

**CITY OF JOHN DAY  
CITY COUNCIL MINUTES  
JOHN DAY, OREGON**

**February 28, 2012**

**Adjourned Meeting**

**COUNCILORS PRESENT:**

Bob Quinton, Mayor  
Steve Schuette, Council President  
Gene Officer, Councilor  
Donn Willey, Councilor  
Doug Gochnour, Councilor

**COUNCILORS ABSENT:**

Chris Labhart, Councilor  
Don Caldwell, Councilor

**STAFF PRESENT:**

Peggy Gray, City Manager  
David Holland, Public Works Director

**GUESTS PRESENT:**

None

**Agenda Item No. 1 – Open and Note Attendance**

The John Day City Council meeting opened at 7:00 p.m. Mayor Bob Quinton noted that all Councilors were present with the exception of Councilors Chris Labhart and Don Caldwell who are both absent and excused.

**Agenda Item No. 2 – Approval of City Council Minutes of February 14, 2012**

The minutes of the February 14, 2012 adjourned meeting were included in the agenda packets and presented for the Council's approval. Councilor Gene Officer moved that the minutes of February 14, 2012 be approved as presented. Councilor Steve Schuette seconded the motion, the motion passed unanimously.

**Agenda Item No. 3 - Appearance of Interested Citizens**

Mayor Quinton thanked those in attendance and asked everyone to please sign in. He asked if there were any additional items that anyone would like to add to the agenda. There were none presented.

**Agenda Item No. 4 – Discuss for Adoption Resolution No. 12-680-04, a Resolution to Declare an Account Uncollectible and Take Off the Books as Receivable**

Resolution No. 12-680-04, a resolution to declare an account uncollectible for Javier Garcia in the amount of \$197.07 was presented to the John Day City Council for adoption. Mayor Quinton stated Mr. Garcia is living in Heppner and is currently teaching at a school in Heppner. City Manager Gray stated she would pass the information on to the Secretary/Cashier.

Councilor Steve Schuette moved to adopt Resolution No. 12-680-04; Councilor Donn Willey seconded the motion. The motion passed unanimously.

#### **Agenda Item No. 5 – Discuss City Manager’s Annual Evaluation**

Mayor Quinton stated it was time for the City Manager’s annual evaluation. Councilor Schuette requested the annual evaluation in electronic form; City Manager Gray stated she would email the form to the all the councilors who had email addresses.

The procedure for the evaluation was discussed with Mayor Quinton requesting the councilors include comments on the evaluation. Mayor Quinton asked the councilors to return their evaluation forms to him by March 21, 2012 and stated the council will meet in executive session at the March 27, 2012 regular city council meeting to discuss the city manager’s evaluation.

#### **Agenda Item No. 6 – Other Business and Upcoming Meetings**

1. League of Oregon Cities bulletins were included in the council packets.
2. 2012 Legislative Session update from Rep. Cliff Bentz for the council’s information and review.
3. At the February 14 2012 council meeting, the city council was informed the City received a letter from Judge Cramer dismissing the Opera House Claim against the City of John Day. The following information was included in the council packets:
  - Letter to Judge Cramer from Richard J. Kuhn (attorney representing the City)
  - Order Granting Defendant’s Motion for Summary Judgment
  - Defendant’s Cost Bill

Mayor Quinton presented a letter (with attachment) from Mr. Shaun Robertson; Member-Manager of the Opera House LLC dated February 24, 2012 to the city council. Mr. Robertson requested this letter, with the attachment, be entered into the official record with regard to this item on the agenda. It is noted that all councilors present received a copy of the letter and the letter will be placed in the two absent members council boxes.

Mayor Quinton noted that at Mr. Robertson’s request the letter with attachments will be entered into the official records; it was the consensus of the John Day City Council to take no position on the letter; leaving it up to the court and the insurance company. The February 24, 2012 letter is attached to these minutes.

In addition Public Works Director David Holland presented an electronic message (with attachment) forwarded to Richard Kuhn on June 8, 2011 to the City Council (original message dated December 20, 2010). Public Works Director David Holland stated the electronic message was given to the City Council for information only and asked that it be entered into the official records. The electronic message with attachment is attached to these minutes.

4. Mayor Quinton presented a letter to the John Day City Council dated February 28, 2012 announcing his resignation as John Day Mayor effective the end of business Friday, April 13, 2012. Mayor Quinton will be moving from the City of John Day and, as such, will have to give up his seat as Mayor of the City of John Day. The Council will discuss the vacancy at their March 13, 2012 council meeting.

