

Doing Away With Demolition-by-Neglect

By Julia Miller

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ON THE COVER: The Lamar House in Oxford, Miss., has been restored as a teaching museum following years of neglect. Mississippi's only Supreme Court Justice, L.Q.C. Lamar, lived in this Oxford house from 1868 until 1888. The Oxford-Lafayette County Heritage Foundation purchased the house in 2003 and spearheaded the \$2 million rehabilitation project. Before photo courtesy of the Oxford-LaFayette County Heritage Foundation. After photo by KG Wiseman.

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In November 2009, the Chicago Department of Buildings declared the YWCA in the city's South Loop "imminently dangerous," paving the way for its current owners, 830 LLC, to demolish the 1895 building. Among the oldest of the structures composing the "Michigan Avenue Street-wall" and included in the city's Michigan Boulevard Historic District, the YWCA had been neglected for more than three decades while under the ownership of a major publishing company. Following an unsuccessful attempt by a local developer to convert the structure into condominiums, the YWCA was sold in 2008 to its current owner, who, in turn, obtained permission to demolish the building, notwithstanding its historic status.

While many Chicago preservationists reluctantly agreed that the building was too far gone to be salvaged, no doubt they also felt that more could have and should have been done to prevent the YWCA's ultimate fate. The building's dilapidated condition was no secret. Reportedly, the building, located on one of Chicago's most preeminent streets, had received multiple citations over the years from the building department for numerous code and safety violations. Why wasn't the inclusion of the property in a local historic district enough? After all, Chicago's historic preservation ordinance, one of the strongest in the country, protects against the demolition of historic resources. What is the loophole and how can it be closed?

Chicago's YWCA fell victim to a condition commonly referred to as "demolition-by-neglect." The building, following a pattern of long-term neglect, became so dilapidated that rehabilitation no longer proved to be a viable option and the building, ultimately, was demolished on public safety grounds. While no one "tried and true" solution exists to the prevention of demolition-by-neglect, a number of measures can be taken to help ensure that historic resources withstand the test of time. By requiring that routine maintenance and major repairs be made, routinely inspecting properties, adopting and utilizing demolition-by-neglect procedures, committing to a course of enforcement, and working closely with building department officials, properties deemed worthy of preservation should, in fact, be preserved over time.

The YWCA Building, located in Chicago's Michigan Boulevard Historic District was demolished in 2010 after more than 30 years of neglect.

Photo courtesy Landmarks Illinois



A victim of foreclosure, the 1905 Samuel J. Hewson House was included in the Preservation Alliance of Minnesota's 10 Most Endangered Historic Places list in 2010. The Alliance is looking for a purchaser for the vacant and vandalized property, located in the Whittier Neighborhood of Minneapolis.

Photo by Kate Scott, Black Box Images, courtesy of Preservation Alliance of Minnesota

This booklet explores each of these approaches in some detail. First, it looks at affirmative maintenance requirements and demolition-by-neglect procedures in historic preservation ordinances. Second, it looks at approaches that may be used to resolve maintenance problems and enforce violations under these laws as they arise. Finally, it examines the role of historic preservation boards in preventing the needless demolition of historic structures under laws designed to protect the public against unsafe buildings.

Although beyond the scope of this publication, it is important to keep in mind that non-regulatory solutions, even when regulatory measures are present, can be instrumental in protecting endangered resources. For example, the



role of historic preservation organizations and their efforts to protect poorly maintained historic properties should not be discounted. Each year, preservation organizations work tirelessly to find solutions to dilapidated resources featured on endangered lists, often with successful results. Large numbers of historic houses and main street buildings in aging communities have been rehabilitated through revolving fund and community investment fund programs. The adoption of new regulatory measures, such as neighborhood conservation districts, (see *Protecting Older Neighborhoods Through Neighborhood Conservation Districts*, National Trust for Historic Preservation, 2004) and tax programs, such as the Low Income Housing Tax Credit and New Markets Tax Credit, have also been instrumental in spurring community reinvestment and stabilizing older, historic neighborhoods.

REGULATORY APPROACHES TO THE PREVENTION OF DEMOLITION-BY-NEGLECT

Circumvention of the application of local preservation laws through demolition-by-neglect not only endangers historic resources, it also undermines the integrity of local historic preservation programs overall. Crumbling walls, leaky porches, sagging roofs, broken windows and doors, and peeling paint do little to further the cause of historic preservation.

By adopting, implementing, and enforcing regulations designed to ensure that properties are appropriately main-

tained, cities throughout the United States protect historic buildings from “demolition-by-neglect.” These laws—(1) affirmative maintenance and demolition-by-neglect provisions in historic preservation ordinances and (2) building codes and unsafe structure acts—enable governments to address maintenance problems proactively. They require that properties be kept in good repair and enable preservation commissions and building department officials to step in and ensure that properties are stabilized and repairs are made before a property becomes so run down that demolition becomes essential.

Affirmative Maintenance Requirements and Demolition-by-Neglect Procedures in Historic Preservation Laws

Once property is designated as a historic landmark or included in a local historic district, certain obligations fall on the property owner. While historic preservation ordinances do not require that properties be rehabilitated or restored, most do require that they be minimally maintained or kept in good repair. Moreover, a growing number of communities now include demolition-by-neglect procedures in their historic preservation programs. These procedures, typically established by amendment to a local preservation ordinance or code, help to close potential loopholes resulting from the failure to maintain historic properties up to minimum standards. If property owners can sidestep preservation laws by not maintaining

their properties, then historic properties will not be preserved notwithstanding the protections in place. These procedures also work to safeguard the public from neglected buildings and protect the investments of nearby property owners, who maintain and rehabilitate their own historic structures.

Affirmative Maintenance Requirements

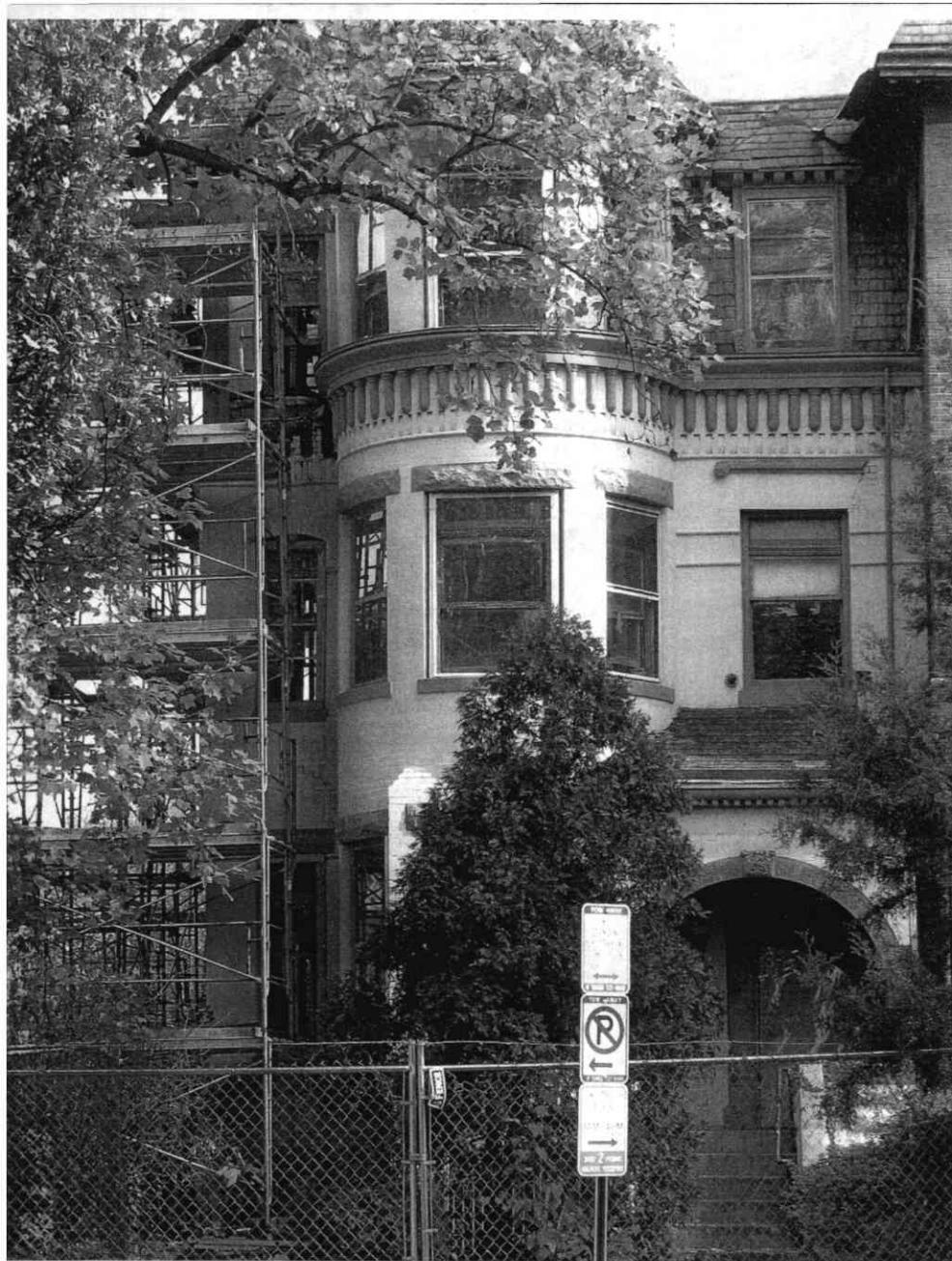
Prevention of demolition-by-neglect begins with the obligation to maintain one’s property. This duty to keep one’s property free from structural defects and to prevent decay and deterioration stems from the public’s specific interest in preserving its historic resources. If properties are not maintained, then the goal of protecting historic properties—as set forth in state and local laws—will not be met.

