

**IOWA DISTRICT COURT FOR FAYETTE COUNTY****City of Oelwein,****Plaintiff,****Case No: OECICV056198****v.****Wright, Gary,****Defendant.****RULING ON CITY'S REQUEST FOR  
"EMERGENCY" DEMOLITION**

On Tuesday July 19, 2022 this Court held hearing on a City motion for emergency action to destroy a building owned by Defendant. The building in question is an elderly commercial structure located within the Oelwein business district, at 27 South Frederick Avenue. Defendant received service of notice of the hearing, and appeared. He requested a continuance to obtain legal counsel. Because the City claimed need for emergency action the Court denied Defendant's motion to continue, but Defendant was heard and argued for his interests. The Court took oral testimony and exhibits submitted by the City, and oral testimony from the Defendant.

The City claims: Due primarily to long years of water leakage, continued existence of Defendant's building stands in "imminent danger" of collapse, threatening harm to the citizens of Oelwein. Defendant denies the City's claim.

**FINDINGS OF FACT**

Defendant's building is a 110-year-old frame structure. The original building, on the lot's west end, is built of brick and clay tile. A later one-story addition attached on the building's eastern side is partly of concrete masonry. The building is framed of lumber. Its west face bears brick front. The north and south walls are freestanding, not party walls. They lie inches from the neighboring buildings. The structure is located at 27 South Frederick Avenue on the east side of the street in what is the downtown business district of Oelwein. The Court will identify it in this opinion as the "27 S.Fred." building.

Defendant testified that, when constructed in 1912, 27 S. Fred. was the first structure built on the block. The 27 S. Fred. served various purposes over the century past. In recent years it has fallen into dereliction. Defendant purchased 27 S. Fred. for \$1,000, from one Barbara Wegner, acquired title within the past year. He testified that he "specializes in reconstruction of old houses" and desires to restore the building. "I just need permission to finish the job." He testified that the City has ordered him to stop working on 27 S. Fred. He will need substantial financing to refurbish the building to its original splendor. Plaintiff has presented plans for renovation, and identified for the Court the portions of the building that need structural correction. He insists that the main portion of 27 S. Fred. is structurally sound. The building is now vacant, without heat, water, or power. The doors and windows of the first floor are covered or boarded. Plaintiff pleads with the City and the Court that he be allowed to "finish the job."

This Court on June 21, 2022 issued an Order supplementing its default Judgment against Defendant entered May 17, 2022. The City became concerned about possible collapse of 27 S. Fred. and asked the Court to authorize a visit from a consulting engineer. The Court authorized that Engineer visit.

The City hired James C. Jacob, a Professional Engineer, of VJ Engineering in Coralville, Iowa. Engineer Jacob visited Oelwein and inspected 27 S. Fred. During trial Engineer Jacob testified that he has 48 years' experience in "structural engineering": building and bridge designing, and forensic evaluations such as that he conducted here.

In a letter to the City, dated July 7, 2022, Mr. Jacob stated in pertinent part:

"The building has suffered from a lack of maintenance for a long time which has resulted in large sections of the roof leaking. The leaking has resulted in large sections of the roof sheathing and roof purlins/joists rotting, to the point that there is an imminent danger of collapse. The one-story portion of the building is enclosed on three sides by higher two-story structures that will result in drifted snow loading that will further increase the chances of a sudden collapse during snow events. Water ponding on the roof will also greatly increase the chance of collapse."

Engineer Jacob opined as to what restoration effort would be required for 27 S. Fred.:

"The building would require replacement of all the wood framing in the one-story areas and at least half the wood framing of the upper two story area. A portion of the second floor wood framing has also been compromised by decay and would also need to be replaced. In addition there is an area of brick masonry on the front wall at the north end that is heavily spalled and this area would also need to be replaced."

The Court finds that these paragraphs make the core of the Engineer's written opinion. He ends by discouraging repair as "economically impractical to restore all the structural elements and also replace finishes and necessary electrical/mechanical systems" and stating that occupancy is "not safe". During his trial testimony Mr. Jacob adopted this letter as his formal opinion, which the Court admitted as an exhibit.