**Adjourn**

There being no further business before the Council, Councilor Donn Willey made a motion to adjourn the meeting. Councilor Gene Officer seconded the motion and the motion passed unanimously. The meeting was adjourned at 7:26 p.m.

Respectfully Submitted:

Peggy Gray  
City Manager

ACCEPTED BY THE CITY COUNCIL, MARCH 13, 2012

---

Mayor Bob Quinton

**Opera House LLC**  
173 SE Dayton St, Ste 1  
John Day, OR 97845  
(541) 575-5789  
[OperaHouseLLC@centurytel.net](mailto:OperaHouseLLC@centurytel.net)

February 24, 2012

John Day City Council

VIA Electronic Transmission to [grayp@grantcounty-or.gov](mailto:grayp@grantcounty-or.gov) and [RQuinton@beobank.com](mailto:RQuinton@beobank.com).

RE: CITY COUNCIL AGENDA ITEM 6

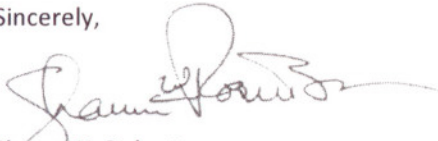
City Council Members:

As you are well aware, the Opera House LLC and City of John Day are involved in a long-standing dispute regarding the City's continued trespass and defective sidewalk installed on our property at 173 SE Dayton Street, John Day. We understand that the City Council will be reviewing Judge Cramer's opinion letter from February 9, 2012 at your Tuesday meeting and would like to take the opportunity to once again describe the facts of this matter to the City in an attachment to this letter.

At its inception, this was a relatively simple matter, easily and inexpensively resolvable. The City's continued intransigence, constantly shifting positions and arguments, and unqualified refusal to accept any responsibility for your trespass or negligence in construction has made the situation much worse and substantially more expensive—at least for my company and the taxpayers of John Day.

Regardless, we agree with Judge Cramer's conclusion that the sidewalk was placed in trespass; we disagree with the other parts of the ruling and have objected. Furthermore, if the Judge rules in your favor we intend to appeal the ruling.

Sincerely,



Shaun W. Robertson  
Member-Manager

- The City Manager misrepresented the sidewalk assessment:
  - Prior to purchasing the building, we instructed our real estate representative to work with the City Manager to have the lien that the City placed against the property related to the City's construction of the sidewalk reassigned to the new owners. Even though the lien specifically stated that it could be assigned (Installment Lien Agreement, page 3) the City Manager misrepresented to our agent that the City was prohibited from assigning the lien (correspondence from Peggy Gray to Will Brown, 6/5/2007) and demanded payment prior to closing.
  - Because the City's demand would have interfered with the strict timeline for purchasing the building, we decided to pay the assessment and address the issues of trespass and defective construction following purchase.
- The City has continually ignored the recommendations of professional historic preservation architects and numerous local contractors:
  - Within days of purchasing the property we engaged the services of a historic preservation architect from the State of Oregon to assess the building, determine the extent of damage from the City's defective sidewalk, and recommend remediation measures.
  - Subsequent to the City's failure to responsibly investigate the damage on its own, we also engaged the services of a private historic preservation expert who performed an on-site assessment, which resulted in the same conclusions as the State official.
  - We worked with both architects as well as local contractors in developing remediation designs that minimized removal of the sidewalk while still addressing the defects in the City's construction.
- The City is negligent in responsibly investigating the damage and responding to concerns:
  - Because of the apparent damage to the building from the obvious defects in the City's sidewalk, my former partner in this project requested a meeting on-site with the City staff.
  - During that meeting, City staff disclaimed any responsibility for the damage even before my partner explained what issues had been identified. Furthermore, the City informed us that we were prohibited from taking any action until the City engineer could investigate further (correspondence from Opera House LLC to R Quinton 1/25/08).
  - After hearing nothing from the City regarding the promised investigation, we again contacted the City and, following a substantial delay, received a letter from the City Manager transmitting correspondence from the City engineer. While the engineer's letter again disclaimed any responsibility for the damage, apparently without any on-site review, the City Manager stated plainly that she should be contacted with any questions or needs for additional information.
    - In response, we submitted a letter to the City Manager requesting additional information and posing further questions based on the investigation and conclusions of the restoration architect (correspondence from Opera House LLC to P Gray, 9/6/07).
    - In her reply letter of 9/10/07, the City Manager failed to respond to any of the questions or requests for information and, renegeing on her prior pledge, merely

stated that “[t]he City sees no reason to incur any further expense in this matter and will not address the questions you presented in said letter”.