The ability to require that historic properties be affirmatively maintained rests on the inherent authority residing in states—referred to as the police power—to regulate, protect, or promote the public health, safety, morals, and general welfare. The leading historic preservation case on this issue continues to be *Maher v. City of New Orleans*, 516 F.2d 1051, 1066-67 (5th Cir. 1975), *cert. denied*, 426 U.S. 905 (1976), under which the federal appeals court upheld an affirmative maintenance requirement applicable to all structures within the historic Vieux Carré in New Orleans. In *Maher*, the court rejected the claim that the city lacked the necessary authority to require that a structure be maintained because it fell outside the police power. Instead, it concluded that “upkeep of buildings appears reasonably necessary to the accomplishment of the goals of the [Vieux Carré] ordinance.”

Because the police power is inherently a state-level authority, the power of local jurisdictions to specifically compel the maintenance of historic properties through historic preservation ordinances is dependent upon state delegations of its authority. In some cases, the authority to require affirmative maintenance or to prevent demolition-by-neglect may

ENSURING THAT HISTORIC RESOURCES WITHSTAND THE TEST OF TIME

- Require that properties are maintained and major repairs are made on a timely basis;
- Have a good monitoring system in place;
- Adopt and utilize demolition-by-neglect procedures;
- Commit to a course of enforcement; and
- Work closely with building department officials.



The District of Columbia evacuated residents after an interior wall of the 1890 building, located in the 16th Street Historic District, collapsed. The D.C. Department of Consumer and Regulatory Affairs reportedly spent more than \$200,000 to stabilize the structure, which the owner must repay with interest.

Photo by Ross Bradford

defects or problems that could lead to demolition-by-neglect. By doing so, they give property owners greater detail on the type of maintenance required. The list of defects can also be used to monitor the condition of the properties and seek enforcement when maintenance is lacking. For example, Portland, Maine's preservation ordinance states:

Portland, Maine

§ 14-690. Preservation of protected structures.

(a) Minimum maintenance requirement. All landmarks, and all contributing structures located in an historic district, shall be preserved against decay and deterioration by being kept free from the following structural defects by the owner and any other person or persons who may have legal custody and control thereof:

- (1) Deteriorated or inadequate foundation which jeopardizes its structural integrity;
- (2) Defective or deteriorated floor supports or any structural members of insufficient size to carry imposed loads with safety which jeopardize its structural integrity;
- (3) Members of walls, partitions or other vertical supports that split, lean, list or buckle due to defective material or deterioration which jeopardize its structural integrity;
- (4) Structural members of ceilings and roofs, or other horizontal structural members, which sag, split or buckle due to defective materials or deterioration or are of insufficient size to carry imposed loads with safety which jeopardize its structural integrity;
- (5) Fireplaces or chimneys which list, bulge or settle due to defective

be express. *See, e.g.*, N.C. Gen. Stat. § 160A-400.14(b) (authorizing any municipality to adopt an ordinance to prevent the demolition-by-neglect of any landmark or property within a historic district). In other states, that authority may be implied by broad grants of land-use authority or more generalized authority to regulate and protect historic properties.

Standard of Maintenance. While the level of maintenance required from place to place is generally consistent, the articulation of the standard of repair under historic preservation laws varies somewhat. Some cities, such as Philadelphia and New York, require that owners of historic resources keep their properties in "good repair." Philadelphia's ordinance, for example, states:

Philadelphia, Pa.

(c) The exterior of every historic building, structure and object and of every building, structure and object located within an historic district shall be kept in good repair as shall the interior portions of such buildings, structures and objects, neglect of which may cause or tend to cause the exterior to deteriorate, decay, become damaged or otherwise fall into a state of disrepair. *Philadelphia Code 14-2007(8).*

This standard, because of its breadth, provides sufficient flexibility to ensure that the widest range of potential defects come within the ordinance's protections.

An increasing number of jurisdictions, however, identify the types of

INSPECTION CHECKLIST

Inspection checklists should be tailored to the specific maintenance requirements in your community's preservation ordinances and the types of resources being monitored. Here are some examples of items that might be included in an inspection checklist.

- Are there any dead trees or limbs on the site that are reasonably capable of causing injury to the property or a person?
- Are the exterior grounds free of excessive weeds, rubbish, garbage, junk, or refuse?
- Is there evidence of heaving, settling or cracking of sidewalks, steps, or pathways?
- If the structure is vacant, is it securely closed so as to prevent unauthorized entry? Is there ineffective waterproofing of exterior walls, roofs, and foundations, including broken windows or doors?
- Are the exterior walls and roof coverings in need of paint or other protective covering?
- Are clapboards or shingles loose or deteriorated?
- Is masonry cracked, missing, or deteriorated? Is the exterior plaster or mortar deteriorated or crumbling?
- Are walls plumb without bulges or depressions? Do the walls or chimneys lean, sag, split, list, or buckle?
- Is the foundation deteriorated, cracked, or otherwise inadequate?
- Are roof shingles curling, cracked, or missing?
- Does the roof ridge sag?
- Do doors and windows fit frames squarely? Are they in good repair and operable condition?
- Are the exterior stairs, steps, balconies, porches, handrails, shutters, cornices, entablatures, wall facings, and other architectural features in sound condition? Is there evidence of delamination, instability, loss of shape and form, or crumbling?
- Are there signs of rotting, holes, insect damage, or other forms of decay or destruction?
- Does the wood appear spongy or brittle on window sills, framing sills, beams, or posts?
- Is there any sign of rot from leaks on the roof decking, fascia, or overhangs?
- Are the gutters intact? Are parts broken, disconnected or partially missing? Is there evidence of rusting?
- Are downspouts loose, damaged, or missing? Are they connected to underground drains or splashblocks?
- Are fences, gates, and accessory buildings in reasonable repair?
- Any evidence of deterioration of interior flooring or floor supports, roof supports, or other horizontal members that causes leaning, sagging, splitting, listing, or buckling?

material or deterioration or are of insufficient size or strength to carry imposed loads with safety which jeopardize its structural integrity; (6) Lack of weather protection which jeopardizes the structural integrity of the walls, roofs or foundation.

Portland Code of Ordinances, Ch. 14, Div. 10.

The obligation to affirmatively maintain a historic resource should include the duty to comply with all applicable laws and codes and require maintenance of interior portions of a structure to the extent necessary to prevent deterioration of a building's exterior. San Francisco's preservation ordinance, for example, states:

San Francisco, Calif.

The owner, lessee or other person in actual charge of a landmark, or of a structure in an historic district, shall comply with all applicable codes, laws and regulations governing the maintenance of the property. It is the intent of this Section to preserve from deliberate or inadvertent neglect the exterior portions of such landmark or structure, the interior portions thereof when subject to control as specified in the designating ordinance, and all interior portions thereof whose maintenance is necessary to prevent deterioration and decay of any exterior portion.

San Francisco Planning Code, Art. 10, § 1008.

Note that imposition of interior maintenance requirements is legally permissible even where a local preservation board's jurisdiction to regulate changes to properties is limited to the exterior of the structure. The requirement to keep the interior of a structure free from structural defects stems from a duty to maintain a structure rather than design-related issues.

Monitoring Systems. Commissions have found that one of the most successful ways to prevent demolition-by-neglect is to establish a monitoring system. Property owners are more likely to maintain their properties when they

know that someone is watching. Moreover, by keeping track of the condition of properties over time, commission staff can prod property owners into compliance on an ongoing basis. In the event that serious problems arise, the commission will have the necessary documentation to initiate formal proceedings against the property owner.

Ideally, monitoring systems should include “baseline documentation” for landmarked and historic-districted properties and inspection checklists. Baseline documentation is the official record of the property’s character-defining features at the time of designation. It may include pictures and a narrative description of the condition of the property and specific features. Inspection checklists document the condition of the property over a period of time and identify whether specific code or maintenance requirements have been violated.

That being said, many preservation commissions (including those in New York City, Philadelphia, and Raleigh) inspect properties only in response to specific complaints, rather than proactively. Because of limited resources, commissions lack the ability to regularly monitor the condition of properties and must rely on complaints filed by nonprofit organizations and others. Once a complaint is filed, a commission or staff member will be sent out to inspect the property and determine whether and how to respond.

Through effective partnering with neighborhood organizations, preservation commissions can monitor problem properties, develop a list of priority cases, and keep neighborhoods informed of legal developments. Raleigh, N.C., for example, uses the following protocol, in addressing demolition-by-neglect complaints:

Raleigh, N.C., Demolition-by-Neglect Triage Procedure

1. Neighborhood identifies deteriorated properties.
2. Neighborhood sends Demolition by Neglect “advice” letter to all owners on list.
3. If no repairs made within 6 months, neighborhood prioritizes by official

action of the neighborhood association according to its rules of procedure and sends prioritized list to [Raleigh Historic Districts Commission (RHDC)].