Mr. Jacob testified by telephone. His testimony added allegations to the effect that:

- 1) "the Thursday before the 4<sup>th</sup> of July" Mr. Jacob visited 27 S. Fred. "for approximately one hour"
- 2) His "process is basically a visual examination of the exposed structural elements of the building." Mr. Jacob alleged that "Most of the structural elements were exposed."
- 3) He "did no demolition effort" to expose structural framing.
- 4) His procedure as consultant leads him to "take a lot of photographic evidence, take it back to the office, and compose my letter based on that." The Court observes that the City offered only four photographs taken by persons unknown. The photographs apparently are not those relied upon by the Engineer.
- 5) "Building is in extremely poor condition due to" water seepage.
- 6) "Fungal decay begins [with leakage] and progresses pretty rapidly". Mr. Jacob says fungus has been growing "for years"; it affects "many structural members."

- 7) 27 S. Fred. “is” in imminent danger of collapse: “Certainly if the roof collapses the front two story wall is unsupported; if it happens to fall into the street” it can be dangerous.
- 8) “You can always remediate...Anything can be remedied, but in this case the cost is so extreme that [repair] is not economically viable. ...You could reconstruct and reinstall the interior, and still have 100 year old walls. Don’t see how that’s economically viable.”
- 9) As for brick & mortar portions: “Certainly the brick is softened and doesn’t have the capacity it had when laid.”
- 10) Remediate thus: “You would take the roof off in sections, try not to remove all” so as to keep some support for the walls. “There’s definitely a danger when remediating a building in this condition.’
- 11) Conclusion: “From my experience, taking the building down would be the most viable solution. Life expectancy of a new building is better than a remediated structure.”

During cross examination Mr. Jacob added allegation that “rot is throughout the entire structure—one hundred percent of some of them [wood frame members, apparently].

The Court is uncertain as to what Mr. Jacob means by “most of the structural elements” [see paragraph 2] being exposed for his examination. Perhaps he means wood framing of the building; or possibly the concrete and tile walls. Two photographs of the building interior do show significant water seepage. The Court notes that the photographs the engineer stated that he took were not offered into evidence. So the Court has only the few and perhaps unrepresentative photographs offered by the City on which to rely. It must simply accept the testimony of the engineer, standing alone.

No collapse of the building has occurred. No evidence appears of actual conditions that will lead proximately, ineluctably and immediately to collapse of the building. The Engineer points only to possibilities.

As this opinion is issued in July the Court can find no imminent danger of collapse from a “snow event.” The opinion mentions rain “ponding” on the roof. But the one picture of the building’s roof appears to show a sloped roof. The Court cannot find that water accumulation to form a “pond” on the roof poses any threat on a sloped roof. That same photograph shows that the roof of the one-story section of 27 S. Fred. has been removed. Some dark spots on roof joists suggests mold or water stains, but the total amount of such dark spots is greatly outweighed by normal-looking wood.

In addition to engineer’s report the City also presented two pictures of the building exterior and three of the interior. The City admitted these exhibits. The City presented the engineer’s testimony. Defendant testified, and provided a diagram of the building. He identified some places that need repair. He insisted that he can do these himself.

### **CONCLUSIONS OF LAW**

The City unquestionably has the emergency power to protect the public from buildings that in fact pose a danger to the public.

**364.12 Responsibility for public places. ...**

3. A city may: ...

c. Require the removal, repair, or dismantling of a dangerous building or structure. ...

h. If the property owner does not perform an action required under this subsection within a reasonable time after notice, a city may perform the required action and assess the costs against the property for collection in the same manner as a property tax. ...

Section 364.12(3)(c)'s power grant to the City does not set a standard for "dangerous". The City offers no local definition from its own Code of Ordinances.

"The power to enforce housing codes relating to health and safety is traditionally among the core responsibilities of municipal government." *Lewis v. Jager*, 818 N.W.2d 165, 178 (Iowa 2012).

Iowa's public policy has long favored cities responding to emergencies.

