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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____



No. 326047

Court of Appeals
Division Three
of the State of Washington

City of Walla Walla,

Respondent,

v.

Terry Knapp,

Appellant.

Brief of Respondent
City of Walla Walla

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3. Counter-statement of the Case

The property located at 712 Whitman St. in the City of Walla Walla has been a continuing scourge on its surrounding neighborhood for over a decade. The City unsuccessfully tried every imaginable means to attempt to get the property owner to keep and maintain the property in a condition that would allow neighbors to enjoy theirs without having to endure the constant barrage of nuisances emanating from it. It therefore instituted condemnation proceedings in 2013 in accordance with chapter 35.80A RCW. (Chapter 35.80A RCW is reprinted in the appendix hereto). After reviewing the property's long list of public health, safety, and welfare violations and its continuing detrimental impact on the surrounding neighborhood, the Walla Walla County Superior Court found on June 16, 2014 that the City's condemnation action is a matter of public necessity and the condemnation of the property to eliminate blight is a public use. CP 1055-60.

The property is located in a residential Walla Walla neighborhood near Pioneer Park consisting of good to average older homes with generally good maintenance, with both an elementary school and middle school within walking distance. CP 1000, CP 1004. In 1994 the property occupant obtained a building permit which expired in 1995. CP 318. At that time a "Stop Work" order was placed on the property due to work in progress that

was beyond the scope of the permit. CP 318. In 2001, the property occupant constructed a substandard shed without permits that was declared to be a dangerous building. CP 314-15. In 2003 the dwelling unit was again posted “Do Not Enter Unsafe to Occupy” because of numerous other unsafe, unsanitary, and disturbing conditions existed on the property. CP 317-20; CP 402; CP 417. The house was in disrepair and violated various building code requirements, including the use of improper construction techniques to build additions and other construction not authorized by permits. CP 318-19. In addition, there were at least 15 vehicles stored on the property. CP 319.

In response to the City's request for voluntary compliance, the property occupant tore down some of the illegal sheds, made most of the vehicles operable, ceased construction activities, and allowed a building inspection. CP 322. However, the inspection revealed other problems previously unknown. A remaining shed was a dangerous structure and the substandard additions to the house made it dangerous. CP 323-24. In addition, the occupant had converted the basement into an unsafe living space. CP 332. Furthermore, multiple plumbing, electrical, and mechanical violations were discovered during the inspection which could not be seen from earlier visual observations of the exterior. CP 326-28. For example, items were constructed without observing adequate fire clearance standards,

inadequate sized plumbing materials were used, and electrical work with exposed live wiring was found throughout the house without a valid electrical work permit from the State Department of Labor and Industries which is responsible for electrical permits and inspections. CP 333-34. The occupant was therefore ordered in 2003 to vacate the premises, demolish the substandard additions, and remove or correct the other conditions that violated plumbing, mechanical, and electrical codes and that "the building shall not be occupied as a dwelling until all of the required corrections have been completed and the building official has issued a certificate of occupancy." CP 324, *See also* CP 325-27.

The corrections ordered in 2003 were not timely made, and the City in 2005 revoked the permit that had been issued for that purpose. CP 409; CP 417. By that time, the property owner had stopped paying the utility bill for the property and the water was disconnected in February of 2005. CP 876; CP 878-79. The City building official on July 1, 2005 declared the house a dangerous building, an "attractive nuisance to children" and "a potential harbor for vagrants," ordered its abatement, and posted it with a notice and order of abatement. CP 331-39; CP 1053-54.

The property owner nonetheless continued to occupy the property. CP 381-83; CP 417. Since the property was without water, its backyard

began being used by occupants to defecate. *See* CP 760; CP 765; CP 767. The property owner also resumed un-permitted construction activities. CP 396-98; CP 410-12. The property owner was again ordered to stop working without proper permits and the property was re-posted as being dangerous in 2007. CP 396-408. During this time period, the property once again began to accumulate many of the nuisance conditions that had earlier been abated in 2003. By 2007, the property was again the site of numerous junk vehicles, bee hives, debris, and other conditions unfit for residential property. CP 418; *see also* CP 479.

The property owner was cited in 2007 and eventually found guilty of offenses related to his un-permitted construction activities and re-accumulation of junk vehicles on the property. CP 430-45 (guilty plea statement and judgment and sentencing forms). Despite enforcement action by the City, these conditions persisted in 2008. CP 424-26. They also remained in 2010 when the property owner pleaded guilty to the offenses charged in 2007 and stipulated to a prospective compliance schedule. CP 435-38.

In addition to the continuance and recurrence of conditions identified above, 712 Whitman St. became the site of an illegal marijuana growing operation and a storage site for stolen property in 2007. CP 449-596. The

property owner was charged and subsequently entered into an agreement whereby he pleaded guilty to the possession of stolen property charge in return for dismissal of charges related to growing marijuana. CP 446-48 (information); CP 597-614 (guilty plea statement). Despite this enforcement action, the property subsequently became the site for the illegal sale of marijuana, and the property owner was charged and convicted for those activities in 2011. CP 615-750.

