

Taking a Bite Out of Blight: Effective Tools and Innovative Strategies in the Battle to Reuse Problem Properties

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NY COM New York State Conference of Mayors & Municipal Officials

- Group Homes
- Local Government-Owner Property
- Religious & Educational Properties

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Effective Tools and Innovative Strategies
in the Battle to Reuse Problem Properties

18th Annual Alfred B. DelBello Land Use & Sustainable Development Conference`



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New York State Conference of Mayors & Municipal Officials

What is Code Enforcement?

New York State Conference of Mayors & Municipal Officials

Code Enforcement

Substantive Standards & Procedures & Processes

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Code Enforcement

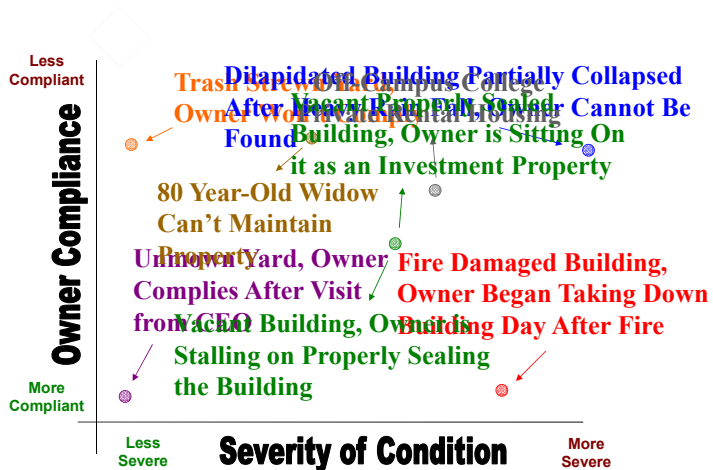
- Regulations:
 - a. Public Nuisance,
 - b. Building Standards,
 - c. Property Maintenance,
 - d. Fire Codes,
 - e. Health Codes,
 - f. Housing/Multiple Dwelling,
 - g. Vacant Property Codes,

Code Enforcement

- Regulations:
 - h. Abandoned Property,
 - i. Rental Registry,
 - j. Business Regulations

Code Enforcement

- Investigation
- Permitting
- Inspections
- Enforcement
 - Criminal Proceeding
 - Civil Proceeding
 - Administrative
 - Summary Abatement





New York State Conference of Mayors and Municipal Officials

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& Sustainable Development Conference**

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I. INTRODUCTION

Distressed, vacant, and abandoned property can be major impediments to maintaining or revitalizing a quality community. No matter how many property owners and tenants work together to renovate façades, improve streetscapes, or maintain properties, just one run-down property or one absentee property owner can substantially hinder those efforts.

Problem property can range from an overgrown yard to the accumulation of debris rivaling professional junkyards and are often the bane of neighboring property owners struggling to create and maintain a quality community. Whether the condition is simply an eyesore or presents a serious threat to the public's health and safety, nuisance conditions can drive down adjacent property values and can have a domino effect on the entire neighborhood. In addition, municipalities have recognized that these conditions are frequently the precursor to more serious problems.

Local government officials have numerous tools that they can use to address the problem properties in their community. Subject to due process considerations, municipalities are authorized to regulate the condition of private properties. In addition, local governments have a variety of ways in which they may remediate nuisance conditions on private properties and place the costs of such municipal remediation on the property owner's tax bill. Every effective code enforcement program, however, must be comprehensive yet flexible. An enforcement program must be able to deal with both minor as well as major violations; it must be able to deal equitably with both unintentional and flagrant violators. This publication discusses the many techniques local government officials can use to deal with distressed, vacant, and abandoned properties, including enforcing the State's *Property Maintenance Code* (which is only one volume of the *Uniform Fire Prevention & Building Code*), the New York's zombie property remediation act, the common law of public nuisance, State and local unsafe buildings laws, rental registries, and search warrants.

II. WHERE TO START?

For the many municipalities that have suffering from distressed properties and neighborhood blight for decades, the problem may seem intractable. But communities do not have to live with nuisance properties because there are myriad tools available to help them deal with distressed, vacant, and abandoned properties. Even in communities with depressed local economies and weak, stagnant, or even decline real estate markets, property maintenance issues can and must be addressed. And while there is no "magic" law to easily correct nuisance conditions, there are a number of actions that can facilitate the process of dealing with nuisance properties.

CREATE A PROPERTY MAINTENANCE TASK FORCE

While most New York communities have been dealing with property maintenance issues for years, creating a task force can facilitate jump starting or reinvigorating enforcement efforts. Creating a task force increases the likelihood of successfully cleaning up the nuisance properties in your community by:

- **Prioritizing the issue.** Creating a task force puts both municipal employees and the public at-large on notice that property maintenance is of paramount importance to local government officials;
- **Focusing resources.** A task force can focus all of the municipality's resources on an issue, resources that are otherwise constantly stretched thin dealing with innumerable other issues; and
- **Increasing awareness.** The mere creation of a task force increases the community's awareness of the problem, often resulting in voluntary compliance and garnering free press coverage.

The composition of the task force varies from municipality to municipality. However, the task force should, at a minimum, include the mayor, the municipal attorney, at least one representative from the local legislative body, the code and zoning enforcement officers, representatives from the fire department or district, and representatives from the local law enforcement agencies. Municipalities should also consider including representatives from the local colleges/universities (if you have any), any housing authorities, merchants' associations, and chambers of commerce. Additionally, local officials should consider including representatives from the county social service agencies as well as State agencies.

Finally, while it would be inappropriate to include a member of the local court on the task force, local government officials should notify the local court of the task force's creation and the possibility of an increased caseload that may result from increased enforcement activity.

REVIEW YOUR LOCAL LAWS, ENFORCEMENT PRACTICES, AND PRIORITIES

While there is no one-size-fits-all solution for dealing with problem properties, there are many legal options available to local governments for dealing with nuisance property conditions. Local government officials should educate themselves about all of the available options. In New York, property maintenance issues can be addressed using:

- The state's Property Maintenance Code, which is part of the state's Uniform Fire Prevention and Buildings. Local governments are responsible for enforcing and administering the state's Property Maintenance Code in their jurisdiction. Moreover, local governments must enact a local law providing for the enforcement and administration of the Uniform Code in their jurisdiction;¹
- A property maintenance local law, establishing both the substantive standards and the procedure for enforcing the local law;
- Public Health Law Article 13, which authorizes local boards of health to order nuisance conditions to be remedied;
- Common law of public nuisance, which holds that local governments may summarily abate public nuisances.²

Despite the established laws, local government officials, including the code enforcement officer and the municipal attorney, should periodically review their property maintenance laws and enforcement efforts to insure that they are adequately serving the municipality's needs.³ Local property maintenance programs need to be comprehensive yet flexible so that the municipality can effectively but fairly deal with all types of property conditions and property owners. At a minimum, local property maintenance laws should address the following:

- **Criminal Penalties.** Local property maintenance laws should
 - Expressly state whether infractions are violations or misdemeanors,
 - Establish the fine schedule⁴ for violations, and
 - Note whether violations are subject to terms of imprisonment;
- **Civil Penalties.** Municipalities should also provide for the option of imposing civil penalties for violations of their local property maintenance laws;
- **Injunctions.** Local property maintenance laws should also provide for the possibility of obtaining injunctions for the courts;
- **Summary Abatement.** For many violations, the municipality may wish to remedy the condition itself, without going to court. Commonly referred to as summary abatement, the municipality should clearly establish the process and procedures for summarily abating nuisance conditions. The local law should address which conditions may be abated summarily and how the abatement takes place, including who makes the determination, how the property owner is notified, and how the abatement may be contested.
- **Liens.** If a municipality is going to remedy a nuisance condition itself, either summarily or pursuant to a court order, the local law must state that any costs incurred by the municipality in remedying the condition can be placed as a lien upon the property. Failure to enact a local law placing abatement costs as liens upon the property can greatly frustrate a local government's ability to recover costs that it incurs in dealing with nuisance properties.

Whatever approach a municipality takes when dealing with nuisance properties, it is crucial that local government officials consult with the municipal attorney to maximize the effectiveness of the property maintenance enforcement program and to minimize the municipality's exposure to liability.

III. THE NEW YORK STATE PROPERTY MAINTENANCE CODE AN INTRODUCTION TO THE UNIFORM FIRE PREVENTION & BUILDING CODE

The cornerstone of every local program dealing with property maintenance issues should be the *Property Maintenance Code of New York State* (the *Property Maintenance Code*). The *Property Maintenance Code* is part of the New York State Fire Prevention and Building Code⁵ (the *Uniform Code*) which prescribes minimum standards for both fire prevention and building construction. It is applicable in every municipality in the State except the City of New York, which has its own code.

MUNICIPALITIES DO NOT HAVE TO ENACT ANY LOCAL LAW OR RESOLUTION FOR THE *UNIFORM CODE* TO BE EFFECTIVE IN THEIR JURISDICTIONS. THE *UNIFORM CODE* IS EFFECTIVE THROUGHOUT THE STATE BY ACT OF THE STATE LEGISLATURE.

The *Uniform Code* is comprised of seven volumes:

1. *Building Code*;
2. *Fire Code*;
3. *Residential Code*;
4. *Plumbing Code*;
5. *Mechanical Code*;
6. *Fuel Gas Code*; and
7. *Property Maintenance Code*.

The *Uniform Code* is NOT available for viewing via any legal service such as Westlaw or Lexis. However, the *Uniform Code* is available for viewing online via the New York State Department of State website at www.dos.ny.gov/DCEA/. Printed copies of the *Uniform Code* (or any of its volumes) may only be purchased from the International Code Council at <https://codes.iccsafe.org/public/collections/NY> or by calling 800-786-4452.

In 1981, the State of New York enacted Executive Law Article 18, which mandated the development and implementation of an integrated building and fire code that would be applicable to all building construction throughout the State. Article 18 sets forth the procedure for developing, maintaining, administering, and enforcing this code, which is called the *Uniform Fire Prevention and Building Code* (the “*Uniform Code*”). The *Uniform Code* addresses such building construction and occupancy issues as fire prevention, life safety, structural stability, sanitation, and accommodation for people with disabilities. On January 1, 1984, the *Uniform Code* became effective, governing all building construction in the State of New York, with the exception of construction in the City of New York.

Beginning in 1998, the State of New York began an exhaustive and thorough review of the *Uniform Code* that culminated in a wholesale revision of the *Code* when the New York State Fire Prevention and Building Code Council (“New York’s Code Council”) adopted the *International Codes* by reference, with some modifications, as New York’s *Uniform Code*. The New York Code Council formally adopted the new provisions on March 6, 2002; these amendments became effective July 3, 2002.

The International Code Council regularly reviews and updates the *International Codes*. Consequently, since 2002, the New York Code Council has also periodically reviewed the revisions made to the *International Codes* and updated New York’s *Uniform Code* on several occasions. New York’s most recent revisions to the *Uniform Code* were adopted on March 9, 2016. This 2016 update is considered a major update to the *Uniform Code* and incorporates the following documents by reference:

- *2015 International Building Code*
- *2015 International Residential Code*
- *2015 International Existing Building Code*
- *2015 International Fire Code*
- *2015 International Plumbing Code*
- *2015 International Mechanical Code*
- *2015 International Fuel Gas Code*
- *2015 International Property Maintenance Code*
- *2016 Uniform Code Supplement*

The Energy Code incorporates the following documents by reference:

- *2015 International Energy Conservation Code*
- *2013 ASHRAE 90.1*
- *2016 Energy Code Supplement*

These revised standards for fire prevention, property maintenance, and building construction became effective on April 6, 2016, when the rulemaking was published in the State Register. The implementation of these new standards has a

transition period which runs from April 6, 2016 until October 3, 2016, during which time regulated parties submitting building permit applications may comply with either the current or newly adopted *Uniform Code* provisions. All building permit applications submitted on or after October 3, 2016 must comply with the newly-adopted *Uniform Code* provisions. There is no transition period for the amendments to the *Energy Code*, which become effective on October 3, 2016.

The International Code Council's 2015 codes, which have been adopted by New York State, can be viewed online at no cost at <https://codes.iccsafe.org/public/collections/NY>. New York's 2016 supplements to the 2015 International Building Code and the 2015 International Energy Code can be downloaded from <https://codes.iccsafe.org/public/collections/NY>.

Additionally, the New York State Department of State has arranged for local municipalities that submit their annual Code Enforcement and Administration report to the Department's Division of Building Standards and Codes to receive (a) copies of the newly adopted *Uniform Code* and *Energy Code* books and (b) a one-year electronic subscription to the newly adopted codes and a one-year Governmental Membership to the International Code Council.

Municipalities **do not** have to enact any local law or resolution for these amendments to *Uniform Code* to be effective in their jurisdictions. The *Uniform Code* and any amendments made to it by the New York State Code Council are effective throughout the State by act of the State legislature. Local governments may not exclude themselves from the *Uniform Code*'s provisions.

While the New York State Code Council establishes the substantive standards set forth in the *Uniform Code*, each local government is responsible for adopting a local law that provides for the enforcement and administration of the *Uniform Code* within its corporate boundaries. To that end, the Department of State has promulgated rules and regulations imposing minimum enforcement and administration standards. Consequently, cities and villages need to review their enforcement and administration programs and, where necessary, adopt laws consistent with the State's minimum standards. Local government officials should periodically review their local enforcement program in consultation with their code enforcement personnel and their municipal attorney to determine what changes must be made to their code program.

Although the *Uniform Code* standards are consistent throughout the State, each municipality's needs with respect to administering and enforcing the Uniform Code are not necessarily the same. A municipal code enforcement program appropriate for a large city containing many apartment buildings and a large downtown commercial core is most likely not an appropriate program for a city or village with a small population and mostly single-family homes. Local needs and conditions should be considered when designing a municipality's *Uniform Code* enforcement program.

Local governments do not enforce or administer the *Uniform Code* on State-owned property or public school property in their jurisdiction. The Department of State enforces and administers the *Uniform Code* on State-owned property, while the Department of Education enforces and administers the *Uniform Code* on both local public school property and State University System property.

Although municipalities may not exclude themselves from the applicability of the *Uniform Code*, municipalities may, by local law, decline to enforce and administer the *Uniform Code* within their boundaries. If a municipality declines to enforce and administer the *Uniform Code*, responsibility for enforcing and administering it passes to the county in which the city or village is located. The transfer of responsibility becomes effective the following January 1, provided the local governing body adopts the necessary local law prior to July 1. If a county declines to enforce the code, it may also adopt a local law to that effect, in which case responsibility for code enforcement passes to the Department of State. Municipalities may reassume the responsibility for enforcing the code within their jurisdiction by adopting a local law repealing the local law by which it declined enforcement. Authority to administer and enforce the Uniform Code returns to the municipality as of the second local law's effective date.

NYCOM does not recommend declining to administer and enforce the *Uniform Code* because counties generally are not going to provide the same level of code enforcement services that the local government would. Municipalities that, due to budgetary constraints or other logistical reasons, are considering declining to enforce and administer the *Uniform*

Code should consider entering into intermunicipal agreements with neighboring municipalities to administer and enforce the *Uniform Code* as a means both of improving service and cutting costs.

THE UNIFORM CODE'S EFFECT ON LOCAL STANDARDS

Since the *Uniform Code* first went into effect on January 1, 1984, municipalities could supersede *Uniform Code* provisions with more stringent local fire prevention and building code standards (the procedures for enacting more restrictive local standards are set forth on page 9). However, because of the extensive changes in the *Uniform Code*, many of the local standards that existed under the old provisions of the *Uniform Code*, may now be “inconsistent and in conflict” with the *Uniform Code* provisions, and may be superseded.⁶ Even if a local standard is not directly in conflict with a new *Uniform Code* provision, its enforcement and administration may frustrate the enforcement and administration of a new *Uniform Code* provision. In such situations, the local standard is superseded by the *Uniform Code*.

The new *Uniform Code* provisions do not affect the validity of any action taken pursuant to or in compliance with a local law or regulation prior to the effective date of the new provisions of the *Uniform Code*.⁷

If there is a question as to whether a local standard has been superseded, municipalities and interested parties should contact the Code Council for an official opinion.

ENACTING MORE RESTRICTIVE LOCAL STANDARDS

After reviewing the provisions of the *Uniform Code*, municipal officials may determine that their locality requires stricter fire prevention and building standards. This may be accomplished by enacting a local law creating the standard and then, within 30 days of enacting the local law, petitioning the Code Council for a determination as to whether the local standard is more restrictive than the relevant provisions of the *Uniform Code*.⁸ The petition must include the following information and documentation:

- 1) A certified copy of the local law;
- 2) A finding by the municipality’s legislative body that sets forth the special conditions within the municipality that warrant imposing the more restrictive local standards;
- 3) Documentation, such as research reports, statistical analyses, and field-related experience, that shows that the local law conforms to accepted engineering and fire prevention practices;
- 4) Documentation, such as research reports, statistical analyses, and field-related experience, that shows that the local law does not discriminate against material products, methods, or systems of demonstrated capabilities;
- 5) An economic impact statement which documents the costs and benefits of the local law, including the potential impact to property and building owners, industry, and local government;
- 6) An analysis of each section of the local law, indicating the content and comparable sections of the *Uniform Code*; and
- 7) Copies of meeting minutes and transcripts, if available, from meetings or hearing in which the local law was discussed and adopted.

Once the application is submitted to the Code Council, it must determine:

- I. whether the local law actually establishes a higher, more restrictive standard, and
- II. if so,

- (i) whether the standard is reasonably necessary due to special conditions prevailing within the local government and
- (ii) whether the standards conform to the accepted engineering and fire prevention practices and purposes of the *Uniform Code*.

If the Code Council determines that the local standards satisfy the requirements of Executive Law § 379(2), it will adopt the standards applicable to that locality only. However, the Code Council may impose conditions and term limits on the standards, and may terminate the local standards when it deems necessary. Pending the Code Council’s review of the municipality’s petition, the local law establishing the local standard will remain in effect. Information regarding the process for enacting more restrictive local standards can be found online at <https://www.dos.ny.gov/DCEA/mrls.html>.

VARIANCE FROM UNIFORM CODE STANDARDS

Situations may arise that warrant individual properties or buildings being granted variances from specific *Uniform Code* provisions.

Local government officials do not have the authority to grant variances. Moreover, requests for variances must be made by the property owner and not the municipality.

The Secretary of State has established a dual process for obtaining variances from *Uniform Code* provisions.⁹ Cases involving variances or modifications that do not substantially affect the *Uniform Code*'s provisions for health, safety or security are classified as routine cases and are processed administratively by the Department of State.

Requests for substantive variances are reviewed by the State's regional boards of review. Boards may grant substantive variances if the party seeking the variance demonstrates that strict compliance with the particular *Uniform Code* provision:

1. Would create an excessive and unreasonable economic burden;
2. Would not achieve the code's intended objective;
3. Would inhibit achievement of some other important public policy;
4. Would be physically or legally impracticable;
5. Would be unnecessary in light of alternatives which ensure that the *Uniform Code*'s intended objective(s) will be achieved, or in light of alternatives which, without a loss in the level of safety, achieve the code's intended objective more efficiently, effectively, or economically; or
6. Would entail a change so slight as to produce a negligible additional benefit consonant with the *Uniform Code*'s purposes.

Forms requesting a variance are available from the Regional Offices of the Division of Code Enforcement and Administration. A list of the Regional Service Units may be accessed on the Department of State's website at https://www.dos.ny.gov/DCEA/reg_off_cty.html.

ADMINISTERING & ENFORCING THE UNIFORM CODE

1. Overview

Local governments are responsible for enforcing and administering the *Uniform Code* within their corporate boundaries. Municipalities do NOT need to adopt the current *Uniform Code* for it to be effective in their jurisdictions. The *Uniform Code* is in effect by directive of the State Legislature. Cities and villages MAY NOT exclude themselves from the *Uniform Code*'s provisions.

Note that the Department of State has promulgated rules and regulations imposing minimum enforcement and administration standards. Cities and villages need to review their enforcement and administration programs and, where necessary, to adopt laws or ordinances consistent with the State's minimum standards. Local government officials should periodically review their local enforcement program in consultation with their code enforcement personnel and their municipal attorney to determine what changes must be made to their code program.

Local officials should consult their municipal attorney when enacting and amending their municipality's administration and enforcement program. Additionally, municipalities should periodically review the effectiveness of their enforcement program to insure that it is addressing their community's code enforcement needs.

Local governments do not enforce or administer the *Uniform Code* on State-owned property or public school property in their jurisdiction. The Department of State enforces and administers the *Uniform Code* on State-owned property, while the Department of Education enforces and administers the *Uniform Code* on both local public school property and State University System property.

Although municipalities may not exclude themselves from the applicability of the *Uniform Code*, municipalities may, by local law, decline to enforce and administer the *Uniform Code* within their boundaries.¹⁰ If a municipality declines

to enforce and administer the *Uniform Code*, responsibility for enforcing and administering it passes to the county in which the city or village is located. The transfer of responsibility becomes effective the following January 1, provided the local governing body adopts the necessary local law prior to July 1. If a county declines to enforce the code, it may also adopt a local law to that effect, in which case responsibility for code enforcement passes to the Department of State. Municipalities may reassume the responsibility for enforcing the code within their jurisdiction by adopting a local law repealing the local law by which it declined enforcement. Authority to administer and enforce the *Uniform Code* returns to the municipality as of the second local law's effective date.

NYCOM DOES NOT RECOMMEND DECLINING TO ADMINISTER AND ENFORCE THE *UNIFORM CODE*. MUNICIPALITIES THAT, DUE TO BUDGETARY CONSTRAINTS OR OTHER LOGISTICAL REASONS, ARE CONSIDERING DECLINING TO ENFORCE AND ADMINISTER THE *UNIFORM CODE* SHOULD CONSIDER ENTERING INTO INTERMUNICIPAL AGREEMENTS WITH NEIGHBORING MUNICIPALITIES TO ADMINISTER AND ENFORCE THE *UNIFORM CODE* AS A MEANS BOTH OF IMPROVING SERVICE AND CUTTING COSTS.

Each municipal governing body must develop and implement a program for enforcing and administering the *Uniform Code* within their municipal boundaries. Although the *Uniform Code* standards are consistent throughout the State, each municipality's needs with respect to administering and enforcing the *Uniform Code* are not necessarily the same. A municipal code enforcement program appropriate for a large city containing many apartment buildings and a downtown commercial core is most likely *not* an appropriate program for a rural village with a small population and mostly single family homes. Local needs and conditions should be considered when designing a municipality's *Uniform Code* enforcement program.

Cities and villages must adopt a local law or ordinance (cities only) for administering and enforcing the *Uniform Code*.¹¹ State regulations require every municipal code enforcement program to include certain features.¹² Not all of the required features must be addressed in the local law providing for the enforcement and administration of the *Uniform Code*, while some features will be addressed in the local law, others may be addressed in resolutions, ordinances (cities only), or rules.¹³ Local officials should consult their municipal attorney when enacting and amending their municipality's administration and enforcement program. Additionally, municipalities should periodically review the effectiveness of their enforcement program to insure that it is addressing their community's code enforcement needs.

2. Designating Responsibility for Code Enforcement

(a) Overview

The persons, offices, departments, agencies, or combinations thereof, authorized to and responsible for administering and enforcing the *Uniform Code* must be clearly identified.¹⁴ The responsibility for enforcing and administering the code may be divided between various officers, departments, and outside contractors. For example:

- New building construction, alterations, conversions, and demolitions may be assigned to a building department;
- Inspections of public and commercial buildings may be assigned to the fire department; and
- Inspections of existing residential buildings may be assigned to a housing department.

Alternative, all of a municipality's code enforcement responsibilities may also be vested in a single officer or department who is responsible for administering and enforcing not only the *Uniform Code* but also the municipality's local zoning regulations.

The *Uniform Code* Two types of code enforcement professionals are responsible for administering and enforcing the *Uniform Code*. "Code enforcement personnel" is a code enforcement officer (CEO) charged with administering and enforcing every aspect of the *Uniform Code* program, including processing permit applications, conducting construction inspections, issuing certificates of occupancy, processing complaints, and prosecuting violations. "Code compliance technicians" (fire inspectors) are responsible only for conducting fire safety and property maintenance inspections.¹⁵

(b) Training and Certification Requirements

All local code enforcement officers must complete a prescribed program of minimum basic code enforcement training.¹⁶ The training was developed by the Fire Fighting and Code Enforcement Personnel Standards and Education Commission. Individuals must complete 114 hours of instruction within one year of their initial appointment to become certified CEOs.¹⁷ In addition, every CEO is required to complete 24 hours of in-service training in each calendar year following the year in which they complete the basic training program.¹⁸

While not as extensive as the CEO training requirements, code compliance technicians (fire inspectors) must complete 48 hours of the CEO training. For more information on code enforcement training and certification, including a schedule of upcoming courses, visit the State's Division of Code Enforcement and Administration web site at <http://www.dos.state.ny.us/code/edu.htm>.

In addition, municipalities may contract with private contractors (such as an architectural or engineering firm) to provide assistance in administering and enforcing the *Uniform Code*.

Local governments may contract with an individual, partnership, business corporation or similar firm to administer and enforce the Uniform Code. The local government is responsible for ensuring that the contractor meets the state's certification and training requirements. However, contractors MAY NOT be authorized to issue building permits, certificates, orders, or appearance tickets related to administering and enforcing the Uniform Code.¹⁹ Thus, for those cities and villages that employ contractors to enforce and administer the Uniform Code within their jurisdiction, they will need to identify the public officer or employee²⁰ who will issue building permits, certificates, orders, or appearance tickets when necessary.

3. Building Permits

Building permits have long been required for work subject to the Uniform Code's requirements. However, the new minimum requirements change which work may be exempted from the building permit requirement. Beginning January 1, 2007, cities and villages may, but are not required to, exempt certain types of work from the permitting requirements, including storage sheds, playground equipment, playhouses, above-ground swimming pools with water depth of less than 24 inches, fences,²¹ retaining walls,²² and window awnings. Local governments may also exempt repairs, which do not involve

1. removing or cutting away load-bearing walls and partitions, structural beams, or load bearing components;
2. removing or changing any required means of egress;
3. enlarging, altering, replacing or relocating any building system; or
4. removing from service of all or part of a fire protection system for any period of time.

However, even work which is exempted from permitting requirements must still be performed in accordance with the Uniform Code standards.

In addition, building permits must now have expiration dates. In the past, some municipalities have neglected to establish expiration periods for their building permits, resulting in construction projects being dragged out for years. Because building projects may not be completed during the valid time period, municipalities may wish to allow permits to be renewed one or even two times. The procedure should clearly set forth when the renewal application may be applied for and that if the renewal application is not timely submitted or if the applicant exhausts all of the available renewals, then the applicant must submit a new building permit application.