"I. That any persons may "raze houses to the ground to prevent the spreading of a conflagration," without incurring any liability for the loss to the owner of the houses destroyed, is a doctrine well established in the common law. The maxim of the law is, that "a private mischief is to be endured rather than a public inconvenience." 2 Kent's Com., 338. Lord COKE says: "For the Commonwealth, a man shall suffer damage; as for the saving of a city or town, a house shall be plucked down if the next be on fire. This every man may do, without being liable to an action." *Mouse's Case*, 12 Coke, 63; *Id.*, 13. In *Respublica v. Sparhawk*, 1 Dall., (Pa.), 383, MCKEAN, Chief Justice, says: "Of this principle, there are many striking illustrations. If a road be out of repair, a passenger may lawfully go through a private inclosure. So, if a man is assaulted, he may fly through another's close. In time of war, bulwarks may be built on private ground. \* \* \* Houses may be razed to prevent the spread of fire, because of the public good." In *Dillon on Municipal Corporations*, Sec. 756, the learned author states the common law doctrine as clearly and succinctly as it is any where to be found. He says: "The rights of private property, sacred as the law regards them, are yet subordinate to the higher demands of the public welfare. *Salus populi suprema est lex*. Upon this principle, *in cases of imminent and urgent public necessity, any individual or municipal officer may raze or demolish houses and other combustible structures* in a city or compact town, to prevent the spreading of an extensive conflagration. This he may do independently of statute, and without responsibility to the owner for the damages he thereby sustains." The ground of exemption from liability in such cases is that of *necessity*, and if property be destroyed, in such cases, without any apparent and reasonable necessity, the doers of the act will be held responsible. In support of this doctrine, see [Governor and Company of, etc. v. Meredith](#), 4 Term R., 794, 797; *Taylor v. Plymouth*, 8 Met., 462, 465; [Mayor etc. of N. Y. v. Lord](#), 18 Wend., 126, 132, 133; same case, 17 *Id.*, 285; [Dunbar v. Alcalde etc. of San Francisco](#), 1 Cal., 355; [Surocco v. Geary](#), 3 *Id.*, 69; [Conwell v. Emrie et al.](#), 2 Cart., (Ind.) R., 35; [American Print Works v. Lawrence](#), 3 *Zabriskie*, 590, 609, 610; same case, 1 *Id.*, 248; [McDonald v. City of Red Wing](#), 13 *Minn.*, 38."

*Field v. City of Des Moines*, 39 Iowa 575, 577-78, 28 Am.Rep. 46 (1874).

To the same effect is *Cole v. Kegler*, 64 Iowa 59, 61, 19 N.W. 843, 844 (1884):

“The power to abate implies that there is or may be in existence something to be abated. A nuisance must exist before it can be abated. The power conferred, therefore, authorizes cities and towns to abate an existing thing. No express power is given to declare that a nuisance exists, nor do we think that it can or should necessarily be implied. The council may abate all nuisances, but this does not imply that it can determine what constitutes a nuisance as an existing thing, for the reason that the nuisance must in fact exist. If it does, then it may be abated. If it does not, the council has no power to declare it, or, in other words, create, and then proceed to abate. We do not think the general assembly intended to confer on cities and towns the power to finally and conclusively determine, without notice or a hearing, and without the right of appeal, that any given thing constitutes a nuisance, unless, probably, in cases of great emergency, so strong as to justify extraordinary measures upon the ground of paramount necessity.”

Quoted with approval in *Hancock v. City Council of Davenport*, 392 N.W.2d 472, 476 (Iowa 1986). Such a “great emergency” and “paramount necessity” does not appear to exist with regard to 27 S. Fred.

For collapse of 27 S. Fred to be “imminent” it must be:

“ ‘ready to take place,’ ‘near at hand,’ ‘hanging threateningly over one’s head,’ and ‘menacingly near.’ ” *Id.* (quoting [State v. Shanahan](#), 712 N.W.2d 121, 142 (Iowa 2006)). ... ‘is impending or about to occur’.... *Id.* (quoting [State v. Lane](#), 743 N.W.2d 178, 182 (Iowa 2007))... ‘on the point of happening.’ ” *Id.* (quoting *Black’s Law Dictionary* 750 (6th ed. 1990)).

*In re L.H.* 904 N.W.2d 145, 150 (Iowa 2017). The Court does not find any condition as described by Engineer Jacob that fits the urgency of his term “imminent”.