- Our complaint against the City was filed at the City’s insistence:
  - In a final attempt to encourage the City to work with us in addressing the damage caused to our private property from the City’s defective sidewalk, we once again met with the City.
  - In that meeting, the Mayor and City Manager were clear that the City had no intention of cooperatively addressing the damage it caused and would do nothing until forced to do so in Court.
  - Because of the City’s continued intransigence and insistence on going to court, we filed a notice of claim with the City and notified it that we intended to move forward with emergency actions to halt further damage to the building (correspondence from Opera House LLC to P Gray, 12/7/07).
- In an apparent attempt to delay resolution of this matter, the City took formal action to prohibit me from conducting the emergency actions recommended by two professional architects:
  - Rather than conduct its own reasonable investigation or even consider the advice of the State and private professionals, the City instead instructed the City Attorney to file suit against one of the members of the Opera House LLC personally prohibiting any action on the sidewalk from being taken (correspondence from M. Timko to S Robertson, 1/17/08).
  - Because we were aware that there were numerous facts in this matter that were not being represented candidly to the City Council by City staff, we replied directly to the City Council on 1/25/08 again stating the irrational position that the City had placed us in—i.e., refusing requests to work with us in repairing the damage, refusing to repair the damage on their own, and finally refusing to allow us to take emergency action to halt further damage. Furthermore, we notified the City that the action it had taken to prohibit any work on the sidewalk was surprising since the City did not even have a property interest to the land containing the sidewalk.
- The City has no vested property interest in the lands under the sidewalk and street and trespassed when it placed the sidewalk.
  - As early as 1992, the City was made aware that it had no deed to the street or other publicly used areas on SE Dayton Street (correspondence from Bob Baggett to Mayor Chris Labhart and City Council, 5/26/92)<sup>1</sup>.
  - As discussed below in further detail, the City violated and approved work in multiple violations of its construction contract with its construction firm.
    - The City was fully aware of the property boundaries between the undedicated, public street and the private property on SE Dayton since it received, reviewed, and approved the engineering design drawings of the City engineer that identified the property boundary.

---

<sup>1</sup> Apparently the City hired Mr. Baggett to complete survey, documentation, and monumentation of a number of City streets. Mr. Baggett’s report to the City Council, which seems to have been ignored with regards to SE Dayton, recommended that the City obtain title status and acquire a right of way for public purposes. Interestingly, the City failed to produce this document in response to our attorney’s discovery request for materials evidencing the City’s ownership of the street and sidewalk.

- Article 4 (4.01) of the City’s Construction Contract required the City to “...obtain in a timely manner and pay for easements for permanent structures or permanent changes in existing facilities”, which, of course, the City failed to do along our property even though it was aware it did not possess a property interest on our property that would allow it to construct a sidewalk.
- The City destroyed or allowed the destruction of survey monuments on our property and refused to replace them in order to delay resolution of this matter:
  - Survey pins locating our property along SE Dayton Street have been found on every survey of our property since at least 1995 until immediately after the City’s project.
  - Upon our request, the County Surveyor attempted to locate the survey pins in the newly constructed sidewalk and was unable to do so. It is our understanding that the City also removed the survey pins from the west side of SE Dayton Street and was directed to replace them as required by State law.
  - However, the City neglected to replace the pins along our property boundary and continued to disclaim any responsibility; eventually the City’s engineer replaced the monuments after substantial delay.
- The City approved construction work in multiple violations of the construction contract:
  - In addition to failing to acquire the necessary rights of way to construct its sidewalk, as the City’s contract required, the City also either violated certain terms of the construction contract or allowed multiple violations of the construction contract. These violations led directly to continued and ongoing damage to the building.
  - The contract required the City to provide surveys and reference points for construction and to either protect existing survey monuments or replace those that it or its agents destroyed (Contract 4.05, 8.05, SC-4.05 and General Requirements). The City clearly understood where our property boundary was and that it did not have a right of way to construct a sidewalk at this location. The survey monuments that it destroyed when it removed the former sidewalk should have been replaced in order to avoid the eventual trespass of the new sidewalk.
  - The City approved the contractor’s work that violated the Technical Specifications (Contract Section 3) requiring that “[w]ork shall conform with the American Concrete Institute’s publication “Slabs on Grade”, the provisions of the ACI Manual of Concrete Practices, and other specifications of the contract.
    - The ACI guidelines require expansion/isolation joints between slabs and adjoining structures such as walls to allow horizontal and vertical movement (Design of Slabs on Grade, ACI 369R-92; Manual of Concrete Practices, ACI 224.3R-95(5.3) and ACI 302.1R-8 (3.2.5.1)). Although the City installed such joints at other locations (Photo 1), it failed to do so at our property, instead attaching the hard concrete to the soft stone of the building.
    - Other technical specifications of the contract also required the City to have expansion joints installed “...adjacent to any structure” (Contract Section 3 J.4, K.3), which, again, it included at other parts of the project but failed to do along our building.