4. RHDC makes evaluation of conditions (applying standards listed in ordinance), based upon prioritization provided by neighborhood and available resources.

5. RHDC advises neighborhood of its determination regarding demolition by neglect.

6. RHDC prepares petition based upon prioritization and available resources, submits to Inspections Department to initiate case.

For further information, see [www.rhdc.org/LocalHistoricDistrictLandmarkServices/DemolitionbyNeglect/DemolitionbyNeglectProcedure/tabid/196/Default.aspx](http://rhdc.org/LocalHistoricDistrictLandmarkServices/DemolitionbyNeglect/DemolitionbyNeglectProcedure/tabid/196/Default.aspx).

Demolition-by-Neglect Procedures

The failure to maintain historic properties can be addressed in a variety of ways. As discussed later on in this booklet (see “Remedies and Enforcement” below), a preservation commission may be able to issue a citation for the failure to maintain

a structure (if it has the requisite authority) or refer violations to building code inspectors for enforcement. Some cities may seek court orders to repair neglected properties along with significant penalties for violating the terms of a preservation ordinance. Increasingly, however, communities are incorporating demolition-by-neglect provisions in their historic preservation ordinances. These provisions provide preservation commissions with direct authority to address a property owner’s failure to maintain a historic property head on—so that necessary repairs are made before the property becomes so deteriorated that demolition is required as a matter of public safety. They also provide commissions with the tools they need to compel compliance, yet, at the same time, offer flexibility, so that solutions that meet the needs of both the preservation commission and the property owner can be worked out on an administrative level.

Demolition-by-Neglect Defined. Demolition-by-neglect, in its broadest sense, describes the failure to maintain a historic structure over a prolonged period of time so that, as a result of the neglect, the structure’s preservation becomes threatened.

ENFORCEMENT AND COMPLAINTS

Many preservation commissions rely heavily on complaints from preservation and neighborhood organizations and members of the general public in their efforts to protect against situations of demolition-by-neglect and violations of historic preservation laws generally. While complaint-driven systems are no substitute for systematic monitoring and enforcement programs, they are an essential component of most preservation enforcement programs and have proven to be effective when the complaint system is straightforward, well-advertised, and responsive. Contact numbers and complaint forms should be available in print and online. Complaint procedures should also be routinely posted in newsletters and other correspondence. New York City (www.nyc.gov/html/lpc/html/working_with/reportViolation.shtml), the District of Columbia (www.planning.dc.gov/planning/cwp/view,a,1284,q,570657.aspx), and San Antonio (www.sanantonio.gov/historic/enforcement.aspx), for example, post their enforcement and complaint procedures online.



The historic Ferlita Macaroni Factory in Ybor City, Fla., is being stabilized following years of neglect. In April 2010, the City Council—sitting as the Ybor City Development Corporation—approved the allocation of \$100,000 to make temporary repairs to the 86-year-old landmark, which had suffered a partial roof collapse in 2007.

Photo courtesy Salt Construction Company

In some cases the lack of maintenance is deliberate. By disinvesting in the property, the owner hopes, over time, to obtain permission to demolish the resource on public safety grounds. In other situations, the lack of maintenance may result from circumstances beyond the control of the property owner. Demolition-by-neglect is often tied directly to “affirmative maintenance,” and is defined in preservation ordinances in the following ways:

Dallas, Tex.

Neglect in the maintenance of any structure on property subject to the predesignation moratorium or in a historic overlay district that results in deterioration of the structure and threatens the preservation of the structure.

Source: Dallas Development Code, Div. 51A-4.500; § 51A-4.501.

Topeka, Kans.

The failure to provide ordinary and necessary maintenance and repair to a structure resulting in the deterioration of the structure or resulting in permanent damage, injury or loss to exterior features.

Source: Topeka Code Ch. 80 § 80-2.

Washington, D.C.

Neglect in maintaining, repairing, or securing an historic landmark or a building or structure in an historic district

that results in substantial deterioration of an exterior feature of the building or structure or the loss of the structural integrity of the building or structure.
Source: D.C. Official Code § 6-1102(a) (3A).

determined by the department of safety and permits.

(2) The deterioration of a building characterized by one or more of the following:

- a. Those buildings which have parts thereof which are so attached that they may fall and injure members of the public or property;
- b. Deteriorated or inadequate foundation;
- c. Defective or deteriorated floor supports or floor supports insufficient to carry imposed loads with safety;
- d. Members of walls, or other vertical supports that split, lean, list, or buckle due to defective material or deterioration;
- e. Members of walls or other vertical supports that are insufficient to carry imposed loads with safety;
- f. Members of ceiling, roofs, ceiling and roof supports, or other horizontal members which sag, split, or buckle due to defective material or deterioration;
- g. Members of ceiling, roofs, ceiling and roof supports, or other horizontal members that are insufficient to carry imposed loads with safety;
- h. Fireplaces or chimneys which list, bulge, or settle due to defective material or deterioration;
- i. Any fault, defect, or condition in the building which renders the same structurally unsafe or not properly watertight.

Source: New Orleans Code, Ch. 84, § 84-108.

San Antonio, Tex.

(a) Applicability. In keeping with the city's minimum housing standards, the owner, or other person having legal custody and control of a designated historic landmark or structure in a local historic district shall preserve the historic landmark or structure against decay and deterioration and shall keep it free from any of the following defects:

- (1) Parts which are improperly or inadequately attached so that they may fall and injure persons or property;
- (2) Deteriorated or inadequate foundation;
- (3) Defective or deteriorated floor supports or floor supports that are

New Orleans, La.

The maintenance of any building resulting in any one or more of the following:

- (1) The deterioration of a building to the extent that it creates or permits a hazardous or unsafe condition as

insufficient to carry the loads imposed safely;

(4) Walls, partitions, or other vertical supports that split, lean, list, or buckle due to defect or deterioration or are insufficient to carry the loads imposed safely;

(5) Ceilings, roofs, ceiling or roof supports, or other horizontal members which sag, split, or buckle due to defect or deterioration or are insufficient to support the loads imposed safely;

(6) Fireplaces and chimneys which list, bulge, or settle due to defect or deterioration or are of insufficient size or strength to carry the loads imposed safely;

(7) Deteriorated, crumbling, or loose exterior stucco or mortar, rock, brick, or siding;

(8) Broken, missing, or rotted roofing materials or roof components, window glass, sashes, or frames, or exterior doors or door frames; or

(9) Any fault, defect, or condition in the structure which renders it structurally unsafe or not properly watertight.

(b) Compliance. The owner or other person having legal custody and control of a designated historic landmark or structure in a local historic district shall, in keeping with the city's minimum housing standards, repair the landmark or structure if it is found to have any of the defects listing in Sub-section (a) of this section. In addition, the owner or other person having legal custody and control of a historic landmark or a building, object, site, or structure located in a historic district shall keep all property, including vacant property, clear of all weeds, fallen trees or limbs, debris, abandoned vehicles, and all other refuse as specified under the city's minimum housing codes and ordinances.

San Antonio Unified Development Code, Art. 5, Div. 2, § 35-615.

Historic properties may be identified as a candidate for "demolition-by-neglect"

proceedings in a number of ways. A building may come to the attention of a preservation commission through the efforts of a neighbor, a neighborhood or preservation organization, or upon identification by a building inspector as a potentially hazardous structure. However, the decision of whether to initiate demolition-by-neglect proceedings typically rests with the preservation commission itself, based on preliminary findings relating to the condition of the property at issue.

Keep in mind that the timing of demolition-by-neglect proceedings is important. On the one hand, it is important that demolition-by-neglect proceedings are not initiated too early. The level of deterioration must support the claim. On the other hand, if the property is too far gone, then efforts to preserve the property may be too late. The building's features may not be salvable or the repairs may be economically infeasible.

Documentation is an essential component of any demolition-of-neglect proceeding. The documentation should establish that the property is undergoing demolition-by-neglect, as defined in the preservation ordinance. Any visual and written evidence of the condition of the property

At a typical hearing, staff to the commission will present the evidence on the condition of the property—focusing specifically on the structural and safety issues that pose a threat to the building as well as the people inhabiting or coming in contact with the building. The property owner, in turn, will be given the opportunity to respond to that evidence, which generally ranges from offers to correct the problem to disputes over the condition of the property and financial concerns.

Upon consideration of all of the evidence, the preservation commission will decide whether to make a final determination of demolition-by-neglect. In many cases, the commission will work with the property owner in developing a timeline for stabilizing the structure. This should entail identifying immediate measures to stabilize and secure the property and undertaking necessary long-term repairs. In difficult cases, a preservation organization may be instrumental in finding purchasers for the property or sources of funding or low cost loans.

If the property owner fails to appear before the preservation commission or declines to take any corrective actions, the commission may need to take cor-

IF THE PROPERTY is too far gone, then efforts to preserve the property may be too late. The building's features may not be salvable or the repairs may be economically infeasible.

and character-defining features at the time of designation and over time should be included in the documentation. Ideally, the evidence should include an assessment or report by a structural engineer with some expertise in historic resources. This may be done by building department staff or an individual retained by the commission.

Once a property has been identified as being threatened with demolition-by-neglect, notice is sent to the owner, requesting his or her appearance at the preservation commission's next regularly scheduled public meeting, at which time the matter will be heard.

rective action immediately. Discussion of remedial measures and enforcement options is found under "Remedies and Enforcement" on page 12.