The condition of the property itself was never properly corrected, but the owner continued to reside there without running water and persisted with un-permitted construction activities. CP 759-60; CP 762-64; *see also* CP 773-777; CP 872-79. The City again ordered the property owner to stop work and to vacate the property in 2013 and condemned it in accordance with the City's property maintenance code. CP 773-77. Neighboring property owners report that the deplorable conditions at 712 Whitman St. described above have now continuously existed since the 1990's. CP 751-767.

The Walla Walla City Manager determined on September 3, 2013 based upon the property's current state and its long history of repeated and continuous violations to constitute a threat to public health, safety, and welfare. CP 970-73. Notice was given to the property owner, and the matter was scheduled for consideration by the Walla Walla City Council on

September 11, 2013. CP 968-69. The property owner appeared at the September 11 City Council meeting, and the Council considered the matter. CP 981-82. The City Council found that the property had not been lawfully occupied since at least 2005 when it was declared dangerous and had its water disconnected. CP 975-76, section 1, ¶ B. It additionally confirmed the City Manager's determination that the property constitutes a threat to public health, safety, and welfare. CP 975, section 1, ¶ A. It therefore declared the property a blight on its surrounding neighborhood and authorized its acquisition to eliminate that blight. CP 976-77, sections 2-4.

The City attempted unsuccessfully to acquire the property by negotiation and therefore gave notice on January 24, 2014 that it would proceed with condemnation. CP 992-1020. The Walla Walla City Council passed an ordinance on February 12, 2014 authorizing commencement of this condemnation proceeding. CP 986-88. The condemnation proceeding was filed in Walla Walla County Superior Court on April 16, 2014. CP 3-23.

The City filed a motion on May 16, 2014 in the condemnation proceeding for a determination of public use and necessity. CP 24-29. The hearing upon the motion was continued on June 2, 2014 at the property owner's request to June 16, 2014. CP 1071. The Superior Court considered the matter on June 16 and found that condemnation of the property is a public

necessity and its acquisition by the City to eliminate blight on the surrounding neighborhood is a public use. CP 1055-60.

The property owner, Mr. Knapp, appealed to the Court of Appeals. CP 1062-69.

4. Argument

A. Standard of Review

A trial court's decision on public use is reviewed to determine if it is supported by substantial evidence. *City of Blaine v. Feldstein*, 129 Wn.App. 73, 79, 117 P.3d 1169 (2005); *Seattle v. Loutsis Investment*, 16 Wn.App. 158, 174, 554 P.2d 379 (1976), *review denied* 88 Wn.2d 1016 (1977). In addition, the appellate court views substantial evidence in a light most favorable to the party who prevailed on the issue of public use in the trial court. *Util. Dist. v. For. Trade Zone Indus.*, 159 Wn.2d 555, 578, 151 P.3d 176 (2007).

B. Appellant failed to preserve his procedural complaints for appeal

Mr. Knapp complains that the Superior Court did not hold a hearing with live witnesses, and his principal argument on appeal is that the court therefore did not conduct an authentic judicial inquiry to determine public use. He argues that the matter should be remanded for further proceedings. However, "[d]espite ample opportunity to request a separate evidentiary

hearing, no such request was made. This issue may not be raised for the first time on appeal." *State v. Hartley*, 51 Wn.App. 442, 449, 754 P.2d 131 (1988).

Property owners in *Bellevue School Dist. v. Lee*, 70 Wn.2d 947, 949, 425 P.2d 902 (1967) argued at the trial court level against condemnation on the basis that the action of the governmental entity was allegedly arbitrary, capricious, or fraudulent. For the first time on appeal, they tried to add an argument that the entity's condemnation authority was statutorily limited. *Lee*, 70 Wn.2d at 949-50. The Supreme Court rejected that attempt, writing:

In a plethora of decisions, involving many varying situations, this court has steadfastly adhered to the rule that a litigant cannot remain silent as to claimed error during trial and later, for the first time, urge objections thereto on appeal. The trial court must have an opportunity to consider and rule upon a litigant's theory of the case before this court can consider it on appeal.

Lee, 70 Wn.2d at 950.

Mr. Knapp argued in the trial court below only that the record did not support the blight determination made by the City. Nowhere did he argue that he was entitled to the trial type hearing that he now claims on appeal should have been provided. CP 1048-52. Even if it is assumed that Mr. Knapp could have demanded a bench trial on the issue of public use, he cannot now urge that the failure to conduct one constituted error. He didn't

ask for one and failed to preserve the issue for appeal.