- The contract required the removal of “...any irregularities of more than ¼-inch in 10 feet” to be eliminated (Contract Section 3 K.2). We have submitted surveys of the sidewalk and photographs showing irregularities in substantial excess of ¼-inch (Table 1, Photo 2, Photo 3).
  - The contract required slopes of 0.02 ft/ft (2%) away from buildings. We have conducted surveys of the sidewalk that demonstrate that, in places, the sidewalk fails to meet the slope requirements and, in fact, slopes towards the building at certain locations. Interestingly, the City has also taken photographs that display the sidewalk sloping towards the building. However, the conclusion and sworn affidavit of your public works director contradicted your own evidence, as we discuss further below.
  - The City may also have approved other violations of the contract such as removing and failing to replace other physical, permanent structures, failing to comply with drain connection requirements, and extending sidewalk widths beyond the contract specifications. However, since the City failed to respond to any of our questions related to these matters we were unable to determine the extent of possible violation.
- The City submitted evidence that the sidewalk failed to meet the slope requirements of the contract but concluded that it had:
  - In contrast with our detailed survey of the sidewalk slope and irregularities and photographs showing how the construction not only violated the construction contract but was defective, the City submitted photographs as evidence that it did not (Photo 4, Photo 5; Declaration of David Holland).
  - Ignoring for the moment that the picture plainly shows meltwater flowing towards the entry door threshold and under the doors, the photograph obviously shows that the sidewalk slopes away from the bottom of the level towards the building. Unbelievably, the Public Works Director’s sworn testimony was that “[t]he location of the bubble in the level reflected in these photographs demonstrates that the sidewalk slopes away from the Opera House building.”
- The City has disregarded and failed to respond to any of the damage caused by its defective sidewalk:
  - We have repeatedly submitted photographs and other evidence of continuing and ongoing damage to the building caused by the City’s defective sidewalk (Photo 6, Photo 7, Photo 8 and many others).
  - In response, the City has absurdly suggested that I should install an awning over the sidewalk.
- The City has the obvious ability to construct projects appropriately but failed to do so on our property at SE Dayton Street:
  - Multiple contractors have pointed out to us other projects that the City has completed that used the construction methods that not only should have been used on our property and that were required by the City’s construction contract such as expansion joints, drains, and slopes (Photo 11, Photo 12).
  - We speculate that two considerations likely led to some of the defects in the City’s sidewalk:



- During the project, the property was owned by an absentee landowner and perhaps the City felt that it did not need to adhere to the contract provisions and widely accepted construction methods since the owner was unlikely to discover the defects and complain.
- The curb was poured prior to the sidewalk and when it was discovered how much higher the sidewalk was going to be than the entry door threshold, the City allowed the contractor to grade the concrete down to a lower level.
- However, since the City has failed to respond to any of the evidence we have submitted our suppositions are only likely conclusions.