If a building permit is issued in error because of incorrect, inaccurate or incomplete information, or if the work for which the permit was issued violates the Uniform Code, the permit must be revoked or suspended until the permit holder demonstrates that the completed and proposed work complies with applicable provisions of the code.

4. Construction Inspections

The Code Council has also updated the minimum requirements for construction inspections. Specifically, all permitted work must remain accessible and exposed until inspected and approved by the code enforcement officer. The permit holders are responsible for notifying the agency when construction work is ready for inspection. In addition, a final inspection must be conducted after all work authorized by the building permit has been completed. For each inspection conducted, an inspection report must be issued that notes whether the work was completed satisfactorily. If work fails

to comply with the Uniform Code, the report must identify the problems with the work and the construction must remain exposed until it is brought into compliance, re-inspected, and found satisfactory.

5. Stop Work Orders

The minimum requirements with respect to stop work orders remains basically unchanged. However, this is a good opportunity to review the stop work order process. Stop work orders may be used to halt work that (1) does not conform to the Uniform Code's provisions, (2) is being conducted in a dangerous or unsafe manner, or (3) is being performed without obtaining a required permit. A stop work order must state the reason it is being issued and the steps which must be taken before the stop work order will be rescinded and work will be permitted to resume. Each local government must clearly identify the procedures for issuing and rescinding stop work orders.

6. Certificates of Occupancy & Compliance

A certificate of occupancy or compliance is required for (1) any work which is the subject of a building permit and (2) for all structures, buildings, or portions thereof, which are converted from one use or occupancy classification to another. Before a certificate of occupancy or compliance may be issued, the building, structure or work must be inspected.

A certificate allowing **temporary occupancy** may be issued prior to the work being completed if, and only if:

1. the structure or portions thereof may be occupied safely,
2. all installed fire- and smoke-detecting or fire protection equipment is operational, and
3. all required means of egress from the structure have been provided.

Temporary certificates may be valid for a specific limited time during which the permit holder must undertake to bring the structure into full compliance with the Uniform Code.

Note that a certificate of occupancy or compliance which is issued in error or on the basis of incorrect information may be suspended or revoked if the relevant deficiencies are not corrected within a specified period of time.

7. Fire or Explosion

The local government must establish procedures for fire department chiefs to notify the code enforcement official of any fire or explosion involving any structural damage, fuel burning appliance, chimney or gas vent.

8. Unsafe Structures

The Property Maintenance and Fire Safety Codes establish minimum guidelines regarding unsafe structures and equipment. The local government must establish sufficiently detailed procedures for identifying and addressing unsafe structures and equipment.

9. Operating Permits.

Operating permits are required (1) to manufacture, store, or handle excessive quantities²³ of hazardous materials; (2) to undertake hazardous processes and activities,²⁴ (3) to use pyrotechnic devices in places of public assembly; (4) for buildings containing one or more areas of public assembly with an occupant load of 100 persons or more; and (5) for buildings whose use or occupancy classification may pose a substantial potential hazard to public safety, as determined by the city or village.

The premises must be inspected before any operating permit may be issued. In addition, operating permits may remain in effect indefinitely or for a specific period of time consistent with local conditions. If activities do not comply with applicable provisions of the Uniform Code, operating permits must be revoked or suspended.

10. Fire Safety & Property Maintenance Inspections

Perhaps the most important provisions of the new regulations are the requirements for fire safety and property maintenance inspections. For dormitory buildings and buildings with areas of public assembly, fire safety and property maintenance inspections must be conducted at least once a year. For multiple dwellings and all nonresidential occupancies, fire safety and property maintenance inspections must be conducted at intervals consistent with local conditions, but in no event may the intervals exceed three years. Note that these inspections are required for the common

areas of the multiple dwellings and dormitories. Code enforcement programs are not required to inspect each individual dwelling unit. For more information on inspection programs for rental properties see the section on Inspection Programs on page 29.

11. Annual Reporting Requirements

Every local government that enforces and administers the Uniform Code must file with the Secretary of State an annual report of its Uniform Code enforcement and administration activities.²⁵ The reports must be filed with the Department of State's Division of Code Enforcement and Administration between January 1st and January 30th for the previous calendar year. The report must be submitted on the form developed by the Division of Code Enforcement and Administration and is available online at

12. Record Keeping

Maintaining adequate records in connection with a municipal code enforcement program is critical. The records involved in enforcing and administering the *Uniform Code* are extensive: including applications, permits, certificates of occupancy, notices of violations, appearance tickets, correspondence, CEO log books and notes, and photographs. Proper records are invaluable if a municipality institutes or must defend legal action in connection with code enforcement. The minimum standards require a municipality to maintain records concerning activities undertaken in connection with *Uniform Code* enforcement and administration.

The records must also reflect any fees charged and collected by the local government as part of its code enforcement program. Collecting a fee when a permit is issued or when some other code enforcement activity is performed can offset, in part, the costs incurred by a local government in operating an enforcement program. The amount of the fees charged must bear a direct relation to the service being provided by the municipality. Fees that far exceed the cost of administering the *Uniform Code* will be considered a tax, which is improper. A fee schedule can be written into the local law or ordinance to establish the enforcement program. However, if the local law simply authorizes the municipal legislative body to establish a fee schedule by resolution, the legislative body will avoid the need to amend the local law each time an adjustment of the fee schedule becomes necessary. The handling of fees should be in accordance with generally accepted accounting principles. Employees and officers responsible for handling fees submitted as part of administering the *Uniform Code* should consult with their municipality's comptroller regarding the handling of fees.

In addition, records should be handled in accordance with records management best practice procedures. Records management by local governments is governed by Arts and Cultural Affairs Law Article 57. For further information on requirements concerning the storage and retention of public records, consult Article 57 or contact the New York State Archives and Records Administration (SARA) at the following address: SARA Office of Cultural Education, Cultural Education Center, Empire State Plaza, Albany, NY 12230. Local code enforcement officials should participate in establishing the recording and filing system and remain familiar with its continuing operation. Familiarity with the system should result in the enforcement official making greater use of the system, thereby leading to a more effective enforcement program.

13. Supplemental Features

In establishing these minimum standards, the Secretary of State has sought to provide local governments with enough flexibility to establish programs appropriate for local conditions. The minimum features, therefore, are generally not sufficient for the needs of a particular locality, and the municipality may, and often should, choose to include more than the minimum in its enforcement program. Local officials should consult their municipal attorney and code enforcement officials when enacting and amending their municipality's administration and enforcement program to ensure that it is effective. Additionally, municipalities should periodically review the effectiveness of their enforcement program to insure that it is addressing their community's code enforcement needs.

IV. PUBLIC NUISANCE

In addition to State and local "property maintenance" laws, the law prohibiting public nuisances is another tool that local governments may use to deal with problem properties. In fact, most property conditions that are violations of the *Property Maintenance Code* and of local property maintenance laws can be classified as nuisances.

There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word “nuisance.” It has meant all things to all people, and has been applied indiscriminately to everything from an alarming advertisement to a cockroach baked in a pie.

*Prosser and Keeton on Torts, 5th Edition*²⁶

Nuisance properties can present an intractable problem for both individual property owners and for local government officials working to address the negative impacts that nuisance properties have on the community. Nuisance properties vary greatly in shape and size. Some blight neighborhoods with trash or overgrown vegetation. Others blight neighborhoods with graffiti, broken windows, peeling paint, missing siding and shingles, or “temporary” tarps. And some threaten the safety of passersby, adjacent buildings, or the general health and safety of the entire community.

Regardless of the nature or extent of the nuisance, each of these conditions calls for a response from local government officials, whether it be for the purpose of maintaining the residents’ quality of life, preventing the spread of blight, or protecting the public’s health, safety, and welfare. States have created a myriad of legal tools to empower municipal officials to address a broad range of problem conditions, including building codes, property maintenance laws, urban renewal programs, and land banks. While each of these tools can solve many of the problems that local officials face, situations frequently arise that, for one reason or another, cannot be adequately addressed using any of these tools. When faced with a stubborn problem property that is not readily solved by enforcing the local property maintenance laws, local officials may wish to analyze the problem from the perspective of traditional public nuisance law.

The law of public nuisance is a broad umbrella that gives local government officials considerable flexibility in dealing with each type of nuisance condition or activity. However, it is important for local government officials and their lawyers to understand the law of public nuisance and its nuances in order to help keep their community safe and healthy while at the same time limiting the local government’s exposure to liability and unnecessary remediation expenses. This article will give an overview of public nuisance law and how local government officials can use it to address the numerous types of problem properties that plague cities, villages, and towns across New York.

THE BASICS OF NUISANCE LAW: PRIVATE AND PUBLIC

For lawyers, any mention of nuisance law invariably conjures up memories of their first year of law school. Both introductory torts and property classes include discourses on the basic principles of private nuisance law, which has its roots in English and colonial common law. In general terms, private nuisance has been defined as:

[A] thing, condition or use of some continuity as distinguished from a solitary act, which through offensive odors, noises, substances, smoke, ashes and soot, dust, gas, fumes, chemical diffusion, smog, disturbances and vibrations of earth, water, air or structures, emanations, sights, or the like, works hurt, annoyance, inconvenience or damage to the public or to another, with respect to his or her comfort, health, repose or safety or with respect to the free use and comfortable enjoyment of his or her property, whether it does so by reason of its nature or by reason of conditions and circumstances, where the cause of these effects has no legal sanction, or where, if the cause is sanctioned, the effects, nevertheless, are unreasonably harmful or annoying to persons of normal sensibility, and constitute a legal wrong remediable in equity or at law.²⁷

The basic maxim upon which private nuisance law rests is “every person must so use his or her property as not to interfere with his or her neighbor.”²⁸

But as previously mentioned, nuisances come in two flavors (private and public) which are frequently confused and conflated. As Professor William Prosser has noted, however, private and public nuisances “have almost nothing in common, except that each causes inconvenience to someone, and it would have been fortunate if they had been called from the beginning by different names.”²⁹

New York’s Court of Appeals has also addressed the distinction between private and public nuisance, noting:

A private nuisance threatens one person or a relatively few (*McFarlane v. City of Niagara Falls*, 247 N.Y. 340, 344, 160 N.E. 391, 392), an essential feature being an interference with the use or enjoyment

of land (*Blessington v. McCrory Stores Corp.*, 198 Misc. 291, 299, 95 N.Y.S.2d 414, 421, *affd.* 279 App.Div. 807, 110 N.Y.S.2d 456, *affd.* 305 N.Y. 140, 111 N.E.2d 421). It is actionable by the individual person or persons whose rights have been disturbed (*Restatement, Torts*, notes preceding § 822, p. 217). A public, or as sometimes termed a common, nuisance is an offense against the State and is subject to abatement or prosecution on application of the proper governmental agency (*Restatement, Torts*, notes preceding § 822, p. 217; *see Penal Law*, § 240.45). It consists of conduct or omissions which offend, interfere with or cause damage to the public in the exercise of rights common to all (*New York Trap Rock Corp. v. Town of Clarkston*, 299 N.Y. 77, 80, 85 N.E.2d 873, 875), in a manner such as to offend public morals, interfere with use by the public of a public place or endanger or injure the property, health, safety or comfort of a considerable number of persons (*Melker v. City of New York*, 190 N.Y. 481, 488, 83 N.E. 565, 567; *Restatement, Torts*, notes preceding § 822, p. 217).³⁰

Whereas private nuisances are relatively finite in scope with a definable property use or condition that directly bears impacts another individual's right to use or enjoy their property, public nuisance law covers a broad range of situations. A building can be a public nuisance because it is unsafe,³¹ because it is being used in an illegal manner,³² or because it has been abandoned and is being used by derelicts.³³

PRIVATE VERSUS PUBLIC NUISANCE: DOES IT MATTER?

While the definitions of public and private nuisances are distinct, and while, as Professor Prosser has noted, they are not even related in legal principle, in practice the difference between private and public nuisances is not always readily apparent. Many *private* nuisances can also be characterized as *public* nuisances. For instance, an unmown or trash strewn yard will most directly impact those properties that are adjacent to or nearby the offending property. However, the same nuisance properties are generally considered to be *public nuisances* as well for a variety of reasons: the nuisance condition is a harborage for rodents and other disease spreading vermin; it is suitable for breeding mosquitoes³⁴; or it can be noisome and unsightly, which lowers neighboring property values.³⁵ Even more serious nuisance conditions such as buildings in danger of collapsing can also carry this dual characterization of a private and public nuisance.³⁶

An important issue with the private versus public nuisance distinction, however, is who may take action to have the nuisance abated. As New York's courts have consistently held, plaintiffs must have an interest in real property negatively impacted by a nuisance in order to maintain a private nuisance action.³⁷ Thus, a plaintiff's claim for public nuisance must allege a special injury or damages "beyond that of the general inconvenience to the public at large."³⁸

Moreover, if a use or condition is strictly a private nuisance, as opposed to also constituting a public nuisance, it is questionable whether local government officials can commence legal proceedings in the strictly private dispute.³⁹ This can be difficult because residents, businesses, and property owners negatively affected by purely private nuisance conditions frequently bring their complaints to their local government officials seeking redress.

NUISANCE LAW CODIFIED

The law of public nuisance is not merely a common law doctrine. Several concepts of public nuisance have been codified in various sections of New York State law. The following is an overview of those provisions.

1. New York State Public Health Law, Article 13: Nuisances & Sanitation

Public nuisance law has been most clearly codified in Public Health Law Article 13, which authorizes municipalities to abate "nuisances, or causes of danger or injury to life and health" by way of their local boards of health.⁴⁰ Local boards of health may order property owners and occupants to abate conditions that are a nuisance or detrimental to the public health. Public Health Law § 1303 expressly authorizes local boards of health, its agents, or employees to enter onto property and suppress or remove the nuisance or condition.⁴¹ The method of abating a nuisance condition must be reasonable and practical, however.⁴² The expense of removing a nuisance or condition detrimental to health must be paid by the property owner or occupant.

The board of health may commence an action in the name of the municipality to recover the expense of abating the nuisance.⁴³ Judgments for the recovery of nuisance abatement expenses may be docketed and then a lien in the amount of the judgment may be placed upon the real property.⁴⁴

2. Criminal Nuisance

As Professor Prosser noted, a public nuisance “is a species of catch-all criminal offense.”⁴⁵ Thus, it should not be surprising that nuisance has been codified as a crime in New York. Specifically, Penal Law § 240.45 establishes criminal nuisance in the second degree when (1) an individual knowingly or recklessly creates or maintains a condition that endangers the safety or health of a considerable number of persons by engaging in conduct that is either unlawful in itself or unreasonable under all the circumstances; or (2) an individual knowingly conducts or maintains any premises, place or resort where persons gather for purposes of engaging in unlawful conduct.

Additionally, Penal Law § 240.46 establishes criminal nuisance in the first degree, which applies when an individual “knowingly conducts or maintains any premises, place or resort where persons come or gather for purposes of engaging in the unlawful sale of controlled substances in violation of [Penal Law §§ 220.39, 220.41, or 220.43], and thereby derives the benefit from such unlawful conduct.”

Prosecuting criminal nuisance cases instead of or in addition to merely seeking an administrative or civil remedy requires local government officials to satisfy a higher standard of proof. Moreover, whereas administrative and civil remedies for public nuisance are strict liability in nature, to obtain a conviction for criminal nuisance, prosecutors must prove that a defendant knowingly or recklessly created the nuisance. Consequently, criminal nuisance is used relatively infrequently to address public nuisances. Rather, it is generally employed in extreme cases as a deterrent or when a defendant’s conduct is so egregious as to warrant criminal punishment.

3. Nuisance Abatement Laws: Local Point Systems

Many local governments, invoking their municipal home rule authority, have codified nuisance regulations via their local laws. While some municipalities have merely codified the common law definition of public nuisance, many others have created nuisance laws based upon a points system, whereby a nuisance property is defined because of a chronic history of nuisance activity over a specific period of time. Most such point systems enumerate criminal offenses resulting from separate incidents, convictions for which carry a certain number of points. If a property accumulates a total number of points within a specific time period (for example, accumulating 12 points within an 18 month period), the property is declared a nuisance, and the local government may order it be vacated.

This type of nuisance abatement program was designed to deal with properties that are the site of chronic criminal activity which the property owner is unwilling or incapable of preventing. A point system has a couple of benefits: first, it relies on the criminal justice system to establish the facts; second, it quantifies nuisance, giving property owners a clear understanding of when their property will be declared a nuisance. The actual declaration of a public nuisance still requires the local government to make an administrative finding as to the number of points accumulated within the period of time. Moreover, the process must satisfy procedure due process protections by giving effected property owners notice of the action and an opportunity to be heard. Moreover, the municipality’s determinations is still subject to an Article 78 proceeding.

4. Nuisance Abatement Laws: Property Maintenance Laws

(a) The New York State Property Maintenance Code

Property maintenance laws are, in many respects, a codification of nuisance conditions, establishing minimum thresholds for maintaining property. The State of New York has, via *The Property Maintenance Code of New York State* (hereinafter *The Property Maintenance Code*),⁴⁶ promulgated property maintenance standards that are applicable statewide. *The Property Maintenance Code* is part of New York State’s *Uniform Code* which prescribes minimum standards for both fire prevention and building construction. The *Uniform Code* is applicable in every municipality in the state except the City of New York, which has its own code. Municipal officials do not need to enact any local law or resolution for the *Uniform Code* to be effective in their jurisdiction because the *Uniform Code* is effective throughout

the state by act of the New York State Legislature. Local governments are responsible, however, for providing for the enforcement and administration of the *Uniform Code* within their jurisdiction.⁴⁷

The provisions of the *Property Maintenance Code* constitute minimum requirements and standards for premises, structures, equipment, and facilities for light, ventilation, space, heating, sanitation, protection from the elements, life safety, safety from fire and other hazards, and for safe and sanitary maintenance.⁴⁸ Moreover, the *Property Maintenance Code* is applicable to the occupancy of existing structures and premises regardless of whether they were constructed before or after the *Uniform Code* was enacted.⁴⁹

(b) Local Property Maintenance Codes

In addition to the State's *Property Maintenance Code*, municipalities may, pursuant to their traditional police powers to protect the public's health, safety, and welfare and the State's Municipal Home Rule Law, enact their own property maintenance codes via local law. Local property maintenance codes may address general property conditions such as the outdoor storage of junk, rubbish or debris on private property as well the cutting, trimming or removing of brush, grass or weeds.⁵⁰ However, the State's *Property Maintenance Code* may make the need to enact new local property maintenance laws unnecessary.⁵¹ Moreover, it is unclear whether New York's adoption of the *Uniform Code* has preempted local governments from adopting their own local property maintenance codes.⁵²

FINDING AND DECLARING PUBLIC NUISANCES

1. Defining a Public Nuisance

Although not required under New York State Law, a local law, ordinance, or resolution may declare what specific conditions or uses constitute a nuisance in that municipality.⁵³ Courts are not bound by a municipal declaration of what constitutes a nuisance, however. For a condition to constitute a legal nuisance, it must be so in fact, irrespective of a local law, resolution, or ordinance declaring it a nuisance.⁵⁴ In addition, the declaration must establish a standard of uniform applicability, and it may not vest unbridled or ungoverned discretion in the municipal legislative body or enforcement officials.⁵⁵ For example, local governments may (a) declare that loose trash that is allowed to accumulate on people's property is a nuisance, (b) establish a procedure for notifying the property owner of the condition, directing them to clean it up, and (c) authorize village employees to enter onto the property and abate the condition if the property owner fails to do so within a specified period of time.

2. Administrative Finding

Whether or not a municipality has defined public nuisance via local law or ordinance, for local officials to take action, they must make a finding that a particular use or condition at a particular property is a nuisance (either under a local standard or the common law). A city council or village board of trustees, acting in an administrative capacity or as a fact-finding body, may find a particular activity, use, or condition to be a nuisance and order it to be abated.⁵⁶ Alternatively, local governments may also empower specific officials, such as the code enforcement officer, to make findings regarding the existence of nuisance conditions and order their abatement. Findings of a nuisance and orders to abate nuisance are administrative in nature and, as such, are subject to Article 78 review.

JUDICIAL RELIEF

Individuals injured by a private nuisance may bring an action in equity in New York's court to abate a nuisance or an action pursuant to the New York State Real Property Actions and Proceedings Law (RPAPL) § 841. Likewise, municipalities are entitled to judicial relief against public nuisances, pursuant to either Public Health Law § 1307 or RPAPL § 841.⁵⁷ A municipality's power to restrain, prohibit, or suppress a public nuisance gives it the power to invoke the aid of a court of equity for the purpose of abating or restraining the nuisance.⁵⁸ A petition to abate a nuisance must set forth facts showing the existence of the nuisance. The common law remedy to a public nuisance is an injunction enjoining the property owner from allowing the nuisance use or condition to continue. Alternatively, the court may issue an order authorizing the municipality to abate the nuisance.

There are several benefits of obtaining a court order to address nuisance uses or conditions. First, obtaining a court order to take action against nuisance properties may spur otherwise reluctant property owners to abate the nuisance

themselves, thereby saving the municipality the cost of doing so. In addition, abating a nuisance pursuant to a court order affords local governments significant protection against liability as it allows local governments to assert defenses of collateral estoppel and res judicata if the municipality is sued for damages arising out of the nuisance abatement. Local government officials must weigh the benefits of obtaining a court order with the cost of doing so in light of the risk involved.⁵⁹ Finally, many nuisance properties are often worth less than what it will cost the local government to remediate the nuisance condition. For example, the cost of demolishing a derelict building that is threatening the public's safety can run into the hundreds of thousands. Even run-of-the-mill demolitions generally cost tens of thousand of dollars. Seeking to recover the expense of demolition by placing a lien upon the property (even when done as part of the court proceeding) is frequently ineffective because the property is worthless. Part of the judicial relief sought from the court should be to have the property owner pay for the clean-up expenses. If the property is owned by a limited liability entity, local government officials can also use the court proceedings to attempt to pierce the corporate veil, instead of having local taxpayers shoulder the cost of the remediation.

SUMMARY ABATEMENT

Although municipalities may seek judicial relief in abating nuisances, they are not required to obtain a court order prior to abating a public nuisance. The power of municipalities to declare and abate public nuisances and the right of summary action in the abatement exists at common law.⁶⁰ The New York Court of Appeals recognized in the early 19th Century that the power to summarily abate nuisances is a police power vested in local governments, noting

The right of summary abatement of nuisances without judicial process or proceeding, was an established principle of the common law long before the adoption of our Constitution, and it has never been supposed that this common-law principle was abrogated by the provision for the protection of life, liberty and property in our state Constitution, although the exercise of the right might result in the destruction of property.⁶¹

In a summary abatement of a public nuisance, municipal officials may enter onto private property and remove, compel removal, or destroy a structure, thing, substance, condition, or property constituting a public nuisance.⁶² Municipalities are not prevented from suppressing or abating public nuisances even though the condition or use has been in existence for a long time. Moreover, it is immaterial that a municipality abates a nuisance after receiving a complaint from newcomers to the neighborhood, since it is every owner's right to enjoy and develop his or her property free of a public nuisance.⁶³ Moreover, municipalities have a common-law right to abate public nuisances regardless of the validity of any local legislation relating to the nuisance and regardless of the fact that the nuisance was created in accordance with all existing statutes.⁶⁴ Municipalities ordinarily may abate only those nuisances occurring within their corporate limits.⁶⁵

Note, however, that a municipality "acts at its peril in making its determination and proceeding to abate the nuisance."⁶⁶ If a court determines that the condition abated was not in fact a nuisance, the municipality can be held liable for the destruction of the property.⁶⁷ Consequently, municipal officials should use caution when summarily abating nuisances. Local government officials may wish to consult with their municipal attorney and insurance carrier before undertaking any abatement activity, particularly in those instances where the value of the property involved or the cost of the abatement will be substantial.

RECOVERING COSTS

1. Summary Abatement

Municipalities may recover the costs incurred in summarily abating a public nuisance.⁶⁸ However, provision for the recovery of the abatement expenses **must** be authorized by local law if it is not already authorized by state statute. Municipalities may make property owners and tenants personally liable for the abatement expenses. However, recovering the cost of abatement from individuals is frequently unsuccessful. Consequently, municipalities generally authorize placing the cost of abating nuisances as liens upon the property. Note that this authorization must be accomplished by local law. Municipalities must substantially follow the procedure they create for placing liens upon property for the cost of removing a nuisance.⁶⁹ In addition, the municipality must, prior to remediating the nuisance and to the extent practicable, (a) notify the property owner of the nuisance condition, (b) give the owner an opportunity to contest the declaration of the nuisance or abate the nuisance themselves, and (c) inform the property owner that the municipality will abate the nuisance if the property owner fails to do so and will place a charge on the property for the

cost of the abatement. Note, however, that local officials do not need to comply with prior notice requirements under exigent circumstances such as demolition of an unsafe building that is in imminent danger of collapsing.⁷⁰

2. Abatement Pursuant to a Court Order

If a municipality does not have a local law authorizing it to recover the costs of abating a public nuisance, the municipality may recover the costs of abating a nuisance if the abatement is performed pursuant to a court order that authorizes the abatement and the recovery of the abatement costs. A notice of pendency or notice of lis pendens should be filed with the county clerk at the commencement of a case.⁷¹

3. Unsafe Buildings

Unsafe buildings have become a chronic problem for many communities across New York. Many buildings have suffered from decades of deterioration resulting from neglect and a lack of regular maintenance and repair. General Municipal Law § 78-b expressly authorizes the governing body of each city, town, or village to commence a special proceeding in a court of competent jurisdiction¹ to collect the costs of demolition, including reasonable and necessary legal expenses incidental to obtaining an order to demolish, from the owner of any building or structure that may now be or shall hereafter become dangerous or unsafe to the public.

WHAT ELSE CAN NUISANCE LAW DO?

The versatility of nuisance law is not limited to addressing the broad category of conditions and activities that threaten the public's health, safety, and welfare. Nuisance law can also be used to address uses that frequently cause problems in a community, but which are protected due to another principle of law.

1. Grandfathered Uses and Nuisance Law

Grandfathered uses can be particularly difficult situations for local government officials to deal with. A grandfathered use is one that exists prior to the adoption of a land use regulation that would otherwise prohibit the use. Federal and New York State Constitutional protections against the taking of property vests property owners with a right to continue non-conforming uses that exist prior to the adoption of land use regulations. This principle of law is also known as the doctrine of vested rights, and it allows property owners to continue to use their properties in ways that are contrary to and violative of newly adopted land use regulations.