Examples of demolition-by-neglect procedures include the following:

Dallas, Tex.

(3) Demolition-by-neglect procedure.
(A) Purpose. The purpose of the demolition-by-neglect procedure is to allow the landmark commission to work with the property owner to encourage maintenance and stabilization of the structure and iden-

tify resources available before any enforcement action is taken.

(B) Request for investigation. Any interested party may request that the historic preservation officer investigate whether a property is being demolished by neglect.

(C) First meeting with the property owner. Upon receipt of a request, the historic preservation officer shall meet with the property owner or the property owner's agent with control of the structure to inspect the structure and discuss the resources available for financing any necessary repairs. After the meeting, the historic preservation officer shall prepare a report for the landmark commission on the condition of the structure, the repairs needed to maintain and stabilize the structure, any resources available for financing the repairs, and the amount of time needed to complete the repairs.

(D) Certification and notice. After review of the report, the landmark commission may vote to certify the property as a demolition-by-neglect case. If the landmark commission certifies the structure as a demolition-by-neglect case, the landmark commission shall notify the property owner or the property owner's agent with control over the structure of the repairs that must be made. The notice must require that repairs be started within 30 days and set a deadline for

and assist the property owner in obtaining any resources available for financing the repairs.

Dallas Development Code, Div. 51A-4.500; § 51A-4.501.

Montgomery County, Md.

In the event of a case of demolition-by-neglect of an historic resource on public or private property, the following provisions shall apply:

(a) If the historic resource has been designated on the master plan as an historic site or an historic resource within an historic district, the director shall issue a written notice to all persons of record with any right, title or interest in the subject property, or the person occupying such premises, of the conditions of deterioration and shall specify the minimum items of repair or maintenance necessary to correct or prevent further deterioration. The notice shall provide that corrective action shall commence within 30 days of the receipt of such notice and be completed within a reasonable time thereafter. The notice shall state that the owner of record of the subject property, or any person of record with any right, title or interest therein, may, within 10 days after the receipt of the notice, request a hearing on the necessity of the items and conditions contained in such notice. In the event a public hearing is requested, it shall be held

to prevent demolition-by-neglect, if the commission finds that such improvements are necessary, it shall instruct the director to issue a final notice to be mailed to the record owners and all parties of record with any right, title or interest in the subject property advising of the items of repair and maintenance necessary to correct or prevent further deterioration. The owners shall institute corrective action to comply with the final notice within 30 days of receipt of the revised notice.

(2) In the event the corrective action specified in the final notice is not instituted within the time allotted, the director may institute, perform and complete the necessary remedial work to prevent deterioration by neglect and the expenses incurred by the director for such work, labor and materials shall be a lien against the property, and draw interest at the highest legal rate, the amount to be amortized over a period of 10 years subject to a public sale if there is a default in payment.

Montgomery County Code, Ch. 24A, § 24A-9.

In some jurisdictions, demolition-by-neglect proceedings are held by building code officials rather than the historic preservation commission. In Raleigh, N.C., for example, the Historic Districts Commission petitions the Inspections Director to require that repairs be made.

Raleigh, N.C. § 10-6181. PETITION AND ACTION.

The Historic Districts Commission or the County Historic Preservation Commission, whichever has jurisdiction, may file a petition listing specific defects with the Inspections Director requesting that he act under the following procedures to require the correction of deterioration or making of repairs to any Historic

REGARDLESS OF THE PROCESS used...coordination between preservation staff and building department officials makes sense.

completion of the repairs. The notice must be sent by certified mail.

(E) Second meeting with the property owner. The historic preservation officer shall meet with the property owner or the property owner's agent with control over the structure within 30 days after the notice was sent to inspect any repairs completed

by the commission upon 30 days' written notice mailed to all persons of record with any right, title or interest in the subject property and to all citizens and organizations which the director feels may have an interest in the proceedings.

(1) After a public hearing on the issue of necessity of improvements

Landmark or significant structure located within the Historic Overlay District so that such structure shall be preserved and protected in accordance with the purposes of §§10-1051 and 10-2011(c) of this Code.

(a) Whenever a petition is filed with the Inspections Director charging that a structure is undergoing demolition-by-neglect, the Director (or a designated agent) shall, if his preliminary investigation discloses a basis for such charges, within seven (7) days issue and cause to be served upon the owner and/or such other person who may have legal possession, custody, and control thereof, as the same may be determined by reasonable diligence, a complaint stating the charges in that respect and containing a notice that a hearing will be held before the Director at a place within the County in which the property is located therein fixed not less than thirty (30) nor more than forty-five (45) days after the serving of such complaint; that the owner and/or parties in interest shall be given a right to answer to give testimony at the place and time fixed in the complaint; that the commission with jurisdiction shall also be given notice of the hearing; and that the rules of evidence prevailing in courts of law or equity shall not be controlling in hearings before the Director. The purpose of the hearing is to receive evidence concerning the charge of deterioration and to ascertain whether the owner and/or other parties in interest wishes to petition the Historic Districts Commission for a claim of undue economic hardship. (b) If after such notice and hearing, the Director determines that the structure is undergoing demolition-by-neglect because it is deteriorating, or if its condition is contributing to deterioration, according to the standards of §10-6181, the Director shall state in writing the findings of fact in support of such determination and shall issue and cause to be served upon the owner and/or other parties in interest therein

an order to repair within the time specified those elements of the structure that are deteriorating, contributing to deterioration, or deteriorated. In the event that the owner and/or other parties in interest wish to petition for a claim of undue economic hardship, the Director's order shall be stayed until after the Historic Districts Commission's determination in accordance with the procedures of §10-6183, except as provided in §10-6185.

Raleigh, NC Code of Ordinances, Div. II, Pt. 10, Ch. 6, Art. J.

Regardless of the process used—which can vary depending upon state enabling law requirements and individual circumstances within each jurisdiction—coordination between preservation staff and building department officials makes sense. Building department staff can be helpful in identifying demolition-by-neglect situations, developing the necessary documentation to build a case, and, in some cases, enforcing orders to repair down the road. Moreover, a good working relationship with building department officials can be helpful in obviating efforts by property owners to circumvent preservation ordinances altogether by obtaining orders from building department officials to demolish properties on public safety grounds. See discussion below under “Protecting Historic Properties from Unnecessary Demolition on Public Safety Grounds.”

Economic Hardship. Many preservation ordinances require that a demolition permit be issued notwithstanding a finding of demolition-by-neglect, if the denial of a permit to demolish a property would result in “economic hardship.” In Baton Rouge, for example, property owners may seek relief from undue hardship on the grounds of “exceptional practical difficulty” or “undue hardship.” See Baton Rouge Unified Development Code § 3.523. This provision authorizes the Commission to vary or modify strict adherence



After citations for building violations and “demolition by neglect” the developer for the Philadelphia Naval Home has since rehabilitated this local and national historic landmark into luxury housing.

Photos courtesy Adrian Scott Fine and the Philadelphia Preservation Alliance

to the requirements of the city's preservation law, as necessary to relieve such difficulty or hardship.

Consideration of economic hardship in demolition-by-neglect proceedings can be particularly challenging because of the range of emotional problems likely to surface and the complexity of the issues likely to arise. As discussed above, decisions not to maintain a property can be part of a deliberate strategy to circumvent the constraints of a historic preservation ordinance. Thus, it is important to ensure that a property owner is not granted an exception on the grounds of economic hardship if the hardship has, in effect, been “self-imposed.”

In other cases, however, a structure may have fallen into disrepair not by design but because a person or entity has encountered significant financial problems or even bankruptcy. As Deputy General Counsel for the New York City Landmarks Preservation Commission observed:

ECONOMIC HARDSHIP EVIDENTIARY CHECKLIST

Under typical economic hardship procedures, an applicant may apply for a "certificate of economic hardship" after a preservation commission has denied his or her request to alter or demolish a historic property protected under a preservation ordinance. In support of an application for relief on economic hardship grounds, the applicant must submit evidence sufficient to enable the decision-making body to render a decision. The type of evidence required is generally spelled out in preservation ordinances or interpreting regulations. The burden of proof is on the applicant.

The following checklist is a useful tool for local commissions and other regulatory agencies considering economic hardship claims:

1. Current level of economic return

- Amount paid for the property, date of purchase, party from whom purchased, and relationship between the owner of record, the applicant, and person from whom property was purchased;
- Annual gross and net income from the property for the previous three years; itemized operating and maintenance expenses for the previous three years, and depreciation deduction and annual cash flow before and after debt service, if any, during the same period;
- Remaining balance on the mortgage or other financing secured by the property and annual debt service, if any, during the prior three years;
- Real estate taxes for the previous four years and assessed value of the property according to the two most recent assessed valuations;
- All appraisals obtained within the last two years by the owner or applicant in connection with the purchase, financing, or ownership of the property;
- Form of ownership or operation of the property, whether sole proprietorship, for-profit or not-for-profit corporation, limited partnership, joint venture, or other;
- Any state or federal income tax returns relating to the property for the last two years.

2. Any listing of the property for sale or rent, price asked, and offers received, if any, within the previous two years, including testimony and relevant documents regarding:

- Any real estate broker or firm engaged to sell or lease the property;
- Reasonableness of price or rent sought by the applicant;
- Any advertisements placed for the sale or rent of the property.