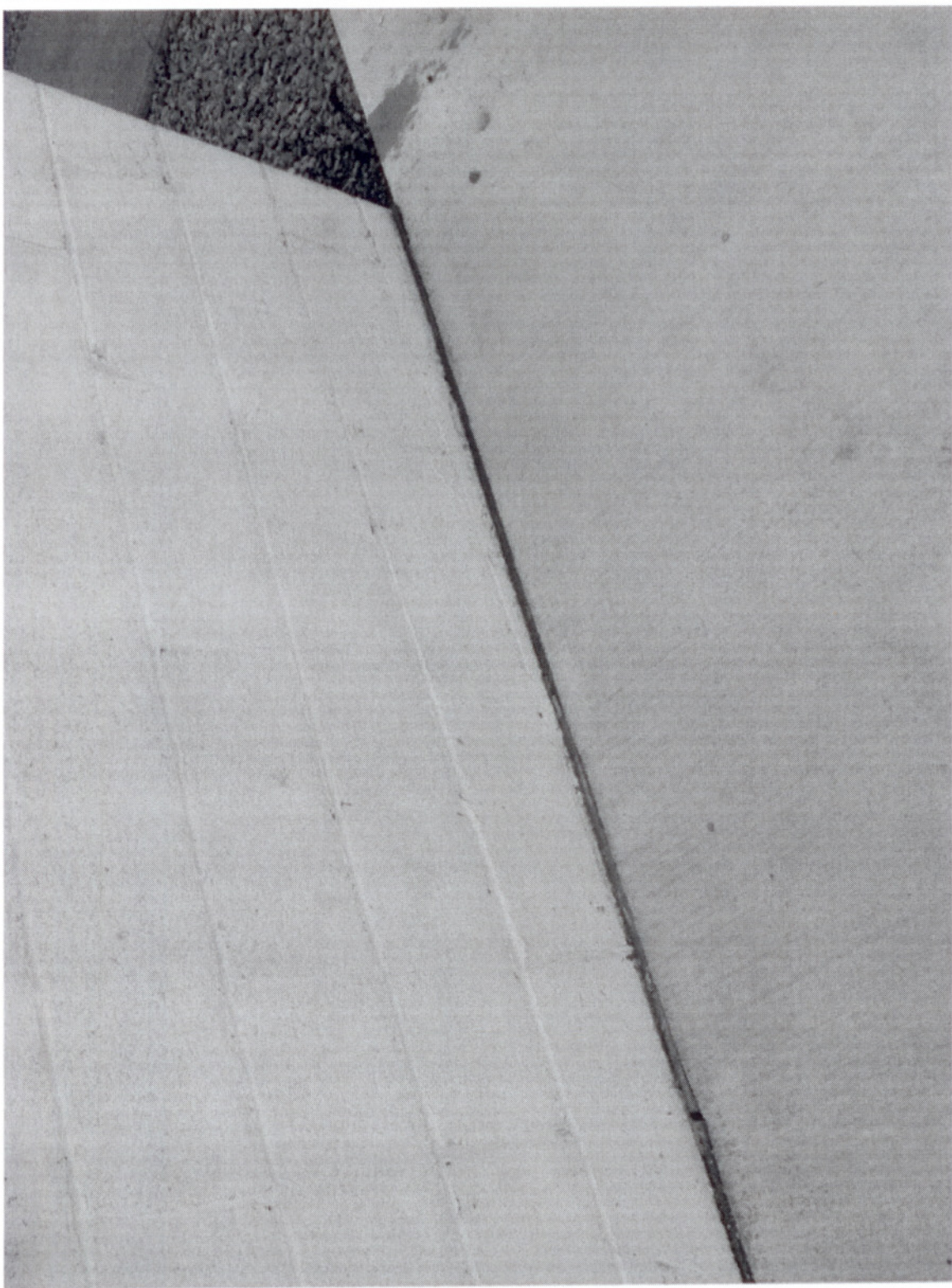


Photo 1. Expansion/isolation joints installed along American Legion Hall building

Table 1. Sidewalk Profiles

Stat #	Profile	Baseline to Crown (in)	Crown Elev (in)	Baseline to Bldg (in)	Bldg Elev (in)
0+16		62 $\frac{3}{4}$	1 $\frac{7}{8}$	62 $\frac{3}{4}$	+ 1 $\frac{7}{8}$
0+18		52	1 $\frac{5}{16}$	61 $\frac{3}{4}$	1 $\frac{1}{16}$
0+20		51	1 $\frac{1}{8}$	58	$\frac{13}{16}$
0+22		47 $\frac{3}{8}$	1 $\frac{1}{8}$	58	1 $\frac{1}{16}$
0+24		43 $\frac{3}{4}$	1 $\frac{1}{8}$	51 $\frac{3}{4}$	$\frac{15}{16}$
0+26		41 $\frac{3}{8}$	1 $\frac{3}{16}$	49 $\frac{1}{16}$	$\frac{7}{8}$

Stat #	Profile	Baseline to Crown (in)	Crown Elev (in)	Baseline to Bldg (in)	Bldg Elev (in)
0+28		36 ¼	13/16	44 ¾	9/16
0+30		35 ¼	15/16	42 ¾	11/16
0+32		27 ½	9/16	47	3/16
0+34		28 ¾	¾	43 ¾	0
0+36		13 ¾	3/16	41 ¾	- ¼
0+38		17 7/16	¾	38 ¾	0
0+40		16 ¾	7/16	29	7/16

Stat #	Profile	Baseline to Crown (in)	Crown Elev (in)	Baseline to Bldg (in)	Bldg Elev (in)
0+42		25 1/2	13 1/16	25 1/2	3/4
0+44		23	3/4	23	3/4
0+46		20 3/4	3/4	20 3/4	3/4
0+48		5 1/2	3/16	17 3/4	3/4
0+50		14 3/4	3/4	14 3/4	3/4
0+52		11 1/2	5/16	11 1/2	5/16

Stat #	Profile	Baseline to Crown (in)	Crown Elev (in)	Baseline to Bldg (in)	Bldg Elev (in)
0+54		9	$\frac{3}{16}$	9	$\frac{3}{16}$
0+34		9	$\frac{3}{16}$		
0+36		9	$\frac{3}{16}$		



