

STATE OF INDIANA)
) ss:
COUNTY OF LAKE)

2017 082484

STATE OF INDIANA
LAKE COUNTY
FILED FOR RECORD

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MICHAEL B. BROWN
RECORDER

**BEFORE THE BOARD OF PUBLIC WORKS AND SAFETY
CITY OF HAMMOND, INDIANA**

IN RE: 7234 Jarnecke Avenue)
 Order to Repair or Demolish)
 Following Hearing)

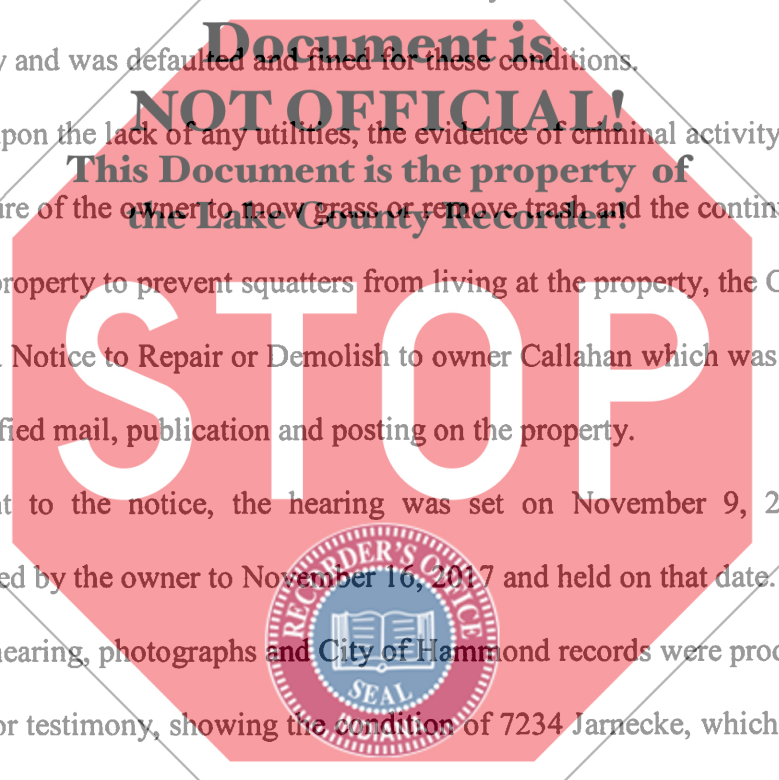
FINDING OF FACT AND DECISION

This matter came before the Hammond Indiana, Board of Public Works and Safety (hereinafter the "Board") on November 16, 2017 on a Notice of Violation of the Hammond Housing Code and Indiana Unsafe Building Act and Order to Repair Structurally Unsafe Building, dated October 13, 2017. Appearing for the City of Hammond at the public meeting was Attorney Kristina Kantar and Building Inspector. Appearing for the property owner was the owner, Brian P. Callahan, represented by counsel, attorney Michael Kvachkoff. The Board, having heard testimony from Hammond Building Inspector and property owner, Brian P. Callahan; and reviewing evidence, now finds that:

1. This matter commenced in May 2015 when the City of Hammond received a complaint of "squatters" living without running water on the residential property. Squatters continued to live off and on at the property without utilities until March 2016 when the property was marked "uninhabitable."
2. After the property was marked uninhabitable, squatters continued to live in the residence requiring the City of Hammond to board up the property and make it secure on several occasions.

