



AGENDA REPORT

TO: Edward D. Reiskin
City Administrator

FROM: William Gilchrist
Director, Planning and
Building Department

SUBJECT: 465 63rd Street Appeal By Property
Owner

DATE: October 18, 2021

City Administrator Approval 

Date: Nov 3, 2021

RECOMMENDATION

Staff Recommends That The City Council Conduct A Public Hearing And, Upon Conclusion, Adopt A Resolution Denying The Appeal Of Appellant Kobie Lyons And Upholding The Decision Of The Independent Hearing Officer Regarding Housing Conditions At 465 63rd Street (Complaint No. 1901763 For Parcel No. 016-1392-029-00).

EXECUTIVE SUMMARY

This is an appeal filed by property owner Kobie Lyons (Appellant) regarding a Notice of Violation (NOV) issued by the Building Official in 2019, based on habitability defects at 465 63rd Street (Complaint No. 1901763 for Parcel No. 016-1392-029-00). Upon receipt of the NOV, Appellant exercised their right to request a hearing before an independent Hearing Officer. A hearing took place over the course of two days in March and April 2021. After the hearing, the independent Hearing Officer issued a written decision upholding the decisions of the Building Official. Appellant is now exercising their right to appeal the Hearing Officer's decision to the City Council.

BACKGROUND AND LEGISLATIVE HISTORY

On April 25, 2019, Code Enforcement Services of the City's Planning and Building Department received a complaint from a tenant residing at 465 63rd Street (Complaint No. 1901763). The Tenant reported a lack of heat, electrical problems, and deteriorated paint. On May 1, 2019, Specialty Combination Inspector Michae Legault inspected the property and identified multiple housing habitability problems. On May 8, 2019, Inspector Legault issued a NOV to the property owner with a list of the violations and a description of the action required to correct each of the violations (**Attachment A**).

The NOV listed the following violations:

Property Maintenance (Blight):

- Trash and debris on the exterior [Oakland Municipal Code (O.M.C.) Section 8.24.20 DI];

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- Overgrown vegetation (O.M.C. Section 8.24.020 D10)

Building Maintenance (Housing):

- Electrical system is in a state of dilapidation and cannot service the electrical needs of the building per Pacific Gas & Electric (PG&E) (O.M.C. Section 15.08.120,15.08.140,15.08.050);
- There is no permitted heat source in any of the units (O.M.C. Section 15.08.120, 15.08.140, 15.08.050);
- Light fixtures around the exterior are in need of repair (O.M.C. Section 15.08.050);
- Rear staircase is in disrepair (O.M.C. Section 15.08.050,15.08.120,15.08.140);
- Four water heaters and a dishwasher installed without permits (O.M.C. Section 15.08.120, 15.08.140);
- Four windows and two doors replaced without permits (O.M.C. Section 15.08.120, 15.08.140);
- Front porch has dry rot, light fixtures around the exterior and interior are without covers, non-functional windows, fence is falling down, two exterior access panels are dilapidated, gate is in disrepair, J-box under house is without cover, glass on fire extinguisher is broken, front porch light is dilapidated, gate is hard to open (O.M.C. Section 15.08.050);
- Unit 463: Hole in wall, ceiling finish is crumbling in kitchen and cabinet paint is bubbling. No light covers on many fixtures, mold on ceiling, bathroom window is inoperable (O.M.C. Section 15.08.050);
- Unit 461: Closet has mold and dry rot, shower surround is painted with permeable paint over the tiles, toilet area has permeable floor, multiple light fixtures are missing covers (O.M.C. Section 15.08.050);
- Unit 465: Cracked glass in bedroom, multiple lights without covers (O.M.C. Section 15.08.050);
- Unit 459: Lights without covers, door frame is dilapidated (O.M.C. Section 15.08.050).

The NOV provided instructions for the actions required by the property owner to correct the violations. The NOV did not assess any fees or charges and instructed the owner to make the corrections and contact the Inspector to schedule a follow-up inspection.