Photo 2. "rollover" of concrete near building trapping water; erosion of building foundation

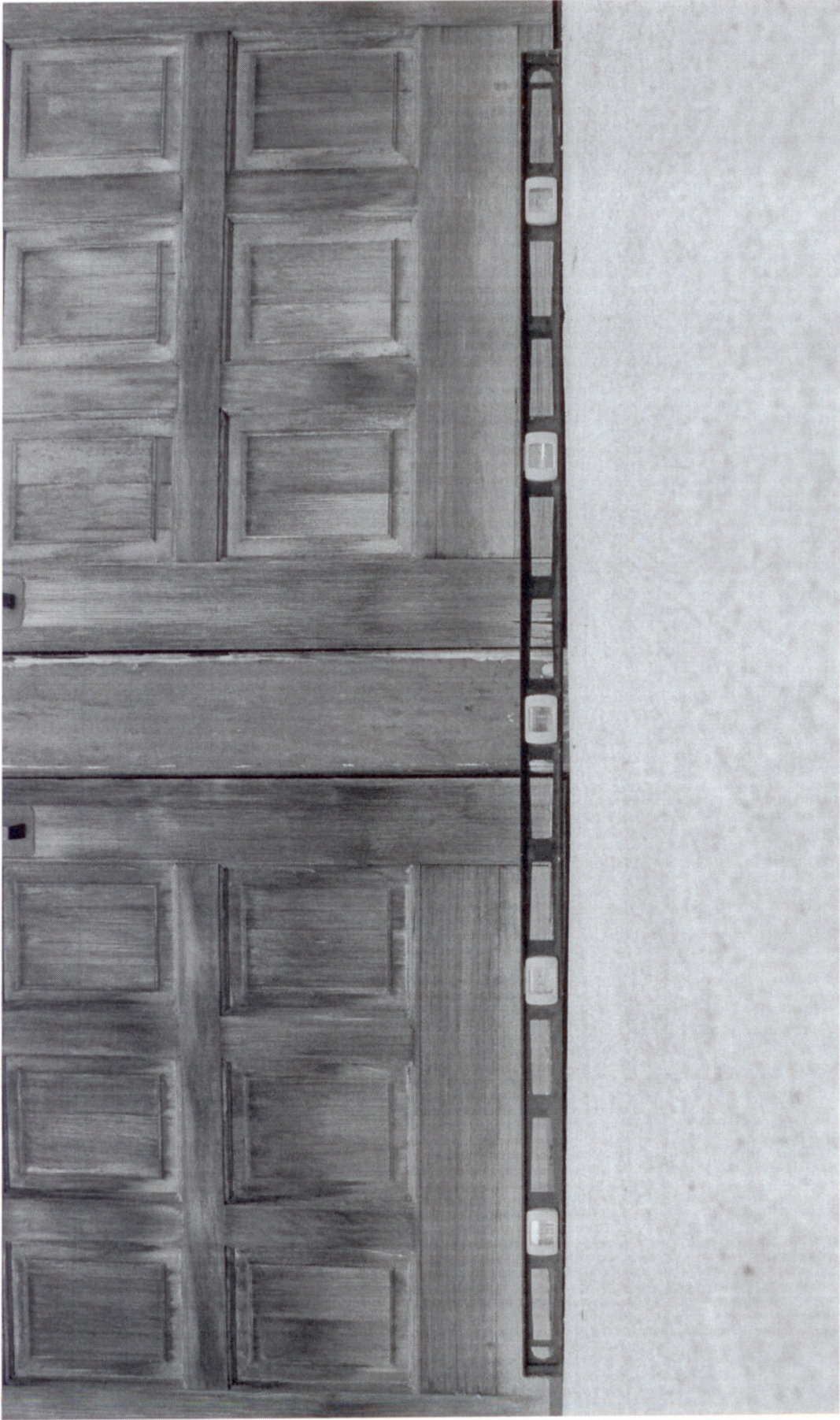


Photo 3. Slope across doorway; crown of sidewalk interferes with opening door on left