C. The Superior Court properly made a public use determination.

A court in a condemnation proceeding is not required to hold a trial type hearing to find a public use. "The trial court has the discretion to determine whether there are factual and credibility issues that require a testimonial hearing. If there are no relevant factual disputes or credibility issues and the record is sufficient to fully inform the court, the case may be properly resolved without a testimonial hearing." *City of Blaine v. Feldstein*, 129 Wn.App. 73, 76, 117 P.3d 1169 (2005). Mr. Knapp failed to raise any relevant factual dispute in the proceedings below, and the Superior Court properly determined public use based upon the record.

The City acknowledges the general observation made by Professor Stoebuck, quoted on page 11 of appellant's brief, that since "Washington has, except in urban renewal cases, adopted a very restrictive view of public use, there is a greater possibility of obtaining a finding of no public use in Washington than in most jurisdictions." WILLIAM B. STOEBUCK & JOHN W. WEAVER, WASHINGTON PRACTICE: REAL ESTATE: PROPERTY LAW § 9.28 (2d ed. 2004). This is not however a case where a municipality condemned property for a reason heretofore unknown at law. Urban renewal cases

address "blighted areas" and public use is defined by statute. RCW 35.81.005. Public use in this particular type of condemnation proceeding addresses "blight" on a surrounding neighborhood and is also defined by statute. RCW 35.80A.010.

Chapter 35.80A RCW authorizes condemnation of property to eliminate a blight on the surrounding neighborhood. RCW 35.80A.010 provides in pertinent part that: "Condemnation of property, dwellings, buildings, and structures for the purposes described in this chapter is declared to be for a public use." A property may be condemned under Chapter 35.80A RCW as a "blight on the surrounding neighborhood" if it meets any two of the following factors:

(1) If a dwelling, building, or structure exists on the property, the dwelling, building, or structure has not been lawfully occupied for a period of one year or more; (2) the property, dwelling, building, or structure constitutes a threat to the public health, safety, or welfare as determined by the executive authority of the county, city, or town, or the designee of the executive authority; or (3) the property, dwelling, building, or structure is or has been associated with illegal drug activity during the previous twelve months.

RCW 35.80A.010.

Washington has long recognized that the legislature may declare in the first instance that a purpose is public, and its declaration will be disregarded only if the courts find it to be unfounded. *Hallauer v. Spectrum*

Props., 143 Wn.2d 126, 138-40, 18 P.3d 540 (2001); *Anderson v. Superior Court*, 119 Wash. 406, 410, 205 P. 1051 (1922). Chapter 35.80A RCW declares elimination of blight to be a public use. RCW 35.80A.010 further defines what constitutes a "blight on the surrounding neighborhood." Mr. Knapp did not challenge the validity of the statute in either the trial court or his assignment of errors. *See* CP 1048-52 (Mr. Knapp's response in the trial court); Brief of Appellant, pp. 3-6 (Mr. Knapp's assignments of error raised herein). He consequently cannot do so now. *Det. of Brock*, 126 Wn.App. 957, 960-61 n.1, 110 P.3d 791 (2005) (failure to assign error); *Bellevue School Dist. v. Lee*, 70 Wn.2d 947, 950-51, 425 P.2d 902 (1967) (failure to raise issue in trial court). The only issues relevant to the determination of public use in this case are those listed in RCW 35.80A.010.

Even if Mr. Knapp could now belatedly challenge the statute, the Washington Supreme Court has already held that elimination of blight is a public use. *Miller v. Tacoma*, 61 Wn.2d 374, 382-88, 378 P.2d 464 (1963). Respondent therefore submits that the legislative declaration of public use in Chapter 35.80A RCW cannot be considered "unfounded," and the public use issue in this case therefore involves only application of the statute as opposed to a novel question to be cut from whole cloth. The public nature of the use is legislatively declared and not subject to attack for genuineness. *See also*

Berman v. Parker, 348 U.S. 26, 31-33, 75 S.Ct. 98, 99 L.Ed. 27 (1954).

The first relevant inquiry under RCW 35.80A.010(1) is whether or not a dwelling has been lawfully occupied. The Superior Court found in this case that the property had not been lawfully occupied for over a year, because it has been without water since 2005 and because the house on the property had been declared dangerous in 2005. CP 1058-59, ¶2.10. It was therefore not capable under any circumstances of being lawfully occupied since that time.

The record establishes that the house at 712 Whitman St. was declared dangerous on July 1, 2005, and that notice and order has never been rescinded. CP 1053, ¶ 1.2; CP 331-41. A building cannot be lawfully occupied after it has been declared dangerous. CP 44, ¶ E (local ordinance adopting dangerous building code); CP 55, § 203, CP 59, § 404, CP 63, § 701.3 (provisions of the dangerous building code prohibiting occupancy). Mr. Knapp knew that the house had been declared dangerous as evidenced by his untimely attempt to appeal the dangerous building order in 2005. CP 342-46. He made a conclusory assertion in his declaration in response to the motion for a determination of public use that the house isn't dangerous, but he admitted that compliance work had not been completed. CP 1042, ¶ 3. He said that "I intend to complete all of the items." CP 1042, ¶ 3. Far from

contesting that the house had not been lawfully occupied, Mr. Knapp asserted that he knows that "the residence cannot be lived in prior to final inspection approval" and that "I am not living at the property." CP 1042, ¶ 4.