Many communities find that some prior non-conforming uses negatively impact the surrounding community, impeding healthy, sound community development. However, New York's highest court has upheld local regulations that prohibit prior non-conforming uses because they are a nuisance. In *Stringfellow's v. City of New York*,⁷² the Court of Appeals held that the City had shown via "numerous studies" that the adult uses in question, even though they were prior non-conforming uses, had "negative secondary effects" on the surrounding community.⁷³ The City's showing that the adult businesses had numerous "negative secondary effects" on the surround community addressed potential infringement of the adult businesses' First Amendment free speech rights, which was the primary concern of the Court.⁷⁴

While the *Stringfellow's* Court does not clearly articulate it, "negative secondary effects" is another way of saying public nuisance. A key caveat on using nuisance law to address prior non-conforming uses is that the onus of proving the existence of the nuisance is on the municipality. Thus, local governments considering using nuisance law to require prior non-conforming uses to conform to newly adopted land use regulations must shoulder the burden of proving that a use is a nuisance in fact. The Court noted that, in addition to the demonstrated negative secondary impacts, the law was saved because it contained a one-year amortization provision that allowed the adult uses in question to remain in place to recoup their investments. The City's amortization period could be extended upon the showing of a hardship.⁷⁵

It is unclear whether such amortization periods are, in fact, necessary. A review of New York's public nuisance law reveals no such requirement. To the contrary, New York law is consistent in its position that local governments may immediately abate public nuisances.⁷⁶ Note, however, that local officials should consider alternative, less restrictive methods of addressing public nuisances. In *Stringfellow's*, the Court noted that "the City Council reasonably determined that the listed alternatives would not adequately address problems it sought to ameliorate."⁷⁷ Consequently, local

officials need to be prepared not only to demonstrate a grandfathered use’s “negative secondary effects” but also to justify the method of abating the use or condition that is causing the “negative secondary effects.”

2. RLUIPA and Nuisance Law

Another law that is presenting significant land use challenges for communities is the Religious Land Use and Institutionalized Persons Act of 2000 (also known as RLUIPA). In a nutshell, RLUIPA “prohibits zoning and landmarking laws that substantially burden the religious exercise of churches or other religious assemblies or institutions absent the least restrictive means of furthering a compelling governmental interest.”⁷⁸

“In addition, RLUIPA prohibits zoning and landmarking laws that:

- (1) treat churches or other religious assemblies or institutions on less than equal terms with nonreligious institutions;
- (2) discriminate against any assemblies or institutions on the basis of religion or religious denomination;
- (3) totally exclude religious assemblies from a jurisdiction; or
- (4) unreasonably limit religious assemblies, institutions, or structures within a jurisdiction.”

Clearly, discrimination against individuals or institutions based upon their religious beliefs should never be tolerated. But RLUIPA has created an extremely lopsided playing field where religious institutions have significant ability to override municipal land use regulations, thereby negatively impacting the surrounding community. Religious organizations and individuals have gone into many communities and sited their facilities in locations that are incongruous with the surrounding community, frequently harming adjacent and nearby property owners and tenants. One tack local governments should consider taking when dealing with RLUIPA claims that will harm the community is to determine whether the proposed use constitutes a nuisance, similar to the *Stringfellow’s* use.⁷⁹ As the Sixth Circuit Court of Appeals reasoned in addressing an RLUIPA action challenging a township’s zoning restrictions and denial of a church’s request for special land-use exemptions,

[N]eighbors likely care little if the music emanating from Northridge's buildings or the noise from over a thousand cars honking or driving away is of a spiritual or secular character; *a church must abide by nuisance limitations too. Cf. id.; see also Living Water*, 258 Fed.Appx. at 738 (permitting limitations on the timing and frequency of a church’s activities).⁸⁰ [emphasis added]

Of course, merely asserting that an RLUIPA use is a nuisance is going to be insufficient to withstand a legal challenge. Rather, local officials will need to shoulder the burden of proving that the use or condition is, in fact, a nuisance.⁸¹ The Supreme Court of Texas addressed this issue in a case where the City of Sinton prohibited a religious ministry from locating a correctional rehabilitation facility in certain areas of the City. The City asserted that the prohibition served “a compelling interest in advancing safety, preventing nuisance, and protecting children.” The Texas court rejected this argument however, noting that the City failed to present any “evidence to support the City's assertion with respect to ‘the particular practice at issue’—Barr's ministry.”⁸² The Fifth Circuit Court of Appeals also echoed this reasoning in an RLUIPA case involving a city’s prohibiting of a religious animal sacrifice. In rejecting the city’s prohibition of the practice, the Fifth Circuit noted that for the City “to prevail, it must show by specific evidence that Merced's religious practices jeopardize its stated interests.”⁸³

Having to satisfy the evidentiary requirements of demonstrating that a use or condition constitutes a nuisance is not necessarily an appealing prospect for local officials or their attorneys. But when faced with an RLUIPA claim, addressing the negative impacts of the use on the community from the perspective of nuisance law may allow local officials and their attorneys to more clearly articulate and argue why the uses are harmful to the community and are not allowed.

Public nuisance law is a fundamental and versatile tool for local government officials and municipal attorneys. However, to use nuisance law effectively to address the challenges facing any community, local officials and municipal lawyers must familiarize themselves with the basic tenets of the law. Approaching property uses and conditions that are negatively impacting a community from the perspective of public nuisance law can be a solution to challenging situations for which a clear statutory remedy is not available.

V. NEW YORK'S 2016 ZOMBIE PROPERTY AND FORECLOSURE PREVENTION LEGISLATION

One of the most significant reforms passed during the 2016 New York State Legislative session was included in Chapter 73 of the Laws of 2016.⁸⁴ Signed into law on June 23, 2016, this omnibus legislation includes substantial changes to New York's Real Property Actions and Proceedings Law (RPAPL) that are intended to address zombie properties, a major cause of the distressed, vacant, and abandoned properties that blight New York's cities and villages. Zombie properties are mortgage-delinquent properties that have been abandoned by the owner but which languish for years in a state of disrepair and neglect until the mortgagee completes the foreclosure process.

The zombie property provisions were included as Part Q of Chapter 73. Although the zombie property legislation does not have an official title, it is commonly being referred to as New York's 2016 Zombie Property and Foreclosure Prevention Legislation (hereinafter referred to as "the Act").

The Act becomes effective December 20, 2016,⁸⁵ and has four main components:

- a. It requires certain mortgagees to inspect properties that are 90 days mortgage-delinquent and to secure and maintain properties that are found to be vacant and abandoned;
- b. It requires certain mortgagees to register vacant and abandoned properties with a State-maintained property registry;
- c. It allows mortgagees to complete mortgage foreclosure via an expedited process when the property is vacant and abandoned; and
- d. It enhances many of the consumer protections that were enacted to protect homeowners after the subprime mortgage market collapse in 2008.

Although amendments may need to be made to the Act to address vague or ambiguous provisions or gaps in the regulations, this law is a major step forward in the fight to combat blight. The following article provides a detailed explanation of the law's inspection and maintenance requirements as well as the state-administered abandoned property registry. A brief overview of the expedited foreclosure process and consumer protection provisions will also be provided.

REQUIREMENT FOR MORTGAGEES TO INSPECT, SECURE, AND MAINTAIN VACANT AND ABANDONED PROPERTIES

Overview of RPAPL § 1308

The Act adds Section 1308 to the Real Property Actions and Proceedings Law (RPAPL). Section 1308 requires loan servicers to inspect, secure, and maintain mortgage-delinquent properties that have become vacant and abandoned.

Section 1308 only applies to vacant and abandoned one- to four-family residential real property. Additionally, the duty to inspect, secure, and maintain vacant and abandoned property under Section 1308 applies only to first lien mortgage holders. Although not defined in State law, the first lien mortgage holder generally refers to the individual or entity in the first or priority position to benefit from a mortgage foreclosure.

Additionally, small lenders are excluded from Section 1308's requirements. Specifically, for each calendar year, Section 1308 does not apply to state- or federally-chartered banks, savings banks, savings and loan associations, or credit unions that:

- a. originate, own, service, *and* maintain their mortgages or a portion thereof; *and*
- b. originate, own, service, or maintain less than 0.3 percent of the total loans in the state for the calendar year ending two years prior to the current calendar year.

For medium-sized lenders, Section 1308 only applies prospectively.⁸⁶ Medium-sized lenders are state- or federally-chartered banks, savings banks, savings and loan associations, or credit unions which originate, own, service, and maintain between 0.3 percent and 0.5 percent of the total loans in the State for the calendar year two years prior to the current calendar year.

It is anticipated that questions and determinations regarding whether specific lenders will be subject to Section 1308 will be handled by the State's Department of Financial Services.

Mortgagee's Duty to Inspect and Determine the Occupancy Status of Mortgage-delinquent Properties

Within 90 days of a borrower's delinquency, servicers authorized to accept payment of a loan must inspect the subject property's exterior to determine its occupancy status. After this initial inspection and throughout a loan's delinquency, the servicer must conduct exterior inspections of the property every 25 to 35 days.⁸⁷

If, after inspecting a mortgage-delinquent residential property, the servicer (a) has a reasonable basis to believe the property is vacant and abandoned, as defined in RPAPL § 1309, and (b) is not otherwise restricted from accessing the property, then the servicer must secure and maintain the property pursuant to RPAPL § 1308(3), (4), (5), (6), & (7).⁸⁸

Within seven business days of determining that a property is vacant and abandoned, the servicer must (a) post a reasonably visible notice (containing the servicer's toll free number or similar contact information) on an easily accessible part of the property, (b) monitor the property for any change in occupancy or contact with the borrower, property owner, or occupant, *and* (c) monitor the property to ensure that the notice remains posted so long as the duty to maintain the property applies.⁸⁹

For the purposes of Section 1308, residential real property⁹⁰ is defined, pursuant to RPAPL § 1309(2)⁹¹, as vacant and abandoned if:

- a. After inspecting the property three times⁹², at each inspection
 1. There was no occupant present and no evidence of occupancy at the property as evidenced by
 1. overgrown or dead vegetation;
 2. the accumulation of newspapers, circulars, flyers or mail;
 3. past due utility notices, disconnected utilities, or utilities not in use;
 4. the accumulation of trash, refuse, or other debris;
 5. the absence of window coverings such as curtains, blinds, or shutters;
 6. one or more boarded, missing or broken windows;
 7. the property being open to casual entry or trespass; or
 8. the property having a building or structure that is or appears structurally unsound or has any other condition that presents a potential hazard or danger to the safety of persons; *and*
 2. The residential real property is not being maintained in a manner consistent with the standards set forth in New York Property Maintenance Code §§ 301, 302⁹³, 304.1, 304.3, 304.7, 304.10, 304.12, 304.13, 304.15, 304.16, 307.1 and 308.1;⁹⁴ *or*
- b. A court or other appropriate state or local governmental entity⁹⁵ has formally determined, following due notice to the borrower at the property address and any other known addresses, that the residential real property is vacant and abandoned; *or*
- c. The property owner and each borrower have separately issued sworn written statements expressing their intent to vacate and abandon the property and an inspection of the property shows no evidence of occupancy to indicate that any persons are residing there.

Residential real property *may not* be deemed vacant and abandoned if:

- a. An unoccupied building on the property is diligently⁹⁶ being constructed, renovated, or rehabilitated to completion;
- b. A building on the property is occupied on a seasonal basis and is secure;
- c. Any buildings on the property are secure *and* the property is the subject of a probate action, action to quiet title, or other ownership dispute of which the servicer has actual notice;
- d. A natural disaster damaged a building on the property and one or more owners intend to repair and reoccupy the property; or

- e. A building on the property is occupied by the mortgagor, a relative of the mortgagor, or a tenant lawfully in possession.⁹⁷

Mortgagee's Duty to Secure Vacant and Abandoned Mortgage-Delinquent Properties

Pursuant to RPAPL § 1308(4), if no one responds to the posted notice within seven *calendar* days thereby indicating that the property is *not* vacant or abandoned, or if an emergent property condition arises which could reasonably damage, destroy or harm the property, the servicer must:

- a. In cases where the property contains two or more points of ingress or egress, replace no more than one door lock to provide subsequent access to the property;
- b. Secure, replace, or board up broken doors and windows;
- c. Secure any part of the property that may be deemed an attractive nuisance including, but not limited to, a water feature that could create a drowning risk, refrigerator or freezer units, outbuildings, wells or septic tanks;
- d. Take reasonable measures to ensure that pipes, ducts, conductors, fans and blowers do not discharge harmful gases, steam, vapor, hot air, grease, smoke, odors or other gaseous or particulate waste directly upon abutting or adjacent public or private property or that of another tenant;
- e. Winterize the applicable plumbing and heating systems, if appropriate;
- f. Provide basic utilities including, but not limited to, water, electricity, natural gas, propane and sewer service, as appropriate and when allowed by the local utility provider, that are needed for the operation of sump pumps or dehumidifiers, or when there are jointly-owned or shared utilities with adjoining properties or units, except for turning off water service to prevent flooding or water leaks in the property, or when other utility service could reasonably create a hazard to the property or an unauthorized occupant or person entering the property;
- g. Remove and remediate any significant health and safety issues, including outstanding code violations;
- h. Take reasonable measures to prevent the growth of harmful mold;
- i. *Respond to government inquiries regarding property condition, subject to restrictions regarding financial privacy* [emphasis added]; and
- j. Ensure that the notice required to be posted pursuant to RPAPL § 1308(3) remains posted on an easily accessible part of the property that would be reasonably visible to the borrower, property owner, or occupant so long as the duty to maintain applies.

Servicers may never remove personal property from the property unless:

- a. The personal property poses a significant health and safety issue; or
- b. There is an uncontested order to do so by a governmental entity.⁹⁸

Mortgagee's Duty to Maintain Vacant and Abandoned Mortgage-delinquent Properties

Pursuant to RPAPL § 1308(6), a servicer who has determined that a property is vacant and abandoned must take reasonable and necessary actions to maintain the property until the earlier of the following events:

- a. An occupant of the property asserts their right to occupy the property, or the servicer or its agents have received threats of violence;
- b. The borrower files for bankruptcy;
- c. A court orders the servicer to stop maintaining the property;
- d. A homeowners' association or cooperative prevents the servicer from gaining access to or maintaining the property;
- e. The property is sold or transferred to a new owner;
- f. The servicer or investor releases the lien on the property; or
- g. The mortgage note is assigned, transferred or sold to another servicer.

Reasonable and necessary actions to maintain the property include, but are not limited to:

- a. Ensuring that the property remains secure as required by RPAPL § 1308(4); and
- b. Maintaining property pursuant to the standards set forth in New York Property Maintenance Code §§ 301, 302,⁹⁹ 304.1, 11 304.3, 304.7, 304.10, 304.12, 304.13, 304.15, 304.16, 307.1, and 308.1, to the extent that the mortgage servicer or its agents are able to obtain necessary or required permits or approvals.¹⁰⁰

The Property Maintenance Code can be accessed online from the New York State Department of State's Division of Code Enforcement and Administration website at http://codes.iccsafe.org/app/book/toc/2015/I-Codes/NY/2015_IPMC_HTML/index.html.

ENFORCEMENT OF MORTGAGEE PROPERTY MAINTENANCE OBLIGATIONS

Violations of RPAPL § 1308's mandate to inspect, secure, and maintain mortgage-delinquent property may be heard before a hearing officer or a court of competent jurisdiction. If a hearing officer or court determines that, based on the preponderance of the evidence, a mortgagee or agent of a mortgagee has failed to inspect, secure, and maintain a mortgage-delinquent property as required by RPAPL § 1308, the hearing officer or the court may impose a civil penalty of up to \$500 per property for each day the violation persists.

The State's Superintendent of Financial Services may enforce RPAPL § 1308, after giving seven days' notice to the lender, assignee, or mortgage loan servicer of the violation.

Additionally, any municipality may, after giving seven days' notice to the lender, assignee, or mortgage loan servicer, also seek to have RPAPL § 1308's requirements to inspect, secure, and maintain any residential property located within its jurisdiction enforced in any court of competent jurisdiction. Any civil penalty imposed as the result of an action brought by a municipality pursuant to RPAPL § 1308(8)(a) is retained by the municipality.¹⁰¹

LOCAL GOVERNMENT AUTHORITY TO ABATE NUISANCE CONDITIONS PRESERVED

Notwithstanding the authority to enforce the provisions of RPAPL § 1308, a municipality may enter onto and maintain any mortgage-delinquent residential property in order to address a threat to public health, safety, or welfare. Municipalities must notify any lender, assignee, or mortgage loan servicer of such action as soon as practicable. Any municipality which remediates a residential real property pursuant to RPAPL § 1308(8)(c) may maintain a cause of action in any court of competent jurisdiction against the lender, assignee, or mortgage loan servicer to recover costs the municipality incurs as a result of maintaining the property. The municipality must notify the Department of Financial Services in writing at least ten days prior to bringing such an action. A municipality's failure to notify the Department of Financial Services, however, may not be asserted as a defense by a lender, assignee, or mortgage loan servicer.

Department of Financial Services Rulemaking

The Department of Financial Services is authorized to adopt such rules and regulations to implement, administer, operate, and enforce RPAPL § 1308.

RPAPL § 1308's Effect on Agreements Between the Department of Financial Services and Exempt Mortgagees

Pursuant to RPAPL § 1308(11), any agreement between any state- or federally-chartered banks, savings banks, savings and loan associations, credit unions, or servicers for which RPAPL § 1308 provisions do *not* apply and the Department of Financial Services that is associated with the maintenance and repair of vacant and abandoned property remains in full force and effect for as long as the terms and conditions of the agreement remain in effect.

Preemption of Local Regulations

Pursuant to RPAPL § 1308(13), local governments may not (1) impose a duty to maintain vacant and abandoned properties in a manner inconsistent with the provisions of RPAPL § 1308, or (2) establish or impose a penalty or other monetary obligation *with respect to* a state- or federally-chartered bank, savings bank, savings and loan association or credit union that originates, owns, services or maintains a mortgage related to such property. However, this

preemption does not affect the ability of local governments to abate nuisance or dangerous conditions or to recover the cost of doing so from lenders, assignees, or servicers.

Moreover, local governments may not require any state- or federally-chartered bank, savings bank, savings and loan association, or credit union that originates, owns, services, or maintains a mortgage that is not subject to RPAPL § 1308 to maintain a vacant or abandoned property.

NOTE: The preemption provisions found in RPAPL § 1308 do NOT preempt local governments from imposing property maintenance requirements and administering property maintenance programs in general against property owners or other individuals or entities in control of a property, including bank-owned properties (as opposed to properties in which banks have only a mortgage interest).

THE STATE'S VACANT AND ABANDONED PROPERTY REGISTRY

Overview

The second major component of New York's 2016 Zombie Property and Foreclosure Prevention Legislation is a vacant property registry. Specifically, the Real Property Actions and Proceedings Law is amended to add Section 1310 which charges the State's Department of Financial Services with maintaining a statewide vacant and abandoned property electronic registry.

Although information provided to the Department of Financial Services for the registry is deemed and treated as confidential, the Superintendent of Financial Services may, at his/her discretion, release the information if it is in the best interest of the public. Any such released information must continue to be treated confidentially by the parties receiving the information.

Additionally, the Department of Financial Services must provide any county, city, town, or village official, upon written request, access to registry information specific to property located in the official's jurisdiction.

Mortgagee Reporting Requirement

Within 21 days of learning¹⁰² that a property is vacant and abandoned, a lender, assignee, or mortgage loan servicer must report to the Department of Financial Services the following information:

- a. The current name, address, and contact information for the lender, assignee or mortgage loan servicer responsible for maintaining the vacant property;
- b. Whether a foreclosure action has been filed for the property in question, and, if so, the date on which the foreclosure action was commenced; and
- c. The last known address and contact information for the mortgagor(s) of record.

Additionally, the lender, assignee, or mortgage loan servicer must update the registry within 30 days of learning of a material change to any of the information contained in initial submission to the registry.

The Department of Financial Services may adopt rules and regulations necessary to administer and operate the registry, including but not limited to rules and regulations governing registry access and specifying the manner and frequency of registration and the information that must be provided.

The Vacant and Abandoned Property Toll-Free Hotline

The law requires the Department of Financial Services to establish and maintain a toll-free hotline to which people may report hazards, blight or other concerns related to vacant and abandoned property. On June 28, 2016, the Department of Financial Services announced its toll-free hotline number, 800-342-3736. In addition, reports may be made online at www.dfs.ny.gov.

Local Vacant and Abandoned Property Registry Preemption

Pursuant to RPAPL § 1310(5), local governments may not (1) impose a duty to register vacant and abandoned property, locally with the municipality in addition to the State registry, or (2) establish or impose a penalty or other

monetary obligation related to registering vacant and abandoned properties *with respect to* a state- or federally-chartered bank, savings bank, savings and loan association or credit union that originates, owns, services or maintains a mortgage related to such property.

NOTE: The preemption provisions found in RPAPL § 1310 do NOT preempt local governments from imposing vacant property registry requirements on property owners, including bank-owned properties (as opposed to properties in which banks have only a mortgage interest).

THE EXPEDITED MORTGAGE FORECLOSURE PROCESS FOR VACANT AND ABANDONED PROPERTIES

The third major component of the 2016 Zombie Property Legislation is the establishment of an expedited foreclosure procedure for property that is vacant and has been abandoned by the owner. Specifically, the law adds a new Section 1309 to the RPAPL, which authorizes plaintiffs in any foreclosure proceeding (e.g., a mortgagee) to apply, by notice of motion or order to show cause, for a judgment of foreclosure and sale on the grounds that the property is vacant and abandoned. The court must make a written finding as soon as practicable as to whether the plaintiff has proven that the property to be foreclosed upon is vacant and abandoned. If the court determines that the property is vacant and abandoned, it must set forth:

- a. The evidence relied upon in finding the property vacant and abandoned;
- b. The evidence showing that the plaintiff is the owner and holder of the subject mortgage and note, or has been delegated the authority to institute a mortgage foreclosure action by the owner of same; and
- c. The sums due and owing upon the subject mortgage and note after a review of the detailed and itemized account of each fee, each cost, and a calculation of interest accrued.

The court may not enter a judgment pursuant to Section 1309 if

- a. The mortgagor or any other defendant has filed an answer, appearance, other written objection that is not withdrawn, or has otherwise demonstrated an intention to contest the foreclosure action; or
- b. The court does not find that the mortgaged property is vacant and abandoned.

In addition, the 2016 Zombie Property Legislation amends RPAPL § 1351 to require plaintiffs in mortgage foreclosure proceedings to sell the property within 90 days of the date of the judgment. Moreover, RPAPL § 1353 is amended to provide that if a plaintiff in a mortgage foreclosure proceeding purchases the property, then the plaintiff-purchaser must place the property on the market for sale or other occupancy within 180 days, or within 90 days of completing repairs, renovation, or rehabilitation of the property. A court may grant an extension for good cause.

ADDITIONAL PROTECTIONS FOR HOMEOWNERS DELINQUENT ON MORTGAGE PAYMENTS AND IN FORECLOSURE

This legislation also provides additional protections for homeowners as part of the mandatory settlement conference in residential foreclosure actions, including the creation of a new “Consumer Bill of Rights” and supplemental notice requirements informing property owners of their rights, including their right to remain in their homes until the completion of the foreclosure process. Additional information regarding the 2016 Zombie Property and Foreclosure Prevention Legislation’s expedited foreclosure process and the consumer protections for homeowner provisions may be found on the Empire Justice Center’s website at www.empirejustice.org.

VI. UNSAFE BUILDINGS

Unsafe buildings present special problems for municipalities, posing serious threats to the public’s health, safety, and welfare. In New York State, a municipality has the power to adopt a local law to provide for the repair or demolition of unsafe structures.¹⁰³ This action should be taken with the requirements of the *Property Maintenance Code* in mind. Enforcement of such local law has been upheld as a valid exercise of municipal police powers to protect the health, safety, and welfare of its inhabitants.¹⁰⁴ Any local law which compels the repair or demolition of a building must afford a property owner due process of law which requires adequate notice and an opportunity to be heard on the matter.¹⁰⁵ For cities, the process and procedures that must be included are set forth explicitly in statute.¹⁰⁶ Any local law adopted

by a village must also provide constitutionally sufficient due process of law.¹⁰⁷ Courts have found that the statutory provisions of General City Law adequately protect the due process rights of property owners.¹⁰⁸ NYCOM recommends that any village adopting a local law on this subject matter include, at a minimum, all of the procedures set forth in General City Law.

State statute specifically allows a city to adopt a local law which allows for any costs incurred in demolition of unsafe structures to be assessed against the property.¹⁰⁹ Courts have upheld such provisions as a valid exercise of municipal powers.¹¹⁰ Villages should adopt a similar local law. A municipality may also commence a special proceeding against a property owner in any court of competent jurisdiction for the costs of demolishing an unsafe structure, including any legal fees incurred.¹¹¹

There are other provisions in State law which allow for a municipality to demolish unsafe structures despite the lack of a local law on the subject. These sections of statute apply in limited instances and also require adequate due process be afforded a property owner.¹¹² The *Uniform Code* also authorizes a municipality to order the vacating, repair, or demolition of unsafe structures which constitute “an imminent danger to life or safety as a result of structural instability, fire, explosion or other hazardous condition.”¹¹³ A city or village may also exercise emergency powers to cause a building to be repaired or demolished so long as the municipal action is a reasonable response to specific circumstances.¹¹⁴ To be deemed reasonable, emergency municipal action must be kept within the limits of necessity. A municipality must establish that it acted in response to a dire necessity and that its action was reasonably calculated to alleviate or prevent the crisis condition.¹¹⁵

VII. REMEDIAL OPTIONS

OVERVIEW

The ultimate goal in dealing with problem properties is to correct the offending property condition or use. Remedial options can be broken down into two categories: property owner remediation and municipal remediation. Each type of remediation has its pros and cons. Regardless of the method of remediation that is used, property maintenance programs must be proactively enforced to be effective.

Enforcement options vary widely from the relatively benign issuance of a notice of violation, which can be mailed to a property owner, to the issuance of a criminal court appearance ticket. In addition, remedial action taken by the municipality can result in the municipality seeking to recover from the property owner the cost of the remediation.¹¹⁶

As previously noted, municipalities must have enacted a local law providing for the *Uniform Code*'s enforcement and administration. Municipalities are expressly authorized to enforce the *Uniform Code* using civil, criminal, and administrative remedies.¹¹⁷ In addition, municipalities may provide for the enforcement of their local laws by legal or equitable proceedings.¹¹⁸ Specifically, municipalities may prescribe that violations of their local laws are misdemeanors, offenses, or infractions. Furthermore, municipalities may provide for the punishment of violations their local laws by civil penalty, fine, forfeiture and/or imprisonment.¹¹⁹ These local laws must take into considerations the due process limitations that are imposed by both the U.S. and the New York State Constitutions.

