under 17F, as well as the process in RCW 35.80, which is with regard to unfit buildings under the City – excuse me, the State of Washington Revised Code.

Phelps: When you say unfit, what do you mean by unfit buildings?

Trautman: There is a definition both in the City of Spokane Municipal Code, as well as the RCW which identify, I think, the conditions of it are substandard, that include that the building may be rendered inhabitable and may also be ordered demolished.

Phelps: And all that without going to Superior Court; is that correct?

Trautman: The City establishes if they're in a process for an administrative hearing by the Building Official for consideration of those factors and that determination.

Phelps: And none of that goes before the Superior Court unless there were to be an appeal filed; is that correct?

Trautman: Correct.

Phelps: And these fees that you assess, what are the fees that you assess?

Trautman: If the Building Official determines after this hearing that the building is substandard and/or unfit, then there is a fee adopted under 802 assessed against the property.

Szambelan: Okay. So basically that RCW allows municipalities such as Spokane to fine these structures that are substandard and put them through a process to assess liens without going to Superior Court?

Trautman: It's my –

Phelps: Yeah. I just want to record an objection. I think it calls for a legal determination. I don't know that she's qualified, but having stated that for the record I'll allow – I don't have any objection or comment, so you go ahead with –

Szambelan: The administrative process you already asked her about what authority exists, so I understand your objection. But it's fine for her to testify about it.

Phelps: That's fine. I'm making my objection for the record.

Szambelan: Understood.

Phelps: Thank you.

Szambelan: You can answer.

Trautman: Okay. Maybe if you repeat the question again.

Szambelan: Yes, restate the question. I've lost it as well.

We have a process – do we have a process set out to go through unfit or substandard buildings?

Trautman: Yes, we do in the Spokane Municipal Code.

Szambelan: And the authority to create that is granted by the State statute?

Trautman: It's my understanding that it does do so, in addition to there being a parallel process in the International Code Council documents with regard to the authority of the Building Official with regard to determining unsafe and inhabitable structures.

Szambelan: In your opinion can you tell us what the goal is in this whole process with this structure?

Trautman: The goal of the process identifies an opportunity for these conditions to be brought to the attention of the property owner or responsible party, an opportunity for the conditions to be remedied. The ordinance provides for the Building Official after the hearing and testimony to render specific decisions with regards to the property, such as that he can order it to be rehabilitated. He can order it to be demolished as examples of that.

Szambelan: Thank you.

McGinn: All right.

Szambelan: So were you asked to submit a rehabilitation plan on the other property, the one we're talking about, back in 2009?

Dutton: I may have been. I don't remember exactly.

Szambelan: And so you're aware of the process and you still determined not to file a rehabilitation plan?

Dutton: My plan on the house on 11th is to sell it.

Szambelan: Okay.

Dutton: I have no money to do anything with it. The plan of rehabilitation seemed to be kind of a monster. They left it up to me to decide what needed to be done. That was subject to their approval, in which case they probably wouldn't have improved it. I don't have any money to do any of the improvements.

Szambelan: But you did not submit a plan?

Dutton: I didn't submit a plan. I contacted Mr. Phelps. He contacted somebody in the City Attorney's Office and told them that I was going to sell the property and be done with it. I couldn't afford to deal with it. I was under the understanding that that was a reasonable solution. I went back to the Building Official's meeting and that wasn't a reasonable solution, so here we are.

Szambelan: Thank you.

McGinn: Would you like to do any follow-up questions for your other –

Szambelan: No.

Phelps: I have some questions.

McGinn: I'm sorry, excuse me.

Phelps: That's okay.

McGinn: Go ahead, Mr. Phelps.

Phelps: Mr. Dutton, do you own the Wainsgate (phonetic) property, the one that we're here on today?

Dutton: Yes, I did.

Phelps: All right. And do you know what the amounts of the liens are they put on your property?

Dutton: I believe it was for \$1800.

McGinn: Okay, very good.

Mr. Szambelan, do you have anything else you want to present in the way of witness testimony?

Szambelan: Not of witnesses, no.

McGinn: All right.

Let's see. Going in order, Mr. Phelps, do you have an argument you want to present as closing?

Phelps: I do.

McGinn: All right. Please do.

Phelps: The Washington State Constitution in Article IV, Section 6 addresses jurisdiction of Superior Courts. I'll read it. It's kind of lengthy, but I'd like to have it in the record.

“Superior Courts and District Courts have concurrent jurisdiction in cases in equity. The Superior Court shall have original jurisdiction in all cases at law which involve the title or possession of real property, or the legality of any tax, impost, assessment, toll, or municipal fine, and in all other cases in which the demand or value of the property in controversy amounts to \$3,000 or as otherwise determined by law, or a lesser sum in excess of the jurisdiction granted to justices of the peace and other inferior courts, and in all criminal cases amounting to felony, and in all cases of misdemeanor not otherwise provided for by law; of actions of forcible entry and detainer; of proceedings in insolvency; of actions to prevent or abate a nuisance; of all matters of probate, of divorce, and for annulment of marriage; and for such special cases and proceedings as are not otherwise provided for. The superior court shall also have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court; and said court shall have the power of naturalization.... They shall have such appellate jurisdiction in cases arising in justices' and other inferior courts in their respective counties as may be prescribed by law. They shall always be open, except on nonjudicial days, and their process shall extend to all parts of the state.”

I think that's the part that's important. And then it addresses the Judge shall have the power to issue writs of mandamus, quo warranto, and review, and writs of habeas corpus. And it talks about legal holidays.

So essentially what's happened through either the Revised Code of Washington or the process that the City has laid out is that the City is addressing actions to prevent or abate a nuisance or – and of taking title to your possession of real property without taking the matters before the Superior Court. They can take action to demolish your house. They can take action to put liens against your property, a recurring lien. And at no time do they have to go to Superior Court.

McGinn: I don't believe it does. I'm familiar with that case.

Phelps: All right.

McGinn: I can take another look at it though in order to review your specific claims.

Phelps: I appreciate it. Thank you.

McGinn: All right. Thank you, Mr. Phelps.

Mr. Szambelan?

Szambelan: Thank you. To examine – Assistant City Attorney - and make a closing argument.

First off, as far as the Appellant's argument, as far as who made the complaint, the Defendant is always able to submit a public records request under RCW 42.17. There's nothing in the testimony before the Building Official or here that he ever made such an attempt or how it prejudiced him in any way. It's basically moot at this point. He waived that argument.

I think it's important here to stay on track, that we are not – this whole process is not about a taking of a person's property. As testimony was set forth that there's a lien that's placed out there for – by the Building Official and for monitoring purposes.

The Appellant here tries to make a big difference between overkill jurisdiction and a nuisance abatement under RCW 7.48, I believe it is. While this is not an abatement proceeding, as the testimony has been presented by all three, it's about a substandard property and what the rehabilitation of that property would be. And giving the property owner the opportunity to come forth and present what he would do for rehabilitation process.

In this case Mr. Dutton himself testified that he has gone through this process before, and he didn't remember if he provided a rehabilitation plan in the previous property he had before the Building Official, nor did he provide a rehabilitation plan in this particular hearing, which was basically a waiver. He was sent forth a notice providing that if he did not do so that he would be possibly assessed a Building Official fee and monitoring fee. In effect, he knew the process. He invited the assessment to be placed upon himself. There's no evidence that he provided any financial records or any indication that any type of burdensome effect that this had on him.

As far as due process goes, Mr. Dutton was provided notice by the Building Official and gave adequate notice of what the hearing is, what the process is, which he already stated he's already gone through, and was provided an opportunity to provide evidence and present his case. Not only that, he had his attorney show up and was afforded – he had legal counsel there to present any evidence, and even his attorney did not provide any evidence which would be in effect inviting error in this matter.

So we continue on with the due process. This hearing was accommodated again to provide Mr. Dutton due process by Mr. Dutton's attorney not being able to attend the first hearing before

And so our position is contrary to the State and Federal Constitutions for government to take property in this matter. If they wanted to do an abatement, or if they want to take his real property, they should take the matter to the Superior Court, which under our Constitution has the original jurisdiction and take action there, and then he'll have, of course, the rights that he gets when he goes to Court. Certainly the Court will require that they tell them who is complaining prior.

And my other argument is there's – that violates our State Constitution that says that he has a right to an open and public hearing, and that he has a right to discover the nature of the accusations. I understand it's not a criminal matter, but still does have basic due process issues and requirements of an open hearing under Article I of our State Constitution. I'm sorry, I've forgotten the exact subsection, but it may be 13. But in any event, under Article I where the State Constitution has a right to an open hearing and open files so that he – if he went to Superior Court, certainly the file would be open to the public, and the public would have access to it, and he would have access to it. Here the complaining party can file it and mark off a box and say I don't want this to be disclosed, and the government refuses to disclose it. That's one of the benefits of the original action being in Superior Court is there's the open hearings and the open files that are not only available to the Appellant, but they're available to the public.