The record also established that 712 Whitman St. has been disconnected from any water supply since 2005. CP 872-79; CP 1038-39. A house cannot be lawfully occupied unless it is connected to water service. CP 89, ¶ J, CP 172, ¶ J, and CP 239, ¶ J (local ordinances adopting the property maintenance code); CP 116, §§ 501.2 and 505.1, CP 199, §§ 501.2 and 505.1, CP 284, § 501.2, and CP 286, § 505.1 (provisions of the property maintenance code prohibiting occupancy of a house unless its plumbing fixtures are connected to water). Mr. Knapp attempts to blame the City for his failure to connect the property to water, but his declaration nonetheless admits that the house is not connected to water. CP 1042, ¶ 4.

Notwithstanding Mr. Knapp's attempt on pages 13-14 of appellant's brief to rewrite RCW 35.80A.010 with reference to how a property "might" be occupied, the relevant fact for purposes of RCW 35.80A.010(1) is whether or not a house has been lawfully occupied in the past year. The statute is unambiguous and therefore not susceptible to Mr. Knapp's self-described "logical analysis" of its meaning by creation and manipulation of categories which change the requirement from a showing of lack of lawful occupancy

to a need for a showing an "unlawful occupancy." *See State v. Gray*, 174 Wn.2d 920, 927, 280 P.3d 1110 (2012) ("If the statute is unambiguous after a review of the plain meaning, the court's inquiry is at an end"). Mr. Knapp complains about whose fault it is that no one could legally reside at 712 Whitman St. during the past 9 years, but he came forth with no facts upon which to dispute that the house has in fact not been lawfully occupied during that time. The dangerous building declaration still stands, and no certificate of occupancy has been issued. CP 1053-54, ¶¶ 1.2-1.3. The house has no running water. CP 1039, ¶ 1.6. It has therefore not been lawfully occupied, and Mr. Knapp presents no relevant factual dispute on that issue.

The second relevant inquiry under RCW 35.80A.010(2) is whether the executive authority for a city has determined that a property constitutes a threat to public health, safety, or welfare. The Superior Court found in this case that the Walla Walla City Manager properly determined that the property constitutes a threat to public, health, safety, and welfare. CP 1058, ¶2.9.

The record established that the Walla Walla City Manager determined on September 3, 2013 that the property at 712 Whitman St. constitutes a threat to the public health, safety, and welfare. CP 304-07 (City Manager determination). Mr. Knapp made a conclusory assertion in his June 12, 2014

declaration that the property does not pose an immediate risk to the health, safety or welfare of any person. CP 1042, ¶ 3. However, he did not present anything to dispute that the City Manager determination was in fact made.

This case involves a public use that has been statutorily declared and defined by the Washington Legislature in RCW 35.80A.010. It was incumbent on Mr. Knapp in the trial court to either submit facts demonstrating that the requirements of the statute were not met or to challenge the validity of the statute. He did neither. He failed to present any facts to dispute that 712 Whitman St. has not been lawfully occupied since 2005 or that the Walla Walla City Manager determined that the property constitutes a threat to the public health, safety, and welfare. Those are the only relevant facts under RCW 35.80A.010(1) & (2).

Mr. Knapp instead tried to argue that, after twenty (20) years of noncompliance, he continues to work on the property and will eventually make it habitable. CP 1041-43. That is not relevant under RCW 35.80A.010, and the Superior Court properly exercised its discretion to determine public use on the basis of the record before it. *See City of Blaine v. Feldstein*, 129 Wn.App. 73, 76, 117 P.3d 1169 (2005); *cf. Grimwood v. University of Puget Sd.*, 110 Wn.2d 355, 359-60, 753 P.2d 517 (1988) (discussing the type of facts needed to avoid summary judgment in an

ordinary civil case).

D. 712 Whitman St. is blighted property and its acquisition is a public use and necessity.

Mr. Knapp complains that the "trial court decision merely endorsed, in conclusory terms, the action by the executive authority of the City." Brief of Appellant, pp. 11-12. The City submits that this is not a valid complaint.