On June 7, 2019, Appellant, through his representative, filed an appeal (**Attachment B**). The appeal did not specify how the City had erred or abused its discretion, but requested an evidentiary hearing of the following actions:

1. Removal of Trash (O.M.C Section 8.24.020 DI) and overgrown vegetation (O.M.C. Section 8.24.020 D10);
2. Heating, Ventilation and Air Conditioning (HVAC) System plan, Electrical System plan (O.M.C Section 15.08.120, 15.08.140, 15.08.050);
3. Light fixtures, rear staircase, four (4) water heaters, four (4) windows and two (2) doors replacement (O.M.C Section 15.08.120, 15.08.140, 15.08.050).

An administrative hearing was initially scheduled for March 2020 (**Attachment C**). The hearing was subsequently rescheduled three times due to the COVID-19 pandemic: once in April 2020, and twice in December 2020 (**Attachments D – F**). The Hearing was rescheduled for a fourth time at the request of the Appellant and was ultimately set for March 31, 2021 (**Attachment G**).

The hearing took place over the course of two days, on March 31 and April 26, 2021. In compliance with O.M.C. 15.054.1.125, the hearing was conducted by an independent Hearing Officer. The City presented three witnesses: Inspector Legault, and two tenants of the subject property, William Harr and Darril Tighe. Appellant presented their case along with their property manager, Randall Whitney. Both the City and Appellant submitted documentary evidence in advance of the hearing, which was accepted into the record.

After review and consideration of the documentary evidence, arguments of the parties, and testimony from several witnesses, the Hearing Officer issued a Decision on May 3, 2021, denying the appeal (**Attachment H**). The decision to deny the applicant's appeal was mailed to Appellant on May 27, 2021 (**Attachment I**).

On June 7, 2021, Appellant filed an appeal of the Hearing Officer Decision (**Attachment J**). As the grounds for the appeal, Appellant alleges "[t]here is no substantial evidence in the record to support the Hearing Officer's decision," and "[t]he Hearing Officer's decision is based on an error of law." Specifically, Appellant alleges the following:

1. Hearing Officer ignored all expert testimony supplied by the appellant, including licensed electricians, plumbers, and contractors;
2. The City and Hearing Officer refused to grant appellant a one-time 30-day postponement as is guaranteed to all appellants;
3. The Hearing Officer ignored Inspector's admission that specific violations were issued carelessly and erroneously;
4. The Hearing Officer ignored cross examination of Inspector establishing that violations were issued on areas he had no access to;
5. Inspector issued violations that were vague and arbitrary;
6. Hearing Officer showed clear error by not providing Appellant opportunity to submit all evidence and present witnesses;

7. The City of Oakland and Hearing Officer demonstrated abuse of discretion in handling and procedural preparation of appeal hearing.

Based on the findings of the independent Hearing Officer, and the Appellant's failure to demonstrate how the City erred in issuing the NOV, staff recommends that the City Council adopt a resolution denying the appeal and upholding the independent Hearing Officer's Decision.

ANALYSIS AND POLICY ALTERNATIVES

Per O.M.C. 15.04.1.125(G): "The appellant must state the basis for the appeal and how the decision by the Hearing Officer was in error," and "The appellant shall have the burden of demonstrating that there is no substantial evidence in the record to support the Hearing Officer's decision, or that the decision is based on an error of law."

Appellant's Arguments and Staff Responses:

- 1) **Appellant Argument:** Hearing Officer ignored all expert testimony supplied by the appellant, including licensed electricians, plumbers, and contractors.

Staff Response: All evidence proffered by Appellant was accepted into the record. Appellant has not identified any factual or technical grounds to support their claim of error. Appellant has not met its burden of demonstrating that there is a lack of substantial evidence supporting the Hearing Officer's decision, nor has Appellant identified any substantive facts demonstrating how the City erred (O.M.C. 15.04.1.125(G)).