So I think that's our argument in a nutshell.

McGinn: All right. Thank you, Mr. Phelps.

I do have one quick question.

Phelps: Sure.

McGinn: I could have missed it, but I don't think I did in looking at the briefing. I didn't see – it's an interesting argument that you've raised on jurisdiction. I did not see that briefed in the materials from your office or, of course, from Mr. Szambelan because he didn't see that argument. So my only question is this. I think you all laid out the arguments very well. I understand the arguments. I understand that I have some homework to do on the legal issues. I did not look at that in advance because I didn't know that was coming.

My question is does the City desire an opportunity to actually brief that question now that you've heard the argument? And I'm willing to go ahead and figure it out on my own. I don't know which one of you will be aggrieved by the answer that I reach until you – you won't know, so that's not fair necessarily. But the question is do you want to have an opportunity to actually brief that question of jurisdiction?

Phelps: You know, I wouldn't have an objection to both parties doing briefing and providing it to you. I think that would probably give you additional guidance on that. So....

Szambelan: Well, we could leave the record open so we can provide that.

McGinn: Yeah, and that's what I'm suggesting is that that could be a possibility. I don't – I try to avoid assigning homework assignments at these things because I'd rather just, you know,

McGinn: Is the 7th okay with you, Mr. Szambelan?

Szambelan: Yeah. For whose?

McGinn: The due date for his briefing.

Szambelan: Okay.

McGinn: Is that –

Szambelan: And then I'm going to –

McGinn: And then you're going to get some time after that. So for the first time – the first brief is due from Mr. Phelps on October 7th. How much time is that? Let's see, that's the 24th to the 7th.

Reid: That's two weeks.

McGinn: Two weeks? Two weeks after that?

Reid: The 21st, will that work for you?

Szambelan: All right.

McGinn: Is that okay?

Szambelan: Possibly. Yeah. I don't have my calendar.

Phelps: If he needs more time I don't have an objection to the time.

McGinn: All right, fine. We'll set it for the 7th for Mr. Phelps' briefing.

Reid: And then you want to go to the 28th for him?

McGinn: The 21st? Let's just go to the 21st.

Reid: Okay.

McGinn: And, Mr. Szambelan, if you need more time just let us know. The 21st for Mr. Szambelan. And then once I receive the briefing from both sides, whatever that last day is, then we'll count the time period after that for me to get the decision out. Does that make sense to everybody?

Phelps: It does to me. I think that's fine.

McGinn: All right. Thanks everybody for coming and testifying. I appreciate the professionalism of getting through this process.

EXHIBIT LIST

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Building Official Appeal



AP-13-02

Planning and
Development Services
808 W Spokane Falls Blvd
Spokane, WA 99201
Phone: (509) 625-6300
www.buildingspokane.org

Number: B1307933BOAP

Job Title: **APPEAL OF BUILDING OFFICIAL DECISION ON DILAPITATED HOUSE**

Site Information:
Address: **1914 E 11TH AVE**
Parcel #:

Permit Status: **Plan Review**
Status Date: **07/11/2013**
Parent Permit: **B0713900BOAP**

EXHIBIT NO. 1

Applicant

Owner

**BLAYNE DUTTON
7918 E UTAH
SPOKANE VALLEY WA 99201**

**DUTTON, BLAYNE
1914 E 11TH AVE
SPOKANE WA 99202-3511**

509-230-1242

Description of Work: **APPEAL OF BUILDING OFFICIAL DECISION ON DILAPITATED HOUSE AT 1914 E 11TH.**

Contractor(s)

Inspector:

(Call between 7:30 am and 8:30 am for inspection).

Fees:	Qty:	Amount:	Payments:	Ref #	Amount:
BLDG Official Appeal	1	\$250.00	07/11/2013 Check	13339	\$250.00
		<u>\$250.00</u>			<u>\$250.00</u>

Estimated Balance Due:

Amount:

\$0.00

CONDITIONS OF APPROVAL

Contact SRCAA at (509) 477-4727 and/or visit www.spokanecleanair.org before renovation or demolition activity begins to ensure compliance with applicable asbestos regulations. An Asbestos Survey may be required.

RECEIVED

JUL 12 2013

HEARING EXAMINER

THIS IS NOT A PERMIT

000096

result in the City of Spokane taking my property;

- 6. Why is the decision wrong?
 - Error or misinterpretation of FACT
 - Error or misinterpretation of LAW OR COMPREHENSIVE PLAN
 - Error in PROCEDURE

7. Please identify the specific factual, legal or procedural errors or misinterpretations that you believe resulted in the decision being wrong and how correcting the error would result in a different decision. If you believe a misinterpretation of the law or Comprehensive Plan or procedural error was made, please identify the specific laws, code sections or plan policies that you believe were misapplied, misinterpreted or violated.

The case is contrary to Washington Constitution by taking property without due process.

8. What is the harm resulting to you from the decision? The government is taking my property for City purposes by unreasonable assessments

9. What relief do you seek? What would you have the decision maker do? I would seek to have the action reversed and all liens removed from my property. I will also

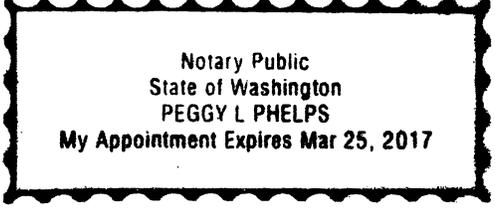
SUBMITTED BY: bring other challenges after review of the entire record. Blyne Dutton

ACKNOWLEDGEMENT

I certify that I know or have satisfactory evidence that Blyne Dutton this instrument and acknowledged it to be his/her own free and voluntary act for the uses and purposes mentioned in this instrument.

Date: 6/26/2013

Peggy L Phelps
Notary Public in and for the City of Spokane,
State of Washington.
My commission expires: 3/25/2017



For Staff Use Only:

Date appeal filed: 7-11-13
Was appeal timely filed? yes
Appeal fee? 250
Transcript fee? N/A

Date appeal period ends: 7-18-13
Is appellatant a party of record? yes
Fee paid? yes
Fee paid? N/A

Don Skindler
Inspector Supervisor
6108

Staff reported this property was in the Building Official process in 2007. A Building Official hearing was held on September 11, 2007 and October 16, 2007 and appealed to the Hearing Examiner. The appeal hearing was held on November 8, 2007. The Hearing Examiner remanded the matter back to the Building Official for another hearing which was to be held as soon as possible but not before a criminal matter associated with the property was to be resolved. No new hearing was held after this. The June 4, 2013 hearing is the result of a new complaint on the property which code enforcement staff received on February 4, 2013. A site inspection occurred as a response to this complaint and prompted the property to be put into the Building Official process due to substandard conditions listed above. Staff reported all photographs were obtained from the public right of way. A certified letter was sent to Blayne Dutton, the property owner dated April 15, 2013 identifying the complaint, the conditions noted, and a scheduled hearing date of May 14, 2013. Douglas D. Phelps, attorney for the property owner contacted a city attorney prior to the hearing and requested additional time to put the house up for sale. The first hearing was re-scheduled to June 4, 2013, but Mr. Phelps was informed by City Attorney Tim Szambelan that the Building Official would not continue delaying the hearing to sell the house.

Staff reported a site visit was conducted on June 3, 2013 and the house and garage were found secure. There is a "for sale by owner" sign in the front yard. The condition of the structures is the same as described above. There are no active building permits on file.

Douglas D. Phelps, attorney for Blayne Dutton, the property owner asked staff what findings were used to determine the property is abandoned. Staff explained the property is abandoned as it gives indications that no one is presently in possession such as by disconnection of utilities and disrepair. Mr. Phelps asked what disrepair staff was referring to and staff explained the dilapidated roof on the house, siding with peeling paint, rear entry room with inadequate structural support and sagging structural members, fascia peeling away from the garage, and the openings in the roof all constitute disrepair. Mr. Phelps asked staff how the determination was made that water is penetrating the house. Staff explained the determination was made based on evidence collected from the public right of way showing the roof has holes due to deterioration. Mr. Phelps asked if an interior inspection was conducted to make these findings to which staff answered there was not.