The City acknowledges the general rule that "the question of whether a proposed acquisition is really for a public use is a matter for judicial inquiry[,]" and that "what constitutes a public use depends on the particular facts in each case." *In re Port of Seattle*, 80 Wn.2d 392, 394, 495 P.2d 327 (1972). The City submits, however, that Mr. Knapp cites and incorrectly interprets this general rule on page 16 of appellant's brief as a mandate for de novo trials when making public use and necessity determinations. The role of the court in a condemnation proceeding for blight is limited. In *Apostle v. Seattle*, 77 Wn.2d 59, 63, 459 P.2d 792 (1969), the Washington Supreme Court explained:

[F]ortunately or unfortunately, the judiciary does not have the responsibility of passing on the credibility of witnesses, or of weighing the evidence with reference to blight in such a proceeding. . . . [T]he legislature has made the local governing body (the city council in this instance) the tribunal which makes the factual determination of blight. The province of the court is only to determine whether the factual determination of blight is supported by sufficient evidence to prevent the city council's determination from

being arbitrary and capricious. The trial court may not overrule the city council's determination of blight merely because it believes that the area is not blighted.

The statute at issue in this case made the City Manager the authority which makes a factual determination whether "the property, dwelling, building or structure constitutes a threat to the public health, safety, or welfare" and the City Council the tribunal which makes the factual determination whether the acquisition of the property "is necessary to eliminate neighborhood blight." RCW 35.80A.010. "In the condemnation context, "'necessary" . . . mean[s] reasonable necessity under the circumstances.' . . . It does not mean immediate, absolute, or indispensable need." *Reg'l Transit Auth. v. Miller*, 156 Wn.2d 403, 411, 128 P.3d 588 (2006) (citations omitted); *see also State ex rel. Lange v. Sup. Ct.*, 61 Wn.2d 153, 156, 377 P.2d 425 (1963).

It was not, as argued by Mr. Knapp, the responsibility of the court to retry those issues anew, weigh evidence, or pass on the credibility of witnesses. "The courts ought not substitute their judgment for that of the administrative or legislative agency charged by law with choosing the methods or means of accomplishing the public purpose." *Steilacoom v. Thompson*, 69 Wn.2d 705, 711, 419 P.2d 989 (1966). Decisions delegated by condemnation procedures to municipal authorities may be overcome only

by a showing of actual fraud or such arbitrary and capricious conduct that amounts to constructive fraud. *See Des Moines v. Hemenway*, 73 Wn.2d 130, 139, 437 P.2d 171 (1968) (applying the rule to necessity determinations); *see also Reg'l Transit Auth. v. Miller*, 156 Wn.2d 403, 411, 128 P.3d 588 (2006).

The City Manager determined on September 3, 2013 that "the dwelling, buildings, structures and property at 712 Whitman St. in the City of Walla Walla constitutes a threat to public health, safety, and welfare." CP 305, ¶ 1.4. The City Manager did make a "present tense" finding of a threat to public health, safety, and welfare. He found that the "property, dwelling, buildings and other structures at 712 Whitman St. have been, and continue to be, a blight on the surrounding neighborhood and a threat to public health, safety, and welfare, and in particular the health, safety, and welfare of neighbors to that location." CP 306-07, ¶ 1.4.2. This finding is supported by the record of continuing code violations, CP 773-77, and reports of members from the neighborhood surrounding the property that noxious conditions currently persist. *See* CP 751-768. One neighbor reported on June 9, 2013 that the "yard is strewn with all manner of shanty shacks, decommissioned cars, outhouses, beehives, and who knows what else." CP 767. Another confirmed on June 13, 2013 that the "[b]ack yard of property is wall to wall with shanty style structures filled with lumber and junk and possibly some

old cars. The grass is dry and there is little vegetation." CP 762. Another on June 14, 2013 reported an "unfinished tree house towering close to the fence line. . . ." CP 766. Another wrote on June 14, 2013:

We have lived two houses to the east of 712 Whitman Street for nearly 3 years, and have always assumed the property was occupied, based upon the routine and frequent observations of the owner and others at the property. However, in this time, no visible improvements have been made to the structure. We have never seen any sort of trade person(s) visit the property, or seen the owner with any types of materials one might associate with home improvements. In addition, we have never heard any sounds typically associated with such improvements, such as any use of a power tool, hammering of nails, etc.

CP 759. Another explained that his family have lived in the neighborhood for sixteen years and the residence at 712 Whitman St. "has always been an eyesore and for most of the time that we've resided here, there has been a large amount of questionable activity there as well." CP 751.

The City Manager buttressed that determination with an additional finding that:

The property, dwelling, buildings and other structures at 712 Whitman St. have been the site of numerous, repeated, and continuous violations of health, safety, and welfare codes. The property, dwelling, buildings and other structures at 712 Whitman St. are the site of persistent violations of health, safety, and welfare code violations and have continuously remained a threat to public health, safety, and welfare for at least twelve years despite all enforcement actions taken by public officials.

CP 305, § 1.4.1. The history supporting that determination is thereafter

detailed. CP 305-06.