- 2) **Appellant Argument:** The City and Hearing Officer refused to grant Appellant a one-time 30-day postponement as is guaranteed to all appellants.

Staff Response: Postponements may be granted for good cause due to illness, death, or personal emergency. There is no "guaranteed" right to a postponement. Any request for postponement must be submitted in writing and must state the reasons for the request. The hearing in this case was initially scheduled for March 31, 2020 (**Attachment C**). It was subsequently postponed three times over a period of nine months due to the COVID-19 pandemic (**Attachments D – F**). After the hearing was finally set for December 15, 2020, the Appellant requested—and was granted—a postponement due to the prior owner's passing in September 2020. The hearing was therefore continued for an additional three months to March 31, 2021 (**Attachment G**).

Six days before the scheduled hearing, Appellant requested another continuance to review the case and gather evidence. This request was denied for lack of good cause, and because the hearing had already been postponed multiple times over the course of a year.

O.M.C. 15.04.1.125(B) requires the City to schedule administrative hearings on NOV appeals "[a]s soon as practicable after receiving the request for administrative hearing." The public has a reasonable expectation of expeditious adjudication of complaints filed

with Code Enforcement Services—particularly complaints involving serious habitability violations such as lack of heat and/or an inadequate or unsafe electrical system. The NOV pertaining to these violations was issued in May of 2019. Appellant’s request for administrative review was filed in June of 2019. The hearing took place almost a full two years later. Appellant had ample opportunity to prepare for the March 31, 2021 hearing, plus an additional month to prepare and submit evidence prior to the second day of the hearing on April 26, 2021.

- 3) **Appellant Argument:** The Hearing Officer ignored Inspector’s admission that specific violations were issued carelessly and erroneously.

Staff Response: It is unclear what “admission” the Appellant refers to in this argument. Nowhere in the record does Inspector Legault testify or otherwise admit that the violations were issued carelessly or erroneously. Both staff and the independent Hearing Officer have determined that the violations noted in the May 2019 NOV were present and appropriately cited. Appellant continues to dispute the NOV despite presenting no evidence supporting its claim of error.

- 4) **Appellant Argument:** The Hearing Officer ignored cross examination of Inspector establishing that violations were listed on areas he had no access to.

Staff Response: It is unclear what the Appellant refers to in this argument. All violations were supported with photographs, documentation from PG&E, and the testimony of three witnesses.

- 5) **Appellant Argument:** Inspector issued violations that were vague and arbitrary.

Staff Response: It is unclear which violations Appellant is referring to, or exactly how Appellant alleges the City abused its discretion. All violations were supported with photographs, documentation from PG&E, and the testimony of three witnesses. The Hearing Officer reviewed all evidence in this case and found no error.

- 6) **Appellant Argument:** Hearing Officer showed clear error by not providing Appellant opportunity to submit all evidence and to present witnesses.

Staff Response: Appellant had ample opportunity to submit evidence and present witnesses prior to and during the course of the two-day hearing. Despite being untimely and outside the relevant scope of the 2019 NOV, all evidence proffered by the Appellant was accepted by the Hearing Officer over the objection of the City Attorney.

- 7) **Appellant Argument:** The City of Oakland and Hearing Officer demonstrated abuse of discretion in handling the procedural preparation of appeal hearing.

Staff Response: It is unclear what “discretion” or “procedural preparation” the Appellant refers to in this argument. The appeal hearing was postponed numerous times to accommodate availability, all of Appellant’s evidence was accepted into the record despite being untimely, and Appellant had almost two years to either remedy the outstanding violations or present evidence as to how the City erred.

