



## Establishing a Demolition by Neglect Ordinance

by Dan Becker

Many historic resources are demolished each year due to a lack of maintenance that leads to deterioration. When deterioration reaches the extent that it creates health and safety violations, building officials are obligated to act in the public interest to abate the hazard; the frequent result is demolition that circumvents local historic preservation ordinances. Whether such lack of maintenance is intentional in order to avoid preservation ordinance controls on demolition, or unintentional due to a lack of awareness or financial resources, the result is the same: loss of a community asset.

While demolition by neglect is a serious problem for many communities, it is a challenge that can be met. Meeting the challenge requires understanding the fundamental legal principles required for a defensible demolition by neglect ordinance, including the key components required for a useful demolition by neglect ordinance, and selecting effective strategies for the adoption (or improvement) and implementation of a successful demolition by neglect program in your community.

### Fundamental Legal Principles

The first step toward a demolition by neglect program is determining your community's authority to adopt an ordinance. In most cases, such authority is dependent upon state enabling legislation; however, some local governments have "home rule" powers that permit them to adopt ordinances without specific enabling legislation. This is a critical determination...home rule governments can directly adopt their own demolition by neglect ordinance. If your community does not have home rule, then you must establish whether

your enabling legislation has provisions that authorize minimum maintenance provisions.

A number of states (including Alabama, North Carolina, Rhode Island, Virginia, and Wisconsin) have specific language in their enabling legislation regarding demolition by neglect of historic structures. This is the best case scenario. Lacking such specific language, in some cases authority can be inferred from statutes that allow governments to create preservation programs to protect historic resources, or from general enabling legislation that gives local authorities power to protect or promote the public health, safety, and welfare. In these cases, consult your local government's attorney for guidance, perhaps even seek an opinion from your state's attorney general.

Your ordinance must ensure due process. It must be clearly related to the governmental goal of preserving historic resources, and it must be designed to be reasonable, fair, and of general applicability to the community. The issue of regulatory taking also has great bearing upon demolition by neglect ordinances, especially as it relates to economic hardship. Further information on these principles can be found in the reading list at the end of this article.

### Key Components of an Ordinance

An effective ordinance will contain specific elements: standards, petition and action procedures, economic hardship provisions, appeals, and enforcement. You must be able to define deterioration in order to abate it. Standards are required to provide a benchmark for evaluation. A general

statement requiring that a building be kept in good repair will prove to be difficult to enforce because judgments of "good repair" can be challenged as arbitrary. Precise language in your ordinance should clearly define what is considered to be deterioration. Petitions that allege demolition by neglect should list specific defects that reference these standards, so that a reasonable person viewing the deterioration can see what part of the ordinance is being violated.

Clear procedures are necessary to ensure that each case is handled in the same way and that property owners are assured of due process. Provisions should be included in the ordinance for the submittal of petitions alleging demolition by neglect, the process for notification of the property owner, procedures for conducting hearings, and time frames for actions. Also necessary are criteria for evaluating and making findings regarding economic hardship, the manner for filing of appeals, and modes of enforcement by remedy, abatement, and/or penalty. Again, state law provisions may dictate what kind of enforcement tools you have at your disposal.

Particular attention should be paid to criteria for evaluating economic hardship. This is a necessary safeguard that protects the local government and property owners from claims of regulatory takings. Your ordinance should spell out in detail the kind of financial information that the property owner must provide in order to demonstrate a claim of economic hardship, and ensure that findings are made with regard to the claim. In the event that the evidence proves that such a claim is valid, then the ordinance should also provide guidance in the preparation of a plan to relieve the hardship.

### Strategies for Adopting an Ordinance

Each community has its own personality when it comes to the kinds of ordinances that are appropriate for its citizens, and no one strategy will fit all. It will not advance your preservation cause if such an ordinance becomes controversial, so it will pay dividends to carefully consider whether such an ordinance is right for your community, and how to establish support for its adoption.