In particular, the City Manager found that a storage building constructed at 712 Whitman St. was "declared to be a substandard and dangerous building in May of 2001." CP 305, § 1.4.1.1. This is supported by the record. *See* CP 314-15. Additionally, the City Manager found that the "property, dwelling, buildings and other structures at 712 Whitman St. was found to be in violation of numerous health, safety, and welfare codes in February of 2003." CP 305, § 1.4.1.2. This is supported by the record. *See* CP 318-19. While some corrective action was taken "numerous conditions persisted and additional violations of health, safety, and welfare codes occurred, and a notice and order was issued in May of 2003." CP 305, § 1.4.1.2. This is supported by the record. *See* CP 322; 323-28.

The City Manager further determined that "[n]umerous violations of health, safety, and welfare codes persisted at 712 Whitman St., and a notice and order for abatement of a dangerous building was issued on July 1, 2005." CP 305-06, § 1.4.1.3. This finding is based on and supported by the City building official's 2005 notice and order. *See* CP 331-37; *see also* CP 417.

The City Manager found that the property became "the site of criminal activity and a repeat violation of health, safety, and welfare codes occurred at 712 Whitman St.," and criminal and other enforcement action

was required to be taken to address those violations during 2005-2006. CP 306, § 1.4.1.4 and 1.4.1.6. This is supported by the record. *See* CP 377-94; CP 417; CP 479.

The City Manager found that the property "was the site of criminal drug activity and other criminal activity and a criminal enforcement action was required to be taken during 2007." CP 306, § 1.4.1.6. This is supported by the record showing that the property was used to store stolen property and illegally grow marijuana. *See* CP 446-614.

The City Manager found that "[r]epeated violations, of health, safety, and welfare codes occurred at 712 Whitman St., and a criminal enforcement action was required to be taken to address those violations during 2007-2010." CP 306, § 1.4.1.7. This is supported by the record. *See* CP 395-445. Not only did un-permitted construction activities continue, but the property once again also "accumulated large amounts of junk, litter, and debris. . . which includes but is not limited to scrap lumber, auto parts, hulk vehicles and parts thereof, plumbing fixtures, buckets, bee hives, appliances and other items which are not intended for outside storage on a residential property. . . ." CP 418.

The City Manager found that "712 Whitman St. was the site of criminal drug activity and a criminal enforcement action was required to be

taken during 2011." CP 306, § 1.4.1.8. This is supported by the record. See CP 615-750.

The City Manager found that "[r]epeated violations of health, safety, and welfare codes occurred at 712 Whitman St., and an enforcement action was required to be taken to address those violations in May of 2013." CP 306, § 1.4.1.9. This is supported by the record. See CP 773-77.

Mr. Knapp did not contest any of that history or those findings. Mr. Knapp instead argues that this extensive history could not be considered, because "present tense" language is used in RCW 35.80A.010(2). However, by Mr. Knapp's own admission in his June 12, 2014 declaration in the Superior Court, non-compliant conditions remained seven months after the City Manager's September 3, 2013 determination. CP 304-07.

The language used in RCW 35.80A.010(2) does not require a city to ignore a property's history. The determination of whether a property constitutes a "constitutes a threat to the public health, safety, or welfare. . . ." is a matter for the City Manager to decide under that statute. The standards used to make that determination are not susceptible to challenge unless they are arbitrary. See *Edwards v. City Council of Seattle*, 3 Wn.App. 665, 670, 479 P.2d 120 (1970), review denied 78 Wn.2d 996 (1971). In both *Steilacoom v. Thompson*, 69 Wn.2d 705, 710-11, 419 P.2d 989 (1966) and

Tacoma v. Welcker, 65 Wn.2d 677, 684-86, 399 P.2d 330 (1965), the Supreme Court rejected an argument that a municipality could consider only existing problems when determining public necessity for a condemnation. "[A] public authority may provide 'reasonable safeguards against a reasonably realistic and foreseeable future danger. . .'" *Steilacoom*, 69 Wn.2d at 711. RCW 35.80A.010(2) requires the executive authority of a city to determine whether a property "constitutes a threat." "Arbitrary and capricious conduct is willful and unreasoning action, without consideration and regard for facts or circumstances." *Tacoma*, 65 Wn.2d at 684. The City submits that any evaluation of the nature and extent of a threat depends in large part upon background facts and circumstances, and it is neither arbitrary nor capricious to consider the history of a property when determining if it poses a threat to public health, safety, or welfare. The difference between a transitory isolated instance and a chronic problem is duration and/or repetition.