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3. Owner Callahan was notified in April 2017 of garbage on the property and need for repairs. City of Hammond was forced to cut the grass on the property on several occasions.
4. In September 2017 the property at 7234 Jarnecke no longer had NIPSCO gas and electric as it was disconnected as a result of a squatter illegally jumping power from the pole and living in the garage.
5. Owner Callahan was cited in Hammond City Court based on the condition of the property and was defaulted and fined for these conditions.
6. Based upon the lack of any utilities, the evidence of criminal activity on the premises, the failure of the owner to mow grass or remove trash and the continual need to board up the property to prevent squatters from living at the property, the City of Hammond issued a Notice to Repair or Demolish to owner Callahan which was served upon him by certified mail, publication and posting on the property.
7. Pursuant to the notice, the hearing was set on November 9, 2017, which was continued by the owner to November 16, 2017 and held on that date.
8. At the hearing, photographs and City of Hammond records were produced, along with inspector testimony, showing the condition of 7234 Jarnecke, which was not repaired by the owner prior to the hearing.
9. Owner testified he was aware of the squatters living at the property, was aware of the board ups which resulted from their intrusion, was aware that power was being stolen by the squatters, and did not contest the photographs which depicted the blighted condition of the property on various dates in 2016 and 2017. Owners only



explanation as to why repairs were not made was that “someone” told him not to return to the property, however he provided no evidence or documents in support of that position.

AUTHORITY TO ACT

The State of Indiana, by statute, created the Unsafe Building Law. An unsafe building is specifically defined by Indiana Code Section 36-7-9-4, and pursuant to Indiana Code § 36-7-9-5, the enforcement authority of a City is permitted to “issue an order requiring action relative to any unsafe premises, including removal of an unsafe building.” *409 Land Trust v. City of South Bend*, 709 N.E.2d 348, 351 (Ind.Ct.App. 1999). The Indiana Unsafe Building Law defines an unsafe premises as:

- [A] building or structure, or any part of a building or structure, that is:
- (1) in an impaired structural condition that makes it unsafe to a person or property;
 - (2) a fire hazard;
 - (3) a hazard to the public health;
 - (4) a public nuisance;
 - (5) dangerous to a person or property because of a violation of a statute or ordinance concerning building condition or maintenance; or
 - (6) vacant and not maintained in a manner that would allow human habitation occupancy, or use under the requirements of a statute or an ordinance.

Ind. Code §36-7-9-4.

The threshold for demolition of an unsafe structure is not whether the property can be repaired, because “in theory any building can be repaired.” *Brown v. The Anderson Board of Public Safety*, 777 N.E.2d 1106, 1109 (Ind.Ct.App.2002). The Court instead considers “whether the building will be repaired” and “whether the option of repair will effectively correct the

condition considered to be a danger to the public.” *Id.* In determining whether a building may be deemed unsafe, factors such as the location of a building, as in a residential area, are considered. *Foursquare Tabernacle Church of God in Christ v. The DMD of Indianapolis*, 630 N.E.2d 1381, 1388 (Ind.Ct.App.1994). In the case before this Board, the property in question is a single family house in the middle of a residential neighborhood. The property is owned by an individual who neither maintains nor repairs the property.

CONSTITUTIONALITY

In the lengthy litigation of *Starzenski v. City of Elkhart*, a woman owned real estate in the City of Elkhart that had no water or gas service and was “jam packed” with debris and garbage. 659 N.E.2d. 1132, 1134-5 (Ind. App. 1996). The City of Elkhart ordered the property owner to clean and remove the debris or the City would take action to bring the property into compliance. *Id.* Ms. Starzenski failed to clean the property, and the City entered the property and removed the debris without a warrant, which the property owner claimed was a violation of her due process rights as well as a taking without just compensation. *Id.* at 1136.

The Court held that a warrant was not required, and that “the City’s intrusion into the Starzenski’s property was reasonable and necessary.” *Id.* at 1138; *see also Starzenski v. City of Elkhart*, 842 F. Supp. 1132, 1137(N.D. Ind. 1994); *Starzenski v. City of Elkhart*, 87 F.3d 872, 877 (7th Cir. 1996). The Court acknowledged the City of Elkhart’s “important interest in protecting the health and property of its citizens from nuisances” and balanced it against the property owner’s interest in remaining free from government intrusion and found that the procedures set forth in the Unsafe Building Act afforded the property owner “considerable due process protection.” *Starzenski*, 659 N.E. 2d at 1139.