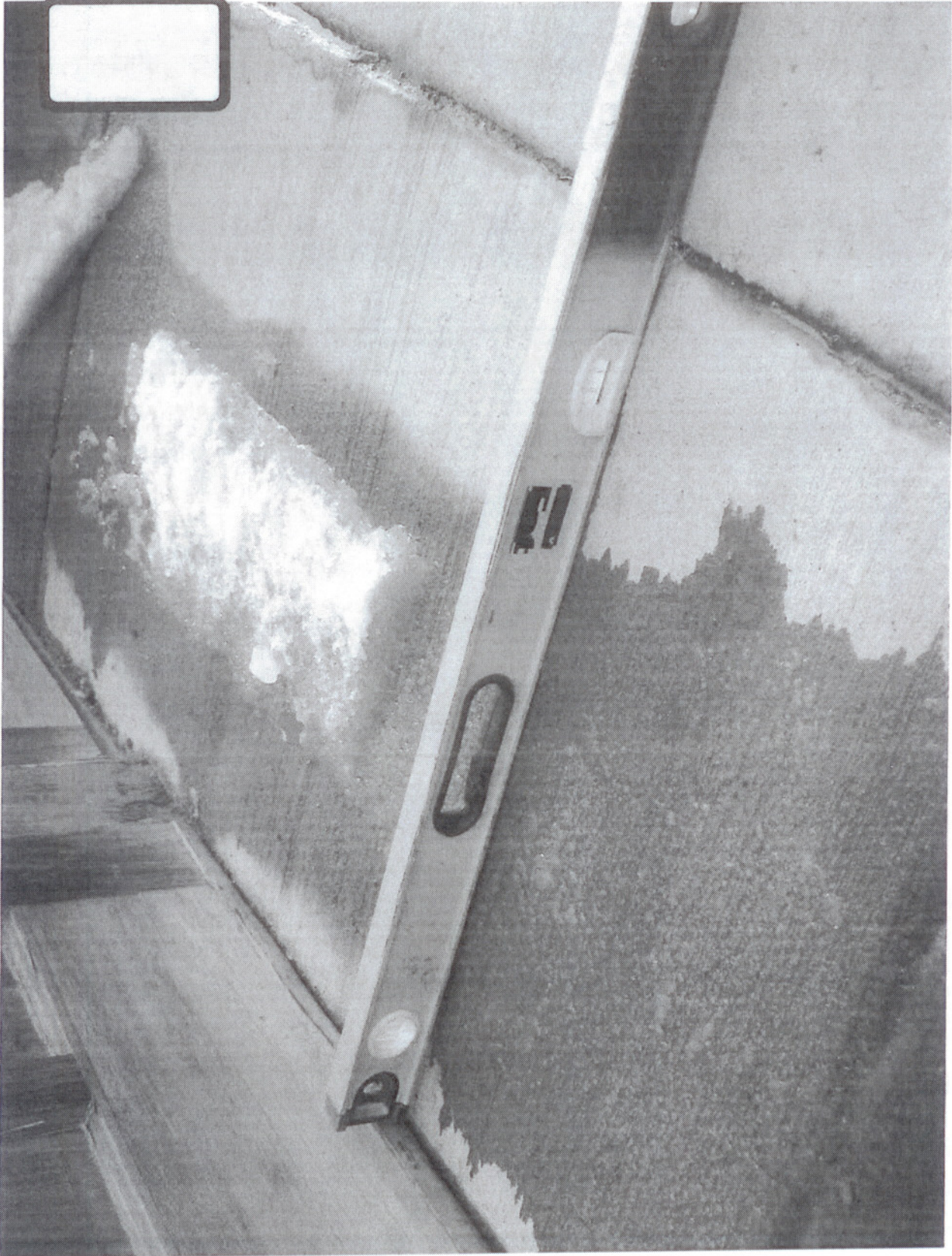


Photo 4. Photograph submitted by City



Photo 5. Enlargement of photo submitted by City



Photo 7. 3/29/2011 @ 8:39 am

Photo 6. 3/29/2011 @ 9:50 am

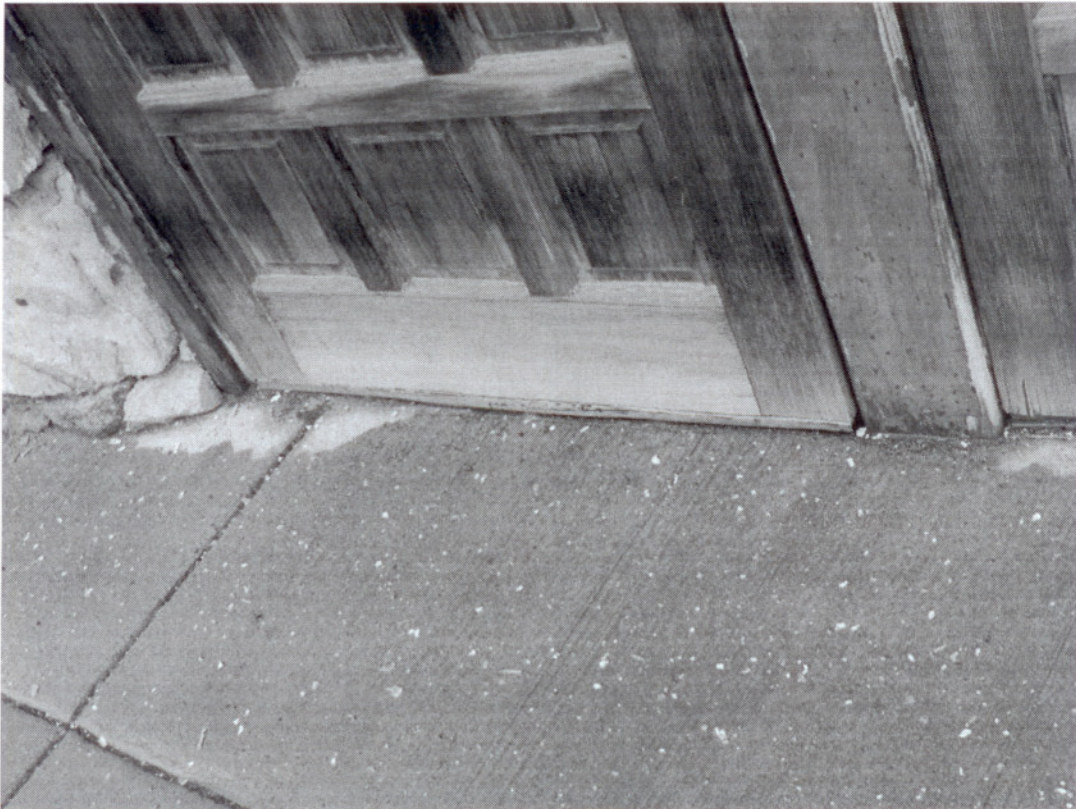




Photo 8. Water penetration of foundation from sidewalk; erosion of lime mortar; no expansion joint; hard concrete adhered to soft stone

Photo 9.  
Water  
penetration  
of building  
from  
sidewalk  
higher than  
floor level  
and sloping  
to building



Photo 10.  
Water  
penetration  
to building



Photo 11.  
Sidewalk  
construction  
showing  
slope away  
from entry  
door



Photo 12.  
Drain  
installed





## Dave Holland

---

**From:** Dave Holland  
**Sent:** Wednesday, June 08, 2011 2:33 PM  
**To:** 'dhl@hhw.com'  
**Subject:** FW: Emailing: IMG\_0098, IMG\_0099, IMG\_0100, IMG\_0101, IMG\_0102, IMG\_0103, IMG\_0104, IMG\_0105, IMG\_0106  
**Attachments:** IMG\_0098.JPG; IMG\_0099.JPG; IMG\_0100.JPG; IMG\_0101.JPG; IMG\_0102.JPG; IMG\_0103.JPG; IMG\_0104.JPG; IMG\_0105.JPG; IMG\_0106.JPG

-----Original Message-----

**From:** Dave Holland  
**Sent:** Monday, December 20, 2010 2:38 PM  
**To:** 'Richard Kuhn'  
**Cc:** Peggy Gray  
**Subject:** Emailing: IMG\_0098, IMG\_0099, IMG\_0100, IMG\_0101, IMG\_0102, IMG\_0103, IMG\_0104, IMG\_0105, IMG\_0106

Hi Rick,

I took these pictures today with a 4 foot level as a straight edge. I put the bottom of the level even with the bottom of the doors to show a relationship with the bottom of the doors versus the top of the cement. I used a level so that you can zoom in on the bubble and the bottom of the door also. In these pictures you can see that the cement is lower than the doors except that small section on the north end of the north door. The other thing is that the north door is lower than the south door. You can also see that booth doors are sagging to the center away from the hinged side of the door which will not allow them to open level but in fact sag down to drag on the cement.

The message is ready to be sent with the following file or link attachments:

IMG\_0098 N door near the middle  
IMG\_0099 N door S end  
IMG\_0100 S door N end this was my first attempt trying to hold the level and take the picture.  
IMG\_0101 S door N end I blocked the level even with bottom of the door.  
IMG\_0102 S door S end  
IMG\_0103 top of doors in question showing sag to the middle, doors open out to the street from the center.  
IMG\_0104 N door  
IMG\_0105 S door  
IMG\_0106 N end of N door way, the concrete is level or a hair high for 4 to 6 inches into the door way near the clump of snow in this picture.

Note: To protect against computer viruses, e-mail programs may prevent sending or receiving certain types of file attachments. Check your e-mail security settings to determine how attachments are handled.

