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 it requires understanding the fundamental legal principles required for a defensible demolition by neglect ordinance, incorporating 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 as 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 have specific language in their enabling legislation regarding demolition by neglect of historic structures, including Alabama, North Carolina, Rhode Island, Virginia, and Wisconsin. This is the best case scenario. Lacking such specific language, in some cases authority can be inferred from statutes that allow local jurisdictions 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 from substandard housing or unsafe buildings. In these cases, consult your local

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Located at the edge of the now prestigious Oakwood Historic District, this deteriorated property had been purchased decades earlier as a rental investment property for the owner’s children’s inheritance. The local commission worked with the elderly owner to reposition it in the marketplace from entry level to market-rate in order to generate improved cash flow. They were able to use pro-bono design services and brokered a major tax credit rehab (20% state, 20% federal) with private financing.

This historic house in Raleigh, North Carolina, after repairs were made as a result of their demolition by neglect ordinance.
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 petition and the deterioration can recognize the violation(s) of the ordinance.

Detailed 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. Raleigh chose to authorize only the preservation commission to submit petitions; this was to avoid spurious claims. Individuals and organizations bring their concerns to the commission, which then provides an initial assessment about whether to proceed. 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 itemize the specific 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 a proposed demolition by neglect 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 Raleigh’s experience. 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 effort by the preservation community 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 statutory prescriptions for enforcement of minimum housing standards. Our plan if challenged was to avoid the position that it was something entirely new to be defended. We would treat demolition by neglect as an extension of powers the state had already granted: by doing this, we would take 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; properties 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 downtown associations and with local government agencies charged with enforcement.
The Raleigh Historic Development Commission 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 the ordinance, 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.

**DETERMINING ECONOMIC HARDSHIP AND CREATING PRESERVATION PLANS**

When the City of Raleigh adopted a new Unified Development Ordinance in 2013, significant improvements to the initial demolition by neglect ordinance were made, most particularly in its economic hardship provisions. Notable scholarship on economic hardship has occurred during the past 15 years. A literature search for best practices revealed a body of impressive work strengthening local government program techniques to assess and accommodate hardship.

Highlights of these improvements include establishing a “Hardship Review Panel” to review financial information related to determining hardship; listing standards for determination of hardship in addition to standards for determination of deterioration; a more thorough list of financial information to be provided for hardship assessment; supplementing economic return to include the concept of “reasonably beneficial use” for non-income producing properties and those owned by non-profit organizations; and more guidance in the preparation by the commission of a “Plan for Relief of Economic Hardship.”

The use of a hardship review panel ensures that real estate and financial experts are judging the economic profile of the property, rather than the commission, whose expertise is directed toward design review not financial considerations. It also avoids the appearance of a conflict of interest with the commission acting as judge and jury. Standards for determination of hardship make clear that the determination is based on the characteristics of the property, not the ownership, as well as assigning to the owner the burden of proof for hardship tests.

A novel concept not observed elsewhere is introduced in Raleigh’s ordinance relating to the Hardship Review Panel’s work. If the panel reaches a conclusion that a hardship does exist, the ordinance requires the panel to “establish a monetary value of capital expenditure on the property that the panel believes would yield a return on the investment without economic hardship.” This becomes the level of investment that is expected from the owner toward financing the preservation plan for stabilization/repair of the property. The commission then works to develop additional “gap” resources and strategies necessary to eliminate the hardship and complete remedial work. The preservation plan for saving the resource thus becomes an investment partnership recognizing the individual owner’s financial or beneficial use interests and the public’s architectural, heritage and cultural interests. ■

**USEFUL SOURCES**

The City of Raleigh’s demolition by neglect ordinance can be accessed online at https://user-2081353526.cld.bz/UnifiedDevelopmentOrdinance/451/#zoom=Z

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