The promise that Mr. Knapp now makes that he "intend[s] to complete all of the items" to bring his property into compliance, CP 1042, ¶ 3, is the same one he made in 2010 when he stipulated that the "ultimate deadline for passing the rough plumbing, framing and electrical inspections is: June 22, 2010." CP 437, ¶ 9. His assertion that the threat has abated since

he secured a permit months after the blight determination was made, CP 1042, ¶ 4, is belied by his multiple failures to follow through with work required by prior permits. CP 318 (re: 1994 permit); CP 409 (revocation of 2005 permit); CP 417 (re: 2005 permit); CP 773 (re: 2009 permit). His assertion that a cursory inspection performed solely for issuance of a building permit should be misinterpreted as an indication that the number of problems existing on the property are limited is contradicted by the disclaimer on the permit that final inspection approval would be needed, CP 1047, and the fact that it has been in the past shown that many latent defects created by Mr. Knapp's construction activities could only be discovered by a thorough final inspection, *see* CP 323-28. The limited scope of an inspection for purposes of issuing a building permit does not by its nature address the many nuisance conditions additionally remaining in the yard. CP 762 and CP 767 (condition of yard). The history demonstrates that Mr. Knapp has long employed a delay and derail strategy with respect to any enforcement action against his property. His efforts undertaken here after a blight determination had already issued are no different, and the City submits that they have no bearing upon the validity of the determination, because the issue is whether the City's determination was arbitrary and capricious at the time it was made and not whether the court believes the property is blighted. *See Apostle v. Seattle*, 77

Wn.2d 59, 63, 459 P.2d 792 (1969).

The City Council determined on September 11, 2013 that the acquisition of 712 Whitman St. is necessary to eliminate neighborhood blight. CP 976, § 3. It also made findings enumerating the reasons why the property constitutes a blight under RCW 35.80A.010. It incorporated the City Manager's health, safety, and welfare determination. CP 975, § 1(A). That determination satisfies RCW 35.80A.010(2) and is supported by its own findings and substantial record as described in the preceding paragraphs.

In addition, the City Council determined that the property had not been lawfully occupied for over a year, because (1) the dwelling on the property had been declared dangerous in 2005, and (2) the property had been without water since 2005. CP 975-76, § 1(B)(1) & (2). That determination satisfies RCW 35.80A.010(1) and is also supported by a substantial record. CP 331-41 (2005 dangerous building order); CP 55, § 203, CP 59, § 404, CP 63, § 701.3 (code provisions making it unlawful to occupy a dangerous building); CP 872-79 (proof of water disconnection); CP 116, §§ 501.2 and 505.1, CP 199, §§ 501.2 and 505.1, CP 284, § 501.2, and CP 286, § 505.1 (code provisions making it unlawful to occupy property that is not connected to water).

Mr. Knapp did not factually contradict any of those findings. Mr.

Knapp made only a conclusory assertion that remaining compliance issues do not constitute an immediate threat to health, safety, and welfare. CP 1042, ¶ 3. The City submits that his difference of opinion does not however come anywhere close to the showing needed to overturn the City's determinations. *See Steilacoom v. Thompson*, 69 Wn.2d 705, 711, 419 P.2d 989 (1966). "Action, when exercised honestly, fairly, and upon due consideration is not arbitrary and capricious, even though there may be room for a difference of opinion upon the course to follow, or a belief by the reviewing authority that an erroneous conclusion has been reached." *City of Blaine v. Feldstein*, 129 Wn.App. 73, 81, 117 P.3d 1169 (2005) (quoting *Tacoma v. Welcker*, 65 Wn.2d 677, 684-85, 399 P.2d 330 (1965)).

Mr. Knapp was twice given notice and an opportunity to be heard by the City when making its condemnation determinations. CP 968-73 (notice to Mr. Knapp of the September 3, 2013 City Council hearing to consider declaring the property a blight); CP 1015-17 (notice to Mr. Knapp of the February 12, 2014 City Council meeting to consider whether to authorize condemnation proceedings). The City applied the criteria specified in RCW 35.80A.010 to find a public use and necessity. CP 975-77. In addition, as explained in the preceding paragraphs, there was overwhelming evidence to support the specific findings made by the City Manager and Council. The

Superior Court made findings confirming the appropriateness of each. CP 1057-59, ¶¶ 2.4, 2.6-2.10. It was therefore not required to further re-litigate issues determined by the City under RCW 35.80A.010 or otherwise disturb the City's determinations. *See Apostle v. Seattle*, 70 Wn.2d 59, 64-65, 422 P.2d 289 (1966).

"The province of the court is only to determine whether the factual determination of blight is supported by sufficient evidence to prevent the city council's determination from being arbitrary and capricious." *Apostle v. Seattle*, 77 Wn.2d 59, 63, 459 P.2d 792 (1969). The Superior Court in this matter reviewed an extensive record and determined that the City met the requirements of Chapter 35.80A and the acquisition of 712 Whitman St. by condemnation is a public use and necessity. CP 1055-60. It was not required to do more in the "absence of proof of actual fraud or such arbitrary and capricious conduct as would constitute constructive fraud" which Mr. Knapp never produced. *Des Moines v. Hemenway*, 73 Wn.2d 130, 139, 437 P.2d 171 (1968); *see also State v. Lauman*, 5 Wn.App. 670, 675, 490 P.2d 450 (1971).