Mr. Phelps also asked if the determination that the heating was inoperable was made from an interior inspection. Staff explained that the heating system was not part of the findings and is not listed as a violation. Mr. Phelps asked how the determination was made that the plumbing was defective/inoperable. Staff explained the findings show the water has been shut off since February of 2005 according to City utility records. Mr. Phelps asked if plumbing could be operable if potable water was carried into the house and staff explained that the condition of the plumbing system was not inspected as there has been no interior inspection; plumbing is not currently operable due to a lack of running water. Mr. Phelps asked if staff checked if taxes are current. Staff explained this information can be obtained from the Spokane County Assessor, and currently the status of taxes does not affect the findings related to the physical condition of the structures in the hearing process.

Mr. Phelps further asked if only one window pane on the front window was broken and/or open. Staff further explained that the finding the house is inadequately weatherproofed was made based on the overall condition of the structure which includes the missing glazing on the front window as well as the holes in the roof, all of which is allowing weather to penetrate the structure. Mr. Phelps asked when the complaint came in for the property. Staff explained code enforcement received the complaint on February 4, 2013. Mr. Phelps asked who the complainant was and staff explained this information cannot be disclosed however, a public records request can be made on the file.

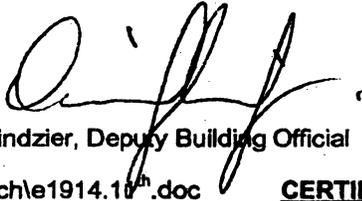
Mr. Phelps testified the property owner, Mr. Dutton has removed some items from the interior of the house in preparation for showing and the plan is to sell the property.

NOTICE OF RIGHT TO APPEAL

You have the right to appeal the decision of the Building Official to the City Hearing Examiner within 30 days from the date of this letter. Appeal forms are available by contacting the Office of Neighborhood Services and Code Enforcement Department @ 625-6083. Pursuant to Spokane Municipal Code 08.02.087 an appeal fee of \$ 250 must accompany a completed appeal form. THE DATE OF THE LAST DAY TO APPEAL IS JULY 18, 2013 AT 4:30 pm.

If you have any questions please call Boris Borisov at 625-6083.

SO ORDERED



Dan Skindzier, Deputy Building Official

DS:BB:ch\1914.11th.doc

CERTIFIED #7196 9008 9115 5841 1203

Enclosure: Rehabilitation Plan

PC: D. Skindzier, Deputy Building Official

000102



HEARING EXAMINER
808 W. SPOKANE FALLS BLVD.
SPOKANE, WASHINGTON 99201-3333
509.625.6010
FAX 509.625.6059

BRIAN T. MCGINN
HEARING EXAMINER

July 24, 2013

CERTIFIED MAIL

Blayne Dutton
7918 East Utah Ave.
Spokane Valley, WA 99212

EXHIBIT NO. 3

RE: Appeal of Building Official's Decision – Dutton, 1914 E. 11th Avenue
Hearing Examiner File No. AP-13-02

This is to confirm that a hearing on the above-noted appeal has been scheduled for **Tuesday, August 20, 2013 at 9:00 a.m.** The hearing will be held in **Conference Room 2B, Second Floor** of Spokane City Hall, 808 West Spokane Falls Boulevard.

If the Appellant wishes to submit additional written materials (via: email: hearingexaminer@spokanecity.org; fax: 625-6059 or postal) to this office please do so by **Thursday, August 8, 2013, at 5 P.M.** The City will have until **Thursday, August 15, 2013, at 3:00 P.M.** to reply. ***Please submit copies to each other as well.*** If you have any questions regarding procedure, please telephone this office at 625-6010.

Sincerely,

Lee Ann Reid
City of Spokane Hearing Examiner's Office

c: Heather Trautman, Neighborhood Services and Code Enforcement
Dan Skindzier, Building Dept.
Tim Szambelan, Assistant City Attorney
Boris Borisov, Code Enforcement

AMERICANS WITH DISABILITIES ACT (ADA) INFORMATION: The City of Spokane is committed to providing equal access to its facilities, programs and services for persons with disabilities. Individuals requesting reasonable accommodations or further information may call, write, or email. Individuals requesting reasonable accommodations or further information may call, write, or email Gita George-Hatcher at (509) 625-7083, 808 W. Spokane Falls Blvd, Spokane, WA, 99201; or ggeorge-hatcher@spokanecity.org. Persons who are deaf or hard of hearing may contact Ms. George-Hatcher at (509) 625-7083 through the Washington Relay Service at 7-1-1. Please contact us forty-eight (48) hours before the meeting date.

000104

BEFORE THE HEARING EXAMINER FOR THE CITY OF SPOKANE

CITY OF SPOKANE,)	
CODE ENFORCEMENT)	
Plaintiff,)	File # AP-13-02
)	
v.)	MEMORANDUM OF LAW
)	
BLAYNE DUTTON,)	
<u>Defendant</u>)	

I. FACTS

On April 15, 2013, Blayne Dutton was served with a document entitled "Notice of Building Official Administrative Hearing."

This document informed Mr. Dutton that a complaint had been filed against him as to the residence at 1914 E 11th Avenue in Spokane. It also informed him that government officials had entered onto his property to perform an inspection of the same, without Mr. Dutton's permission and without, presumably, a warrant from the court for such an entry.

II. ISSUES

1. Was the "inspection" performed by Code Enforcement on Mr. Dutton's property performed in violation of Mr. Dutton's Fourth Amendment and Washington State Constitutional rights?

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be health, fire, or building inspectors. Their purpose may be to locate and abate a suspected public nuisance, or simply to perform a routine periodic inspection. The privacy that is invaded may be sheltered by the walls of a warehouse or other commercial establishment not open to the public. See *v. Seattle*, 387 U.S. 541 [87 S.Ct. 1737, 18 L.Ed.2d 943]; *Marshall v. Barlow's, Inc.*, [436 U.S. 307], at 311-313 [98 S.Ct. 1816, 1819-21, 56 L.Ed.2d 305]. These deviations from the typical police search are thus clearly within the protection of the Fourth Amendment.”

Conner, 897 F.2d 1487 at 1490, *quoting Tyler*, 436 U.S. at 504-05, 98 S.Ct. at 1947-48.

For the building inspector to perform an “inspection” of Mr. Dutton’s property, without first obtaining a warrant to do the same, is a clear violation of the Fourth Amendment. For the building department to act on the same is also a violation.

IV. CONCLUSION

Mr. Dutton was given a notice that says, in short, “We got a complaint from an unknown person, we invaded your privacy by trespassing on your property, and we came to the conclusion that we are going to use the power of the state to require certain performance from you.” This is a mockery of the requirements of both the Fourth and Fourteenth Amendment, and cannot be allowed to stand.

This case must be remanded back to the Department of Code Enforcement for a proper hearing concerning the merits of the case. At this hearing, no evidence garnered from the illegal entry onto the defendant’s property may be presented.

Reid, Lee Ann

From: Leah Hill [LeahH@phelpslaw1.com]
Sent: Thursday, August 08, 2013 2:15 PM
To: Hearing Examiner
Cc: Skindzier, Dan
Subject: Dutton - Additional Materials
Attachments: Aug 08 13 Memorandum.pdf

Attached please find our Memorandum of Law to be used at the time of hearing on August 20, 2013.

Leah Hill
Office Supervisor/Criminal Case Manager
Phelps & Associates, PS

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Mr. Dutton then filed an appeal with the City Hearing Examiner on July 11, 2013, claiming he had been denied due process in his appeal, but failed to specify what due process he believed he was denied. The Memorandum filed by his attorney identified only a single allegation claiming that City officials illegally went upon Mr. Dutton's property without his permission to conduct their investigation, which the City denies.

II. BRIEF STATEMENT

The Hearing Examiner should affirm the City Building Official's determination that there is a substandard building on Mr. Dutton's property under SMC 17F.070.400, because the City's Building Official was provided sufficient evidence from the investigation to support such a determination. The evidence submitted to the Building Official was obtained in plain view and was not a violation of Mr. Dutton's Fourth Amendment rights or the Washington State Constitution, under Article 1, Section 7. The notice provided to Mr. Dutton afforded him sufficient notice of the condition of his property and the opportunity to present a defense at his hearing before the Building Official. In addition, Mr. Dutton did have an attorney attend the Building Official hearing and was provided the opportunity to question City staff and present evidence at the hearing.

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Under the open view doctrine, when an officer is lawfully present in an area, his detection of items by using one or more of his senses does not constitute a search within the meaning of the Fourth Amendment. *State v Seagull*, 95 Wn.2d. 898, 632 P.2d 44 (1981).