An actual partial collapse of a building supports finding of “emergency to the public outside of the building” and justifies immediate demolition. See *Cerro Gordo Hotel Co. v. City of Mason City*, 505 N.W.2d 509, 510 (Iowa App. 1993). Likewise, overall decay, or a fire that partly destroys a building, may render the structure subject to destruction as a nuisance. See *City of Shenandoah v. Replogle*, 198 Iowa 423, 428, 199 N.W. 418, 420 (1923)(quoting *State v. Lawing*, 164 N.C. 492, 80 S.E. 69, 71, 51 L.R.A.N.S. 62, 67 (1913):

“The action of the Legislature authorizing the enactment of this ordinance, and of the board of aldermen in passing it, is not a taking of private property for public uses; but it is the restriction of the defendant in the unlimited use of his property by virtue of the police power, \* \* \* for the purpose of protecting the community from the dangers to which the public would be exposed by the continuance of a wooden building in that locality, by the requirement that, when it becomes unusable by decay, it shall be replaced by a safer construction than wood.”

“We think the same rule applies where, as here, there had been a partial destruction by fire rather than by decay.”

But even partial consumption of a structure by fire does not necessarily require the building’s destruction as a nuisance. See *City of Britt v. Cheney*, 715 N.W.2d 767 (Iowa App. 2006) (Table).

No actual collapse of 27 S. Fred. has occurred. Nor has the building caught fire. Sole evidence for “emergency” and accompanying destruction is the city’s engineer expert’s opinion: collapse is “possible” and repair is “uneconomical”. At a stretch, the Engineer’s recitations of condition might be taken as evidence of 27 S. Fred’s “decay”. *City of Shenandoah*, supra. The Court observes the Engineer’s admission that he did not examine each and every one of the building stud supports.

The Court notes that little to no evidence suggested building frame is collapsing. The worst problem appears to be leaky patches in the roof that have generated some wood rot. The Engineer’s letter speaks of “large areas of the roof sheathing and roof purlins/joists rotting”. The Court attempted to elicit from Engineer Jacobs an actual percentage of the structural wood thus deleteriously affected. The Court desired to identify what the Engineer meant by “large” areas. The Engineer could not give the Court a percentage of the structural wood that is compromised.

The Court takes the Engineer’s opinions to be honestly offered, and very likely accurate in most respects. Doubtless the building will indeed prove to be a money pit for Defendant, or for any other owner. Perhaps the framing or masonry will begin to sag noticeably, so as to patently threaten collapse. At the moment, the Court finds, any threat of collapse is latent only, derived from observations of some wood rot and water where water ought not be. No evidence appears of walls out of plumb, mortar cracking, bricks falling, bulging basement walls, persons crashing through crumbling floors, or the like—the sorts of evidence this Court would find convincing.

As of now the Court finds the Engineer Jacobs’ opinions, focusing as they do upon “chances” of collapse and upon “economic [un]viability”, insufficient to justify a taking of Defendant’s private property. Defendant shall retain the ownership of his building, conditioned upon his actual restoration of it to structural soundness. The Court will hold Defendant to his word, that his “dream” is to make 27 S. Fred. whole and useful again. The Court does possess some doubt that Defendant can achieve his “dream”. But the Court invites Defendant to prove the skeptical Court wrong.

The Court concludes that the City has failed to show by preponderance of the evidence that 27 S. Fred. poses such a threat of imminent harm that the City must summarily destroy it to protect the public.

**IT IS ORDERED, ADJUGED and DECREED that**

- 1) The City’s request for authority to demolish Defendant’s building at 27 S. Fred. is denied.

- 2) Defendant shall fulfill what he told the Court at trial that he desired: he shall rehabilitate and restore 27 S. Fred to habitable, usable condition. In so doing he shall remove and replace any and all wood, roof material, studs, flooring and other material compromised by rot or decay. Defendant shall complete the project with 12 months of this Order's date.
- 3) The City shall not deny Defendant necessary permits for such reconstruction.
- 4) Defendant is cautioned that the City building inspector will monitor his work, and will expect to see him progress steadily in the reconstruction. Defendant shall not use the building simply as a storage unit.
- 5) If Defendant fails to fully rehabilitate and reconstruct his building by July 31, 2023 then the City may renew its application for demolition of 27 S. Fred. as a public nuisance upon presentation of proper proof.



State of Iowa Courts

**Case Number**  
OECICV056198  
**Type:**

**Case Title**  
OELWEIN VS. GARY WRIGHT  
OTHER ORDER

So Ordered

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David James Hanson, Magistrate Judge,  
First Judicial District of Iowa

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