3. Feasibility of alternative uses for the property that could earn a reasonable economic return:

- Report from a licensed engineer or architect with experience in rehabilitation as to the structural soundness of any buildings on the property and their suitability for rehabilitation;
- Cost estimates for the proposed construction, alteration, demolition, or removal, and an estimate of any additional costs that would be incurred to comply with the requirements for a certificate of appropriateness;
- Estimated market value of the property: (a) in its current condition; (b) after completion of the proposed alteration or demolition; and (c) after renovation of the existing property for continued use;
- Expert testimony or opinion on the feasibility of rehabilitation or reuse of the existing structure by an architect, developer, real estate consultant, appraiser, and/or other real estate professional experienced in historic properties and rehabilitation.

4. Any evidence of self-created hardship through deliberate neglect or inadequate maintenance of the property.

5. Knowledge of landmark designation or potential designation at time of acquisition.

6. Economic incentives and/or funding available to the applicant through federal, state, city, or private programs.

...it is the rare case when demolition-by-neglect is intentional or venal. More often than not, the cause for neglect is due to benign reasons—elderly or ill property owners, estate disputes, foreclosures, and other problems.

See John Weiss, "Pursuing an Owner for Demolition-By-Neglect: A Tortious Legal Path," *District Lines* (Spring 2009), p. 2.

In some cases, the condition of the property may, in fact, be so severe that

This vacant, fire-damaged duplex in the Quadrangle-Mattoon Street Historic District of Springfield, Mass., has been under the control of a court-appointed receiver since January 2009. After the historical commission denied the owner's request to demolish the structure, the owner asked the housing court to remove the receiver and order the structure's demolition on economic feasibility grounds. State and local preservation groups are working together to find a preservation solution for the 1872 structure.

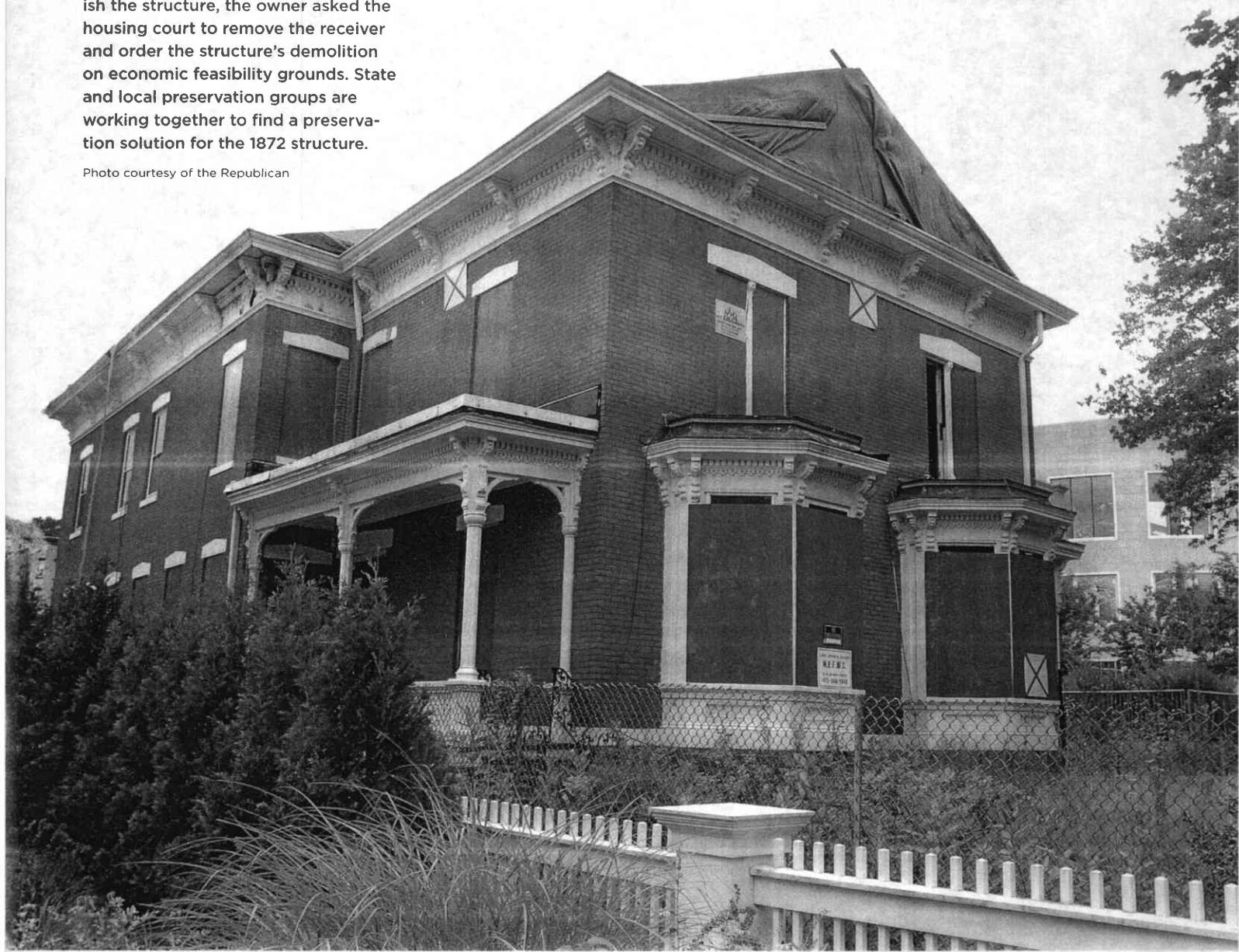
Photo courtesy of the Republican

preservation of the property is not financially feasible. An economic hardship claim could be raised, for example, by a property owner who had purchased a historic property in need of extensive repairs but subsequently found that the repairs needed to rehabilitate the property were so extensive that the property could not earn a reasonable return in either its "as is" or "rehabbed" condition.

As with economic hardship proceedings in general, the burden of establishing demolition-by-neglect rests on the property owner and the exact meaning of the term "economic hardship" depends on how the standard is defined in the ordinance. Under many preservation ordinances economic hardship is

difficult to establish and is often defined as consistent with the legal standard for an unconstitutional regulatory taking. A property owner generally will not be able to prove a regulatory taking unless he or she has been denied all reasonable beneficial use or return on the property as a result of the commission's action. See *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978).

In hearing economic hardship matters, commissions must be prepared to make a legally defensible decision based on all the evidence presented. In the event of conflicting expert testimony, which is often the case in economic hardship proceedings, the commission must be prepared to weigh the evidence, making specific



findings on the relative credibility or competency of expert witnesses.

Moreover, as with constitutional takings cases generally, it is important to understand that a finding of economic hardship must be based on the property and not the property owner. The question of whether a property is economically viable does not depend on the financial means of the property owner. If the property is economically viable, it can be sold in the marketplace. Also, if building code compliance issues are involved, the inability to pay is simply not at issue. The public health and safety is at stake. On a practical level, in demolition-by-neglect cases, this often means finding a new owner, who has the means and motive to make the necessary repairs.

Procedural Due Process and Related Concerns. Demolition-by-neglect provisions address the due process rights of individuals in several ways. Property owners are given notice of preliminary and final determinations of demolition-by-neglect and provided with advance notice and the opportunity for a hearing before a final determination of demolition-by-neglect is made. Hearings take place before an expert commission—usually the preservation commission, at which time evidence is presented and testimony is heard. Decisions are made based on evidence in the record. Although not required as a matter of constitutional law, final decisions are often appealable to another administrative body or county council.

Portland, Maine

(c) Any such order shall be in writing, shall state the actions to be taken with reasonable particularity and shall specify dates for compliance, which may be extended by the department for reasonable periods to allow the owner to secure financing, labor or materials. Any such order may be appealed to the board of appeals within thirty (30) days. The board shall reverse such an order only if it finds that the department had no substantial justification for

requiring action to be taken, that the measures required or time periods specified were not reasonable under all of the circumstances. The taking of an appeal to the board or to court shall not operate to stay any order requiring structures to be secured or requiring temporary support, unless the board or court expressly stays such order. The court of competent jurisdiction to enforce any order. *Portland Code of Ordinances, Ch. 14, Div. 10 § 14-690.*

Raleigh, N.C.

Findings made by the Inspections Director or by the Commission with jurisdiction may be appealed to the Board of Adjustment. To perfect such an appeal, application must be filed by an aggrieved party with the Board of Adjustment within ten (10) days following receipt of the order for repair of the property or determination. Appeals shall be in the nature of certiorari [petition for review] (Ord. No. 1992-66-TC-399, §5, TC-15-92, 10-6-92).

Raleigh Code of Ordinances, Div. II, Pt. 10, Ch. 6 § 10-6184.

Remedies and Enforcement

While a strong preservation ordinance and a well-written demolition-by-neglect provision can go far, a good preservation program requires much more. The ability to effectively preserve and protect a community's historic resources also requires the commitment to monitor designated resources and enforce violations when they occur. After all, what good is a demolition-by-neglect provision if it is never invoked and its terms never enforced. Indeed, some may argue that enforcement is one of the most critical components of any preservation program, because without enforcement, a requirement to affirmatively maintain a historic resource is of no consequence.

As with building safety programs in general, a historic preservation program should be equipped with a range of tools to address demolition-by-neglect, once an official finding is made. A preserva-



Checklists for determining demolition-by-neglect should include inspecting the roof, gutters, and downspouts among numerous other maintenance requirements.