Applicable Law:

- O.M.C. 15.08.020 establishes standards to safeguard life or limb, health, property, and public welfare by regulating and controlling the use occupancy, locations, and maintenance of residential and non-residential buildings, structures, portions thereof and real property within the City of Oakland.
- O.M.C. 15.08.140 provides that buildings, structures, real property, and all construction or work for which a permit is required shall be subjected to inspection by the City. The O.M.C. 15.08.080 established authority to the Building Official and designees to enforce all of the provisions of the Code.
- O.M.C. Chapter 15.08.410 establishes an Administrative Hearing for any person adversely affected by an order, decision, or determination made under Section 15.08.350 of this Code may appeal by requesting an administrative hearing before a Hearing Officer following procedures set forth in O.M.C. 15.04.1.125.
- O.M.C. Chapter 15.04.1.125 establishes the Administrative Hearing procedures in order to appeal orders, decisions, or determinations made by the Building Official relative to the application and interpretation of the non-administrative (technical) requirements of this Code, any person adversely affected by the order, decision, or determination may request an administrative hearing with a Hearing Officer.
- O.M.C. Chapter 15.04.1.125(C) establishes the Scope of Hearing. The administrative hearing before a Hearing Officer shall be an evidentiary hearing. Only those technical matters or issues specifically raised by the appellant in the request for administrative hearing shall be considered. The appellant and the City may present witnesses and such documentary evidence as are relevant to the issues. The Hearing Officer shall have the power to administer oaths. Upon a showing of good cause by the appellant or the City, the Hearing Officer may request that the City Clerk issue subpoenas under the seal of the City for a witness to appear and testify or to produce documents. Willful failure to appear to testify or to produce documents under subpoena may be punished as an infraction or as an administrative citation. The City has the burden of proof by a preponderance of the evidence.
- O.M.C. Chapter 15.04.1.25(D) determines that the Hearing Officer shall not be an employee of the City of Oakland and shall be qualified by experience and training to pass on building construction and other matters pertaining to this Code.
- O.M.C. 15.04.1.25(F) describes the Effect of Hearing Decisions of the Hearing Officer in all instances shall be final and conclusive unless the appellant files an appeal.
- Designation of the Oakland City Council as the Appeals Board, and Appeals of Hearing Officer Decision to the Appeals Board is described in O.M.C. Chapter 15.04.1.125(G). Only appeals based on substantive violation of Chapter 15.04, 15.08 or the California Building Standards Code may be appealed. This includes Building Code violations, substandard/public nuisance determinations, and orders to abate.

- The appellant must file the appeal within 14 calendar days of service of the Hearing Officer's determination. The appellant shall file the appeal on a form, under such procedures, and at such location as may be established by the City Administrator. The appellant must state the basis for the appeal and how the decision by the Hearing Officer was in error. The appellant shall pay a fee established for appeals to the Appeals Board in the Master Fee Schedule (O.M.C. 15.04.1.25(G)(3)).
- The Appeals Board's consideration shall be limited to the record established by the Hearing Officer. The Appeals Board shall not consider new evidence unless the proponent shows that the evidence is both newly discovered and material and could not, with reasonable diligence, have been produced at the hearing before the Hearing Officer. If, the Appeals Board makes such determination, it may hear the additional evidence at a continued hearing, allowing the opposing party to respond, or may remand the matter to the Hearing Officer to consider the new evidence (O.M.C. 15.04.1.25(G)(4)).
- The Appellant shall have the burden of demonstrating that there is no substantial evidence in the record to support the Hearing Officer's decision, or that the decision is based on an error of law (O.M.C. 15.04.1.25(G)(5)).
- The Decision of the Appeals Board shall be final. The limitation period provided pursuant to California Code of Civil Procedure Section 1094.6 shall apply to all petitions filed seeking judicial review of administrative determinations made by the Appeals Board (O.M.C. 15.04.1.25(H)).