Whether a portion of the curtilage is impliedly open to the public depends on the totality of the circumstances surrounding the deputies' entry. *Seagull*, 95 Wn.2d at 902-03, 632 P.2d 44. An access route is impliedly open to the public, absent a clear indication that the owner does not expect uninvited visitors. See, *Ross*, 141 Wn.2d at 312, 4 P.3d 130; see also *State v. Hornback*, 73 Wn.App. 738, 743, 871 P.2d 1075 (1994). "No trespassing" signs alone do not create a legitimate expectation of privacy, especially without additional indicators of privacy expectations such as high fences, closed gates, security devices, or dogs. See, *State v. Chaussee*, 72 Wn.App. 704, 710, 866 P.2d 643 (1994).

In this instance, the code enforcement officer obtained photographs in open view from the *public right of way* and possibly on the curtilage surrounding Mr. Dutton's property for the June 4, 2013 Building Official hearing. The Code Enforcement officer's actions clearly do not constitute an illegal search of Mr. Dutton's property because the photos and observations of the property was in open view and there could be no expectation of privacy from where the photographs and observations were made. (See attached Declarations of Skindzier and Boris Borisov.)

RESPECTFULLY SUBMITTED this 15th day of August 2013.



Timothy E. Szambelan
Assistant City Attorney #20636
Attorneys for Respondent
City of Spokane

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DECLARATION OF BORIS BORISOV

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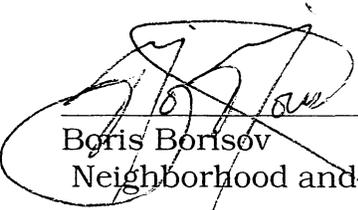
I, Boris Borisov, hereby declare under penalty of perjury under the laws of the State of Washington that the following is true and correct.

1. I am of legal age, am competent to testify, and I make this declaration on my own personal knowledge.

2. I have been employed by the City of Spokane as Neighborhood and Housing Specialist since January of 2013. As part of my duties I have been responsible for the enforcement/compliance of the Spokane Municipal Code sections and monitor properties that have been placed in the Building Official hearing process.

3. I conducted a visual inspection on March 8, 2013 and June 3, 2013 for a property owned by Blayne Dutton on his property located at 1914 East 11th in the City of Spokane. My observations of his property were done from the public right of way and photos taken were also taken in plain view from the public right-of-way.

EXECUTED this 13th day of August 2013, Spokane, Washington.


Boris Borisov
Neighborhood and Housing Specialist

a \$300 monitoring fee could be assessed if the property is found substandard. Since the property owner did not provide a rehabilitation plan at the Building Official Hearing and building(s) was found to be substandard under SMC 17.070.400 and abandoned under SMC 17.070.030 the fees were assessed. These fees are adopted by ordinance under SMC 8.02.067 and applied under 17F.070.440.

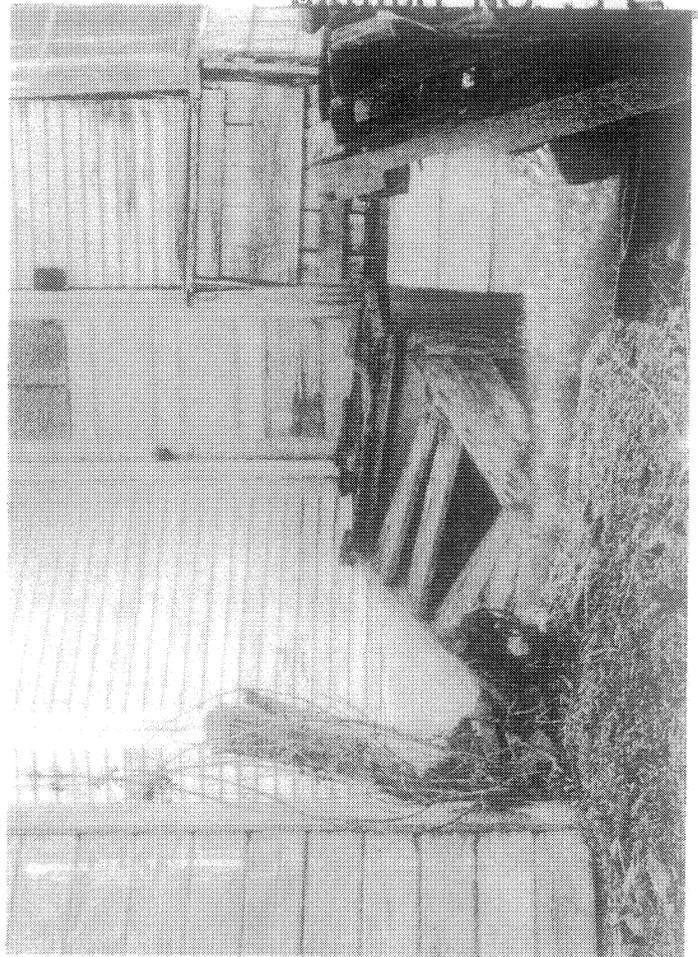
Question #6, and #7

The appellant claims the decision of the Building Official had several errors including misinterpretation of fact, law or comprehensive plan and procedure. The appellant does not however, identify any specific laws, code sections, or plan policies which were misapplied, misinterpreted or violated. The Building Official process is an Administrative one that is outlined under SMC 17F.070.440. The Building Official Hearing fee and property monitoring fee are adopted by ordinance under SMC 8.02.067 and applied under SMC 17F.070.440.

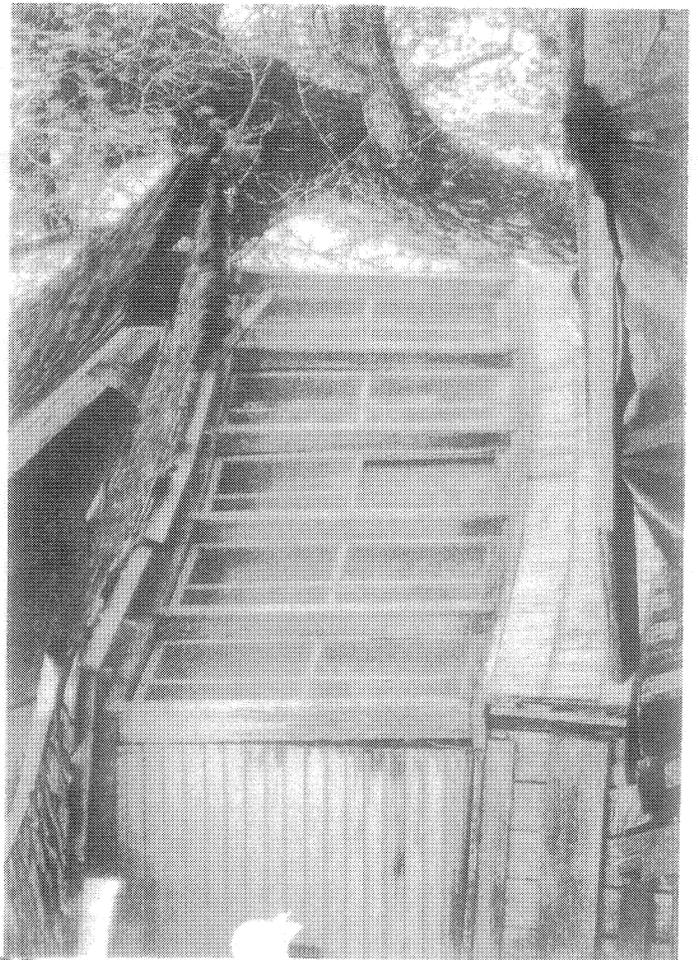
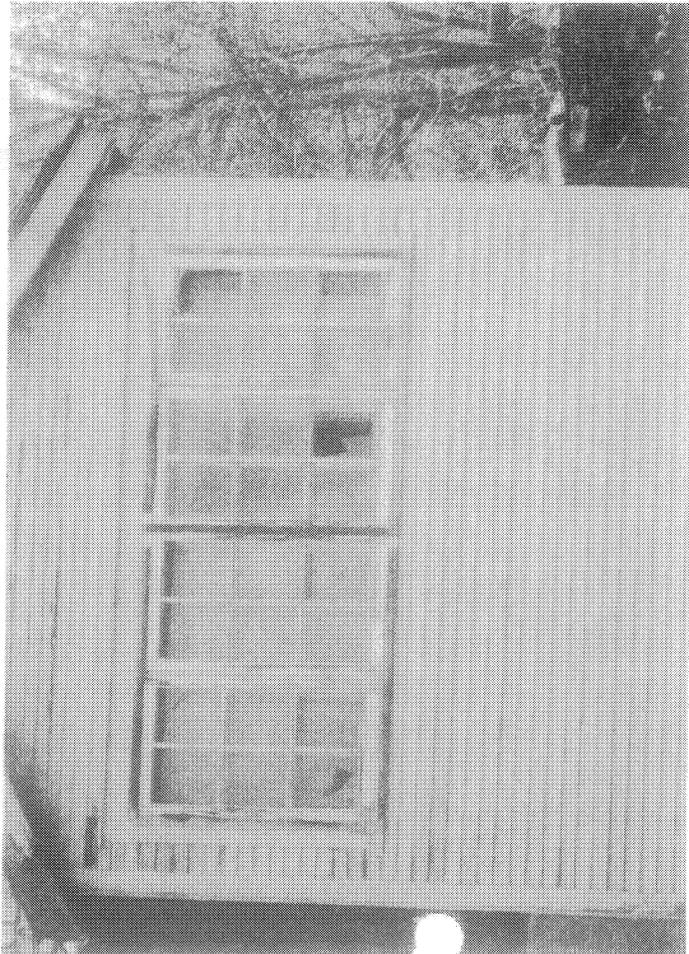
Questions #8 and #9

The appellant claims that the City is taking property by the assessments and asked for the liens to be removed from the property. The Building Official Hearing fee and property monitoring fee are adopted by ordinance under SMC 8.02.067 and applied under SMC 17F.070.440.