Photo by Adrian Scott Fine

tion commission should have the ability to ensure that an owner makes repairs upon request or to have those repairs made itself. Fines not only punish violators but also help to protect historic properties by deterring other, would be violators. Courts can be instrumental in ensuring that repairs are made when all else fails. Highlighted below are examples of remedies and approaches to enforcement used by preservation commissions today.

Stabilization and Repair

Given the fragile existence of historic resources—once demolished they are gone—a number of jurisdictions have empowered preservation commissions to stabilize and repair historic structures. If a property owner fails to make each of the repairs ordered by the commission in its formal finding of demolition-by-neglect then the commission may make the repairs itself and bill the owner for the cost of the repairs. Just as with building code programs generally, if the owner fails to repay the commission, then the cost of the repairs becomes a lien on the property—which could become an obstacle to obtaining financing or selling the property until it is lifted—and can be recouped when the building is sold.

While this option is rarely used, it is an important, if not an essential, component of a demolition-by-neglect provi-

sion. It is that ability to compel or make the repairs that closes the loophole in preservation ordinances.

In Grand Rapids and New Orleans, for example, the commission may make necessary repairs upon finding that a property is threatened by demolition-by-neglect:

Grand Rapids, Mich.

Upon a finding by the Commission that a historic resource within a historic district or a proposed historic district subject to its review and approval or a historic landmark is threatened with demolition-by-neglect, the Commission may do either of the following:

(a) Require the owner of the resource to repair all conditions contributing to demolition-by-neglect.
(b) If the owner does not make repairs within a reasonable time, the Commission or its agents may enter the property and make such repairs as are necessary to prevent demolition-by-neglect. The costs of the work shall be charged to the owner, and may be levied by the City Commission as a special assessment against the property. The Commission or its agents may enter the property for purposes of this section upon obtaining an order from the Kent County Circuit Court.

Grand Rapids Code of Ordinances, Ch. 68 § 5.395 (11).

New Orleans, La.

(c) Upon the applicant's failure to commence work, the commission shall notify the applicant in the manner provided above to appear at an administrative enforcement hearing, pursuant to the procedures set forth in chapters 6, 26 or 28 of the Code. In addition, the city may cause such property to be repaired at its expense at such time as funds are appropriated; in which event the city may file an affidavit executed by the director of the historic district landmarks commission to this effect in the office of the recorder of mortgages for the

parish, which notice shall constitute a lien and privilege against the property.
(d) Failure to comply with the provisions of this article or the rules and procedures of the commission shall constitute a violation hereof and may be punishable by a fine not less than \$100.00 not more than \$500.00 per day for each day that the violation continues.

New Orleans Code, Ch. 84, § 84-108(c).

Other jurisdictions require that a court order be obtained before the work can be performed.

Miami-Dade County, Fla.

(3) Enforcement.

(a) Notice and Administrative Enforcement. When a Miami-Dade County Code Enforcement Officer learns of a violation of section (1), he or she shall give notice in writing

an action seeking: an injunction ordering the property owner to take corrective action; an order authorizing Miami-Dade County to enter onto the property to make the corrective actions; and civil penalties. The Court shall order an injunction providing such remedies if Miami-Dade County proves that the owner has violated this ordinance and such violation threatens the integrity or existence of an individual site or a contributing structure within a district. Such civil action may be initiated in the name of Miami-Dade County at the discretion of the County Manager upon an affirmative vote of a majority of the Historic Preservation Board. Settlements of such lawsuits may be obtained in the same manner. Nothing herein shall prevent the Board of County Commissioners from initiating or

THE ABILITY TO effectively preserve and protect a community's historic resources also requires the commitment to monitor designated resources and enforce violations when they occur.

of the violation to the owner, with specific written details of the corrective action necessary to remedy the violation. Such notice shall be given personally, by registered or certified mail, return receipt requested, or by posting on the property when the address of the owner cannot be located. The property owner shall have 30 days from the date of such notice to perform the corrective action. Thereafter, the Miami-Dade County Code Enforcement Officer may issue a civil citation pursuant to chapter 8CC of the Code of Miami-Dade County.

(b) Action For Injunction And Remedial Relief; Lien on Property. If the Property Owner fails to take corrective action within the 30 day period provided in section 3(a), Miami-Dade County may file

assuming direction of the lawsuit, at its discretion. In the event that the Court authorizes Miami-Dade County to enter onto the property to take the required corrective action, the Court shall also order that the cost of the corrective action shall constitute a lien against the property, accruing interest at the statutory rate for judgments until satisfied.

Miami-Dade County Code of Ordinances, Pt. III, Ch. 16A § 16A-13.1.

Washington, D.C.

Section 10c. Prevention of demolition-by-neglect.

(a) If the Mayor determines that an historic landmark or a contributing building or structure within a historic district is threatened by demolition-by-neglect, upon obtaining an order

from the Superior Court of the District of Columbia, the Mayor may:

- (1) Require the owner to repair all conditions contributing to demolition-by-neglect; or
- (2) If the owner does not make the required repairs within a reasonable period of time, enter the property and make the repairs necessary to prevent demolition-by-neglect.

(b) The cost of any work pursuant to subsection (a) of this section shall be charged to the owner and may be levied by the District of Columbia as a special assessment against the real property. The special assessment shall be a lien against the real property. It is important to keep in mind that other, traditional measures may be available to stabilize historic properties. In situations where a historic

rate offense, then even minor fines can prove significant if accrued over time.

Most preservation ordinances provide for the imposition of civil penalties by courts of law for the violation of preservation ordinances, including the failure to maintain historic properties. While rarely used, some jurisdictions also authorize the imposition of criminal penalties when it can be established that the violation was intentional or willful. The District of Columbia's penalty provision is illustrative:

District of Columbia

Section 11. Penalties; remedies; enforcement.

(a) **Criminal penalty.** Any person who willfully violates any provision of this act or of any regulation issued under the authority of this act shall,

be in addition to and not in lieu of any criminal prosecution and penalty. *D.C. Official Code, 6-1110.*

Some jurisdictions also authorize the imposition of civil fines for violations of historic preservation ordinances generally. These fines are assessed upon issuance of a citation by an enforcement officer for failure to maintain one's property—just as a traffic citation may be issued for speeding along a highway. The property owner, upon receipt of the citation, may contest the matter before an administrative judge.

In the District of Columbia, the authority to issue citations is set forth in the city's preservation ordinance itself. The District's Preservation Office now has three enforcement officers among its staff, who are directly responsible for enforcing the law's provisions—which includes the duty to maintain all designated properties. Each officer is responsible for specific sections of the city—and may, at his or her discretion, issue warnings or citations for violations, depending upon the circumstances presented.

District of Columbia

(c) Civil fines, penalties, and fees may be imposed as alternative sanctions for any infraction of the provisions of this act, or any rules or regulations issued under the authority of this act, pursuant to the Civil Infractions Act of 1985 (D.C. Official Code § 2-1801 et seq.). Adjudication of any infraction of this act shall be pursuant to the Civil Infractions Act of 1985 (D.C. Official Code § 2-1801 et seq.).

(d) (1) The Historic Preservation Office shall be responsible for enforcement of the provisions of this act.

(2) The Mayor may delegate to the Historic Preservation Office coordinated enforcement of Building Code provisions applicable to preservation of historic landmarks and historic districts pursuant to a written agreement with and under the authority of the Building Code Official.

POTENTIALLY, the strongest deterrent in failure-to-maintain and demolition-by-neglect cases is the ability to impose significant penalties.

preservation commission lacks the authority or resources to impose a lien, code enforcement officers may be able to ensure that buildings are secured and boarded up, lawns mowed, and so forth. Indeed, in Philadelphia, Atlanta, and Raleigh, building code enforcement officers work closely with preservation staff to ensure that maintenance requirements are enforced. They conduct inspections and issue summons under their own enforcement procedures to ensure that necessary repairs are eventually made. See Amy Martin, "Demolition-by-Neglect: Repairing Buildings by Repairing Legislation," *Georgetown Law Historic Preservation Papers* 2007, pp. 12-13.

Citations and Penalties

Potentially, the strongest deterrent in failure-to-maintain and demolition-by-neglect cases is the ability to impose significant penalties. If each day is considered a sepa-

upon conviction, be fined not more than \$1,000 for each day a violation occurs or continues or be imprisoned for not more than 90 days, or both. Any prosecution for violations of this act or of any regulations issued under the authority of this act shall be brought in the name of the District of Columbia in the Superior Court of the District of Columbia by the Office of Attorney General for the District of Columbia.