Policy Alternatives

The following options are available to the City Council:

1. Deny the appeal and uphold the Hearing Officer's decision finding that the City did not err or abuse its discretion in issuing the May 8, 2019 NOV and approve the proposed Resolution, thereby allowing the City to proceed with its standard enforcement procedures;
2. Partially grant the appeal as to one or more of the violations being appealed and remand to the Hearing Officer to make findings consistent with Council's ruling;
3. Grant the appeal as to all of the stated grounds for appeal, and remand to the Hearing Officer to make findings consistent with Council's ruling.

FISCAL IMPACT

The total cost of the appeal, including the filing fee, processing fee, and fee for the Hearing Officer services, amounts to \$3,593.50. The Appellant has paid \$1,464.05 of these fees, with \$2,129.45 still outstanding. A breakdown of the costs is included below in **Table 1**. If the Hearing Officer decision is upheld, Appellant will remain responsible for the remaining balance. If the appeal is granted and the Hearing Officer decision is overturned, the City will be

responsible for the remaining balance, and will be required to reimburse Appellant for the fees already paid.

Table 1: Cost of Administrative Appeal

Cost Category	Amount	Funding Code
Appeal Fee	\$ 96.00	1.2415.84111.45419.1000018.NB31
Appeal Fee – Rec & Tec	\$ 14.00	1.2415.84111.45419.1003971.NB31
Hearing Officer Invoice	\$ 2,182.50	1.2415.84412.45419.1000018.NB31
Hearing Processing Fee	<u>\$ 853.00</u>	1.2415.84412.45426.1000018.NB31
Record Management & Tech Enhancement Fee	<u>\$ 448.00</u>	1.2415.84111.45419.1003971.NB31
Total due:	\$ 3,593.50	
Fee paid:	<u>\$ 1,464.05</u>	
Final total due:	\$ 2,129.45	

PUBLIC OUTREACH / INTEREST

No outreach was deemed necessary for the proposed policy action beyond the standard City Council agenda noticing procedures because the case is an individual appeal of Building Maintenance violations and does not impact the public.

COORDINATION

This staff report and resolution was reviewed by Planning and Building Department, Bureau of Building, the City Attorney's Office and the Budget Bureau.

SUSTAINABLE OPPORTUNITIES

Economic: There is no anticipated impact upon economic sustainable opportunities.

Environmental: Code Enforcement activities have environmental benefits by enforcing codes designed to protect the environment, promote safe living conditions, and reduce hazards such as those associated with unsafe electrical wiring, unpermitted construction, and other noncompliant housing elements.

Race & Equity: Ensuring that owners of rental units comply with state and local habitability standards, such as the requirement to provide heat and maintain buildings up to code, is an essential component in ensuring the safety and well-being of tenants and neighbors.

ACTION REQUESTED OF THE CITY COUNCIL

Staff recommends that the City Council conduct a public hearing and, upon its conclusion, adopt a resolution denying the appeal and upholding the decision of the independent Hearing Officer, Nathaniel L. Dunn, regarding the appeal of Oakland Municipal Code 15.08 violations at the property located at 465 63rd Street (Complaint No. 1901763 for Parcel No. 016-1392-029-00).

For questions regarding this report, please contact Dorothy Bieneman, Administrative Analyst II, (510) 238-7693.

Respectfully submitted,



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Prepared by:
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Attachments (10):

- A. May 8, 2019 - Notice of Violation
- B. June 7, 2019 - Administrative Appeal
- C. February 24, 2020 – Appeal Hearing Notice – Hearing Date 03/31/20
- D. March 4, 2020 – Appeal Hearing Notice – Hearing Date 04/28/20
- E. November 23, 2020 – Appeal Hearing Notice – Hearing Date 12/10/20
- F. November 30, 2020 – Appeal Hearing Notice – Hearing Date 12/15/20
- G. March 12, 2021 – Appeal Hearing Notice – Hearing Date – 03/31/21
- H. May 3, 2021- Final Decision
- I. May 27, 2021 – Amended Notice of Decision - Denied
- J. June 7, 2021 - Appeal of Hearing Officer Decision