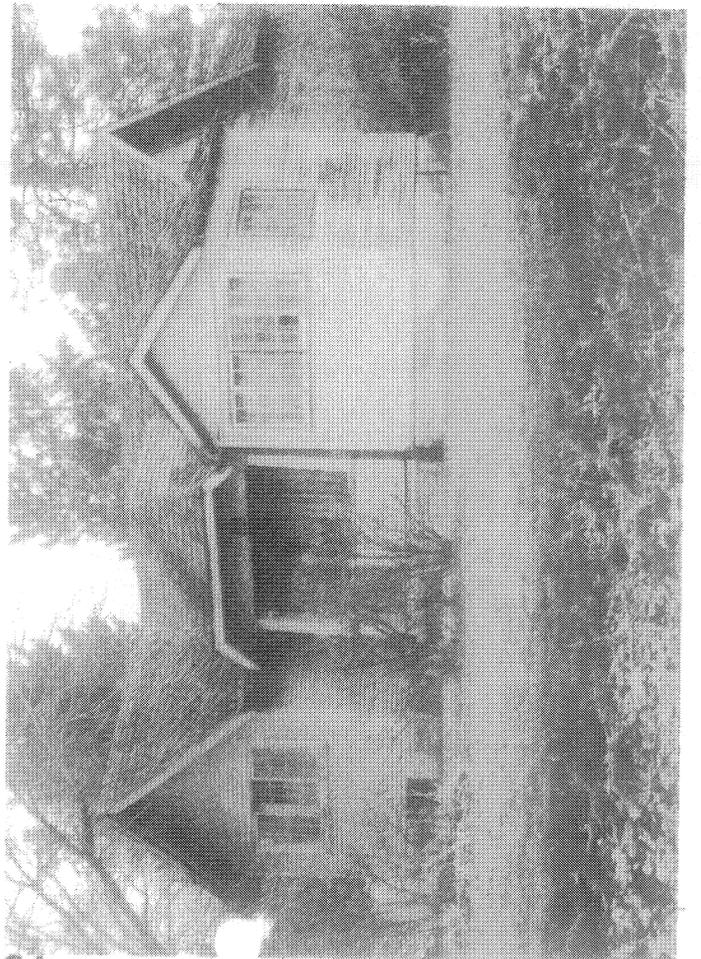
- 6/3/13 Site visit by Code Enforcement staff is conducted prior to the hearing scheduled for June 4, 2013. Observation of the property is made from the public right of way and photos are taken in plain view from the public right-of-way.
- 6/4/13 Building Official Hearing held. Staff provides report of findings and testimony is heard from Mr. Douglas Phelps, attorney representing the property owner. The house and garage are found to be substandard under Section 17F.070.400 of the Spokane Municipal Code and abandoned under Section 17F.070.030. The Building Official Orders for a rehabilitation plan to be submitted, for the property to be kept secure, and for the Building Official fee and property monitoring fee to be assessed. A progress hearing is scheduled for December 10, 2013.
- 6/18/13 Building Official Order from the June 4, 2013 hearing is sent to the property owner via certified and first class mail. Building Official order is posted at the property per Spokane Municipal Code Section 17F.010.050.
- 6/19/13 Copy of the Building Official Order from the June 4, 2013 Hearing is sent to Douglas Phelps, attorney for property owner via certified and first class mail.
- 6/24/13 Code Enforcement receives signed certified mail for Building Official Order sent on June 19, 2013 to Douglas Phelps.
- 6/25/13 Code Enforcement receives signed certified mail for Building Official Order sent on June 18, 2013 to Blayne Dutton, the property owner.
- 7/11/13 Appeal filed.