(b) **Civil remedy.** Any person who demolishes, alters or constructs a building or structure in violation of sections 5, 6, or 8 of this act shall be required to restore the building or structure and its site to its appearance prior to the violation. Any action to enforce this subsection shall be brought in the name of the District of Columbia in the Superior Court of the District of Columbia by the Office of Attorney General for the District of Columbia. This civil remedy shall

(e) An appeal of any enforcement action brought by the Historic Preservation Office shall be heard by the Office of Administrative Hearings. *D.C. Official Code § 6-1110.*

In New York City, enforcement officers housed within the city's Landmarks Preservation Commission (LPC) have the option of pursuing violations of the city's preservation laws before the city's Environmental Control Board (ECB). Under the city's regular enforcement procedures, a notice of violation is issued following the issuance of two warning letters. *See "Frequently Asked Questions about the Enforcement Process,"* posted on the New York City Landmarks Preservation Commission's website at: www.nyc.gov/html/lpc/html/working_with/reportViolation.shtml. *See, also,* Benjamin Baccash, "Enforcement and the New York City Landmarks Law: Past, Present and Future," (Columbia University thesis in partial fulfillment of Master of Science in Historic Preservation May 2002). As in the District of Columbia, owners wishing to contest a Notice of Violation [NOV] must appear before the ECB on the assigned hearing date. Default penalties are assessed if the owner fails to appear at the ECB hearing. (Baccash, pg. 50)

Property owners wishing to avoid the ECB hearing can sign a "Certificate of Correction," agreeing to resolve the violation within a specific time frame. If, however, the property owner fails to sign the certificate or respond to the first Notice of Violation, a Second NOV is issued, along with a fine. If the city plans to seek a judicial recourse, then only warnings will be issued. While courts regard each day as separate offense, ECB does not. (Baccash, pg. 50-51) Demolition by Neglect cases are handled differently. A Notice of Violation for the failure to maintain a landmarked property in a state of good repair, a type B violation, New York City Admin. Code, Tit. 25, § 311, is issued by the Deputy Counsel of the LPC. When compliance is not anticipated, judicial action may be

taken immediately following the issuance of warning letters, bypassing the ECB hearing process altogether. (Baccash, pg. 52)

Outstanding fines become liens against the property but do not prohibit future sales of the property. (Baccash, pg. 52) The LPC, however, requires that any property be in good standing before any future permits may be issued. In fact, except for unsafe conditions, no Building Department permits will be issued if there is an outstanding violation on a landmark property and warning letters and notices of violations appear in title searches. (Baccash, pg. 52)

Finally, it should be noted that a few jurisdictions also prohibit reconstruction of a new building on the site of a property that has been demolished by "demolition-by-neglect," at least for a specified period of time.

San Antonio, Tex.

If any building, object, site or structure covered by this subdivision shall have to be demolished as a public safety hazard and the owner thereof shall have received two (2) or more notices from the director of code compliance of building neglect in violation of this and other city ordinances, no application for a permit for a project on the property may be considered for a period of five (5) years from the date of demolition of the structure. Additionally, no permit for a curb cut needed for the operation of surface parking lot shall be granted by a city office during this period, nor shall a parking lot for vehicles be operated for remuneration or not on the site for a period of five (5) years from and after the date of such demolition.

San Antonio Unified Development Code, Art. 5, Div. 2, § 35-615(c)(3)(iv).

RELATIONSHIP BETWEEN DEMOLITION-BY-NEGLECT AND BUILDING CODES

Historic properties subject to demolition-by-neglect proceedings are often also in violation of local building codes. Thus, when a historic building is in danger of demolition-by-neglect, a preservation commission and its staff may work closely with building code inspectors to ensure that potentially hazardous buildings are boarded up or otherwise secured and brought up to minimum code levels.

Under typical non-emergency building code enforcement procedures, when a violation occurs, a building inspector will prepare a report and issue a "notice of violation" that identifies the condition and all work that must be undertaken within a specific period of time. Fines and penalties may be imposed for each violation, following a citation and administrative hearing process. If corrective action is not taken, then civil or criminal proceedings may be brought in court. If the building is vacant or hazardous, the inspector may have authority to clean the site and secure the structure. Some cities, such as Baltimore and Cleveland, may also use court-appointed receivers to abate nuisances on problem properties. The receiver makes necessary repairs, which become a priority lien on the property and are reimbursed by the owner or upon a forced sale of the structure.



In 2008 a Manhattan Supreme Court justice issued a preliminary injunction ordering the owners of the Windemere apartment complex to halt the deterioration of the vacant landmark, requiring them to bring the 127-year-old building into compliance with the City's landmark regulations. New York City laws require that owners of landmarked buildings keep them in a state of good repair to prevent architectural integrity from being compromised and to prevent intentional "demolition by neglect."

Photo courtesy New York Landmarks Commission

Injunctive Relief

In many ways, New York City stands apart from other jurisdictions in its efforts to enforce the requirement under its landmarks preservation law that properties be kept in "good repair," which is defined as a condition in which, "if not so maintained, may cause or tend to cause the exterior portions of such improvements to deteriorate, decay or become damaged or otherwise fall into disrepair." *See New York City Admin. Code. Tit. 25, § 311.* Although time consuming, New York has had considerable success in obtaining either formidable judgments against property owners or handsome settlements in egregious examples of demolition-by-neglect.

In 2004, the city proved successful in obtaining a court order against the owners of the Skidmore House, a 159-year-old "Greek revival residence" located at 37 East 4th Street in Manhattan, for failing to keep the property in "good repair." Specifically, the court ordered the owners to:

permanently repair and restore the exterior of the Skidmore House to a

state of "good repair," which application should include the repair of all items identified in the Neeley Report, and it is further ordered that the Commission shall be given access to the interior and rear of the property to survey the landmark and determine if other repairs are necessary; and it is further ordered that defendants permanently repair and restore the exterior of the Skidmore House to a state of "good repair" in an expeditious manner upon the issuance of a permit or permits by the Commission; and it is further ordered that defendants are permanently enjoined to maintain the Skidmore House and to keep in "good repair" all exterior portions and all interior portions which if not so maintained may cause or tend to cause the exterior portions of such improvement to deteriorate or otherwise fall into a state of disrepair.

See City of New York v. 10-12 Cooper Square, Inc., 793 N.Y.S.2d 688 (N.Y. Cty. 2004).

More recently, the city obtained a settlement against TOA Construc-

tion Company for failure to maintain the Windemere, an 1881 Queen Anne style apartment building located near 57th and 9th Avenue in Manhattan. The city had filed a lawsuit in the New York County Supreme Court in 2008 to compel repairs and seek civil penalties of \$500 a day for failing to maintain the property. *See City of New York v. TOA Construction, Inc.* (filed 2008). After the city received a preliminary judgment in its favor, *City of New York v. TOA Construction Co.*, No. 08-400584 (N.Y. Cty. Supr. Ct. May 20, 2008), the owner agreed in 2009 to a record settlement, agreeing to pay \$1.1 million in deferred civil fines. The property has since been sold. For further information, see "State Supreme Court Justice Orders Repairs to Landmarked Windemere Apartment Complex in West Midtown Manhattan," New York City Law Department Press Release, issued May 9, 2008. *See, also*, John Weiss, "Pursuing an Owner for Demolition-by-Neglect: A Tortuous Legal Path," *District Lines*, Spring 2009. Other enforcement actions have been filed against the owner of a rowhouse, the owner of the former Corn Exchange Bank, *see City of New York v. Corn Exchange LLC* (filed 2008), and the owner of a neglected rowhouse in the Stuyvesant Heights Historic District, *see City of New York v. Estate of Johnson* (filed 2008).

Enforcement actions have been brought in a handful of other states as well. In *Harris v. Parker*, Chancery, No. 3070 (Cir. Ct. Isle of Wight County, Va. Apr. 15, 1985), a case from Smithfield, Va., the court ordered repairs to be carried out in compliance with the affirmative maintenance requirements in the ordinance. And in *Buttnick v. City of Seattle*, 719 P.2d 93, 95 (Wash. 1986), the court ruled that requiring an owner to replace a defective parapet on a historic building did not result in unreasonable economic hardship. Other cases of interest include *District of Columbia Preservation League v. Department of Consumer and Regulatory Affairs*, 646 A.2d 984 (D.C. App. 1994), in

which the court reversed the District of Columbia's approval of the demolition of a historic landmark in dilapidated condition caused by the owner's own actions, because the demolition permit was unauthorized under the District's preservation act. *See also, City of Providence v. Estate of Tarro*, No. 2008-91 (R.I. Sup. Ct. Jul. 2, 2009), in which the Rhode Island Supreme Court upheld the trial court's determination that a partially, illegally demolished school located in a Providence historic district was an "unsafe structure," but concluded that the issuance of a demolition permit was not compelled as a matter of law because the building did not pose an immediate threat to the public safety.

PROTECTING HISTORIC PROPERTIES FROM UNNECESSARY DEMOLITION ON PUBLIC SAFETY GROUNDS

Within each jurisdiction, there exists a range of laws that address the treatment of unsafe and abandoned structures. Typically these laws define a local building official's authority to abate structures that pose a public safety hazard, including the authority to require that such structures be removed or made safe. If the owner, upon inspection and the issuance of a notice of violation, fails to correct the problem, then the building official may impose fines and take corrective action, such as shoring up a wall, securing the structure against entry, vacating the premises, and demolishing the building in whole or in part. As with demolition-by-neglect procedures in historic preservation ordinances, corrective action is taken after the preparation of a detailed report and upon notice and hearing. The property owner is liable for any penalties and costs incurred to remedy conditions, which constitute a lien on the property.

Note that in emergency situations, when a building poses an immediate threat to the public safety, a different set of rules generally apply. Because of the significant risks at hand, public officials, under carefully defined

circumstances, may demolish a building without advance notice and hearing. Determinations of what constitutes an "emergency" are made by public safety officials—such as a fire chief, and are generally made when a building is in imminent danger of collapse and cannot be stabilized. Emergencies can suddenly develop after years of neglect or arise in the context of a major catastrophe such as a fire, hurricane, earthquake, or flood.