Several lessons can be learned from our experience in Raleigh. Enabling legislation authorizing local demolition by neglect ordinances was adopted by the North Carolina legislature in 1989 as part of a general re-write of the statutes governing preservation in the state. In 1992, the city completely reorganized its preservation program as part of a successful preservation community effort to establish a county preservation program. The justification for the city's ordinance revisions was to ensure that the two programs were well coordinated, as well as to incorporate the state legislation changes. Demolition by neglect became part of a routine updating of the ordinance, rather than the sole focus of a "sales effort"

that might attract undue attention and controversy.

Because the city's ordinance was the first in the state to take advantage of the new enabling authority, we modeled many of its procedures after state prescriptions for enforcement of minimum housing standards. Our plan, if challenged, was to avoid the view that it something entirely new to be defended. We would treat demolition by neglect as an extension of powers the state had already granted: we were taking advantage of a familiar process that had been on the books a long time, was a matter of general course, and was recognized as a process for affirmative enforcement of deficiencies. A case can be made for equal treatment under the law...property with deficiencies (minimum housing standards, demolition by neglect standards) are handled the same way. Happily, we were not required to make these arguments, and the ordinance was adopted after routine review.

### Using the Ordinance

A demolition by neglect ordinance is not for the faint of heart. It is aggressive, pro-active preservation. Recognize that such a program is staff-resource intensive, and requires great precision in the application of due process. It is important to build cooperative partnerships both with neighborhoods and with local government agencies charged with enforcement. Initially, we have undertaken only one case at a time. We have requested that neighborhood groups prioritize properties they wish to have considered under the ordinance's provisions, and to keep the list short. Commission staff assist inspections department staff with monitoring and evaluating property compliance.

Knowing when to use the ordinance is important. Be sure that deterioration is substantial enough to warrant the application of such governmental power, but not so severe that the expense of repair exceeds the market value of the property which could lead to a finding of economic hardship.

The City of Raleigh's demolition by neglect ordinance can be accessed on-line by going to: <http://www.municode.com/database.html>. Navigate to Raleigh, North Carolina, search for '10-6180' and you will call up the section of the code for demolition by neglect.

**For further guidance regarding demolition by neglect and related legal issues, the following resources are recommended:**

Duerksen, Christopher J. and Richard J. Roddewig. *Takings Law in Plain English*, 3rd ed. (Chicago and Denver: Clarion Associates, Inc., 1998)

Pollard, Oliver A, III. "Counteracting Demolition by Neglect: Effective Regulations for Historic District Ordinances," *The Alliance Review*, Winter 1990. National Alliance of Preservation Commissions, Athens, GA.

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Pollard, Oliver A, III. "Minimum Maintenance Provisions: Preventing Demolition by Neglect," Preservation Law Reporter, Volume 8, 1989 Annual. National Trust for Historic Preservation, Washington, DC.

Roddewig, Richard J. and Christopher J. Duerksen. "Responding to the Takings Challenge: A Guide for Officials and Planners," Planning Advisory Service Report #416, May 1989. American Planning Association, Chicago, IL.

White, Bradford J. and Paul W. Edmondson. Procedural Due Process in Plain English: A Guide for Preservation Commissions. (Washington DC: National Trust for Historic Preservation, 1994)

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What is the structural condition of the building? Don't just take the word of the owner if you have doubts. At a minimum, a report from the building commissioner is needed to establish the structural soundness. However, the Commission may want to consult with a structural engineer for an opinion on the structural soundness of a building. Just

because a building is in poor condition doesn't mean it should be torn down.

Can the building be mothballed? Mothballing a building is less expensive than demolition and it preserves the building until economic conditions, a new owner or funds are available to restore the building. If the building is to be demolished because it is vacant, it need not be a blight on the neighborhood. The building and boarded up windows can be painted. The grounds can be maintained. The windows and doors can be properly secured from unwanted access.

A Commission should not be afraid to deny a request for demolition. Once the building has been demolished, it will never return. Furthermore, new construction can never replace the historic character and fabric of a building.

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Communities' rights to appeal Postal Service decisions to the Postal Rate Commission would be expanded to include relocations and new construction along with closings.

H.R. 670 is currently in the Subcommittee on the Postal Service and enjoys the support of 69 co-sponsors. At least 100 co-sponsors are needed by late spring.

For further information contact Preservation Action at (202) 659-0915 or [preservationaction@worldnet.att.net](mailto:preservationaction@worldnet.att.net).

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