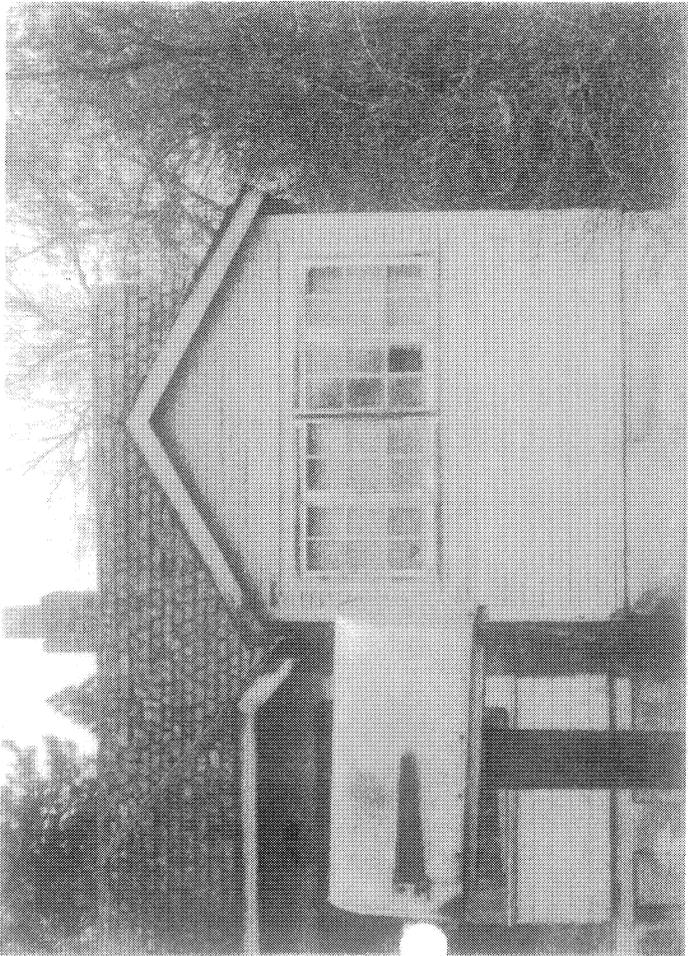
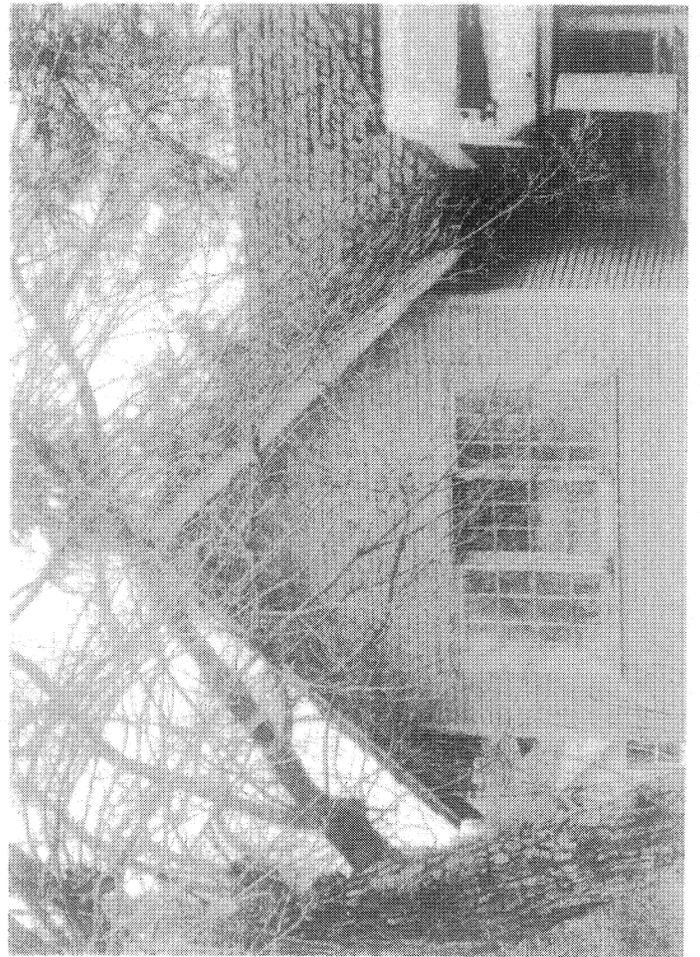
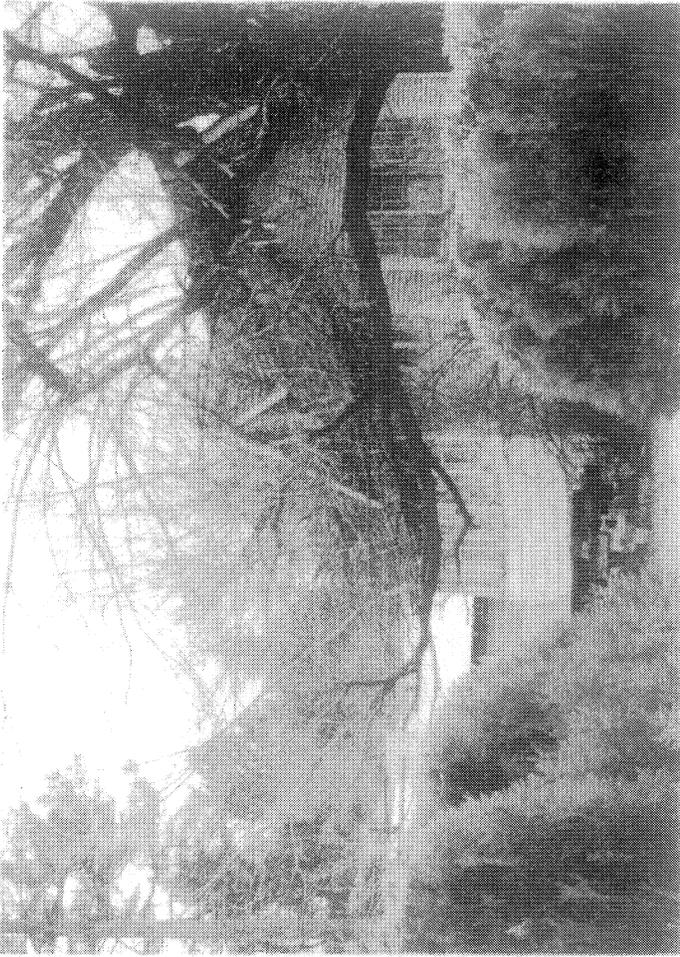
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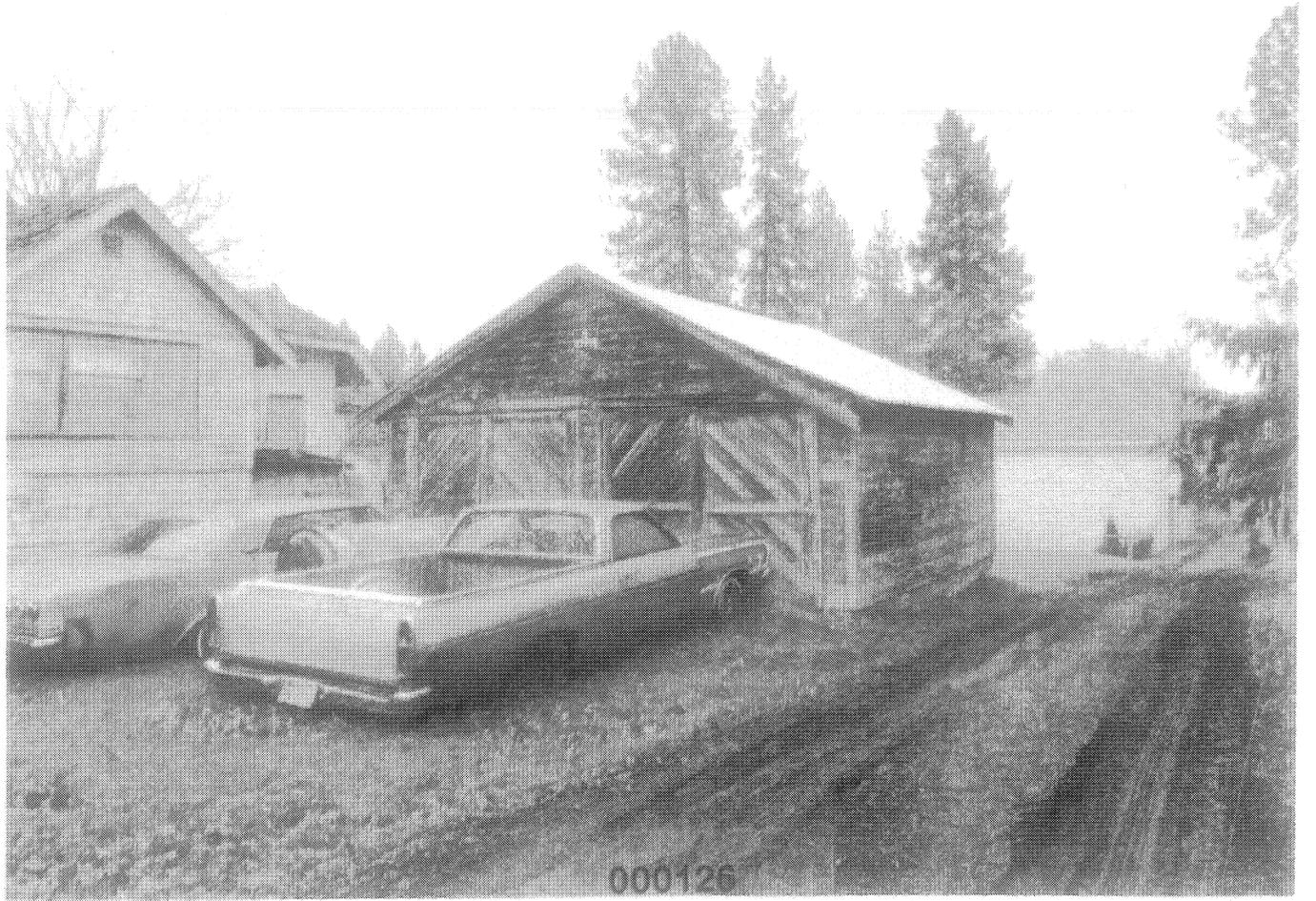
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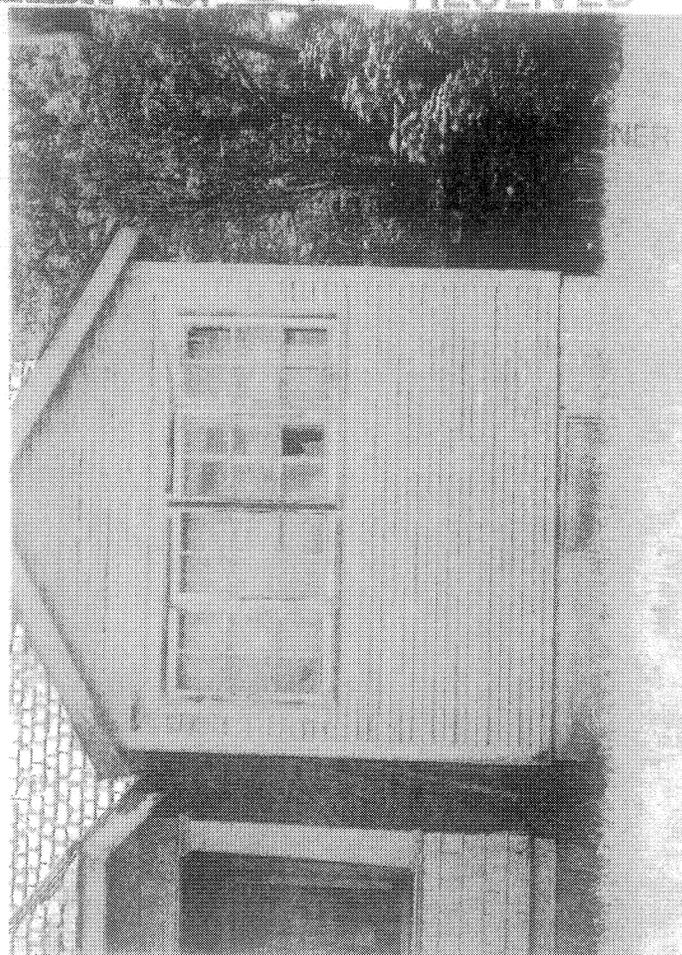
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P.O. Box E 11th 3/1/2007