THE ENFORCEMENT PROCESS

Regardless of the law that is ultimately utilized by a local government to deal with a problem property, the process for policing property conditions in a municipality should be uniform. The following is a description of the basic process and procedures that should be established as part of every local property maintenance program. Every enforcement program should be periodically reviewed, in consultation with the municipal attorney, to insure that it effectively meets the municipality's needs.

1. Report of Violation

The enforcement process begins when the CEO becomes aware of a violation. The CEO may discover the violation himself, or it may be reported to him by a municipal official or local resident. To improve the effectiveness of citizen involvement, every local government should have a system for taking citizen complaints. Complaints should be handled at a central location that is well publicized (e.g., the clerk's office).

In addition to accepting complaints submitted in writing (whether via the complaint form or by letter), enforcement officers should establish a procedure for taking and investigating both oral and anonymous complaints. Municipalities may wish to notify the complainant of the final results of the enforcement action; and if no action was taken, then an explanation should be presented.

Investigations should be logged by CEOs using an Enforcement Inspection Report regardless of the results. This creates a record of initial inspection, and the report can be referred to for further questions or problems with the project. Moreover, a history of enforcement activity can be an invaluable tool if the property becomes the subject of either criminal or civil litigation.

2. The Freedom of Information Law

The question often arises, “May the complainant’s personal information (i.e. name, address, phone number, etc.) be kept private?” This often happens because the subject of an investigation inquires about the complainant. While the Freedom of Information Law (FOIL) creates a presumption of access to government records, FOIL does not require the disclosure of personal information:

- If it would result in an unwarranted invasion of personal privacy;
- If it would result in economic or personal hardship and the information is not relevant to the work of the agency requesting or maintaining it;
- If it was reported in confidence to an agency and is not relevant to the ordinary work of the agency; or
- If it is disclosed, it would interfere with law enforcement investigations or judicial proceedings.”¹²⁰

Questions as to whether a record must be disclosed under FOIL can be directed to NYCOM at 518-463-1185 or to the State’s Committee on Open Government, at 518-474-2518.

3. The Investigation

(a) Inspection Programs

All local governments that enforce and administer the *Uniform Code* provide for a system of periodic inspections. Places of public assembly are the primary target of these inspections programs. Another focus of periodic inspection programs are rental properties because they pose serious issues for municipalities, including sanitation and safety concerns. A major barrier to effectively addressing these concerns is the lack of access to the interiors of rental properties. Municipal officials are frequently faced with problem landlords who either cannot be contacted to obtain access to the property or who refuse to allow local government officials to inspect their rental properties. Because the U.S. Constitution’s Fourth Amendment protects individuals from unreasonable searches and seizures, public officials are limited in when and how they may gain access to private property. In addition, because obtaining a search warrant requires some effort and time on the part of municipal officials, local governments frequently try to implement creative programs to gain access to the problem properties. One program that municipalities frequently try to implement is the “rental inspection” program, which requires landlords to obtain a health/safety inspection before renting or re-renting any of their residential units. If not implemented and administered correctly, these inspection programs can run afoul of both the New York State and U.S. Constitutional protections against unreasonable searches and seizures.

In *Sokolov v. Village of Freeport*, the seminal case in New York on the issue of inspections for code enforcement purposes, a village ordinance prohibited anyone from renting or re-renting residential rental property without first obtaining a permit from the village. To obtain the permit, the landlord had to allow a local government official to inspect the premises to determine that the property was “safe, clean, sanitary, in good repair, and free from rodents and vermin”. The New York State Court of Appeals held that, while such an inspection program does not directly authorize warrantless searches, but rather only imposes criminal penalties for renting or re-renting a residential property without first obtaining a permit, such rental inspection programs *effectively* authorize and require warrantless inspections and thus are unconstitutional.¹²¹ Accordingly, unless the property owner or occupant consents or an exception applies, CEOs must obtain a search warrant to inspect residential properties. In New York State, CEOs are prohibited from entering private property to conduct an inspection unless they obtain consent to inspect the property or a judge has authorized an inspection by issuing a search warrant.

The key to implementing an inspection program that does not run afoul of U.S. and New York State Constitutional protections against unreasonable searches and seizures is that the inspection law cannot make failure to consent to an

inspection subject criminal penalties. Thus, inspection laws should state that if a property owner fails to consent to an inspection, then the code enforcement officer should apply for a search warrant.

(b) Authorization to Enter onto Private Property

Once a possible violation has been observed or reported, the CEO is empowered to investigate the matter, make a preliminary determination of whether or not it constitutes a violation, and take the appropriate action in the enforcement process. Cities and villages must specifically empower the CEO to enter onto private property.¹²² Regardless of whether a municipality has established a local law authorizing its CEOs to enter onto private property, all incursions on private property are subject to the U.S. and State Constitutional prohibitions against unreasonable searches and seizures. When in doubt about the legality of entering onto private property without the owner or occupant's consent, municipal officials should consult with the municipal attorney before entering onto the property. A search warrant is required in non-emergency situations, unless the owner or occupant consents to the search.

(c) When is a Search Warrant Not Required?

There are three situations in which search warrants are not required. When the person in control of the property gives his or her permission to the official to enter onto the property. This includes renters and tenants, who although they do not own the premises, nonetheless have the right to possess and use the property, and thus invite people onto the property.

When the property is open to the general public. In those situations, the property owner or occupant does not have a reasonable expectation of privacy. For example, although code enforcement officers may not enter into individual apartments without the tenants' consent, they may enter common areas of a residential building, such as the lobby and common hallways and stairwells without consent or a search warrant because there is no reasonable expectation of privacy in those common areas.¹²³

When there are exigent circumstances that warrant entering onto the property. This exception should only be used in emergencies, such as situations that pose an **imminent** danger to the public's health, safety, and welfare.

(c) Search Warrants: An Overview

In the course of protecting the public's health, safety, and welfare, there are times when local officials need to access private property when the owner or tenant either refuses or is unable to consent to give access to the property. Whether to enforce building standards and local land use regulations or to address nuisance and safety conditions, code enforcement officers, building inspectors, and local health officials occasionally need to inspect areas of a property that are neither open nor visible to the public. In such circumstances, local government officials must navigate the Constitutional provisions which protect people against unreasonable searches and seizures in order to gain entry to the property.

(i) Protections Against Unreasonable Searches

The Fourth Amendment to the U.S. Constitution provides as follows:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourth Amendment's protections are relatively straightforward, applying when individuals have a reasonable expectation of privacy. If an individual refuses to consent to a search of their property in which they have a reasonable expectation of privacy, government officials will need to obtain a search warrant to gain access to that property. A court may only issue such a search warrant if the requesting official demonstrates that there is probable cause of finding evidence on the subject property that is relevant to a government investigation.

Probable cause is not a particularly demanding standard as the U.S. Supreme Court explained in *Maryland v. Pringle*:

As early as *Locke v. United States* [citation omitted], Chief Justice Marshall observed, . . . “[T]he term ‘probable cause,’ according to its usual acceptance, means less than evidence which would justify condemnation It imports a seizure made under circumstances which warrant suspicion.” More recently, we said that “the quanta . . . of proof” appropriate in ordinary judicial proceedings are inapplicable to the decision to issue a warrant. *Brinegar* [citation omitted]. “Finely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no place in the [probable-cause] decision.”¹²⁴

Moreover, courts have noted that “the standard for establishing probable cause is not a particularly stringent one. It does not require proof of a suspect's guilt beyond a reasonable doubt [citation omitted]. Instead, probable cause to arrest exists when the known facts are “sufficient to warrant a person of reasonable caution in the belief that the person to be arrested has committed or is committing a crime.”¹²⁵

(ii) Probable Cause for “Administrative Searches” - The U.S. Supreme Court Sows Seeds of Confusion

Despite the Fourth Amendment’s relatively straightforward language, significant confusion surrounds obtaining search warrants for code enforcement purposes. The source of this uncertainty can be found in U.S. Supreme Court jurisprudence. In the companion cases *Camara v. San Francisco*¹²⁶ and *See v. City of Seattle*,¹²⁷ handed down in 1967, the U.S. Supreme Court affirmed the need for local government officials to obtain search warrants even for the purpose of carrying out code enforcement inspections, often referred to as administrative searches, as compared to searches as part of traditional criminal investigations. In confirming the need for code enforcement and health officials to obtain search warrants even for “administrative searches,” however, the Supreme Court softened the probable cause standard lower courts needed to apply when reviewing applications for administrative search warrants, noting

This is not to suggest that a health official need show the same kind of proof to a magistrate to obtain a warrant as one must who would search for the fruits or instrumentalities of crime. Where considerations of health and safety are involved, the facts that would justify an inference of ‘probable cause’ to make an inspection are clearly different from those that would justify such an inference where a criminal investigation has been undertaken. Experience may show the need for periodic inspections of certain facilities without a further showing of cause to believe that substandard conditions dangerous to the public are being maintained. The passage of a certain period without inspection might of itself be sufficient in a given situation to justify the issuance of warrant. The test of ‘probable cause’ required by the Fourth Amendment can take into account the nature of the search that is being sought.’ 359 U.S., at 383, 79 S.Ct. at 87 (Mr. Justice Douglas, dissenting).

* * *

Such standards, which will vary with the municipal program being enforced, may be based upon the passage of time, the nature of the building (e.g., a multifamily apartment house), or the condition of the entire area, but they will not necessarily depend upon specific knowledge of the condition of the particular dwelling.

This modified probable cause standard gave rise to referring to search warrants issued for code enforcement inspections as “administrative search warrants.” Unfortunately, the broad, vague probable cause standards have given pause to many legal analysts, particularly in light of the fact that many code violations are subject to criminal penalties. Moreover, some states have found that their own state constitutional protections against searches are more stringent than the standard articulated in *Camara*. For example, the Supreme Court of Washington ruled that “It is by now commonplace to observe [Washington State] Const. art. 1, § 7 provides protections for the citizens of Washington which are qualitatively different from, and in some cases broader than, those provided by the Fourth Amendment.”¹²⁸

(iii) Confusion in New York Courts

New York is not immune from the uncertainty surrounding code enforcement inspections. In *Sokolov v. Village of Freeport*, the New York State Court of Appeals reviewed a village ordinance that prohibited anyone from renting or re-renting residential rental property without first obtaining a permit from the village. To obtain the permit, the landlord had to allow a local government official to inspect the premises to determine that the property was “safe, clean, sanitary, in good repair, and free from rodents and vermin”. The New York State Court of Appeals held that, although such an inspection program does not directly authorize warrantless searches, the imposition of criminal penalties for renting a residential property without first obtaining a permit *effectively* requires warrantless inspections. The Court ruled that

such a program was unconstitutional¹²⁹ and that, unless the property owner or occupant consents to a search, CEOs must obtain a search warrant to conduct such administrative inspections.

However, the Court of Appeals acknowledged in a footnote the softened probable cause standard articulated in the *Camara* decision, noting,

In *Camara* [citation omitted], the court held that a search warrant may authorize an area inspection program based upon an appraisal of conditions in the area as a whole, and that probable cause for the issuance of a warrant authorizing an administrative inspection does not require a demonstration of knowledge of conditions in a particular building. The standards articulated as justifying an area inspection include “the passage of time, the nature of the building (e. g., a multi-family apartment house), or the condition of the entire area” [citation omitted]. This list is not exhaustive, and we believe that another factor to be considered in justifying a search warrant is whether a residential rental property is being introduced onto the marketplace for the first time, without having undergone prior inspection [citation omitted]. We emphasize our belief, however, that the likelihood of warrant approval in this latter instance does not justify dispensing with the warrant requirement altogether.¹³⁰

The *Camara* standard was further recognized in New York by the Bronx County Supreme Court in 1988 when, in evaluating an *ex parte* request by the City of New York Department of Sanitation for authorization to conduct an administrative search, the Court reasoned

The Supreme Court has taught that the detailed standard for the issuance of an “administrative” warrant is different from that for the issuance of a criminal search warrant. All warrants must comport with the Fourth Amendment's requirement of “probable cause”; however, the court in issuing “administrative warrants” must “focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen” (*Camara v Municipal Ct.*, 387 US, supra, at 534-535). The operative test is “balancing the need to search against the invasion which the search entails” (*Camara v. Municipal Court*, supra, 387 U.S. at 536–537, 87 S.Ct. at 1735). “The agency's demand for access will of course be measured, in terms of probable cause to issue a warrant, against a flexible standard of reasonableness that takes into account the public need for effective enforcement of the particular regulation involved” (*See v. City of Seattle*, supra, 387 U.S. at 545, 87 S.Ct. at 1740).¹³¹

The Bronx Court failed to provide any clarity regarding the administrative search warrant standard, however, holding that the proposed search in that case went “far beyond the reasonable goals of regulation.”

Finally, the Court discussed the absence of statutory authority in New York State law to issue administrative search warrants, noting

Petitioners point to no statutory authority for the “administrative inspections” they seek here. There are statutes that specifically authorize “administrative inspections” upon the presentation of an application to the court (e.g., Administrative Code § 27-2123). Even those sections may well have difficulty in withstanding constitutional muster [citations omitted]. The statutes at issue here do not specifically authorize application to the court for a warrant. There is authority holding that the omission from the legislative scheme of specific authority for such warrants precludes a court from proceeding.¹³²

Ultimately the Court did not issue a ruling on the question of its authority to approve “administrative inspections” as the Petitioners had not satisfied their burden of demonstrating probable cause for the granting of such approval.

(iv) When is a Search Warrant Not Required?

There are three situations in which search warrants are not required. First, a search warrant is not needed when a person in control of a property gives his or her permission to the official to enter onto the property, thereby consenting to the search. Renters and tenants, although not owners of a premises, nevertheless have the right not only to possess and use the property but also to invite people onto the property they are renting.

Second, a search warrant is not needed when property is open to the general public. In those situations, the property owner or occupant does not have a reasonable expectation of privacy. For example, although code enforcement officers may not enter into individual apartments without the tenants' consent, they may enter common areas of a residential building that are open to the tenants and their guests, such as the lobby and common hallways and stairwells, without consent or a search warrant because there is no reasonable expectation of privacy in those common areas.¹³³ Note that this exception to the search warrant requirement does not authorize local government officials to break locks to enter such areas.

The third exception to the search warrant requirement arises when there are exigent circumstances that warrant entering onto the property. This exception should only be relied upon in emergencies, such as situations that pose an **imminent** danger to the public's health, safety, and welfare.

(v) New York's Search Warrant Process

Local government officials wishing to obtain permission to conduct administrative inspections to enforce building, fire, and health code regulations may obtain a search warrant pursuant to Criminal Procedure Law, Article 690. Criminal Procedure Law § 690.05 authorizes both police officers and public servants acting in the course of their official duties to apply for a search warrant. Search warrant may be issued by city court, county court, and supreme court judges and village justices, although search warrants issued by a city, town, or village court may only be executed in the county of issuance or an adjoining county.¹³⁴ While code enforcement officers may apply for a search warrant, only police officers may execute search warrants.¹³⁵ Because of the legal complexities involved in obtaining, issuing, and executing search warrants, code enforcement officials should consult with their municipal attorney before commencing this process.

4. Notification To Remedy Violations And Administrative Actions¹³⁶

If a violation is discovered, then there are a variety of enforcement steps that can be taken.

(a) Informal Notification

The first action a CEO should take is to notify the property owner of the violation. Code violations are often simply an oversight on the owner's part, and advising him or her of the violation will resolve the condition. The CEO can employ a variety of methods to notify violators. Each situation will dictate the appropriate method to use.

The first attempt at notification can take the form of an informal personal contact with the property owner, verbally explaining the violation and the potential for further enforcement activity. A record of the contact and the results should be kept.

If the owner cannot be contacted in person, then a letter should be sent both to the property address and to all mailing addresses on file with the municipality (i.e. tax information, building department records, etc.) and the county (i.e. registered owner). The letter should clearly identify the violation and request voluntary compliance. If the nature of the violation or the property owner warrants, the CEO may include in the letter the statement "If you do not correct the violation by [DATE] or contact this office and make arrangements for an extension from that date, we will begin enforcement proceedings."

Generally, correspondence to property owners and occupants regarding violations should be by certified or registered mail with a return receipt requested. This will insure the owner receives it and provide proof that it was received. CEOs should also document informal contact with landowners. Although a simple letter to a landowner may be very formal in its language and appearance, it has no legal effect.

(b) The Notice of Violation

If the situation warrants, a formal and legally enforceable Notice of Violation (sometimes called a Violation Order, Order to Correct, or Order to Remedy) should be served on the property owner.¹³⁷ A Notice of Violation is the formal finding by the CEO that a violation exists. The Notice of Violation must fully describe the nature of the violation, including the date(s) and time(s) the violation is alleged to have occurred. Finally, the Notice of Violation must also direct the landowner to take specific corrective action by a specific date.

In addition to issuing a Notice of Violation, CEOs may take additional administrative enforcement action such as:

- a. Revoking or suspending permits;
- b. Denying new permits for construction or occupation until the violation is removed;
- c. Issuing a stop work order;
- d. Issuing a padlock order to prevent the violation from continuing.

Municipalities must provide for these enforcement actions in local law. In addition, it is imperative that the CEO keep a record of any administrative actions and any other enforcement actions.

5. Judicial Enforcement

When attempts to correct a code violation using a municipality's administrative powers fail, then stronger enforcement methods can be used, such as the commencement of criminal or civil proceedings. The type of violation and the circumstances involved will determine which method of judicial enforcement is most appropriate, and local governments may employ multiple remedial methods simultaneously.¹³⁸

(a) Criminal Proceedings

i. In General

Pursuant to Municipal Home Rule Law § 10(4)(b), municipalities have the general authority to make violations of local law "misdemeanors, offenses or infractions and to provide for the punishment of violations thereof by civil penalty, fine, forfeiture or imprisonment, or by two or more of such punishments." To avoid any confusion, municipalities should clearly state the nature of the penalty in the local law.

In addition, municipalities may also wish to create a penalty for failing to comply with an order of the CEO. Such penalties must be specifically set forth in local law. In addition, for a property owner to be prosecuted successfully for failing to comply with a CEO's order, the order must be personally served upon the property owner to comply with federal and state due process requirements.

Municipalities may provide that each day a violation is allowed to continue constitutes a new and separate offense. In addition, violations of the *Property Maintenance Code* are "punishable by a fine of not more than \$1,000 per day of violation."¹³⁹ In order to impose successive fines, the CEO must document the length and continuing nature of the violation. This will require repeated inspections of the property. It is possible to list more than one violation in the same Information. Successive fines are a valuable tool in obtaining voluntary compliance.

Finally, violations of the *Uniform Code* are punishable by a fine of \$1,000 per day the violation exists and/or a prison sentence not to exceed one year.¹⁴⁰

ii. Commencing Criminal Proceedings

There are two main ways to commence a criminal proceeding for a health, building code, or property maintenance violation: a summons issued by a criminal court or an appearance ticket served by the CEO.

Criminal Court Summons

To commence criminal proceedings against a violator, the CEO may file an Information with the local criminal court. Informations must clearly and thoroughly set forth a prima facie case, including the date, time, and place that the violation took place, the section of the law violated, and the facts relied on for establishing the violation. The Information must be signed and affirmed under penalties of perjury or swears to it before a notary. A supporting deposition may also be added at the commencement of the case, and must be given if the defendant requests one. Where a CEO has not directly observed the condition or actions that constitute the violation, supporting depositions must be taken from all persons with direct knowledge to establish the case. The information must on its face contain each and every element of what must be proven to establish the violation alleged. The supporting deposition should be attached to the information. Photographs or other documentary evidence may also be attached. Once the information and supporting depositions are obtained and properly signed, the local justice will then issue a summons through the local police that will require the violator to appear in criminal court on a specified date.

Note that State law requires the prosecution to be ready for trial within a specific number of days from the day the case is commenced (30 days for violations and either 60 or 90 days for misdemeanors).¹⁴¹ A case is commenced when an accusatory instrument is filed with the court.¹⁴² Because a facially valid accusatory instrument must be filed with the court for a criminal summons to be issued, the “speedy trial” time begins to run even before the court issues the summons. This can put the prosecution at a disadvantage if there is a delay in the defendant appearing in court. Note also that if a defendant fails to appear in court after the issuance of a summons there are no consequences, other than the issuance of an arrest warrant, which could have been issued in any event.¹⁴³

The Appearance Ticket

The process of obtaining a criminal court summons can take time. One way to shorten the time period is to authorize the CEO to issue an appearance ticket. The appearance ticket is a criminal process similar to a traffic citation that provides a quick and easy method for the CEO to bring a case to court.

Before a CEO may issue appearance tickets, the local legislative body must delegate to the CEO the authority to issue appearance tickets through a local law, as specified in Municipal Home Rule Law, § 10(4)(a) and Criminal Procedure Law § 150.20(3).

Serving Appearance Tickets on Individuals

The CEO can serve appearance tickets on individuals without having to go to the local criminal court. After serving the appearance ticket, the CEO may then file the information and complaint, along with any supporting depositions, with the local criminal court at a later date.

Prior to August 24, 2004, New York State Criminal Procedure Law § 150.40 required “an appearance ticket, other than one issued for a traffic infraction relating to parking, [to] be served personally [on the defendant].” As most local government officials know, personally serving an appearance ticket on a absentee property owner can be difficult, if not impossible, costing significant time and money. Moreover, mailing a criminal summons to an absentee property owner is insufficient to commence a criminal proceeding if the property owner chooses to ignore the summons.

To help local governments deal with absentee property owners, Criminal Procedure Law § 150.40 has been amended¹⁴⁴ to read as follows:

An appearance ticket, other than one issued for a traffic infraction relating to parking, must be served personally, except that an appearance ticket issued for the violation of a local zoning ordinance, or of a local building or sanitation code may be served in any manner authorized for service under section three hundred eight of the civil practice law and rules. [emphasis added]

Thus, appearance tickets for local zoning, building, and sanitation code violations may now be served in the same manner as civil summons are served pursuant to Civil Practice Law and Rules § 308. This change greatly enhances the ability of local governments to get problem property owners into their local criminal courts.

Pursuant to Civil Practice Law and Rules § 308, appearance tickets issued for zoning, building and sanitation violations may:

1. Be personally served anywhere within the State;
2. Be delivered within the state to a person of suitable age and discretion at the defendant’s place of business¹⁴⁵ or residence and by either mailing the summons to the defendant’s last known residence or by mailing the summons by first class mail to the defendant’s place of business in an envelope marked “personal and confidential” and not indicating on the outside of the envelope, by return address or otherwise, that the communication is from an attorney or concerns an action against the defendant (the appearance ticket must be delivered and mailed within 20 days of each other);
3. Be delivered within the state to the agent for service of the defendant as designated under Civil Practice Law and Rules § 318;
4. When, after undertaking due diligence efforts, the appearance ticket cannot be served pursuant to either Civil Practice Law and Rules § 308(1) or (2), then the appearance ticket may be served by affixing the summons to the door of either the defendant’s place of business or residence within the State and by either mailing the

summons to the defendant's last known residence or by mailing the summons by first class mail to defendant's place of business in an envelope marked "personal and confidential" and not indicating on the of the envelope, by return address or otherwise, that the communication is from an attorney or concerns an action against the person to be served (the appearance ticket must be affixed and mailed within twenty days of each other);

5. Finally, if it is impractical to serve the appearance ticket pursuant to either Civil Practice Law and Rules § 308 (1), (2), or (4), then the appearance ticket may be served in a manner the court, upon motion without notice, directs.

Note, however, that service of appearance tickets pursuant to this amended version of Criminal Procedure Law § 150.40 does not give New York's criminal courts the authority to issue default judgments. Consequently,

Municipalities have relatively few cost-effective alternatives to deal with absentee landlords, Criminal Procedure Law § 150.40 is a powerful tool for local governments. Because of the legal complexities involved, local government officials should consult with their municipal attorney before serving appearance tickets in the same manner as is allowed by Civil Practice Law and Rules § 308.

Note that if a defendant fails to appear in court after having been personally served an appearance ticket, they may be prosecuted for violating Penal Law § 215.58.

Serving Appearance Tickets on Corporations

Appearance tickets must be **personally** delivered to an officer, director, managing or general agent, or cashier or assistant cashier of the corporation **or to any other agent of the corporation authorized by appointment or by law to receive service of process.**¹⁴⁶ Service of a summons by mail on a corporation, even if it is sent via certified mail, is insufficient service and will not give the local criminal court jurisdiction over the corporation.¹⁴⁷ Information about both domestic and foreign corporations can be found at the Department of State website, http://appsext5.dos.state.ny.us/corp_public/enter_search. This information, which is updated weekly, includes the:

- a. Corporation's current name;
- b. Date it was organized;
- c. Jurisdiction where it was organized, if other than New York State;
- d. County in New York where its primary business is located;
- e. Address where the Department of State will mail the process service to;
- f. Corporation's registered agent, if any; and
- g. Corporation's current status.

Serving an appearance ticket on a corporation's officer, director, managing or general agent, or other appropriate individual of the corporation can often be a difficult and costly task because either none of those individuals can be located or they live too far outside of the community to make personally serving the appearance ticket on them economically feasible.

However, New York's Secretary of State is an agent for all domestic and authorized foreign corporations.¹⁴⁸ Thus, appearance tickets may be served on the Secretary of State, as agent of a corporation, by personally serving two copies of the appearance ticket, along with the \$40 serving process fee, on an authorized person at the Department of State's offices at Customer Service Counter located on the 2nd Floor of 41 State Street, Albany, NY 12231.¹⁴⁹

iii. Prosecution of a Criminal Proceeding

The district attorney has the duty and the right to prosecute all crimes and offenses that may be tried by the courts of the county.¹⁵⁰ However, the district attorney may consent to the appearance on his behalf as to petty crimes and offenses by other public officials or private attorneys.¹⁵¹ Municipal officials should periodically clarify and confirm their relationship with the district attorney. The village attorney may need to file an oath of office with the county clerk as an assistant district attorney when this occurs.

iv. Criminal Court Dispositions

While any sentencing arrangement could include a defendant's promise to rectify the violation, the local criminal courts do not have the authority to require it. Local criminal courts may discharge the case against the defendant on the

condition that the defendant remediate the violation. A successful criminal prosecution generally only results in the imposition of a fine and the occasional short prison sentence, leaving the violation still to be abated.

All too often, however, defendants pay a fine, walk out of court, and continue to violate the code, considering the fine a cost of doing business. This is because successful prosecution involves a lengthy process from summons to conviction during which a landlord continues to receive rents. Also, a city or village may never be able to get an out-of-state resident into court for a criminal prosecution. Unscrupulous absentee property owners understand the limitations of the criminal justice system. Thus, as a practical matter, criminal prosecution of an absentee landlord may not be the optimal means to achieve compliance with local codes.

(b) Civil Proceedings – Injunctions

An injunction is a court order that prevents someone from doing something, such as violating a local or state law. Authority for municipalities seeking injunctive relief from the State's courts can be found throughout the State statutes.¹⁵² Villages and cities have the authority to enforce "local laws by legal or equitable proceedings."¹⁵³

Justices courts do not have the power to issue injunctions of this nature.