E. Appellant is not entitled to attorney fees

RCW 8.25.075(1)(a), cited on page 16 of appellant's brief, permits an award of attorney fees to a condemnee only if "[t]here is a final adjudication

that the condemnor cannot acquire the real property by condemnation." The statute does not apply if a condemnor can cure a defect and still condemn a property after entry of a decision. *See PUD v. Kottsick*, 86 Wn.2d 388, 390, 545 P.2d 1 (1976). The City submits that the trial court decision finding public use and necessity in this case should be affirmed, and there is no basis upon which to award attorney fees. If, however, this court remands for further proceedings, an award of attorney fees would still be unwarranted, because condemnation could still occur.

5. Conclusion

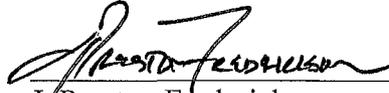
The Superior Court properly determined that the condemnation of 712 Whitman St. "is necessary to eliminate a blight on the surrounding neighborhood and the property's contemplated use by the City of Walla Walla is really public." CP 1059, ¶ IV. The City requests that the order of public use and necessity, CP 1055-60, be affirmed.

DATED November 3, 2014



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DATED November 3, 2014



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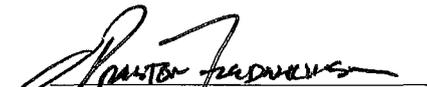
6. Certificate of Service

I personally served true and correct copies of this BRIEF OF RESPONDENT CITY OF WALLA WALLA on the law offices of Michael de Grasse at 59 S. Palouse St., Walla Walla, Washington on the date stated below.

I also personally served true and correct copies of this BRIEF OF RESPONDENT CITY OF WALLA WALLA on the Office of the Walla Walla Prosecuting Attorney at 240 W. Alder St., suite 201, Walla Walla, Washington.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct:

November 3, 2014 Walla Walla, WA
(Date and Place)


(Signature)

7. Appendix

35.80A.010 Condemnation of blighted property. Every county, city, and town may acquire by condemnation, in accordance with the notice requirements and other procedures for condemnation provided in Title 8 RCW, any property, dwelling, building, or structure which constitutes a blight on the surrounding neighborhood. A "blight on the surrounding neighborhood" is any property, dwelling, building, or structure that meets any two of the following factors: (1) If a dwelling, building, or structure exists on the property, the dwelling, building, or structure has not been lawfully occupied for a period of one year or more; (2) the property, dwelling, building, or structure constitutes a threat to the public health, safety, or welfare as determined by the executive authority of the county, city, or town, or the designee of the executive authority; or (3) the property, dwelling, building, or structure is or has been associated with illegal drug activity during the previous twelve months. Prior to such condemnation, the local governing body shall adopt a resolution declaring that the acquisition of the real property described therein is necessary to eliminate neighborhood blight. Condemnation of property, dwellings, buildings, and structures for the purposes described in this chapter is declared to be for a public use.

35.80A.020 Transfer of blighted property acquired by condemnation. Counties, cities, and towns may sell, lease, or otherwise transfer real property acquired pursuant to this chapter for residential, recreational, commercial, industrial, or other uses or for public use, subject to such covenants, conditions, and restrictions, including covenants running with the land, as the county, city, or town deems to be necessary or desirable to rehabilitate and preserve the dwelling, building, or structure in a habitable condition. The purchasers or lessees and their successors and assigns shall be obligated to comply with such other requirements as the county, city, or town may determine to be in the public interest, including the obligation to begin, within a reasonable time, any improvements on such property required to make the dwelling, building, or structure habitable. Such real property or interest shall be sold, leased, or otherwise transferred, at not less than its fair market value. In determining the fair market value of real property for uses in accordance with this section, a municipality shall take into account and give consideration to, the restrictions upon and the covenants, conditions, and obligations assumed by the purchaser or lessee.

35.80A.030 Disposition of blighted property--Procedures. A county, city, or town may dispose of real property acquired pursuant to this section to private persons only under such reasonable, competitive procedures as it shall prescribe. The county, city, or town may accept such proposals as it deems to be in the public interest and in furtherance of the purposes of this chapter. Thereafter, the county, city, or town may execute and deliver contracts, deeds, leases, and other instruments of transfer.

35.80A.040 Authority to enter blighted buildings or property--Acceptance of financial assistance. Every county, city, or town may, in addition to any other authority granted by this chapter: (1) Enter upon any building or property found to constitute a blight on the surrounding neighborhood in order to make surveys and appraisals, and to obtain an order for this purpose from a court of competent jurisdiction in the event entry is denied or resisted; and (2) borrow money, apply for, and accept, advances, loans, grants, contributions, and any other form of financial assistance from the federal government, the state, a county, or other public body, or from any sources, public or private, for the purposes of this chapter, and enter into and carry out contracts in connection herewith.