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Date 6-9-2013

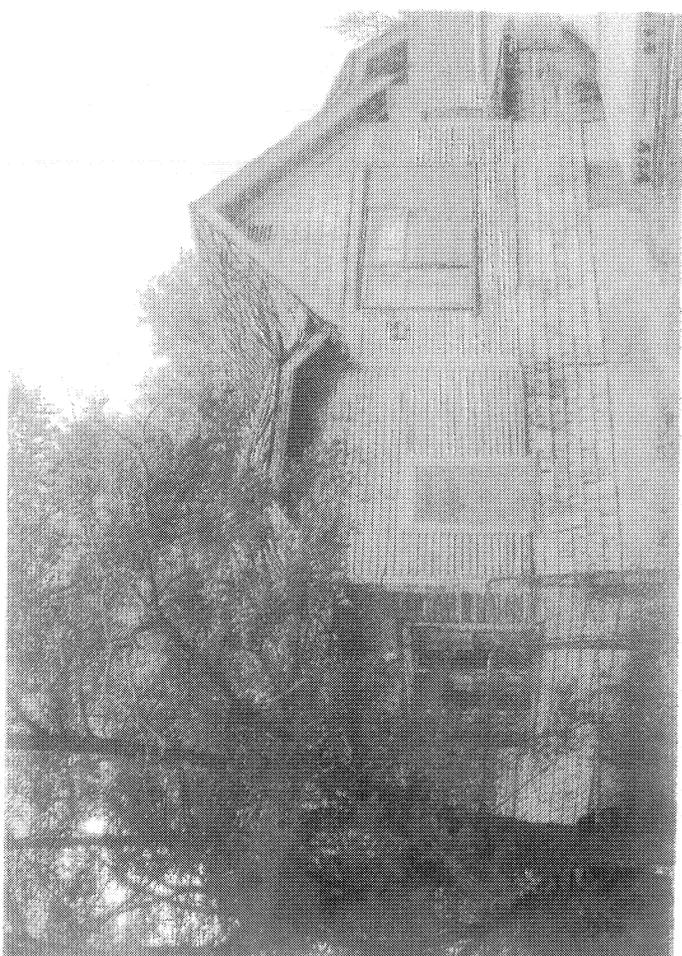
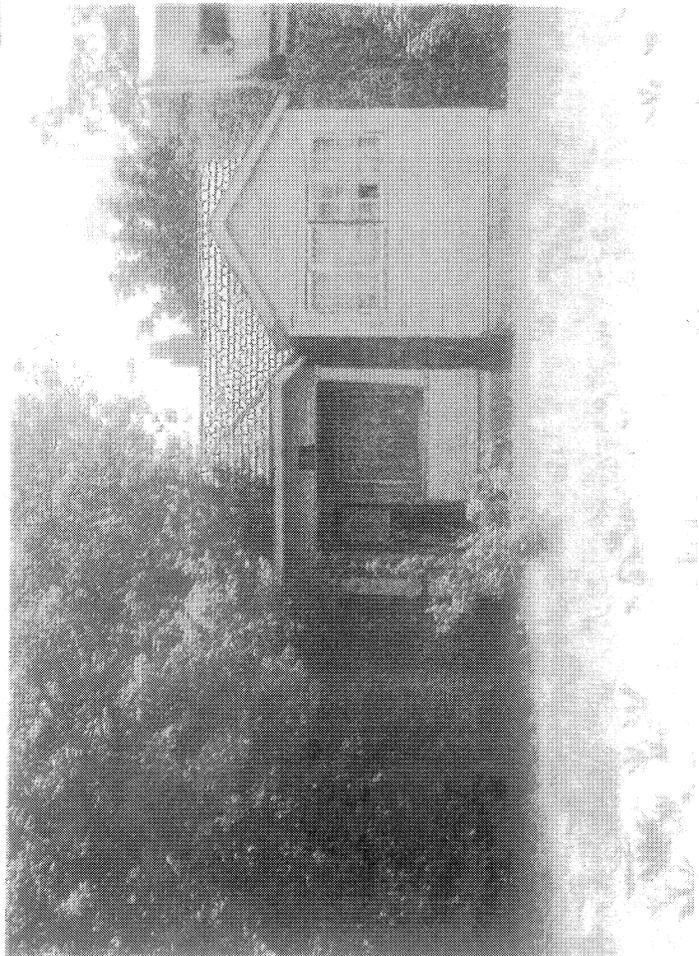
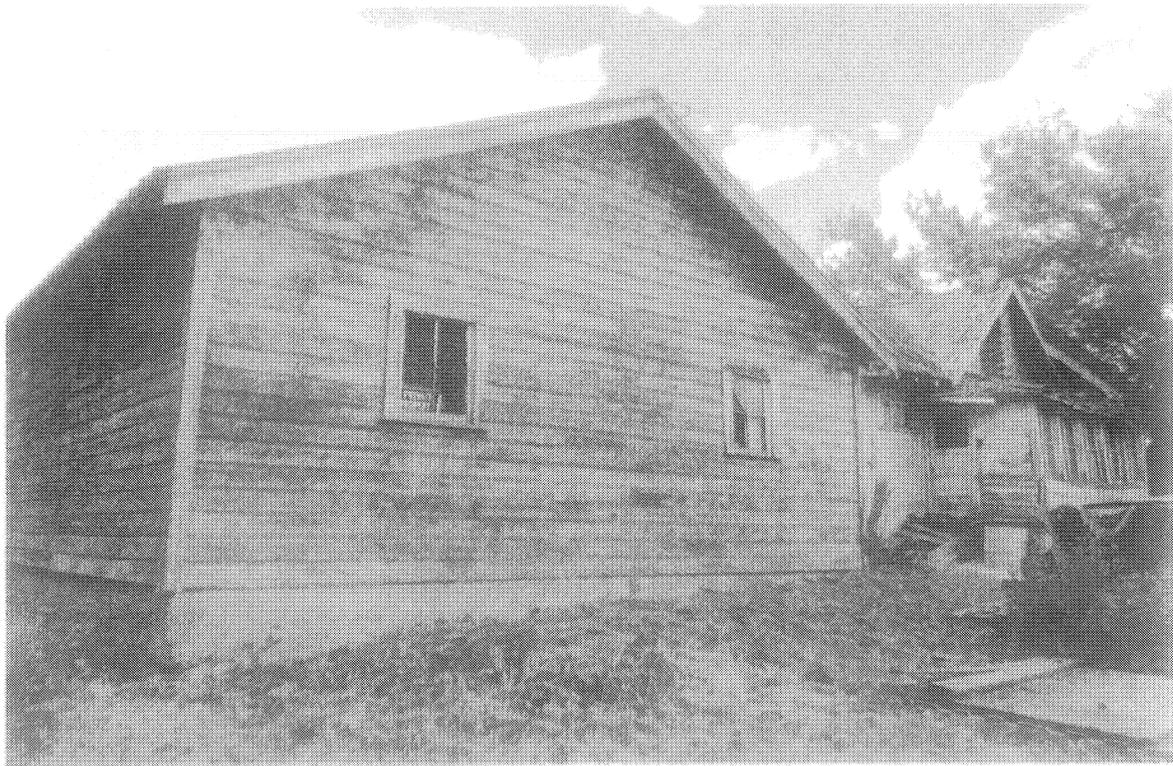


Exhibit # 2
Date 6-11-2013



APPE 1P B.D. 6-5-2013

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HEARING EXAMINER
808 W. SPOKANE FALLS BLVD.
SPOKANE, WASHINGTON 99201-3300
509.625.6010
FAX 509.625.6059

BRIAN T. MCGINN
HEARING EXAMINER
CERTIFIED MAIL

August 21, 2013

Douglas Phelps, Attorney at Law
Phelps and Associates, PS
2903 North Stout Road
Spokane Valley, WA 99206

EXHIBIT NO. 6

RE: Appeal of Building Official's Decision – Blayne Dutton, 1914 E. 11th Avenue
Hearing Examiner File No. AP-13-02

This is to confirm that the **continued hearing** on the above-noted appeal has been scheduled for **Tuesday, September 24, 2013 at 9:00 a.m.** The hearing will be held in **Conference Room 2B, Second Floor** of Spokane City Hall, 808 West Spokane Falls Boulevard.

If you have any questions regarding procedure, please telephone this office at 625-6010.