Municipalities must go to either a city court or the Supreme Court in the county in which their municipality is located in order to obtain an injunction. If a property owner or occupant fails to comply with the court order, they subject themselves to civil and criminal contempt proceedings, which can carry prison sentences and fines. The threat of contempt of court can be a powerful motivator. Municipal officials wishing to obtain injunctive relief should consult with their municipal attorney, who will be needed to institute the action.

An injunctive action in state supreme court against a landowner *may* be a more advantageous means of achieving code compliance than attempting criminal prosecution for a number of reasons. For example, a municipality is not constrained by the same rules of personal service or jurisdiction as in a criminal action. New York law provides for "long arm" jurisdiction over non-domiciliaries. Also, service of process in a civil action is not limited to contiguous counties and may be effectuated by a variety of methods.

There are two types of injunctions that courts may impose: permanent and preliminary. The preliminary injunction provides temporary relief before a trial, while a permanent injunction is a permanent order requiring a property owner to "abate" a violation. A permanent injunction could require that all or portions of a building be torn down or that the property stop being used in a particular manner or a condition be remedied. A preliminary injunction can be issued to suspend use or construction of a building. The preliminary injunction is a drastic remedy and will only be issued if irreparable damage would result from continuing the questionable conduct. A violator who is issued an injunction must either comply, appeal the injunction to a higher court, or face strict penalties if the injunction is violated.

In order to obtain an injunction, a plaintiff usually has to show that they will likely prevail on the merits of the underlying case, that an irreparable harm will occur if they are not granted an injunction and there is no adequate remedy at law for such harm, and that, on balance, it is equitable to grant the requested injunction. A municipal plaintiff need not demonstrate all elements of this traditional three-prong test. When a municipality seeks an injunction to abate code violations, it does not need to demonstrate any imminent harm or the lack of an adequate remedy at law; it only needs to prove the commission of the prohibited activity. A municipal plaintiff would then still have to convince the court that a balancing of equitable principles favors the granting of the injunction.

As previously noted, pursuing an injunctive action in supreme court does not preclude a contemporaneous criminal proceeding for the same code violations. Courts have held that it is perfectly acceptable to bring criminal charges and injunctive proceedings at the same time for the same violation. You don't have to choose one over the other. Also, the outcome in one proceeding does not have any effect upon the other. A dismissal on the criminal charge for failure to personally serve the defendant has no bearing on the merits of the civil proceeding, for example.

DUE PROCESS CONSIDERATIONS

Whatever action taken, municipalities must always take into consideration the due process limitations of the Fourteenth Amendment to the U.S. Constitution and Article I, Section 6 of the New York State Constitution.¹⁵⁴ Any local law adopted by a municipality must satisfy constitutional due process requirements.¹⁵⁵

It is an essential principal of due process that adequate notice and an opportunity to be heard be afforded a person whose property is affected by municipal proceedings.¹⁵⁶ At a minimum, due process requires that a property owner be given notice and an opportunity to be heard prior to municipal entry onto property to abate a property maintenance condition.¹⁵⁷ Procedural safeguards to protect a property owner's due process rights should be placed directly in the text of the local law providing for the enforcement and administration of the *Uniform Code*.¹⁵⁸ In **emergency circumstances**—where the municipality must take immediate action to abate a condition that threatens the public's health and safety (for example, a building in imminent danger of collapsing)—municipalities may dispense with these procedural safeguards. Even in emergency situations, municipalities should provide notice to the extent practicable.

MUNICIPAL REMEDIATION OF NUISANCE AND UNSAFE CONDITIONS

1. Overview

It is often the case that local governments must remediate nuisance and unsafe conditions themselves, either because the property owner is unwilling or unable to do so. Local government officials have two options when remediating conditions themselves:

1. Municipalities may petition the supreme court in the county in which the village or city is located for an order authorizing the municipality to remediate the condition; or
2. Municipalities may summarily (without judicial proceeding) abate unsafe or nuisance conditions.

There are pros and cons to each method of nuisance abatement. Obtaining a court order authorizing the municipality to remediate unsafe or nuisance conditions will clothe the municipality with extensive, although not necessarily absolute immunity for legal action by the property owner. In addition, the municipality may request that the costs it incurs in remediating the property be placed as lien upon the property. One of the costs of going to court however, is that it can be time-consuming and the municipality must have its attorney file the papers with the court.

Summary abatement has the benefit that it can be a very quick and easy method for remediating nuisance and unsafe properties. Note however, that even if local government officials choose to summarily abate nuisance conditions, they must still give the property owner and other parties with an interest in the property (i.e. mortgage holders) notice and an opportunity to be heard, unless exigent circumstances such as a building in imminent danger of collapsing warrant taking action without providing notice and an opportunity to be heard. One of the potential problems with summary abatement is that local governments are exposed to potential liability for damage they cause while abating the condition.

There is no one correct method for abating nuisance and unsafe properties. Local officials must take into account a variety of factors in determining which is the appropriate method for the condition at issue. For example, most municipalities summarily abate unmown and trash strewn yards. In addition, it would make little sense to waste time going to court to obtain an order regarding a building that is in imminent danger of collapse. However, for other properties that are nuisances but that do not pose an imminent danger to the public, municipal officials may want to consider obtaining a court order authorizing the municipality to remediate or demolish a building, particularly the more expensive the cost of remediation.

2. Public Nuisances

While the abatement of public nuisances may be performed summarily, in general, the municipality must, to the extent practicable, give the property owner notice that nuisance condition exists and that, if the property owner does not abate the nuisance themselves, the municipality will remedy the condition and charge the owner for the cost of the remediation.

3. Emergency Situations

Property maintenance laws should also contain provisions allowing municipal entry on to private property in emergency situations to inspect and remediate unsafe conditions. Municipalities may only exercise emergency police powers when it is necessary to act and where the action is reasonably calculated to alleviate or prevent the crisis condition.¹⁵⁹ To justify interference with the beneficial use of property on an emergency basis, a municipality must establish

- (1) that it acted in response to a dire necessity,
- (2) that its action is reasonably calculated to alleviate or prevent the crisis condition, and
- (3) that it is taking steps to rectify the situation.¹⁶⁰

When emergency municipal action is taken without notifying the property owner, local government officials must still notify the property owner after the remediation is performed and before the costs of municipal action to abate the emergency are placed as a lien on the property's tax bill.¹⁶¹

4. Public Health Law Article 13

Public Health Law Article 13 also addresses the abatement of property conditions. Specifically, Public Health Law § 1305(2) provides

If the owner or occupant of any premises whereon any nuisance or condition deemed to be detrimental to the public health exists or the cause of the existence elsewhere, fails to comply with any order or regulation of any local board or health officer having the power of a local board of health for the suppression and removal of any such nuisance or other matter, in the judgment of the or health officer detrimental to the public health, made, served or post as required in this article, such board or its agents or employees may enter upon the premises to which such order or regulation relates, and suppress or remove such nuisance or other matter.

5. Financing Summary Abatements

A major impediment to dealing with nuisance properties is finding the money to pay for the abatement. Even in those instances where the municipality is likely to recover all or even part of the expense of the abatement, it may take months or years to recover the cost of an abatement. Thus, municipalities must frequently scramble to find money to pay for the remediation of nuisance or unsafe properties. In 2005 and 2006, Local Finance Law § 11 was amended to authorize the issuance of bonds for the purpose of demolishing or repairing privately owned buildings that pose a significant threat to the public's health or safety. This new tool can be extremely helpful to those municipalities dealing with remediation projects that run into the tens of thousands or even hundreds of thousands of dollars.¹⁶²

6. Recovering the Cost of Summary Abatements: The Lien

The costs of abating nuisances pursuant to Public Health Law § 1305 may be recovered pursuant to Public Health Law § 1306, which makes both the owner and the occupant of the premises and the person who caused or maintained the nuisance liable for the cost of abating the nuisance, and pursuant to Public Health Law § 1307, which authorizes judgments to recover expenses to be placed as liens upon the property that was the subject of the abatement.

Municipalities should establish, by local law, specific procedures for abating nuisance or unsafe conditions. These procedures should include provisions that allow for the municipality to place the cost of abating the conditions, whether it be mowing a weed-infested yard or demolishing an unsafe building, as a lien upon the property. This provision should be included in the municipality's local law providing for the enforcement of the *Uniform Code* as well as in any other local law relating to property maintenance and land use. Absent such a provision, it is difficult to recover abatement expenses.

TAKING TITLE TO ABANDONED PROPERTY

Another enforcement option available to municipalities is their ability to take title to abandoned properties. The applicable law is New York State Real Property Actions and Proceedings Law ("RPAPL") Article 19-A. It must be noted at the outset that RPAPL Article 19-A is applicable only to residential property, but not to one- or two-family dwellings that are occupied by the owners. Despite these restrictions, RPAPL Article 19-A can be a powerful weapon

in a municipality's arsenal to deal with run-down properties.

1. Initiating Abandonment Proceedings – Making a Finding of Abandonment

Under RPAPL Article 19-A, a municipality's department or agency ("the department") responsible for regulating the occupancy and maintenance of residential property takes the lead in initiating abandonment proceedings. The department must first make an official finding that a dwelling is abandoned.

An occupied dwelling is abandoned if

1. the owner fails either to collect rent or to institute summary proceedings for nonpayment of rent for three consecutive months and
2. the department finds that the dwelling has become a danger to life, health or safety as a result of the owner's failure to maintain the dwelling, which may be shown by the owner's failure to provide services including but not limited to the failure to make repairs, supply janitorial service, purchase fuel or other needed supplies, or pay utility bills.

A vacant dwelling is abandoned if

- the structure is not sealed or continuously guarded as required by law or
- the structure was sealed or is being continuously guarded by a person other than the owner, a mortgagee, lienor or agent thereof, and either:
 - a vacate order of the department or other governmental agency currently prohibits occupancy of the dwelling;
 - or
 - the tax on the property has been due and unpaid for a period of at least one year.

Once the department finds that a dwelling is abandoned, it must then file in its records a certification containing the finding of abandonment and the facts on which the finding is based. In addition, the department must immediately, prominently, and conspicuously attach to the dwelling a notice that the building has been found to be abandoned and that it is a crime to take, remove or otherwise damage any fixture or part of the building.

2. The Judicial Proceeding

(a) Notifying Parties with an Interest in the Property

After the department has found a dwelling to be abandoned, the department may commence a proceeding in supreme court in the county in which the dwelling is located to vest title to the property with the city or village. However, before the department may institute the proceeding it must first file in the office of the clerk of the county in which the dwelling is located a copy of the certificate of abandonment and a notice that the department intends to commence the proceeding.

The notice filed with the clerk must contain the names of the owner of the dwelling¹⁶³ and each mortgagee, lienor, and lessee of record, if any. The notice must be indexed by the clerk as required by New York State Civil Practice Law and Rules ("CPLR") § 6511 and has the same effect as a notice of pendency. The notice expires one year after its filing, unless a proceeding to convey title to the premises has been commenced within that period. Except as otherwise provided in RPAPL Article 19-A, all of the provisions of CPLR Article 65 are applicable to the notice filed with the county clerk.

In addition to filing the notice with the county clerk, the department must serve the property owner with a copy of the certification and a notice stating that proceedings pursuant to RPAPL Article 19-A may be instituted unless the owner notifies the department that the property has not been abandoned. Service upon the owner must be made

- 1) personally or
- 2) by
 - a. posting the notice in a conspicuous place upon the dwelling and
 - b. mailing a copy by registered or certified mail to the last known owner at their last known address.

The owner may, within 30 days of the notice being served, notify and demonstrate to the department that the conditions upon which the department made its finding of abandonment either do not exist or have been corrected.

Within five days of serving the owner, a copy of the certification must also be served on each mortgagee, lienor and

lessee of record, if any, personally or by registered mail to the address set forth in the recorded instrument or, if no address appears therein, to the person at whose request the instrument was recorded. The copy of the certification must, in the case of a mortgagee or lienor, be accompanied by a notice that proceedings pursuant to RPAPL Article 19-A may be instituted unless the mortgagee or lienor either commences proceedings or forecloses the mortgage or lien, or enters into an agreement with the department to bring the building into compliance with the applicable provisions of law, within 15 days of the mailing.

If the name or address of

- (a) the last owner of record; or
- (b) any owner, mortgagee, lienor, or claimant as shown on records maintained by any municipal official required by any local law to maintain records of persons entitled to notice or process in connection with the maintenance of in rem foreclosure actions; or
- (c) the person listed as the owner of the property on the latest completed assessment roll,

is different from that referred to in RPAPL § 1972(2) & (3), a copy of the notice to the owner, or to a mortgagee or lienor, whichever is applicable, must also be sent to that person by registered mail.

(b) Commencing the Judicial Proceeding

Once the department has complied with all of the notice requirements set forth in RPAPL § 1972, the department may commence a proceeding in a court of competent jurisdiction in the county in which the dwelling is located, to vest title to the property in the city or village. The petition commencing the proceeding must be accompanied by a copy of the certification and by an affidavit stating that the provisions of RPAPL § 1972 have been complied with and that no party served with the notice pursuant to such section has acted to remedy the abandonment. A copy of the petition must be served on all persons who were notified pursuant to RPAPL § 1972 by personal service pursuant to CPLR Article 3. In addition, a notice of pendency must be filed pursuant to the provisions of CPLR § 6501. Finally, a copy of the petition and a notice that any person having or claiming an interest in the property may appear at the hearing thereon to protect his interest must be posted in a conspicuous place on the premises. The petition must be noticed to be heard not less than 15 days after service is completed on all parties to the proceeding. A special proceeding pursuant to this article may also be commenced by order to show cause, in which case the manner of service and the time at which the order is returnable shall be as prescribed therein by the court.

If any party to the proceeding contests the abandonment, the burden of proving that the dwelling is abandoned is on the department, and the court may only make a finding based on the facts before it. The court may order a stay of the proceeding for such time as the court deems proper to permit a mortgagee or lienor to foreclose their mortgage or lien and to permit the owner, mortgager or lienor to enter the property to make repairs, or if the property is vacant, to seal or continuously guard the building as required by law. The court may impose terms upon the owner, mortgagee or lienor as it deems proper for the issuance of the order, including the posting of security, if any, as it may require. At the expiration of the period prescribed by the court, the court may extend the time of the owner, mortgagee or lienor to comply with the order, dismiss the proceeding if the owner, mortgagee or lienor has substantially complied with the order, or issue a judgment as provided in subdivision three of this section, if the court finds that the owner, mortgagee or lienor has failed to comply with the order.

If the court finds that the dwelling is abandoned, the court must enter a final judgment in favor of the petitioner. The final judgment must direct the officer of the city or village in which the dwelling is located to execute and record a deed conveying title of the premises to the city or village 30 days after entry of judgment. Once the judgment is entered, the city or village is vested with title to the property. The title is good against any claim to the property.

VIII. LIABILITY FOR CODE ENFORCEMENT AND ADMINISTRATION

For municipalities to be liable for monetary damages in tort claims, a “special relationship” has to exist between the municipality and the claimant. “Special relationship” exists when:

1. An assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured;
2. Knowledge on the part of the municipality’s agents that inaction could lead to harm;
3. Some form of direct contact between the municipality's agents and the injured party; and

4. That party's justifiable reliance on the municipality's affirmative undertaking.¹⁶⁴

A municipality's failure to enforce safety provisions of its local laws or the Uniform Code or to uncover fire and safety violations during an inspection does not give rise to liability, since the enforcement of such provisions inures to the benefit of the public at large.¹⁶⁵

A municipality can create liability if it makes extra assurances, for example that a building is safe, and an injured party relies upon those assertions. But the mere issuance of a certificate/permit does not constitute such an assurance.¹⁶⁶ However, if the municipality knows that blatant and dangerous violations exist on a premises and nonetheless certifies that the premises as safe and an injured party justifiably relies upon the municipality's certification or representation, the municipality may be liable.¹⁶⁷

Municipalities should periodically conduct a risk assessment, in consultation with their attorney and municipal insurance carrier, of their code enforcement and administration process.

ENDNOTES

- ¹ The state’s Code Council has promulgated minimum standards for enforcing and administering the Uniform Code. For more information on Uniform Code enforcement visit the Department of State website at www.dos.state.ny.us/code/lc-codes.html.
- ² The seminal cases on the authority of local governments to abate public nuisances are *Hart v. Albany*, 9 Wend. 571 (1832) and *Lawton v. Steele*, 119 N.Y. 226 (1890).
- ³ The statutory authority for providing enforcement of local laws is found in Municipal Home Rule Law § 10(4)(b).
- ⁴ Note that, while violations of the state’s Property Maintenance Code are subject to fines of \$1,000 per day (see Executive Law § 382), there is no statutory limit to the amount of fines that may be imposed for violations of local laws. Notwithstanding, criminal fine schedules should not be so excessive so as to run afoul of the federal and State constitutional prohibitions against cruel and unusual punishments.
- ⁵ For a full description of the history of the *Uniform Code*, see the New York State Department of State’s *James A. Coon Local Government Technical Series* “Administration and Enforcement of the Uniform Fire Prevention and Building Code and the Energy Conservation Construction Code,” which can be accessed at <http://www.dos.state.ny.us/lgss/publist.htm>.
- ⁶ Pursuant to Executive Law § 383, the provisions of the *Uniform Code* supersede any other provision of a general, special, or local law, ordinance, administrative code, rule or regulation “inconsistent or in conflict” therewith.
- ⁷ Executive Law § 383(1)(a).
- ⁸ Executive Law § 379.
- ⁹ NYCRR, Title 19, Part 1205 (*Uniform Code: Variance Procedures*).
- ¹⁰ See Executive Law § 381.
- ¹¹ Executive Law § 381 directs the Secretary of State to promulgate rules and regulations prescribing minimum standards for administration and enforcement of the *Uniform Code*. In response to Executive Law § 381, the Secretary has adopted NYCRR Title 19, Part 1203 (*Uniform Code: Minimum Standards for Administration and Enforcement*). NYCRR Title 19, § 1203.2(a) states:
Every city, village, town, and county charged under Subdivision 2 of section 381 of the Executive Law with administration and enforcement of the *Uniform Code* shall provide for such administration and enforcement of the code by local law, ordinance, or other appropriate regulation.
- ¹² See NYCRR Title 19, Part 1203.
- ¹³ In addition, those municipalities that have the authority to promulgate regulations by rulemakings may establish some features of the program administering and enforcing the code by rulemaking.
- ¹⁴ NYCRR Title 19, § 1203.3(a).
- ¹⁵ The requirements for code compliance technicians (fire inspectors) are set forth in NYCRR Title 19, § 426.8, while the requirements for CEOs are set forth in 19 NYCRR Part 434.
- ¹⁶ NYCRR Title 19, Part 1208 (*Uniform Code: Training of Staff*).
- ¹⁷ See NYCRR Title 19, Part 1208.
- ¹⁸ *Id.*
- ¹⁹ NYCRR Title 19, § 1203.2(e).
- ²⁰ Any individual who issues a building permit, certificate, stop work order, or notice of violation must be certified by the State.
- ²¹ Fences which are part of an enclosure surrounding a swimming pool are not exempted from the permitting requirement.
- ²² Retaining walls which support a surcharge or impound Class I, II or IIIA liquids are not exempted from the permitting requirement.
- ²³ What constitutes excessive quantities is listed in tables 2703.1.1(1), 2703.1.1(2), 2703.1.1(3) and 2703.1.1(4), of the Fire Code of New York State.
- ²⁴ Hazardous activities include, but are not limited to, commercial and industrial operations which produce combustible dust as a byproduct, fruit and crop ripening, and waste handling.
- ²⁵ See NYCRR Title 19, § 1203.4.
- ²⁶ p. 616.
- ²⁷ 6A *McQuillin Mun. Corp.* § 24:60 (3d ed.)
- ²⁸ *Id.*, citing *Nailor v. C. W. Blakeslee & Sons*, 117 Conn. 241 (1933), *Albright v. Crim*, 97 Ind. App. 388 (1933), *Gleason v. Hillcrest Golf Course*, 148 Misc. 246 (Mun. Ct. 1933), *Hagaman v. Slaughter*, 49 Tenn. App. 338 (1961).
- ²⁹ *Prosser and Keaton on Torts*, p. 618.
- ³⁰ *Copart Indus., Inc. v. Consol. Edison Co. of New York, Inc.*, 41 N.Y.2d 564, 568 (1977); see also *N.A.A.C.P. v. AcuSport, Inc.*, 271 F. Supp. 2d 435, 481 (E.D.N.Y. 2003) (“Private nuisance, historically known by a variety of labels, developed from a single theory of liability affording a remedy for interference with a plaintiff’s use or enjoyment of land that stopped short of dispossession or physical entry onto the land, i.e., trespass In contrast, the concept of a public nuisance began to appear in connection with ‘the entirely separate principle that an infringement of the rights of the crown was a crime;’ early actions involved purprestures, or encroachment upon the royal demesne or the king’s highway. [citations omitted] The two doctrines developed independently as separate theories of liability. While sharing a name presumably because of the ‘superficial

- resemblance between the obstruction of a private right of way and the obstruction of a public right of passage,' they are otherwise unrelated. [citations omitted]"
- ³¹ See *Jewett v. Luau-Nyack Corp.*, 31 N.Y.2d 298 (1972), and *Town of Duaneburg v. Vojnar*, 147 A.D.2d 819 (1989).
- ³² See *City of New York v. Sidne Enterprises, Inc.*, 90 Misc. 2d 386 (Sup. Ct. 1977); see also *City of New York v. Castro*, 143 Misc. 2d 766, 769 (Sup. Ct. 1989) aff'd, 160 A.D.2d 651 (1990) ("where there is repeated illegal conduct [in this case gambling] on a particular property and that conduct violates what is sought to be protected under the law, there constitutes a 'violation' and, therefore, may be considered a public nuisance subject to the Nuisance Abatement Law"); and *City of New York v. Narod R'lty Corp.*, 122 Misc. 2d 885, 887-88 (Sup. Ct. 1983) ("Plaintiff City has shown a violation of the Zoning Resolution and provisions of the Administrative Code in the illegal use of a portion of the subject premises as a bodega thereby constituting a public nuisance as defined in Section C16-2.2 of the Administrative Code.").
- ³³ See *Puritan Holding Co. v. Holloschitz*, 82 Misc.2d 905 (Sup. Ct. New York Co. 1975) (in a community that was working to maintain standards, an abandoned building, whose owner had been issued numerous administrative code violations and which was being used by derelicts, was found to be a public nuisance).
- ³⁴ But see *Lichtman v. Nadler*, 74 A.D.2d 66, 67, (1980) (in which the court noted "the established common law rule that a land owner is under no affirmative duty to remedy conditions of purely natural origin upon his land even though they are dangerous or inconvenient to his neighbors").
- ³⁵ See *Cabrini Terrace Joint Venture v. O'Brien*, 71 A.D.3d 486, 896 N.Y.S.2d 339, 340 (2010) (In a private cause of action, the Court found that "The conditions in tenant's apartment were properly found harmful to the health, safety and comfort of others based on testimony of roach and rodent infestation, clutter, offensive odors, and stacked newspapers and wiring in disarray") and *Brancato v. City of New York*, 244 F. Supp. 2d 239, 245 (S.D.N.Y. 2003) (in a public nuisance abatement action, the court noted "A property owner in densely populated New York City can not be allowed to permit health code violations on his property, endangering public health through possible rodent infestation").
- ³⁶ See *Vacca v. Valerino*, 16 A.D.3d 1159, 1160 (2005) ("plaintiffs presented evidence establishing each of those elements, and thus it cannot be said that the verdict is against the weight of the evidence with respect to the private nuisance cause of action" [that the retaining wall that encroaches upon plaintiffs' property and threatens to collapse thereon]).
- ³⁷ See *Broxmeyer v. United Capital Corp.*, 79 A.D.3d 780 (2d Dep't 2010) (Son of adjacent property owner lacked standing to maintain private nuisance and negligence claims against commercial building owner based on noise generated by heating, ventilating, and air conditioning (HVAC) units on building roof, although son lived in apartment, where son lacked property interest in apartment.) and *Zupa v. Paradise Point Ass'n, Inc.*, 22 A.D.3d 843 (2d Dep't 2005) (Owners of properties which abutted boat basin had standing to bring private nuisance action for injunction against operator of private marina in boat basin, since owners alleged that operation of marina interfered with their use and enjoyment of their land).
- ³⁸ *Bano v. Union Carbide Corp.*, 198 F. App'x 32, 34-35 (2d Cir. 2006), citing *Leo v. Gen. Elec. Co.*, 145 A.D.2d 291, 294 (N.Y.App.Div.1989); see also *Copart Indus., Inc. v. Consol. Edison Co. of New York, Inc.*, 41 N.Y.2d 564, 568 (1977); and *N.A.A.C.P. v. AcuSport, Inc.*, 271 F. Supp. 2d 435 (E.D.N.Y. 2003).
- ³⁹ See *N.Y. Const. Art. VIII, § 1* which prohibits local governments from giving or loaning money or property to aid any individual, or private corporation or association.
- ⁴⁰ Pursuant *Public Health Law § 301*, in cities with populations of less than 50,000 residents, the board of health is the mayor (who is the board's president) and six other persons, one of whom must be a competent physician who shall be appointed by the common council, upon the nomination of the mayor, and shall hold office for three years. Pursuant *Public Health Law § 302*, village boards of health are the village board of trustees and town boards of health are the town board.
- ⁴¹ *Public Health Law § 1305*.
- ⁴² See *Town of Woodbury v. Perrone*, 17 A.D.2d 662 (2d Dept. 1962) (the court required "substantial proof upon the issue" of whether "the only reasonable and practicable method of abating the nuisance" was the action taken by the municipality).
- ⁴³ *Public Health Law § 1306(1)*.
- ⁴⁴ *Public Health Law § 1307*.
- ⁴⁵ *Prosser and Keaton on Torts*, p. 618.
- ⁴⁶ Note that the New York State *Uniform Code*, and consequently, the State's *Property Maintenance Code* is updated every 3 years. The current version is the *2010 Property Maintenance Code of New York State*. The *Uniform Code* is not available via Lexis/Nexis or Westlaw, but is available online (in a format that is not user-friendly) at <http://publicecodes.cyberregs.com/st/ny/st/index.htm>.
- ⁴⁷ See *N.Y. Exec. Law § 381*; see also *N.Y. Comp. Codes R. & Regs. tit. 19, Part 1203*.
- ⁴⁸ *Property Maintenance Code § 101.2*.
- ⁴⁹ See *Conklin v. Ritter*, 285 A.D.2d 855 (3d Dept. 2001), aff'd. 97 N.Y.2d 712 (2002).
- ⁵⁰ See generally, *People v. Stover*, 12 N.Y.2d 462 (1963); *People v. Beecher*, 153 Misc.2d 247 (Valley Stream Justice Ct. 1992); 9 Op. Counsel SBEA No. 105 (1992) ("If a village orders an owner of property to remove offensive debris from the property and the owner fails to do so, the village may itself remove the debris and impose the cost on the parcel as a special assessment.").
- ⁵¹ See *N.Y. Exec. Law § 383*.