The Court also rejected the property owner's second constitutional claim that the City seized her property without just compensation. 659 N.E.2d at 1139. The Court likened this action to a City's action to demolish an unsafe and unsanitary house and reasoned "it is well settled that the government's exercise of its police power to abate a public nuisance hazardous to the public health, safety or welfare does not entitle the property owner to compensation." *Id.*, citing City of Minot v. Freelander 426 N.W.2d 556 (N.D. 1988).

When a City Building Department enforces building and safety codes, it does not amount to a taking. *City of Gary v. Ruberto*, 171 Ind.App. 1, 354 N.E. 2d 786, 790 (1976). The court in *Starzenski* held that such action on the property was not a "taking" but instead "an exercise of the police power." 659 N.E.2d at 1140. AS the property owner had notice and an adequate opportunity to comply, the City did not act unreasonably. *Id.* at 1141. The decision to demolish 7234 Jarnecke due to the owners failure and refusal to address the blight it is causing on the neighborhood is not unreasonable.

JUDICIAL REVIEW OF HEARING AUTHORITY'S DECISION

Judicial Review of a Hearing Authority's decision is provided for in Indiana Code 36-7-9-8 and the standard is a *de novo* review. *Brown v. The Anderson Board of Public Safety*, 777 N.E.2d 1106, 1108 (Ind.Ct.App.2002). Under this standard the trial court may "to a limited extent, weigh the evidence supporting the finding of fact by the enforcement authority." *Id.* The trial court may only negate the finding if "based upon the evidence as a whole, the finding of fact was arbitrary, capricious, an abuse of discretion, unsupported by the evidence or in excess of statutory authority." *Id.*, citing Kopinski v. Health & Hosp. Corp. of Marion County, 766 N.E.2d 454, 455 (Ind.Ct.App.2002). The court does not re-determine the facts nor does it "substitute its

judgment for that of the agency below as ‘the facts [are to be] determined but once.’” Kollar v. Civil City of South Bend, 695 N.E.2d 616, 620 (Ind.Ct. App.1998.)(quoting City of Mishawaka v. Stewart, 261 Ind. 670, 677, 310 N.E.2d 65, 69 (Ind. 1974)). The party seeking the reversal of the administrative order has the burden of proof at trial. Groff v. City of Butler, 794 N.E.2d 528, 534 (Ind.Ct.App.2003). The party with the burden of proof is “responsible for the presentation of evidence” and a transcript of the agency hearing is not required. Kollar, 695 N.E.2d at 620.

An order to vacate and seal a part of a resident (here, demolish) under the Indiana Unsafe Building law, if violated is punishable by contempt of court and a City may be entitled to damages when the amount requested is supported by substantial evidence. Hancz v. City of South Bend, 691 N.E.2d 1322, 1326 (Ind.Ct.App.1998). A property owner has “no right to rent uninhabitable property” which fails to “comply with minimum code standards,” and condemnation by a City is a “lawful exercise of its powers to protect the public health and safety.” City of Gary v. Ruberto, supra, 354 N.E. 2d at 792. A property owner that is permitted time to make repairs and fails to do, faces demolition of the property if that action is necessary to protect the “public health, safety or welfare.” 409 Land Trust v. City of South Bend, 709 N.E.2d 348, 350 (Ind.Ct.App.1999). In the present case Mr. Callahan has been informed of the issues on his property, and for two years has refused to address or correct those issues.

DECISION

In the present case, as currently existing, without water, power or gas, the 7234 Jarnecke residence contains impaired structural conditions and fire hazards that are dangerous to its squatter occupants, rendering the premises unsafe and in violation of Indiana’s Unsafe Building Law. Ind. Code § 36-7-9-4. At no point during the citation process—which was initiated by the

Inspections Department in 2015 – has the owner made any form of necessary repairs to the property.

Based on the evidence, and law and pursuant to the Indiana Unsafe Building Law, the declaration of the Inspections Department that the property is uninhabitable and unsafe and the request for an ORDER TO DEMOLISH is AFFIRMED. Property is to be bid and awarded under law.

Decided, and findings entered this 20th day of November, 2017

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