Sincerely,

Lee Ann Reid
City of Spokane Hearing Examiner's Office

c: Heather Trautman, Neighborhood Services and Code Enforcement
Dan Skindzier, Building Dept.
Tim Szambelan, Assistant City Attorney
Boris Borisov, Code Enforcement

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BEFORE THE HEARING EXAMINER FOR THE CITY OF SPOKANE

CITY OF SPOKANE,)	
CODE ENFORCEMENT)	
Respondent,)	File # AP-13-02
)	
v.)	SUPPLEMENTAL BRIEF
)	REGARDING JURISDICTION
BLAYNE DUTTON,)	CONSTITUTION VIOLATIONS
<u>Appellant</u>)	

I. FACTS

City of Spokane noticed Mr. Blayne Dutton that the Spokane City "Building Official" had scheduled a hearing regarding issues with real property at 1914 East 11th Avenue. The hearing was continued to June 04, 2013 where Mr. Dutton was advised he must establish a "rehabilitation plan" for the real property. Mr. Dutton advised he planned to attempt to sell the real property and placed a for sale sign on the property.

Mr. Dutton challenged the government's illegal entry upon the property without a warrant pursuant to the Fourth Amendment and Article I § 7 of the Washington State Constitution.

The appellant now challenges the jurisdiction of the City Hearing Examiner for maintaining the action. Also the request for "appeal or reconsideration" challenges the unlawful taking of his property stating that the imposition of fees and assessments is an unlawful taking of his real property. The appellant argues that the fees amount to an

interfere with the comfortable enjoyment of the life and property, is a nuisance and the subject of an action for damages and other further relief.” The Revised Code further defines a public nuisance at RCW 7.48.130 as an action “which affects” equally the rights of an entire community or neighborhood. RCW 7.48.280 addressed the method for collecting damages and costs in abating a nuisance and does not allow for an administrative action.

The “Findings of Fact” entered on June 18, 2013 by the “Building Official” amount to a determination that 1914 E. 11th Spokane, Washington is a nuisance. It lists specifically dilapidation, structural defects, defective and inoperable plumbing, inadequate weather proofing, no active utility service for one year, and defects increasing the hazard of fire, accident or other calamity (Order of Building Official June 18, 2013).

The appeal challenges the action as an unlawful taking without due process of law. (Appeal of Reconsideration filed July 11, 2013) Further, that the action denies Mr. Dutton due process of law. Article I § 3 of the Washington State Constitution says “No person shall be deprived of life, liberty, or property without due process of law.” Article I § 7 states “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.”

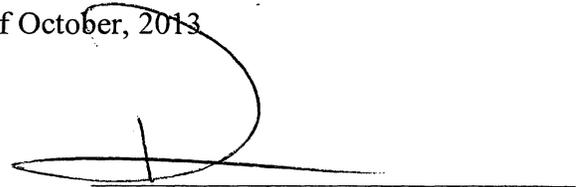
The Washington Supreme Court has further defined a nuisance as “a substantial and unreasonable interference with use and enjoyment of land.” *Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 989, 296 P.3d 860, 867 (2013) Here the City of Spokane violated Article I § 16 by taking the defendant’s real property through an action to abate a nuisance in an administrative proceeding contrary to Washington State Constitution Article IV § 6 requiring that the Superior Court has original jurisdiction in cases of

IV. CONCLUSION

Mr. Dutton was given a notice that says, in short, "We got a complaint from an unknown person, we invaded your privacy by trespassing on your property, and we came to the conclusion that we are going to use the power of the state to require certain performance from you" in regards to that real property. This is a mockery of the requirements of the Washington State Constitution which requires the original jurisdiction be before the Superior Court.

This case must be remanded back to the Department of Code Enforcement for a proper hearing before the Superior Court because the issues must be heard as required by the Washington State Constitution as noted *supra*.

Respectfully submitted this 7 day of October, 2013

A handwritten signature in black ink, consisting of a large, stylized loop that starts from the left, goes up and over, then down and across to the right, ending with a horizontal line.

Douglas Phelps
Attorney for Blayne Dutton

Examiner, the Appellant requested a continuance because his attorney could not attend the hearing. A continuance was granted until September 24, 2013. The Memorandum filed by his attorney identified only a single allegation; that City officials illegally went upon Mr. Dutton's property without his permission to conduct their investigation. The City denies that allegation. At the September 24, 2013 hearing, Mr. Dutton's attorney raised an issue, not set forth in their briefing, claiming that the City's Hearing Examiner did not have jurisdiction to hear the appeal.

II. BRIEF STATEMENT

The Hearing Examiner does have jurisdiction to hear Mr. Dutton's appeal. The Revised Code of Washington, Ch. 35.80, specifically authorizes municipalities to enact ordinances that relate to dilapidated or unfit dwellings, buildings or structures. The City of Spokane enacted ordinance SMC 17F.070 that provides for administrative hearings through the Building Official involving substandard or unfit structures. Under SMC17F.070.460, a property owner, has the right to appeal the Building Official's decision to the City's Hearing Examiner. Jurisdiction for the City Hearing Examiner to hear Building Official appeals is granted under 17G.050.070. A property owner then has the right to appeal the Hearing Examiner's decision to Superior Court, for an additional right of appeal. In the present situation, the appellant had not exhausted the administrative hearing process.

Throughout the administrative proceedings, Mr. Dutton has been afforded substantial due process before the Building Official and Hearing Examiner.

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The Washington State Legislature specifically created RCW 35.80 over fifty years ago to permit municipalities the ability to conduct administrative hearings to address substandard conditions on properties within their jurisdiction. If the Appellant's argument were correct, it would remove the Building Official and Hearing Examiner from the administrative process and cause all substandard and unfit structures actions to be brought before the Superior court in order to determine if the properties are substandard.

However, in actuality, the City's Building Official's administrative process provides a property owner with the process to be heard and present their case to the Building Official in a timely manner and that determination may be appealed to the Hearing Examiner.³ Only then, would the Superior Court have jurisdiction over any appeal of the Hearing Examiner's determination.

2. CITY HEARING EXAMINER HAS JURISTITION TO HEAR AN ADMINISTRATIVE APPEAL FROM THE BUILDING OFFICAL -17G.050.070

The City Hearing Examiner has jurisdiction to hear administrative appeals from the Building Official as well as other matters involving land matters. The Hearing Examiner exercises quasi-judicial powers and conducts public hearings and renders decisions on various matters that relate to an individual's use of their real property. The Appellant in this situation has the right, once a decision has been made by the City Hearing Examiner, to appeal to the Spokane County Superior court. The Appellant's

³ SMC 17G.050.070 (B) (2) Jurisdiction – Hearing Examiner's authority to hear building official appeals.

B. THE HEARING EXAMINER DID NOT IMPOSE A FINE OR LIENS ON MR. DUTTON'S PROPERTY: LIENS ARE AUTHORIZED UNDER RCW 35.80.030 (1) (H) SMC17F.070.500, SMC 08.02.067.

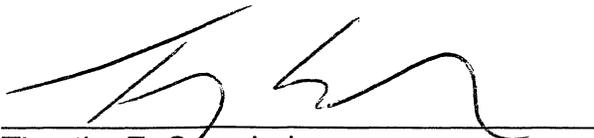
In this matter, the Hearing Examiner *did not* assess the annual fee or the monitoring fee on Mr. Dutton's property. The Building Official assessed fees as authorized under SMC 17F.070.500 a and by RCW 35.080.030 (1) (H) againts Mr. Dutton's property. The Building Official has assessed monitoring fees on the Appellant's property based on his failure to provide any type of rehabilitation plan for his property. The Building Official's annual hearing fee and property monitoring fee is authorized under SMC 08.02.067. Mr. Dutton may still provide a rehabilitation plan and repair the property *within one year* of the assessments and be refunded \$500.00 of the annual fee. The fees charged in the Building Official's process covers staff time of monitoring and staff preparation for the Building Official hearing.

Mr. Dutton's failure to provide a rehabilitation plan may ultimately result in additional actions by the City against his property, as permitted by RCW 35.80 and SMC 17F.070. Mr. Dutton did have an attorney attend the Building Official hearing with him and both were provided the opportunity to question City staff and present evidence at the hearing. The Building Official was left with no choice in the matter but to assess fees because Mr. Dutton did not submit a rehabilitation plan or, at minimum, an actual "real estate" listing of the property for sale

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RESPECTFULLY SUBMITTED this 16th day of October 2013.

OFFICE OF THE CITY ATTORNEY
NANCY L. ISSERLIS, City Attorney



Timothy E. Szambelan
Assistant City Attorney #20636
Attorneys for Respondent
City of Spokane

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