- ⁵² See *N.Y. Exec. Law* § 383 (“The provisions of this article and of the uniform fire prevention and building code shall supersede any other provision of a general, special or local law, ordinance, administrative code, rule or regulation inconsistent or in conflict therewith”)
- ⁵³ See generally, *McQuillin Mun Corp* §§ 24.65 and 24.68 (3d Ed).
- ⁵⁴ See *Archbishopric of the City of New York v. City of New York*, 82 A.D.2d 777, 778 (1981) *modified sub nom*, *Little Antigone Theatres, Inc. v. City of New York*, 56 N.Y.2d 686 (1982); see generally, *McQuillin Mun Corp* § 24.68 (3d Ed). See also *Buffalo v. Kellner*, 90 Misc. 407 (Sup. Ct Erie Co. 1915), *Gunning Sys. v. City of Buffalo*, 62 A.D. 497 (1901), and *Lawton v. Steele*, 119 N.Y. 226, 233 (1890).
- ⁵⁵ *McQuillin Mun Corp* § 24.68 (3d Ed).
- ⁵⁶ See *Shedrick v. Board of Health*, 204 Misc. 545 (Sup. Ct. Steuben Co. 1953). See also generally, *McQuillin Mun Corp* § 24.64 (3d Ed). Municipalities are empowered through their local boards of health to declare and summarily abate nuisances that threaten the public’s health. See Article 13 of the *Public Health Law*.
- ⁵⁷ See *City of Syracuse v. Hogan*, 234 N.Y. 457 (1923); *McQuillin Mun Corp* § 24.73 (3d Ed); *Greentree at Murray Hill Condominium v. Good Shepherd Episcopal Church*, 146 Misc.2d 500 (Sup. Ct. New York Co. 1989); see also *New York Trap Rock Corp. v. Clarkstown*, 299 N.Y. 77 (1949).
- ⁵⁸ *McQuillin Mun Corp* § 24.73 (3d Ed).
- ⁵⁹ See *Conte v. The City of New York*, 294 A.D.2d 109 (1st Dept. 2002) (A court order issued in an unsafe building proceeding barred a subsequent action for damages under the doctrines of collateral estoppel and res judicata).
- ⁶⁰ See *Newburgh v. Park Filling Station*, 273 A.D. 24 (2d Dept 1947).
- ⁶¹ See *Lawton*, 119 N.Y. at 236-7; see also *Hart v. Albany*, 9 Wend. 571 (1832) (“If this is a case in which the corporation or any other person had a right summarily to remove or abate this obstruction, then the objection that the appellants by this course of proceeding may be deprived of their property without due process of law or trial by jury, has no application. Formal legal proceedings and trial by jury, are not appropriate to, and have never been used in such cases.”).
- ⁶² *Lawton*, 119 N.Y. at 233.
- ⁶³ See *Mt. Pleasant v. Van Tassell*, 7 Misc.2d 643 (Sup. Ct. Westchester Co. 1957).
- ⁶⁴ *McQuillin Mun Corp* § 24.65 (3d Ed).
- ⁶⁵ *Id.*
- ⁶⁶ *Shedrick*, 204 Misc. at 547; see also *Oneida v. Kennedy*, 734 N.Y.S.2d 402 (Sup. Ct. Oneida Co. 2001).
- ⁶⁷ See *Babcock v. Buffalo*, 56 N.Y. 268 (1874); see also, *Archbishopric of the City of New York*, 82 A.D.2d 777 (1981).
- ⁶⁸ See *New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985); see also *Woodbury v. Perrone*, 17 A.D.2d 662 (2d Dept. 1962).
- ⁶⁹ See *Application of Barkin*, 189 Misc. 358 (Sup. Ct. Queens Co. 1947); see also *McQuillin Mun Corp* § 24.79 (3d Ed).
- ⁷⁰ See *Application of the Village of Suffern*, 12 A.D.2d 769 (2d Dept. 1961); *300 West 154th St. Realty Co. v. Dept. of Buildings*, 26 N.Y.2d 538 (1970) (“Occasions may arise requiring abatement of a nuisance without any prior notice to those otherwise charged with the duty to abate, when the giving of notice is not feasible. Reasonable notice must be given, wherever possible, however, to provide a landlord, or other party, opportunity to abate the nuisance not created by him or of which he may not have, and could not have, actual notice by reason of control or operation, in a manner causing the least disruption to the premises and minimizing the costs which he must bear ultimately.”).
- ⁷¹ See Article 65 of *N.Y. C.P.L.R.*
- ⁷² 91 N.Y. 2d 382 (1998).
- ⁷³ See also *Town of Islip v. Caviglia*, 73 N.Y.2d 544 (1989).
- ⁷⁴ *Stringfellow's* at 397 (“[I]t is apparent from the amendments' legislative history that ameliorating the negative social consequences of proliferating adult uses was the City's only goal”).
- ⁷⁵ *Stringfellow's* at 405.
- ⁷⁶ See *Lawton*, 119 N.Y. at 236-7; see also *Hart v. Albany*, 9 Wend. 571 (1832).
- ⁷⁷ See *Stringfellow's* at 401; see also *Town of Woodbury v. Perrone*, 17 A.D.2d 662 (2d Dept. 1962)
- ⁷⁸ www.justice.gov/crt/about/hce/rliupaexplain.php.
- ⁷⁹ See *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 674 (10th Cir. 2006) (the court noted that “the Church is thus clearly barred from engaging in any activity that could become a nuisance to the neighborhood”).
- ⁸⁰ *Northridge Church v. Charter Twp. of Plymouth*, 647 F.3d 606, 617 (6th Cir. 2011).
- ⁸¹ See *Fortress Bible Church v. Feiner*, 734 F. Supp. 2d 409, 519 (S.D.N.Y. 2010) *aff'd*, 694 F.3d 208 (2d Cir. 2012) (A town’s denial of a Church application partly on the grounds that the proposed structure would create a public nuisance which endangers the safety of children was unsupported).
- ⁸² *Barr v. City of Sinton*, 295 S.W.3d 287, 307 (Tex. 2009).
- ⁸³ *Merced v. Kasson*, 577 F.3d 578, 592 (5th Cir. 2009)
- ⁸⁴ The legislation (A.10741(Farrell)/S.8159(Flanagan)) was introduced in the Assembly and the Senate on June 17, 2016 and, after a Message of Necessity was issued, passed the same day.
- ⁸⁵ Part Q of Chapter 73 of the Laws of 2016 becomes effective 180 days after it is enacted. Because Chapter 73 was signed into law on June 23, 2016, the effective date is December 20, 2016.

86 Although not defined in the law, “prospectively” is believed to mean that the duty to inspect, secure, and maintain property
will only apply to property that becomes mortgage delinquent after the law’s effective date.

87 RPAPL § 1308(1).

88 RPAPL § 1308(2).

89 RPAPL § 1308(3).

90 RPAPL § 1305(a) defines “residential real property” as “real property located in this state improved by any building or
structure that is or may be used, in whole or in part, as the home or residence of one or more persons, and shall include any
building or structure used for both residential and commercial purposes.”

91 Note that RPAPL § 1309(2) requires plaintiffs in mortgage foreclosure proceedings seeking to take advantage of the expedited
foreclosure process to prove, by a preponderance of the evidence, that the property is abandoned. A court order finding that
the property is abandoned is not required to trigger the servicer’s maintenance obligations.

92 Each inspection must be conducted 25 to 35 days apart and at different times of the day.

93 Excluding §§ 302.2, 302.6, 302.8.

94 The Property Maintenance Code can be accessed online at [http://codes.iccsafe.org/app/book/toc/2015/I-
Codes/NY/2015_IPMC_HTML/index.html](http://codes.iccsafe.org/app/book/toc/2015/I-Codes/NY/2015_IPMC_HTML/index.html).

95 The law does not define what constitutes “other appropriate state or local governmental entity.”

96 This term is not defined.

97 RPAPL § 1309(2)(d).

98 RPAPL § 1308(5).

99 Excluding §§ 302.2, 302.6 and 302.8.

100 RPAPL § 1308(7).

101 RPAPL § 1308(8)(c).

102 Or within 21 days of when the lender, assignee or mortgage loan servicer should have learned.

103 N.Y. Const. Art. IX § 2(c)(10); N.Y. General City Law § 20(35); 74 Op Atty Gen 258.

104 See *Berncolors-Poughkeepsie v. Poughkeepsie*, 96 A.D.2d 595 (2nd Dep’t 1983).

105 *McComb v. Greenville*, 160 A.D.2d 779 (2d Dep’t 1990).

106 General City Law § 20(35).

107 74 Op Atty Gen 258.

108 *Lane v. City of Mount Vernon*, 38 N.Y.2d 344 (1976).

109 General City Law § 20(35)(g).C

110 See *Berncolors-Poughkeepsie*, 96 A.D.2d 595.

111 General Municipal Law § 78-b.

112 See Multiple Residence Law § 305, Multiple Dwelling Law § 309, & Public Health Law § 1303.

113 NYCRR Title 9, § 1153.1(a)

114 See, for example, *Charles v. Diamond*, 41 N.Y.2d 318 (1977).

115 *Id.* at 324.

116 See *Sumkin v. Babylon*, 238 A.D.2d 430 (2d Dep’t 1997); 9 Op. Counsel SBEA No. 105 (1992).

117 Executive Law § 382. Remedies

1. In addition to and not in limitation of any power otherwise granted by law, every local government and its authorized
agents shall have the power to order in writing the remedying of any condition found to exist in, on or about any building
in violation of the Uniform Fire Prevention & Building Code and to issue appearance tickets for violations of the *Uniform
Code*.
2. Any person, having been served, either personally or by registered or certified mail, with an order to remedy any condition
found to exist in, on, or about any building in violation of the Uniform Fire Prevention & Building Code, who shall fail to
comply with such order within the time fixed by the regulations promulgated by the secretary pursuant to subdivision one
of section three hundred eighty-one of this article, such time period to be stated in the order, and any owner, builder,
architect, tenant, contractor, subcontractor, construction superintendent or their agents or any other person taking part or
assisting in the construction of any building who shall knowingly violate any of the applicable provisions of the *Uniform
Code* or any lawful order of a local government, a county or the secretary made thereunder regarding standards for
construction, maintenance, or fire protection equipment and systems, shall be punishable by a fine of not more than one
thousand dollars per day of violation, or imprisonment not exceeding one year, or both.
3. Where the construction or use of a building is in violation of any provision of the *Uniform Code* or any lawful order
obtained thereunder, a justice of the supreme court at a special term in the judicial district in which the building is located,
may order the removal of the building or an abatement of the condition in violation of such provisions. An application for
such relief may be made by the secretary, an appropriate municipal officer, or any other person aggrieved by the violation.

118 Municipal Home Rule Law § 10(4)(b).

119 *Id.*

120 Committee on Open Government, FOIL-Advisory Opinion 12201. See also FOIL-AOs 11036 (If the personal information
was not given with an expectation of privacy, such as the signing of a petition, the personal information must be disclosed) &

10982. Opinions of the Committee on Open Government are available on the internet at <http://www.dos.state.ny.us/coog/coogwww.html>
- 121 *Sokolov v. Village of Freeport*, 52 N.Y.2d 341 (1981). See also *Camara v. San Francisco*, 387 U.S. 523 (1967) & *See v. City of Seattle*, 387 U.S. 541 (1967).
- 122 While Town Law § 138 grants building inspectors “the right to enter and inspect at any time any building, structure, or premises and to perform any other act necessary for the enforcement of such codes, ordinances, rules or regulations, or any of them,” there is no analogous statutory provision for cities or villages.
- 123 See *People v. Siler*, 197 A.D.2d 842 (4t Dept. 1993); *People v. Coppin*, 202 A.D.2d 279 (1st Dept. 1994).
- 124 540 U.S. 366, 371 (2003) (quoting *Illinois v. Gates*, 462 U.S. 213, 235 (1983)).
- 125 *Donovan v. Briggs*, 250 F. Supp. 2d 242, 253 (W.D.N.Y. 2003).
- 126 387 U.S. 523 (1967).
- 127 387 U.S. 541 (1967),
- 128 *City of Seattle v. McCready*, 123 Wash. 2d 260, 267 (1994).
- 129 *Sokolov v. Village of Freeport*, 52 N.Y.2d 341 (1981).
- 130 *Sokolov* at 348.
- 131 *Application of City of N.Y.*, 141 Misc. 2d 756, 759 (Sup. Ct. 1988).
- 132 *Id.* at 761–62.
- 133 See *People v. Siler*, 197 A.D.2d 842 (4t Dept. 1993); *People v. Coppin*, 202 A.D.2d 279 (1st Dept. 1994).
- 134 Criminal Procedure Law § 690.20.
- 135 See Criminal Procedure Law § 690.25; see also *Property Under the Control of John Kun*, 190 Misc.2d 470 (Greene Co. Ct. 2002) (citing Op. Atty. Gen. 85-71 or 85-10).
- 136 The term “administrative” is used to describe actions taken by the municipality in its regulatory capacity (such as the issuing of a building permit, a Notice of Violation or a Stop Work Order, or the abating of a property maintenance conditions by local government officials), as compared to “judicial” or “legislative activities.
- 137 Executive Law § 382 specifically authorizes local governments and their authorized agents to issue Notices of Violation.
- 138 As Terry Rice notes in the Practice Commentaries to Village Law § 7-714, “Institution of an action in one forum does not constitute an election of remedies and a village simultaneously may maintain an injunctive action in Supreme Court and a prosecution in justice court.”¹³⁸
- 139 See Executive Law § 382(2).
- 140 *Id.*
- 141 See Criminal Procedure Law § 30.30.
- 142 See Criminal Procedure Law § 100.05
- 143 See the Practice Commentaries to McKinney’s Criminal Procedure Law § 130.40, by Peter Preiser, who also notes that State’s previous criminal procedure provisions made failure to appear in response to a summons a contempt which was punishable by a fine. However, that provision was dropped from the current Criminal Procedure Law provisions.
- 144 Criminal Procedure Law § 150.40 was amended by Chapter 415 of the Laws of 2004, which was signed by the governor on August 24, 2004. The law took effect immediately.
- 145 For purposes of Civil Practice Law and Rules § 308, “actual place of business” means any location that the defendant, through regular solicitation or advertisement, has held out as its place of business.
- 146 Criminal Procedure Law § 600.10.
- 147 See *People v. Eica Const. Corp.*, 85 Misc.2d 1026 (District Ct. of Suffolk Co., 3d District, 1975).
- 148 Business Corporation Law § 304.
- 149 See *People v. New York Paving, Inc.*, 155 Misc.2d 934 (N.Y. City Crim. Ct., Queens Co., 1992) & *People v. Sage Realty Corp.*, 155 Misc.2d 832 (N.Y. City Crim. Ct., New York Co., 1992).
- 150 See County Law § 700(1).
- 151 See Op. Atty. Gen. 90-8, 92-34, & 89-25.
- 152 Executive Law § 382(3) provides in part:
 Where the construction or use of a building is in violation of any provision of the *Uniform Code* or any lawful order obtained thereunder, a justice of the supreme court at a special term in the judicial district in which the building is located, may order the removal of the building or an abatement of the condition in violation of such provisions.
- 153 Municipal Home Rule Law § 10(4)(b).
- 154 *Nebbia v New York*, 291 U.S. 502 (1934); 1974 Op. Att’y Gen. [Inf.] 258.
- 155 1974 Op. Att’y Gen. [Inf.] 258.
- 156 *Id.*, and cases cited therein.
- 157 See, for example, *McComb v. Greenville* 160 A.D.2d 779 (3d Dep’t 1990) (due process requires notice and opportunity to be heard prior to entry onto property to secure or demolish building); *Scott v. Duanesburg*, 176 A.D.2d 989 (3d Dep’t 1991); *Yax v. Evans*, 41 A.D.2d 232 (4th Dep’t 1973); 1980 Op. St. Compt. #80-66; *But see Sunkin v. Babylon*, 238 A.D.2d 430 (2d Dep’t 1997) (Failure to conduct hearing prior to removal of debris did not deprive petitioner of due process).
- 158 For procedural safeguards designed to protect a property owner’s substantive and procedural due process rights, see Town Law §130(16) (due process safeguards which must be included in town unsafe buildings ordinances).

¹⁵⁹ *Scott v. Duanesburg*, 176 A.D.2d 989, 991 (3d Dep't 1991).

¹⁶⁰ *Belle Harbor Realty v. Kerr*, 35 N.Y.2d 507 (1974).

¹⁶¹ See *Luedeke v. Village of New Paltz*, 63 F.Supp. 2d 215 (N.D.N.Y. 1999) (Property owner assessed for municipal costs for removing snow from sidewalk abutting his property entitled to notice and hearing prior to placement of charges on tax bill).

¹⁶² Local Finance Law § 11 (12-a).

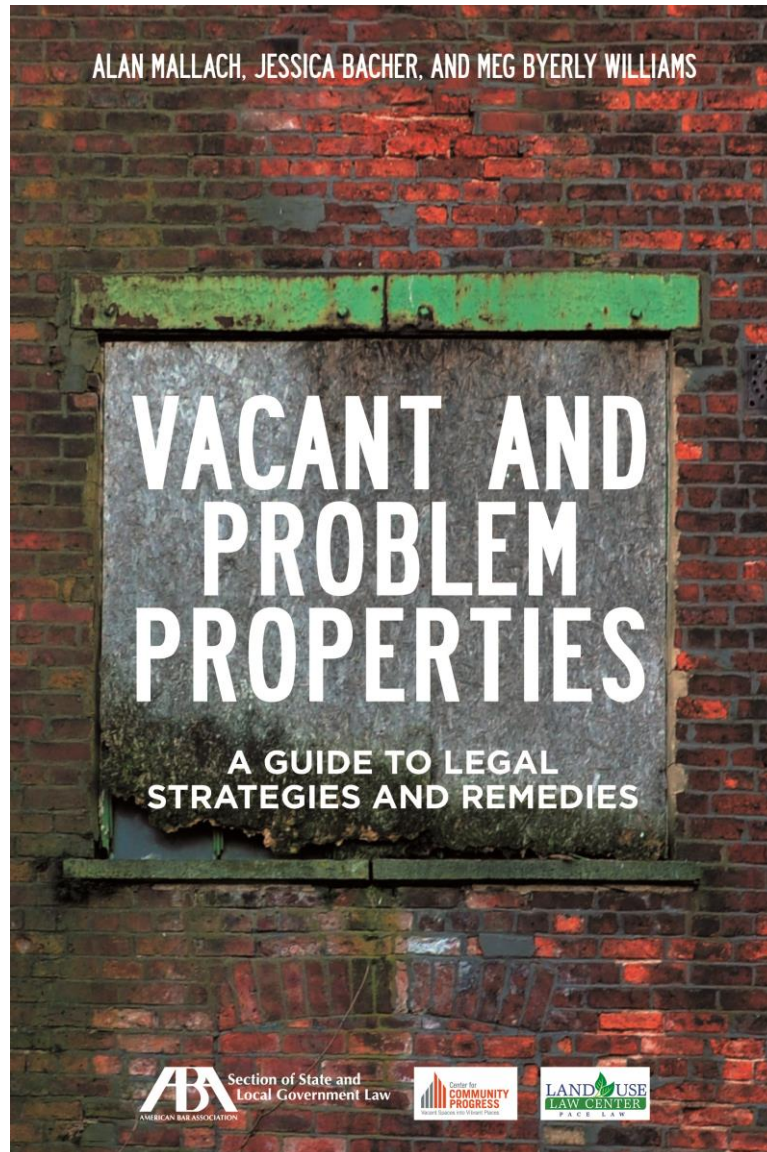
¹⁶³ In the case of a dwelling subject to the provisions of section three hundred twenty-five of the multiple dwelling law, such mailing may be made to the last registered owner at his last registered address.

¹⁶⁴ *Cuffy v City of New York*, 69 N.Y.2d 255 (1987).

¹⁶⁵ See *O'Brien v. Carven Associates, Inc.*, 146 A.D.2d 614 (2d Dep't 1989); see also *Jaramillo v. Callen Realty*, 200 A.D.2d 425 (1st Dep't 1994), leave to appeal denied, 84 N.Y.2d 801 (1994), and *Smullen v. City of New York*, 28 N.Y.2d 66 (1971).

¹⁶⁶ *Broncati v. City of White Plains*, 6 A.D.3d 476 (2d Dep't 2004) (City was not held liable for failing to enforce its own code, even though it issued and renewed a permit to build a construction barricade which obstructed more sidewalk than was permitted by the city's code because there was no "special relationship" with an injured pedestrian).

¹⁶⁷ See *Garrett v. Holiday Inns, Inc.*, 58 N.Y.2d 253 (1983).



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Chapter 2

Creating the Framework in Local Government for Action on Problem Properties

Karen Black

I. Introduction: Understanding the State Legal Context

Local governments have been on the frontlines of the fight to improve real estate property conditions. Over the years, many local leaders have felt that they arrived at the fight underfunded, under-armed, and wholly unprepared to address the vast number of problem properties within their borders. As a result, for many communities, derelict properties became just another part of the landscape. After decades of taking a constrained, bureaucratic set of actions where private owners failed to care for their properties, however, local governments are now proactively expanding and diversifying their tools to address vacant and occupied problem properties and creating a comprehensive legal framework to enforce property condition standards.

This chapter explores the legal frameworks that states and local governments are collaboratively creating to address problem properties. To establish these frameworks, many states and municipalities are reforming and modernizing three long-standing tools—tax foreclosure, eminent domain, and code enforcement—and adopting new targeted tools to incentivize or compel owners to maintain their properties.

The additional tools discussed in this chapter include laws that require identification and registration of owners and properties, make code compliance and tax payments a prerequisite to obtaining government services, open up estates to take properties out of ownership limbo, create personal owner liability for property condition, police buyers' actions after the purchase of a property with code violations, increase government's ability to transfer problem properties to responsible new owners, and provide financial assistance to property owners.

Local governments have also made a concerted effort to collect the data they need to understand the different types of problem properties in their neighborhood markets, to identify the owners of these properties, and to prioritize for aggressive action those properties that impose the most significant financial and emotional costs on the community. This data is critical to inform government investments and to create broad public support for collaborative action on problem properties.

This chapter discusses the state legal context, policies, and legal actions taken at the local level to address problem properties and the preparatory work needed to gain community support and gather the information needed to effectively apply these tools. The chapter concludes with a case study of how Pennsylvania has passed new laws to address problem properties and how local governments are innovatively applying these new tools.

A. The Basis of Local Government Legal Authority

State law gives local governments the authority to enforce property condition standards under their police powers. While strong private property rights are a hallmark of American law, Federal and state law has repeatedly given local government the highest level of control over the use of land within its borders and the ability to use this power to enforce acceptable property conditions. Courts have consistently held that vacant and poorly maintained buildings have a profound adverse effect, both emotional and financial, on the well-being of the communities in which they are located and that regulating their appearance falls squarely within

the city's power to act in furtherance of the general welfare.¹ As a result, the courts have recognized municipalities' broad authority to enforce restrictions on property uses and condition and to compel owners to correct blighting conditions.²

That said, municipalities remain, in the classic formulation, "creatures of the state," and state-enabling legislation is typically needed to give local governments the legal authority to adopt new legal tools to regulate property condition. As a result, even cities with strong home-rule powers, such as New Orleans and Detroit, have created new partnerships with state legislators. Some states, such as Pennsylvania, have passed multiple new laws authorizing local governments to create a more comprehensive legal framework to hold property owners to a set of basic property care standards. (See the case study at the end of this chapter.)

1. Public purpose under the police power dictates that "[i]t is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled." *Berman v. Parker*, 348 U.S. 26 (1954). Many other jurisdictions have adopted anti-blight ordinances in recognition of the obvious harms of urban blight, and a number of jurisdictions have upheld the constitutionality of land use ordinances that seek to reduce urban blight. *See, e.g.,* *Pierczyk Straska Farm v. Town of Rocky Hill*, No. CV 155016838, 2016 WL 673490, at *2 (Conn. Super. Ct. Jan. 27, 2016) (upholding enforcement of citation under ordinance that required correction of blighting factors in building and recognizing its constitutionality); *Donnelly Advertising Corp. of Md. v. Baltimore*, 370 A.2d 1127, 1133 (Md. 1977) (upholding constitutionality of ordinance that eliminated billboards where billboards inhibited homeowners from moving into neighborhood); *Kenefick v. Battle Creek*, 774 N.W.2d 925, 928 (Mich. Ct. App. 2009) (upholding constitutionality of ordinance requiring owners of vacant buildings to pay a fee); *Adjile, Inc. v. City of Wilmington*, No. Civ. A. 04A-02-001WCC, 2004 WL 2827893, at *3 (Del. Super. Ct. Nov. 30, 2004) (same and noting that "[v]acant buildings, . . . without proper care, can be not only a nuisance and blight on the effort to vitalize the City, but a haven for crime and a community eyesore").

2. For example, the Pennsylvania Supreme Court in *Best v. Zoning Bd. of Adjustment of City of Pittsburgh*, 141 A.2d 606, 612–13 (Pa. 1958) states, "preservation of property values is a legitimate consideration since anything that tends to destroy property values of the inhabitants of the [community] necessarily adversely affects the prosperity, and therefore the general welfare, of the entire [community]."

Local Governments' Power to Inspect Rental, Owner-Occupied, and Vacant Properties Varies Significantly

Rental: Renting properties is a form of commerce, and state powers to regulate are expansive. Subject to provisions of state law, local governments can require regular inspections and can offer tenants the power to withhold rent or take other action where the conditions in their rented homes are unsafe or unhealthy. The tenants, not landlords, have a privacy interest in rented homes, and the tenants may consent to a search of their homes and the common areas. Many jurisdictions rely upon tenant complaints to trigger an inspection. See Chapter 4 for a detailed discussion of rental housing regulation.

Owner Occupied: Local governments' ability to regulate owner-occupied housing is far more limited, as owners have a reasonable expectation of privacy in their privately owned homes. In most circumstances, a local government must obtain a search warrant to enter the house. Inspectors may not need a warrant, however, where violations are visible on the exterior of a property from a public thoroughfare. As a result, in many jurisdictions, code enforcement is limited to exterior code violations that may be inspected without a warrant and that have the greatest impact on surrounding property values.

Vacant and Abandoned: Local governments' authority to inspect vacant properties is the most expansive. Municipalities widely require owners of vacant and abandoned properties to board and secure their structures and maintain the exterior of the property. Where the owner violates the codes, nuisance ordinances typically allow the local government to enter the property to maintain the grounds and secure abandoned buildings. These laws also may permit the municipality to clean or demolish the building where it poses a health and safety risk and to recover costs from the owner or place liens on the property equal to the costs of these actions.

B. Traditional Legal Tools

States have historically used three long-standing tools to address problem properties. Since World War II, the most common laws that local governments apply to problem properties are tax foreclosure, eminent domain, and code enforcement. These laws, as written, do not provide local governments with the flexible tools they need to address problem properties effectively. They were created in a different era, for a different purpose, based upon assumptions that no longer apply—for example, that no owner would voluntarily abandon a property because real estate has intrinsic value.

Foreclosure laws were designed to ensure governments recovered unpaid taxes and mandated sale of the foreclosed property without ensuring the capacity of the high bidder at a tax sale auction to repair and reactivate the foreclosed property. (See Chapter 6 for more on tax foreclosure.) Eminent domain laws were created to give governments the ability to condemn or “take” properties for public use, with a focus on properties or neighborhoods that are “substandard” or “blighted.” Too often, the definition of blight was used to “declare certain real estate dangerous to the future of the city” and to displace residents of color rather than to improve property condition.³

Finally, while state laws typically established new agencies or authorities with dedicated budgets to enforce tax foreclosure (county tax sale bureaus) and eminent domain (redevelopment authorities), code enforcement was added as an ancillary responsibility of local governments without dedicated funding. Typically, the codes that local governments enforced to regulate the health and safety of dwellings and structures were scattered among several local laws, including those that regulate construction and health, and were rarely updated until the 1990s, when most states passed enabling legislation to adopt statewide codes or allow local governments to adopt model codes.

3. Wendell E. Pritchett, *The “Public Menace” of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 *YALE L. & POL’Y REV.* Issue 1, Art. 2 (2003), <http://digitalcommons.law.yale.edu/ylpr/vol21/iss1/2>.

II. Emerging Frameworks and Legal Tools

Local governments need to build a sturdy and flexible legal framework of tools to address problem properties effectively. There is no magic bullet to enforce or incentivize property maintenance standards. Each tool offers a different approach with varying costs and risks. To define the approach for a particular property, local governments must frame the most effective approach for the specific set of circumstances. Local governments should consider factors such as the type of violation at issue, the financial capacity of the owner, the seriousness of the violation, the prospects for voluntary compliance, and the need to remediate the violation quickly, as well as cost recovery goals. As discussed in Chapters 4 and 5 with respect to rental housing and vacant properties, respectively, some tools will be more effective in specific types of neighborhood markets.

A. Requirements That Owners Maintain Property to Specific Standards

1. The Affirmative Responsibility of Owners to Maintain and Care for Their Properties

At a minimum, local governments must have a law in place that requires property owners to maintain their properties to clear standards. Although their origins lie far earlier, use of municipal housing codes to establish threshold standards became widespread in the 1960s and 1970s. Many localities today rely upon the adoption of the *International Property Maintenance Code* (IPMC) that was first issued in 1998 to regulate minimum maintenance standards for existing buildings.⁴ The IPMC provides municipalities with an up-to-date code with clear health and safety requirements for existing buildings, structures, and property. It prohibits common blighting influences, such as the accumulation of trash, high weeds, and derelict vehicles. Cities can

4. INTERNATIONAL PROPERTY MAINTENANCE CODE (ICC 2015), <https://codes.iccsafe.org/public/document/toc/551/>.

pay for enforcement through the collection of licenses and fines established under the code.

While many states mandate that municipalities use a standard statewide code (which is often the IPMC), some jurisdictions prefer to pass local ordinances that require properties and structures to be maintained in a safe and healthy condition on the basis of local codes rather than adopt a model code. A local ordinance can set out the jurisdiction's standards for property maintenance and the authority to inspect private property, as well as impose fees, fines, and penalties for failure to meet the law's requirements. The critical ingredients for an effective ordinance are clear standards; detailed contact information for the owner; and a consistent, predictable enforcement process with graduated fines. In many states, the fees a municipality sets must, by law, be linked to the actual cost of enforcing the regulations, including salaries and benefits for inspectors' time.⁵

2. Using Data to Further Strategic Code Enforcement

Data-based or strategic code enforcement mandates regular inspection of the exterior of every property, regardless of whether a specific complaint has been filed with government, and both the exterior and interior of rental properties. The goal is uniform enforcement of clear standards. An initial inspection of each property creates the basis for a database to be maintained and updated by local government that provides critical information about the condition and use of each property. Data-driven code enforcement, rather than complaint-driven code enforcement, allows for better regulatory oversight of private properties and better use of small staffs. It offers fairer enforcement and a more effective approach to improve property conditions across a neighborhood or municipality. Converting to data-based enforcement can

5. Minneapolis has had to prove in court that its registration fee does not exceed the cost of maintaining a building. The county district courts released unpublished opinions. *Steven Meldahl v. City of Minneapolis*, Hennepin County District Court, File No. 27-CV-11-24739 (Nov. 25, 2013), <https://mn.gov/law-library-stat/archive/ctapun/1311/opa130275-112513.pdf>.

also provide critical data needed to enlist broad support for an aggressive strategy toward remediating problem properties. For a detailed discussion of how to establish a database and implement a strategic enforcement model, read Chapter 3.

3. Quality-of-Life Ticketing

Quality-of-life ticketing is a relatively low-cost method to address code violations as part of a systematic code enforcement process. The goal of quality-of-life ticketing is to eliminate unsightly conditions on the exteriors of properties—such as high weeds and grass, trash, abandoned vehicles, appliances, or furniture that violate specific requirements of the property maintenance code or local ordinance. When code inspectors find a property violation, they issue a courtesy notice to the property owner in the form of a ticket or door hanger notice, along with a deadline for corrective action. Rather than citations that are enforceable by the courts and require a hearing, the violations are treated like parking tickets—fines and actions to correct the violations are due immediately. Several Pennsylvania jurisdictions have adopted quality-of-life ticketing because of its relatively low cost and high response rate.⁶ When the owner refuses to fix the condition or pay the fine, however, a citation is issued and the matter lands in court. A quality-of-life ticketing ordinance is designed to streamline the process of punishing violators, freeing up both the magisterial court system and municipal code officials, and ensuring that revenue from fines goes to the local government. The ordinance also makes the process of paying a fine quicker and less expensive for owners and may identify small code violations at a point in time when they can be corrected at low cost.

6. KAREN BLACK, *FROM BLIGHT TO BRIGHT: A COMPREHENSIVE TOOLKIT FOR PENNSYLVANIA* 12-3 (2014), http://www.may8consulting.com/pub_22.html.

B. Tools to Identify and Motivate Property Owners

1. Registration and Licensing

Laws that require registration and licensing ensure owner identification and finance proactive efforts to keep properties up to code. A critical challenge in addressing a problem property is identifying the owner. Property transfer or sale reporting requirements can compel an owner to include a primary address, social security number, or employer identification number and other information sufficient to allow for easy identification, but many do not. Local governments can update their forms to require information adequate to find the owner decades later or may adopt license and registration laws.⁷ Laws that require vacant, foreclosed, and rental property owners to register their properties seek to help local governments identify owners, track property condition, and finance proactive efforts to ensure the properties remain up to code. These registration or licensing laws, discussed in detail in Chapters 4 and 5, typically require an owner to register the property, pay an annual fee to cover the costs of inspections and complaint response, and, if from outside the immediate area, designate a local agent responsible for maintaining the property. Some laws require the owner to obtain liability insurance and to file an action plan for reuse after some period of vacancy.⁸ The fees for these programs vary considerably, but most fees increase over time. The court has upheld Minneapolis's annual fee of over \$6,000 for registration of vacant properties.⁹

7. In many cities, a significant number of low-value residential properties are transferred informally without recording the transfer of deed with local government. Later in this chapter we discuss the need to establish quiet title to these properties to allow the owners of these homes to qualify for loans and grants to maintain their properties.

8. San Diego requires a statement of intent by owners of abandoned properties that proposes a rehabilitation plan and timeline to return properties to productive use per San Diego Municipal Code § 54.0315. The statement of intent form is available at <https://www.sandiego.gov/sites/default/files/legacy/ced/pdf/intent.pdf>.

9. The Minneapolis fee has survived several court challenges. In *DRB No. 24, LLC v. City of Minneapolis*, 774 F.3d 1185 (2014), the U.S. Court of Appeals

III. Making Access to Discretionary Services Conditional on Compliance with Codes and Tax Obligations

Laws that require owners to be current on taxes and code compliant as a prerequisite to obtaining access to discretionary government services can be a cost-effective approach. Moving a private owner from a policy of ignoring code violations to negotiating a timeframe to bring a property up to code demands new tools. Investor owners or heir owners of properties with limited value may not see a financial upside to making repairs to their properties. Some states have authorized a series of tools to gain owners' attention and motivate them to maintain their properties. Some of the most cost effective of these tools require an owner to be current on taxes and code compliant in order to take advantage of a government service. In these situations, the owners present themselves to local governments because there is something that they want, so there are few costs to locate or motivate owners to take action. Jurisdictions may require owners of properties to pay their taxes or fix substantial code violations before being allowed to bid at tax lien auctions, obtain building permits for other properties, and even raise rents if they fail to register or maintain their properties to acceptable health and safety standards.¹⁰ New York City courts refuse to allow the eviction of tenants from unregistered rental properties.

A. Moving Properties out of Ownership Limbo

Local governments are unable to hold owners responsible for their properties where the identity of a legal owner is unclear. Sometimes a lack of a legal owner occurs because of a lender

for the Eighth Circuit upheld the registration fee. This case is available at <http://caselaw.findlaw.com/us-8th-circuit/1687818.html>.

10. See 53 PA. CONS. STAT. Ch. 61 (2010) (Pennsylvania municipalities may deny permits to property owners with code violations); Lynn Thompson, *Landlords Blocked from Raising Rents on Seattle Apartments with Safety Violations*, SEATTLE TIMES, June 6, 2016 (Seattle prohibits landlords from raising rent on an apartment with health and safety violations).

failing to complete the foreclosure process.¹¹ Where such properties become vacant, two states, New York and New Jersey, have passed laws requiring the lender initiating the process to take responsibility for maintaining the property.¹²

More commonly, an owner dies intestate and no one opens probate, or a property has been passed down to an heir without the transfer noted on official government records. Where a lender leaves a property in limbo, jurisdictions that mandate the registration of foreclosed properties have held lenders responsible for the care of the property.¹³ Where homeowners have died and a family member occupies the property without legal ownership, jurisdictions have worked with legal nonprofit organizations to establish free quiet title programs. Laws that open up estates or take properties out of limbo can reactivate properties where ownership is unclear. Some states and local governments have established new protocols to address properties in ownership limbo. Where the property remains vacant long term and there is no owner of record, states such as Pennsylvania give authority to their redevelopment authorities to open probate and administer the estate.¹⁴

B. Establishing Personal Owner Liability

Local government authorities are adding in personam penalties that hold owners directly responsible for code violations to traditional in rem penalties that hold the property responsible for substandard conditions. Where an action in personam is successful, the judgment follows the person, rather than sticking to

11. Joanne Huist Smith, *Many Owners of Abandoned Homes Escape Responsibility*, DAYTON DAILY NEWS, June 30, 2012, <http://www.daytondailynews.com/news/local/many-owners-abandoned-homes-escape-responsibility/mIxdOTe2Ov771iySkH1dM/>.

12. See Chapter 5, Section V for a further discussion of these statutes.

13. Andrew Khouri, *U.S. Bank to Pay L.A. \$13.5 Million over Foreclosed Homes That Fell into Disrepair*, L.A. TIMES, Sept. 29, 2016, <http://www.latimes.com/business/la-fi-feuer-foreclosure-settlement-20160929-snap-story.html>.

14. 20 PA. CONS. STAT. ANN. §§ 3155, 3311 (2006).

an individual parcel, and may be enforced against all the defendant's assets, real and personal. The actions taken to enforce the law are therefore expanded far beyond a judicial sale of the property. Florida statute section 162.09(3), for instance, states that "[a] certified copy of an order imposing a fine, or a fine plus repair costs, may be recorded in the public records and thereafter shall constitute a lien against the land on which the violation exists *and upon any other real or personal property owned by the violator*" (emphasis added). In Florida, a code enforcement lien recorded against one property will also be a lien on other properties in the same county that the violator owns and potentially on the violator's personal property. Other jurisdictions are treating failure to maintain a property as a criminal misdemeanor with penalties of prison time as well as fines. For example, the Cleveland Municipal Housing Court can sentence an owner convicted of a first-degree misdemeanor offense to 180 days in jail as well as a \$1,000 fine for each day a property remains in violation.¹⁵ Courts rarely impose criminal judgments and prison time for property code violations and for good reason, as locking up violators does not help them to repair their property and often alienates city leaders and members of the public.¹⁶ Other jurisdictions allow asset attachment for failure to keep a property in healthy and safe condition. Pennsylvania's Neighborhood Blight Reclamation and Revitalization Act gives municipalities the power to initiate an action against the owner of a blighted property and place a lien on the owner's assets—including the property cited, the owner's other real property, wages, and bank accounts—if the owner fails to take substantial steps to correct a "serious violation" within six months of a final court order.¹⁷

15. *Code Violation Cases*, CLEVELAND HOUSING CT., <http://clevelandhousingcourt.org/en-US/Code-Violation-Cases.aspx> (last visited July 4, 2018).

16. Lucy May & Dan Monk, *Should the Owner of This Evanston Home Go to Jail for Building Code Violations?*, WCPO CINCINNATI, May 17, 2017, <https://www.wcpo.com/news/insider/should-the-owner-of-this-evanston-home-go-to-jail-for-building-code-violations>.

17. 53 PA. CONS. STAT. Ch. 61 (2010).

C. Assistance to Low- and Moderate-Income Property Owners

Local governments are increasingly providing assistance to low- and moderate-income property owners who wish to comply with legal requirements but lack the financial capacity to repair their properties. Home repair programs are an important part of any code enforcement effort. Offering carrots as well as sticks to motivate owners makes good sense, as both types of tools are needed to achieve maximum compliance. In addition, having programs that provide assistance to senior and lower-income homeowners is often critical to obtaining broad community and political support for stricter code enforcement. No one wants seniors on fixed incomes to be displaced from their homes because they did not have sufficient money to make repairs. Home repair grants, loans, and deferred loans due upon sale or transfer are the most common financial assistance programs that local governments offer property owners.

1. Home Repair Grant Programs

Home repair grant programs are an important resource for low-income homeowners who do not have the financial capacity to repair their homes. A significant number of municipalities offer home repair grant programs, although demand for help tends to significantly exceed available funding. Many problem property owners—in particular, homeowners—would like to keep their property in a healthy, safe, and attractive state, but they do not have the money to make needed repairs. The threat of fines is not going to change that equation and may in fact cause an owner to walk away from a property. Studies over the last two decades have shown that where property owners do not have the resources to fix serious problems, such as cracks in the walls or holes in the roof, they are likely to abandon the homes in as little as five years in cities with low market values.¹⁸ A Temple University study found that providing small home repair grants to

18. BARBARA WILSON, *THESE OLD HOUSES: 2001* (2004), <https://www.census.gov/prod/2004pubs/h121-04-1.pdf>.

Philadelphia low-income homeowners significantly reduced the likelihood of abandonment even in neighborhoods with virtually no private property sales.¹⁹

2. Home Improvement Loan Programs

Home improvement loan programs offer a more sustainable option than grants, where the local government or lender requires the borrower to pay back the loan. Several jurisdictions offer loan programs to extend credit to homeowner households or small landlords who cannot obtain a home improvement loan on the traditional market. In 2015, Detroit launched a 0 percent interest loan program to provide loans to homeowners of \$5,000 to \$25,000 for home repair.²⁰ Cleveland Heights boasts a very effective loan guarantee program lead by the nonprofit Home Repair Resource Center, where the nonprofit has guaranteed over \$6 million in loans to homeowners who could not otherwise obtain loans. The Cleveland Heights Challenge Fund began with a \$160,000 loan reserve fund. The \$160,000 was not used to finance loans but rather to guarantee each loan that private lenders closed under the program in case of default. With a 6 percent default rate, the loan reserve fund has guaranteed \$6 million in private loans over the last 40 years.²¹ Philadelphia has a long-standing grant program for low-income homeowners and is adding a loan program for moderate-income homeowners who have low credit scores

19. RESEARCH FOR DEMOCRACY, *BLIGHT FREE PHILADELPHIA: A PUBLIC-PRIVATE STRATEGY TO CREATE AND ENHANCE NEIGHBORHOOD VALUE* (2001), <https://astro.temple.edu/~ashlay/blight.pdf> (reporting that of the almost 12,000 houses that received grants from 1995 to 2000, only 117 were found to have been abandoned by 2000).

20. 0% INTEREST HOME REPAIR LOANS, <http://www.detroitshomeloans.org/> (last visited July 4, 2018).

21. CENTER FOR COMMUNITY PROGRESS CODE ENFORCEMENT ACADEMY, *IMPROVING THE NEIGHBORHOOD FABRIC—EFFECTIVE AND EQUITABLE REGULATORY STRATEGIES FOR OWNER OCCUPIED PROPERTIES* (2015), http://www.communityprogress.net/filebin/Improving_the_Neighborhood_Fabric_Effective_and_Equitable.pdf; interview with Benjamin D. Faller, Executive Director, Home Repair Resource Center (Sept. 28, 2015).

that make it difficult to obtain a home improvement loan.²² Other cities offer deferred loans due upon sale or transfer of the house.²³ Most of the deferred loans are forgivable, often if the owner remains in the house five years or more. Finally, cities such as Baltimore and Buffalo offer home purchase assistance to reactivate vacant properties as owner-occupied primary residences.²⁴

D. Receivership and Nuisance Abatement

Local government, and in some cases individuals or nonprofits, can petition for receivership or nuisance abatement, including a plan for cost recovery, where an owner fails to maintain a property after repeated citations and judgments for code violations.

Receivership offers the opportunity to improve a property and recover costs without taking ownership. Receivership offers local governments (and in many states individuals, businesses, and nonprofits as well) a court-supervised method to enter onto a property, complete the improvements needed to make it safe, and recover costs through the sale or rental of the property. Receivership is a particularly appealing tool for local governments that do not want to become even temporary owners of a property. The receiver typically has the power to borrow money

22. Joe Leonard, *City Council Introduces Home-Repair Loan Bill*, PLAN-PHILLY, Oct. 13, 2017, <http://planphilly.com/articles/2017/10/13/city-council-introduces-home-repair-loan-bill>.

23. See *Homebuyer & Homeowner Resources*, CITY OF SAINT PAUL, MINNESOTA, <https://www.stpaul.gov/departments/planning-economic-development/housing/housing-property/homebuyer-homeowner-resources> (last visited July 4, 2018) (describing the city of Saint Paul's CityLiving Program Home Improvement Deferred Payment Loans, 0 percent interest deferred loans funded by Community Development Block Grant (CDBG) funds and secured by a mortgage; the loan is forgiven after 30 years of ownership and occupancy); *Baltimore City Deferred Loan Program*, LIVE BALTIMORE, <https://livebaltimore.com/financial-incentives/details/baltimore-city-deferred-loan-program/#.WjVjslQ-dPU> (last visited July 4, 2018) (deferred loans funded with CDBG dollars with interest rates from 0 to 3 percent).

24. BHIP, BALTIMORE HOMEOWNERSHIP INCENTIVE PROGRAMS (2015), https://mcd.baltimorecity.gov/sites/default/files/homeownership_incentives.pdf; *Urban Homestead Program*, CITY OF BUFFALO, NY, <https://www.buffalony.gov/306/Urban-Homestead-Program> (last visited July 4, 2018).

against the value of the property to finance repairs and improvements, purchase materials needed for rehabilitation, take over existing leases and enter into new leases, receive public grants or loans, and sell the property with clear and marketable title. A receiver often has priority status over other lien holders so that the receiver can recover the cost of the improvements made. (Read more about receivership in Chapter 6.)

Nuisance abatement laws permit local governments to make improvements to a problem property to address health and safety issues that negatively impact its neighbors. Nuisance abatement laws similarly permit a local government to trespass onto private property to abate a public nuisance without needing to become owners or transfer ownership. A nuisance is defined differently in state laws, but it is basically a condition or use of a property that interferes with neighbors' use or enjoyment of their property or that endangers life, health, or safety. In New Jersey, under the Abandoned Property Rehabilitation Act, abandoned properties are presumed to be nuisances because of their "negative effects on nearby properties and the residents or users of those properties."²⁵ In most states, the law authorizes local governments to use their police powers to enter onto the property and correct nuisance conditions. In Michigan, community-driven nuisance abatement is authorized by laws allowing individuals or nonprofits to bring a nuisance case from property identification to filing suit.²⁶ Like receivership, the government, individual, or nonprofit can abate a nuisance without taking title or ownership of the property. Unlike receivership, money invested in the property may prove difficult to recover.

25. New Jersey authorizes nuisance abatement under the general powers of municipal governments at N.J. STAT. ANN. §§ 40:48-2.3 to -2.12. The presumption that abandoned properties are nuisances is included in the Abandoned Property Rehabilitation Act, P.L. 2003, c.210 (codified at N.J. STAT. ANN. §§ 55:19-78 to -107).

26. MICHIGAN MUNICIPAL LEAGUE, COMMUNITY DRIVEN NUISANCE ABATEMENT (2013), <http://placemaking.mml.org/wp-content/uploads/2013/06/casestudy-cdna.pdf>.

E. Using Existing Tools to Transfer Properties to Responsible New Owners

Virtually every jurisdiction has a handful of nonresponsive owners who will not bring their dilapidated vacant properties up to code. Where those owners also fail to pay taxes, foreclosure laws allow the locality to offer the property or a lien on the property to an investor, who pays the municipality the taxes due. Where the owner pays taxes but will not invest in the property for whatever reason, eminent domain may be the only option to transfer the property to a new, responsible owner. Eminent domain is controversial and costly and therefore is typically the method of last resort.

1. Using Tax Foreclosure to Sell Tax-Delinquent Property to a Responsible New Owner

Local governments in some states, where the states have amended tax foreclosure laws, can transfer tax delinquent properties to responsible owners through tax foreclosure disposition and land bank laws. All states have laws that allow or require local governments to sell liens on properties to investors if the owner fails to pay property taxes or other municipal charges, including code violation penalties.

Many state laws, however, do not allow municipalities to be selective in whom they sell liens to, or to retain the liens themselves for purposes of gaining control over problem properties. For the purposes of addressing problem properties, it is essential that tax foreclosure laws and procedures allow municipalities to pay attention to the capacity and intention of the new owner. Studies have repeatedly shown that auctioning off foreclosed properties to unprepared, irresponsible, or unscrupulous owners means that the properties will result in continued poor condition, and many will return to auction for delinquent taxes.²⁷

27. Cary Spivak & Kevin Crowe, *As Fines Pile Up, Problem Landlords Buy More Homes with Cash—and Neighborhoods Pay the Price*, J. SENTINEL Aug. 22, 2016, <http://archive.jsonline.com/watchdog/watchdogreports/as-fines-pile-up-problem-landlords-buy-more-homes-with-cash--and-neighbor>

Reforming foreclosure laws to move from selling a property to the highest bidder to selling the property to the bidder with capacity and intent to reactivate the property requires local governments that have become dependent upon the auction proceeds to forgo immediate revenue in exchange for much larger tax revenue gains over time.²⁸

A growing number of states have enacted reforms to foreclosure laws to match foreclosure laws with modern land use realities. Most commonly, states restrict purchasers to responsible property owners, create mechanisms to police buyer behavior following the sale, and reduce lengthy owner redemption periods (see the Pennsylvania case study at the end of this chapter for an example). Michigan is often credited with pioneering the modernization of tax foreclosure laws in the late 1990s to control the transfer of thousands of low-value foreclosed properties to responsible new owners.²⁹ Michigan allows municipalities to package properties for sale to a land bank as an alternative to sale to the highest bidder. Other states have prohibited or discouraged the sale of properties to bidders with tax delinquency or code violations on their properties.³⁰ Chapter 7 discusses land banks and their power to acquire properties and transfer these properties to responsible owners for priority uses. Some states

hoods-pay-the-price-b996788-376768471.html. For example, a recent study by the Maggie Walker Community Land Trust found that of 46 properties auctioned off in the Church Hill neighborhood of Richmond, Virginia, 39 remained vacant and unproductive. Bob Adams & Laura Lafayette, *Richmond Needs a Land Bank to Fight Blight*, RICHMOND TIMES-DISPATCH, Nov. 11, 2017, http://www.richmond.com/opinion/their-opinion/guest-columnists/bob-adams-and-laura-lafayette-richmond-needs-a-land-bank/article_333ad311-ba57-527d-ad84-26be81a9acc9.html.

28. Ian Duncan, *Baltimore Official Says Proposed Overhaul for Handling Tax Debts Would Be Too Costly*, BALTIMORE SUN, Sept. 29, 2017, <http://www.baltimoresun.com/news/maryland/baltimore-city/bs-md-ci-tax-sale-task-force-20170929-story.html>.

29. NATALIE PRUETT, *CATCH OR RELEASE? AN ANALYSIS OF RESIDENTIAL TAX-FORECLOSURE CONVEYANCE IN FLINT, MICHIGAN, BETWEEN 2008 AND 2015* (2016), http://www.communityprogress.net/filebin/Center_for_Community_Progress_Catch_or_Release_FINAL.pdf.

30. *Id.*

place specific requirements on buyers of foreclosed properties to bring them up to code within a specified period of time.³¹ Other states have shortened the often-lengthy redemption periods during which owners may pay off their tax debt with interest and reclaim their property with respect to vacant properties, thus providing greater certainty to the buyer and limiting the time that properties sit unmaintained after sale.³²

2. Eminent Domain

Eminent domain is often the tool of last resort but may motivate a nonresponsive owner to repair or sell a problem property. Acquisition by eminent domain is costly and controversial, so it is used strategically and sparingly to address blighted properties. Blight is typically very broadly defined by states.³³ Notably, some states, such as Connecticut, do not define blight; Connecticut instead allows each of 169 local governments to maximum discretion to define and respond to blight differently.³⁴

While the use of eminent domain has been less expansive since legislation limiting its use in response to the 2005 decision in *Kelo vs. New London*,³⁵ it is still a critical tool to address critical properties with unresponsive owners. Many states explicitly provide for what is known as “spot condemnation,” which is the power of municipalities to use eminent domain to take individual blighted properties for reuse, as distinct from the more

31. In Pennsylvania, the Municipal Code and Compliance Act, Act 99 of 2000 (codified at 68 PA. CONS. STAT. §§ 1081–1083), requires purchasers of properties that have known code violations to resolve the violations within 18 months (structures) or 12 months (lots) of purchase. An owner is personally liable for any violations and faces fines ranging from \$1,000 to \$10,000.

32. Thomas B. Langhorne, *Blighted Houses Can Be Kept out of Tax Sale in '16*, EVANSVILLE COURIER & PRESS, Dec. 5, 2015, <http://archive.courierpress.com/news/who-owns-that/blighted-houses-can-be-kept-out-of-tax-sale-in-16-2560c71d-251d-5482-e053-0100007f0e27-360692131.html>.

33. *What Constitutes “Blighted Area” within Urban Renewal and Redevelopment Statutes*, 45 A.L.R.3d 1096 (1974).

34. CONN. GEN. STAT. ANN. § 7-148 (West 2019).

35. *Kelo v. City of New London*, 545 U.S. 469 (2005).

widespread use of eminent domain for redevelopment of larger areas subject to a redevelopment plan.

In jurisdictions such as Cumberland County, Pennsylvania, the threat of eminent domain has proved very effective for encouraging owners to fix or sell their properties. In Cumberland County, the process to condemn a property takes 12 to 18 months from initial identification and requires multiple notices to the owner. Between 2000 and 2008, municipalities referred more than 100 vacant properties to the Redevelopment Authority of Cumberland County for condemnation, and in 95 percent of the cases, the owner fixed or sold the property. Only five properties were taken through the entire eminent domain process and condemned. Between 2008 and 2013, 20 eminent domain actions were brought and only four properties were formally condemned.³⁶

IV. Developing Local Policies

A. Engaging the Community: Building Support for Action on Problem Properties

The support of leaders in both government and the communities impacted by dilapidated properties is critical to effective enforcement of building condition standards. An important starting point is to convince these key stakeholders that local government needs to confront the challenge of privately owned problem properties, the status quo is not an option, and market forces will not be riding in to save the municipality—in fact, gaining control of blight is a prerequisite in many cases for attracting market interest.

Throughout the country, local governments and nonprofits have calculated the direct and indirect costs of privately owned problem properties on local government. These studies show

36. *Condemnation: Condemning Properties Using Blighted Property Review Committee*, PA BLIGHT LIBRARY, <http://www.pablightlibrary.com/condemn-properties-using-blighted-property-review-committee/> (last visited July 5, 2018).

that local governments pay millions of dollars to respond to crimes, fires, vermin complaints, and code violations on problem properties. In addition, there are many governments that secure vacant buildings, mow lawns, and remove trash at taxpayer expense. Vacant and blighted properties also cost municipalities millions or even billions of dollars in indirect costs because they lower property values and property tax revenue significantly.³⁷ Just as importantly, studies show that repairing problem properties improves health, safety, and quality of life for residents occupying those properties and those who live in surrounding properties.³⁸

Blight and problem properties are a solvable challenge if there is political will to address them. By understanding the costs government is already paying to address blight and the unlikelihood that it will disappear without proactive and aggressive action, localities can make the need to address problem properties using all available legal tools more tangible to neighbors, nearby business owners, anchor institutions, and government leaders.

37. See DAN IMMERGLUCK, *THE COST OF VACANT AND BLIGHTED PROPERTIES IN ATLANTA: A CONSERVATIVE ANALYSIS OF SERVICE AND SPILLOVER COSTS* (2016), <http://www.secureviewusa.com/files/news/atlantacostofvacantandblightedimmergluckfinal02.17.16.pdf>; ECONSULT CORP. ET AL., *VACANT LAND MANAGEMENT IN PHILADELPHIA: THE COST OF THE CURRENT SYSTEM AND THE BENEFITS OF REFORM* (2010), http://may8consulting.com/publications/Vacant_Land_Reform-REPORT.pdf; STEEL VALLEY COUNCIL OF GOVERNMENTS ET AL., *FINANCIAL IMPACT OF BLIGHT ON THE TRI-COG COMMUNITIES* (2013), https://housingalliancepa.org/wp-content/uploads/2014/01/FinancialImpactofBlightonTriCG_FullReport.pdf.

38. Charles C. Branas et al., *Vacant Properties and Violence in Neighborhoods*, 2012 ISRN PUB. HEALTH (2012), <https://www.hindawi.com/journals/isrn/2012/246142/>; Eugenia C. Garvin et al., *Greening Vacant Lots to Reduce Violent Crime: A Randomized Controlled Trial*, 19 INJURY PREVENTION 198 (2013), <https://injuryprevention.bmj.com/content/19/3/198>; Eugenia Garvin et al., *More Than Just an Eyesore: Local Insights and Solutions on Vacant Land and Urban Health*, 90 J. URB. HEALTH 412 (2013), <https://link.springer.com/article/10.1007%2Fs11524-012-9782-7>; Charles C. Branas et al., *A Difference-in-Differences Analysis of Health, Safety, and Greening Vacant Urban Space*, 174 AM. J. EPIDEMIOLOGY 1296 (2011), <https://academic.oup.com/aje/article/174/11/1296/111352>.

B. Gathering Information

Local governments are strategically using data to guide investments to improve the condition of problem properties. Creating a single database that identifies the features and locations of problem properties gives local governments new ways to understand and approach the challenge.

Government records are the foundation of a property database. Most jurisdictions begin by merging property ownership and tax delinquency records with local code enforcement records. Where jurisdictions require owners of rental, vacant, or foreclosed properties to register or obtain a license for the rental of these properties, this information should be added as well. All building permits should similarly be added so it is clear if the owner is taking steps to improve the property.

Next the local government can add common data proxies for vacancy such as water shutoffs or U.S. Postal Service vacancy data. A detailed physical survey of property conditions by city staff or volunteers is extraordinarily helpful. In addition, every interaction with a problem property by government or the courts should be added routinely to the database along with a photograph documenting the condition of the property on each occasion when there is some contact.

Police and fire data should be part of the database. The fire and police departments should begin to note whether properties that are the locations for illegal activity or fires are vacant or occupied with a quick summary of their condition. Just knowing that the fire or police departments have been called to an address on several occasions is invaluable at identifying a problem property. Neighboring community members are also a very important source for information about problem properties. Whenever the city sends planners or other staff into the community, spending a few moments asking which properties negatively impact the health and safety of a block or neighborhood will help to round out the picture.

The municipality can use the database to prioritize and target problem properties, to choose the most appropriate tool or strategy to incentivize or compel the owner to remediate the code

violations, to enforce registration and permit laws, and to make a strong case before a judge as to why action is needed to bring a property up to code. The data can also be used to create a better understanding of the number and types of violations in each area of the city, the most common violations in each area, and the owners of multiple properties with code violations.

C. Bringing Stakeholders Together: Creating a Shared Action Plan

In most jurisdictions, there is no one person or department with the necessary information and authority to effectively tackle problem properties. Fire and police respond to a property without knowing whether it is vacant or occupied. Tax sale bodies put tax-delinquent properties for sale without understanding how they are zoned or what the city plan envisions for the future use of that property. As a result, all stakeholders go about their responsibilities without understanding the full picture or working together to draw a new future. There are many key stakeholders who need to be brought to the table to address problem properties systematically and effectively. State and local legislators are critical to enacting new tools or amending existing ones. Police and fire departments know the location of problem properties that represent the greatest risk to city residents. Judges and prosecutors are critical to include in conversations because they must enforce the law against nonresponsive owners. Local government departments in charge of planning, community and economic development, zoning, inspections and permitting, public works, and health all play a role. The public school districts also can be critical participants in the conversation surrounding problem properties, as they are often required to waive delinquent taxes to return properties to the tax rolls.

Creating shared goals and priorities for addressing problem properties, assigning responsibilities, and agreeing to a timeline for action are essential to tackling problem properties. Targeting the properties that have the highest negative impact on the community and using the most effective available tools to address fewer than ten properties is often the best starting point. Focusing

limited resources on the worst of the worst focuses all stakeholders and allows for early wins. Using a collaborative approach makes high-impact change more politically feasible and allows all stakeholders to take credit for tangible changes to the community landscape.

V. A Pennsylvania Case Study

Pennsylvania has reformed existing laws and passed new laws to strengthen local governments' legal framework.

A. Pennsylvania Modernized Its State Laws to Expand Authority to Address Problem Properties

Pennsylvania has added a significant number of legally authorized tools to expand local governments' power to improve the condition of problem properties.³⁹ The Housing Alliance of Pennsylvania, an effective state-wide nonprofit, lead a very successful anti-blight agenda that advocated for many of these changes to law from 2003 to 2016. The Housing Alliance began to form its blight-fighting agenda in 2003 with the publication of "Reclaiming Abandoned Pennsylvania." The publication, written by the author of this chapter, laid out a comprehensive legislative agenda of state-level actions that, if adopted, would make it faster, easier, and cheaper for local communities to address blight. Two additional publications proposed more detailed recommendations, and today many of these recommendations have become a reality.⁴⁰

39. These tools are described in significant detail in a technical manual produced for the Housing Alliance of Pennsylvania called *Blight to Bright: A Comprehensive Toolkit for Pennsylvania*, first published in 2014. As the author of the manual, I have taken the liberty of summarizing significant portions of the manual in this chapter.

40. BLACK, *supra* note 6; KAREN BLACK, FROM LIABILITY TO VIABILITY: RECLAIMING ABANDONED PENNSYLVANIA II, HOUSING ALLIANCE OF PENNSYLVANIA (2004), http://may8consulting.com/pub_05.html; KAREN BLACK, RECLAIMING ABANDONED PENNSYLVANIA (2003), http://may8consulting.com/pub_03.html.

1. Faced with 300,000 Vacant Properties, Pennsylvania Passed Laws to Modernize Its Tax Foreclosure Laws to More Effectively Return Foreclosed Properties to the Tax Rolls

In 1998, the state amended its real estate tax sale law⁴¹ to allow tax claim bureaus to disqualify buyers of properties at tax sales where the buyer is delinquent, has outstanding code violations, or has a rental license revoked by a municipality in the same county.⁴² In 2004 the state passed two laws to streamline the foreclosure process for tax-delinquent vacant properties. The state eliminated the redemption period for vacant properties sold at tax sales and gave county governments the power to foreclose on multiple tax-delinquent vacant properties through a single petition filing. In 2015, the state amended its real estate tax sale law to give a county tax claim bureau the power to incur and recover certain costs of property maintenance and rehabilitation for properties exposed to, but not sold at, tax sales. For the first time, the law gives the tax claim bureau the power to recover the cost of rehabilitation or maintenance necessary to address safety issues from the subsequent sale of a property.⁴³

2. Three Laws in 2006 Allowed Credit Bureaus to Report Tax Debt, Owners to Donate Properties in Lieu of Taxes, and Redevelopment Authorities to Force a Vacant Property into Probate

The legislature passed three more small “fixes” to address recurring challenges faced by local governments seeking to reactivate vacant and abandoned properties in 2006. First, Pennsylvania

41. Act 5 of 1998 (codified as amended at 72 PA. CONS. STAT. § 5860.619).

42. Act 133 of 1998 (codified as amended at 72 PA. CONS. STAT. § 5860.619a); *In Re Upset Tax Sale of September 11, 2009, Country Acres v. Wayne County Tax Claim Bureau*, Commonwealth Court of Pennsylvania (opinion not reported), January 5, 2012.

43. Real Estate Tax Law—Additional Costs for Rehabilitation and Maintenance, Act of Dec. 17, 2015, P.L. 448, No. 77, Session of 2015, No. 2015-77 (codified as amended at 72 PA. CONS. STAT. § 5860.612-3 (2015)), <http://www.legis.state.pa.us/cfdocs/legis/li/uconsCheck.cfm?yr=2015&sessInd=0&act=77>.

passed a law to require municipalities to maintain information on tax delinquency by owners of vacant properties in a form that credit bureaus could easily access. Too often owners owed thousands of dollars, but this information did not impact their credit. The premise is that once tax debt is noted on a credit report, owners will be motivated to pay their tax debt to improve their credit. Also in 2006, the state passed laws to allow local governments to accept the donation of property in exchange for tax forgiveness and to allow redevelopment authorities to administer an estate where the owner has died and no one has stepped forward.⁴⁴ Rather than leave a property in limbo, under the state law, the redevelopment authority can file letters of administration to bring the estate to probate. The estate attorney's legal fees are included in the estate's liabilities and are among the highest-priority items paid out of the estate.

3. In 2008, Pennsylvania Conservatorship Law Authorized Receivership

In 2008, Pennsylvania passed a conservatorship law authorizing the courts to appoint a nearby neighbor, nonprofit organization, municipality, school district, or redevelopment authority as a receiver to make improvements to privately owned property.⁴⁵ This tool has been used extensively by nonprofits across the state. In 2014, the conservatorship law was amended to include vacant lots; increase the developer's fee; and give neighbors, businesses, and nonprofits who are located farther from the property the authority to file a petition for conservatorship.⁴⁶ *The*

44. Act 171 of 2006 (codified at 20 PA. CONS. STAT. ANN. §§ 3155, 3311 (2006)).

45. Abandoned and Blighted Property Conservatorship Act, Act of Nov. 26, 2008, P.L. 1672, No. 135. Cl. 68 (codified at 68 PA. CONS. STAT. Ch. 26).

46. *Id.*; Abandoned and Blighted Property Conservatorship Act—Initiation of Action, Appointment of Conservator, Powers and Duties of Conservator, Incurring Indebtedness and Sale of Property, Act of Oct. 22, 2014, P.L. 2557, No. 157, Session of 2014, No. 2014-157, <http://www.legis.state.pa.us/cfdocs/legis/li/uconsCheck.cfm?yr=2014&sessInd=0&act=157>.

Conservatorship Handbook offers extensive information and sample documents on using conservatorship to eliminate blight.⁴⁷

4. In 2010, Act 90 Gave Local Governments New Powers to Hold Owners Personally Liable for Problem Properties

In 2010, the Pennsylvania legislature passed the Neighborhood Blight Reclamation and Revitalization Act (Act 90) into law.⁴⁸ Act 90 gave local governments several new tools to deal with properties that have serious code violations. First, Act 90 allows municipalities to deny certain permits and licenses to property owners who have significant tax delinquencies or a judgment of serious code violations by a magistrate or judge anywhere in the commonwealth. A municipality may refuse to grant permits for real property including, but not limited to, building permits, occupancy permits, and exceptions to zoning ordinances. To identify property owners who have judgments of code violations, municipalities can search a magisterial court database.

Act 90 also gives municipalities the power to attach the assets of an owner of a property if the owner fails to take substantial steps to correct a serious violation within six months of a final court order.⁴⁹ By allowing jurisdictions to attach an owner's personal and real estate assets, including wages and bank accounts, the law provides a greater opportunity to recoup the costs of code enforcement, blight remediation, and demolition. To date, no municipality has completed asset attachment in Pennsylvania, but several have used a petition to the court to motivate a property owner to appear in court to defend his or her valued assets.

47. *Conservatorship Handbooks*, HOUSING ALLIANCE OF PA., <https://housingalliancepa.org/conservatorship-handbooks/> (last visited July 5, 2018).

48. 53 PA. CONS. STAT. Ch. 61 (2010), titled "Neighborhood Blight Reclamation and Revitalization," October 27, 2010, P.L.875, No. 90.

49. 53 PA. CONS. STAT. §§ 6111–12; see also CITY OF PHILADELPHIA, P.A., ADMIN. CODE § A-503; CITY OF PITTSBURGH, P.A., CODE § 1001.10(b); 53 PA. CONS. STAT. § 39133 (Third Class Cities Code); 53 PA. CONS. STAT. § 56519 (First Class Township Code); 53 PA. CONS. STAT. § 66517 (Second Class Township Code); 53 PA. CONS. STAT. § 46202(24) (Boroughs Code).

Note that the U.S. Supreme Court has held that property owners have a constitutional right to a notice and a hearing before their assets are attached.⁵⁰

In addition, Act 90 gives the court of common pleas the power to establish a housing court, provide “deteriorated property education and training for judges,” and create a related housing clinic to counsel code violators on their responsibilities and procedures to bring properties into code compliance. By providing training and assigning specialized judges to hear code enforcement actions in housing court, jurisdictions can more effectively obtain judicial judgments against nonresponsive owners. Much less successfully, Act 90 also attempted to give Pennsylvania municipalities the power to extradite property owners living in other states to face criminal prosecution for criminal property code violations. Given that the extradition process requires the governor of Pennsylvania to personally make a written request for criminal extradition to the governor of the other state and pay all the expenses to hold and transport the property owner, it has never been used to bring a property code violator to Pennsylvania.

5. In 2013, Pennsylvania Authorized the Creation of Land Banks

In 2013, Pennsylvania passed enabling legislation to allow any municipality with a population of 10,000 or more to establish a land bank.⁵¹ Smaller municipalities are allowed to join together to form a land bank. In the last four years, local governments have established 17 land banks whose purpose it is to convert vacant, abandoned, and tax-delinquent properties to productive use. The most attractive features of the land bank under Pennsylvania law are that it allows the land bank to obtain title to foreclosed properties through negotiated agreements without having to compete with other bidders at a tax sale and that it gives the land banks

50. *Connecticut v. Doehr*, 501 U.S. 1 (1991); *Sniadach v. Family Finance Corp. of Bay View*, 395 U.S. 337, 342 (1969).

51. Act of Oct. 24, 2012, P.L. 1239 No. 153 (codified at 68 PA. CONS. STAT. §§ 2101–20).

the ability to partially finance operations by sharing 50 percent of all tax revenue from its properties for up to five years.

6. In 2016, the State Strengthened Its Law Requiring Purchasers to Resolve Violations within 12 Months

Finally, the state dramatically amended a law in 2016 called the Municipal Code and Ordinance Compliance Act that requires purchasers of properties with known code violations to resolve the violations within 18 months (for structures) or 12 months (for lots) from purchase.⁵² The goal of the original law was to break the cycle of blight and ensure that a property becomes code compliant once it is transferred to a new owner, whether as part of a private sale or a tax sale.⁵³ Realtors, however, presented evidence that municipalities were inappropriately withholding or impeding use and occupancy certificates, leading to some real estate transactions being postponed or canceled due to minor property maintenance violations. The amendment requires local governments to provide a temporary use and occupancy permit where there are minor code violations and a temporary access certificate where there are substantial violations. The new owner has 12 months to bring the property into code compliance or demolish the building.

B. Local Governments Are Using Pennsylvania State Laws to Address Problem Properties in Innovative and Effective Ways

Pennsylvania has 2,561 municipalities, many of which are adopting innovative strategies to improve the condition of their occupied and vacant problem properties by aggressively, consistently,

52. 68 PA. CONS. STAT. Ch. 26; Act 133 of 2016, which took effect January 2, 2017, amends the Municipal Code and Ordinance Compliance Act, originally enacted as Act 99 of 2000. Act 133 of 2016 can be found at <http://www.legis.state.pa.us/cfdocs/legis/li/uconsCheck.cfm?yr=2016&sessInd=0&act=133>.

53. To use the law, a municipality must cite properties for substantial code violations and make the citations available to the public so that it is clear that buyers have at least “constructive knowledge” of the substantial violations at the time of sale.

and proactively using new tools available under Pennsylvania law. Most municipalities fund their efforts through code enforcement fees, fines, and penalties, although Mahanoy City adopted a small increase to its real estate tax in order to create a dedicated blight fund.⁵⁴

1. Philadelphia's Doors and Windows Program Used Act 90 Powers to Target Problem Properties and Lowered Crime, Increased Property Values, and Raised Tax Revenue

Philadelphia launched its Doors and Windows program in October 2011 using the powers authorized by Pennsylvania's Act 90. The program requires owners of vacant buildings on blocks with at least 80 percent occupancy that have a blighting influence on the surrounding community to install windows with frames and glazing on all window openings and operative doors on all door openings.⁵⁵ The fines for noncompliance are \$300 per opening per day. The program targeted owners of multiple blighted buildings. Under this program, the city collected almost \$1.1 million in fines and permit fees. The city achieved compliance rates of 53 percent for targeted properties through citations and 62 percent for properties taken to blight court. A 2014 study by the Reinvestment Fund found that properties that complied with citations from the city's Department of Licenses & Inspections created \$74 million in sales value for surrounding properties and increased the city's transfer tax revenue by \$2.34 million.⁵⁶ Another study by the University of Pennsylvania's Perelman School of Medicine

54. John Usalis, *Mahanoy City Raises Taxes 2 Mills for Blight*, REPUBLICAN HERALD Dec. 20, 2013, <http://republicanherald.com/news/mahanoy-city-raises-taxes-2-mills-for-blight-1.1604394>.

55. PHILADELPHIA, P.A., CODE § 4-PM-901.

56. WILLIAM PENN DATA COLLABORATIVE, CITY OF PHILADELPHIA LICENSES AND INSPECTIONS: ACT 90 ENFORCEMENT ANALYSIS 22 (2014), https://www.iccsafe.org/cs/MJC/Documents/TG-BlightedBuildings/TRF_Study.pdf; see also THE REINVESTMENT FUND, EXECUTIVE SUMMARY: STRATEGIC PROPERTY CODE ENFORCEMENT AND IMPACTS ON SURROUNDING MARKETS 2 (2014), https://www.reinvestment.com/wp-content/uploads/2015/12/Strategic_Property_Code_Enforcement-Presentation_2014.pdf.

found that the installation of working windows and doors in vacant buildings significantly reduced many categories of crime and violence near the buildings, including a 19 percent reduction in assaults, a 39 percent reduction in gun assaults, and a 16 percent reduction in nuisance crimes.⁵⁷

In 2015, the Commonwealth Court issued a per curiam opinion (McCullough, Hearthway, and Friedman) (2735 C.D. 2015) holding that the city lacked authority under the Pennsylvania Constitution to enact the Doors and Windows ordinance because the public purpose served was solely “aesthetic,” as its immediate effect was upon a property’s appearance and did not address the “safety risks posed by blight.” The court granted the Appellant’s Petition for Allowance of Appeal in its Order of July 6, 2017. The Pennsylvania Supreme Court decided an appeal of the lower court’s decision.⁵⁸ It determined that the lower court had erred and upheld the constitutionality of the ordinance as an exercise of the city’s police power and its “compelling interest in combatting blight.”

2. Allentown Took the Lead in Implementing Quality-of-Life Ticketing and Sweeps

Allentown, Pennsylvania, began using quality-of-life ticketing and conducting sweeps in neighborhoods and along commercial corridors to check for code violations and notify owners of violations. The goal of these efforts is to achieve code compliance, so owners were informed in advance about the sweeps and provided with a list of the most common violations to encourage them to make repairs before the date of the sweep. Between 2005 and 2011, the city issued more than 5,800 tickets for \$25 to \$100 in

57. Michelle C. Kondo et al., *Correction: A Difference-in-Differences Study of the Effects of a New Abandoned Building Remediation Strategy on Safety*, PLOS ONE 10(8): e0136595, <https://doi.org/10.1371/journal.pone.0136595>.

58. *City of Philadelphia v. Anthony Rufo and TR Getz*, No. 22 EAP 2017, Supreme Court of Pennsylvania Eastern District, <http://www.pacourts.us/assets/opinions/Supreme/out/Majority%20Opinion%20%20VacatedRemanded%20%2010369793442020332.pdf?cb=1>.

finances and achieved a 60 percent response rate. The remaining 40 percent of owners were brought to court.⁵⁹

3. Schuylkill County Established Eligibility Requirements for Tax Sale Bidders

Schuylkill County in the coal region of eastern Pennsylvania requires all bidders at tax sale to register and sign an affidavit that they are not delinquent in paying real estate taxes, have no municipal utility bills that are more than one year outstanding, and do not bid for or act as the agent for any landlord who has had his or her license revoked. Unfortunately, the requirement lacks teeth because the bureau does not have the resources to determine whether filers of affidavits are lying and because bidders who have substantial resources can bid under a different corporate name. At judicial sale, however, the bidder must have the approval of the municipality in which the property is located. Before repository or private sales, the bureau sends the municipality a letter noting the buyer and the municipality has 45 days to approve or deny sale to the high bidder at a public meeting for reasons that are not “frivolous.” Where the municipality rejects the high bidder, the property is either added to the next judicial sale or placed in the repository.⁶⁰

4. Johnstown Denies Permits to Owners with Serious Code Violations

The city of Johnstown was one of the first Pennsylvania municipalities to implement the provisions of Act 90. Johnstown checks whether owners have tax delinquencies or code violations as part of the permit review process. Johnstown has found that the threat of permit denial has motivated owners to correct their delinquencies or serious code violations so that they can obtain building, zoning, and occupancy permits.⁶¹

59. BLACK, *supra* note 6.

60. Interview with Deb Dasch, Schuylkill County Tax Claim Bureau (Aug. 14, 2013).

61. BLACK, *supra* note 6.

5. Wilksburg Opens Probate to Take Vacant Properties out of Ownership Limbo

Wilksburg Redevelopment Authority in Allegheny County used state powers to issue letters of administration and open probate on vacant properties. They have completed several estate administrations that transferred real estate to a new owner.

6. Philadelphia Is Making Significant Investments in Home Repair Grant and Loan Programs for Homeowners

Philadelphia is also making a significant investment in home repair grants and loans to bring its housing units up to code and prevent displacement. In 2017, Philadelphia's city council approved a \$100 million bond issue backed by a 0.1 percent increase in the real estate transfer tax rate to support homeowners and small landlords who need financial assistance to fix their housing. Of this investment, \$60 million will be used to finance grants to homeowners with incomes below 150 percent of the poverty line and \$40 million will be used to create a new low-interest loan program to serve moderate-income households that earn too much to qualify for a grant but are unable to obtain a loan on the private market. In Philadelphia, 31,447 homeowners applied for home improvement loans between 2012 and 2015. Lenders denied 62 percent of their applications primarily due to poor credit scores, as 50 percent of Philadelphians have credit scores below the 660 threshold that many lenders require of their borrowers.⁶² The details of the loan program are still to be decided, but it is hoped that private capital will be used to fund the loans and that the public money will guarantee those loans and provide wraparound services for the homeowner applicants.

62. *Time to Get Behind the Home Preservation Loan Program Ordinance*, HEALTHY ROWHOUSE PROJECT, <http://healthyrowhouse.org/time-to-get-behind-the-home-preservation-loan-program-ordinance/> (last visited July 8, 2018) (presenting testimony of Jill Roberts, Healthy Rowhouse Project Executive Director, in support of Bill 170878 to allow the issuance of a \$40 million bond to support a home repair loan program).

The Pennsylvania Legislature has enacted flexible and useful laws to make it easier for local governments to address problem properties. In Pennsylvania, as in most of the nation, local governments are proving that vacant and blighted properties are not a natural part of the landscape and are employing new strategies to hold owners accountable for property conditions.