Special problems arise when the procedures governing historic resources and those for the treatment of unsafe buildings are not integrated. A building official, unfamiliar with older buildings, may order the demolition of a historic resource

est extent possible. Work should be performed only to the level necessary to abate the emergency condition. It may be possible, for example, to shore up a wall in danger of collapse, or undertake only a partial rather than full demolition of structure compromised by a fire.

The following programs are illustrative:

■ The District of Columbia ensures that unsafe and unsanitary buildings are not demolished without notice and consultation with the city's historic preservation office. In situations where a historic building poses an "extreme and immediate threat to the safety and general welfare," the building can be demolished only if the city finds, in consultation with

CROSS-DEPARTMENTAL COMMUNICATION

Effective communication across city departments is always a good idea. Historic properties are more likely to be protected against demolition-by-neglect if historic preservation staff has a good working relationship with the building department officials and the fire department. An integrated, accessible information management system that tracks information on properties including ownership, tax history, historic designation status, and code enforcement actions, would also go a long way.

in dilapidated condition without first consulting the historic preservation commission. He or she may not understand a building's historic value or its potential as a candidate for rehabilitation.

To ensure that historic properties are not needlessly demolished, communities should have in place procedures that, at a minimum, require that preservation commissions are notified and consulted *before* permits are issued to demolish historic resources. Decisions authorizing the demolition of a historic resource should be supported by a report that documents the condition of the property, the reasons behind the decision, and the preservation commission's recommendations, if any. In emergency situations, advance notice should be provided to preservation commissions, to the great-

the preservation office that "the unsafe condition cannot be abated by shoring, stabilizing, or securing the building or structure." In less than exigent circumstances, the city must include a qualified architect or historic architect on its investigative survey team and give the team's recommendations "great weight." Demolition is permissible only when a structure presents an extreme and immediate threat to the public safety due to "unsafe structural conditions." *See D.C. Code §§ 6-801 (a-1) and (a-2); § 6-802(b); § 6-803 (b); § 6-901(a).* The District also requires that the city notify the Historic Preservation Review Board to determine the status of a building before seeking demolition under its "Due Process Demolition Act" and requires compliance with its preservation law if the structure

has been or is eligible for designation as a landmark or contributing structure in a historic district. *See* D.C. Code § 42-3173.04.

■ In Galveston, except for certain residential properties, hearings before the city's Buildings and Standards Commission (BSC) for purposes of taking corrective action against a dangerous building cannot be held "for all designated landmark buildings and structures with a federal, state, or local landmark designation, and for all buildings and structures fifty (50) years or older, to the city's historic preservation officer for review," until the BSC has received a written report from the city's preservation board that states that the building may not be rehabilitated and designated as a historic property. *See* Galveston City Code, Ch. 10, Sec 10-62(b).

■ Miami requires that the city notify its preservation commission whenever an official determines that a designated historic structure is unsafe, and officials are

required to repair rather than demolish a historic building to the extent possible. Even in emergency situations, the city may perform only that work necessary to abate the emergency condition. *See* Miami Code § 23-6-3.

■ Minneapolis limits the authority of building officials to correct unsafe or dangerous conditions on designated and nominated historic structures. While buildings may be demolished in emergency situations, only that work necessary to correct the unsafe condition may be performed and decisions as to the extent of work to be performed must be made in consultation with the planning director. Moreover, the planning director must prepare a report documenting the reasons for the emergency and the nature and extent of the work performed. *See* Minneapolis Code § 599.50.

■ In Phoenix, the city must notify the historic preservation officer whenever a building located in a historic district is proposed for demolition pursuant to a

legal hearing process. (Notice must be provided at the same time that notice is given to the owner and any lienholders.) The preservation commission, in turn, is directed to consider the matter at its next meeting. Compliance is excused only if the condition of the building is so dangerous and harm to the public is so imminent that time will not permit notice and hearing process. *See* Phoenix Historic Preservation Ordinance § 813 B(1)(b)(6).

■ Tucson allows historic buildings in imminent danger of collapse to be demolished. Even then, it requires the city to notify the historical commission's chair, the state historic preservation officer, and an architect included on list provided by the historic commission whenever a historic building is in imminent danger of collapse. Moreover, a report must be filed documenting the necessity of demolishing a historic resource and if feasible, the demolition must be delayed for salvage and documentation. *See* Tucson Code § 16-66.

Note that in some jurisdictions, protection is afforded not only to historic structures officially designated under a local preservation ordinance but also to those properties that may be under consideration for designation or eligible for designation. By doing so, a local jurisdiction can ensure that significant resources—although poorly maintained—do not fall through the cracks. Galveston, for example, requires building officials to refer all matters involving properties designated under federal, state, and local registers *and* all properties 50 years or older. For further information on laws protecting non-designated properties from demolition, see "Protecting Potential Landmarks through Demolition Review," (National Trust for Historic Preservation, 2007).

Integration of historic preservation and unsafe building procedures can also help to ensure that historic preservation laws are not circumvented by requests by property owners for demolition permits from building department officials on public safety grounds. In the District



Closed since 2007, the 1923 Takoma Theatre, located in the District of Columbia's Takoma Park Historic District, is in danger of demolition-by-neglect. In May 2010 the city denied the owner's application to demolish the 500-seat theater, rejecting the owner's claim of unreasonable economic hardship.

Photo by Julia Miller



The Robles House, Galveston, Tex., continues to be neglected even though the court ruled against the owners in their lawsuit against the city. The Galveston Historical Foundation included the property on its Heritage at Risk List in May 2010 because of its potential precedential effect and the importance of the property to Galveston's East End Historic District.

Photo courtesy Galveston Historical Foundation

of Columbia, for example, a property owner sought to bypass the city's preservation laws by seeking a permit to demolish a landmarked structure in the District of Columbia that had been damaged in a fire on the grounds that the property was in imminent danger of

collapse. The building officials for the Building and Land Regulation Administration, upon inspecting the property, concluded that the building was not in danger of collapse and therefore did not warrant a "waiver" from the city's historic preservation laws. The city's Board of Appeals and Review agreed, as did the D.C. Court of Appeals. *See J.C. & Associates v. D.C. Board of Appeals*, 778 A.2d 296 (2001).

Significantly, the D.C. Court in *J.C. & Associates* clarified that the city's Unsafe Building's Act did not confer a "right" to demolition permits upon a showing that a building is unsafe. Rather, the court explained, the act is "purely a grant of enforcement authority to the Mayor to secure or demolish

unsafe structures or to compel their owners to do so, under specified conditions as the Mayor sees fit."

Public Safety Exclusions in Preservation Ordinances

Most preservation ordinances include a public safety exception to the general rule, which restricts the demolition of historic resources on public safety grounds. Consistent with local law in general, these provisions give recognition to the paramount importance of public health and safety in our communities. Thus, notwithstanding restrictions on demolition in preservation ordinances, even highly significant historic properties can be demolished, in whole or in part, if a property owner can establish that his or

her property falls within this exception. Chicago and Denver, for example, both authorize the demolition of a historic property upon an official determination that it is imminently dangerous to life, health, or property:

Chicago, Ill.

(c) This section shall not apply to permit applications for the demolition of: (i) any building or structure that is necessary to remedy conditions imminently dangerous to life, health or property, as determined in writing by the Department of Buildings, the Board of Health or the Fire Department; or (ii) auxiliary buildings or structures such as garages.

Chicago, Illinois Municipal Code § 2-120-825.

Denver, Colo.

(7) Remedy of dangerous conditions. In any case where the building inspection division of CPD, the department of environmental health or the fire department or any other duly authorized officer or agency of the city orders or directs the construction, reconstruction, alteration, repair or demolition of any improvement to a structure for preservation or structure in a district for preservation, for the purpose of remedying conditions determined by that department, agency or officer to be imminently dangerous to life, health or property, said work may proceed without further delay imposed by reason of this chapter, provided any such department, agency or officer shall give the commission notice prior to issuance of any such order or directive. Nothing contained herein shall be construed as making it a violation of this chapter for any person to comply with such order or directive without receipt of a statement from the commission.

Denver, CO Revised Mun. Code, Ch. 30 § 30-6(7).

Issues arise when a property owner seeks to demolish a historic resource, notwithstanding evidence that demolition is

not necessary to protect the public safety. In Galveston, Christopher Columbus Street Market, LLC, the owners of an 1880s two-story house with two additions built in the 1920s, filed a request with the City of Galveston to demolish the additions on public safety grounds, which the city granted. At the same time, the owner also requested a certificate of appropriateness from the city's landmark commission to demolish the main house on the grounds that demolition of the main house was also necessary as an "imminent threat to the public health and safety."

The landmarks commission denied the request and the zoning board affirmed that decision, which was upheld by the courts on appeal in *Christopher Columbus Street Market, LLC v. Zoning Bd. of Galveston*, 302 S.W.3d 408 (Tex. App. 2009). Although a structural engineer retained by the property owner had testified that the house was "structurally unsafe and economically unrepairable," the city's structural engineer reported that demolition of the additions was feasible without demolishing the main structure—even though they shared a common wall.

CONCLUSION

One of the most common problems faced by historic preservation commissions, nonprofit preservation organizations, and preservation advocates in general, is how to protect historic structures and buildings from significant deterioration through lack of maintenance and repair. This publication explores some of the regulatory approaches used by communities today to ensure that properties are regularly maintained. By incorporating demolition-by-neglect provisions in historic preservation ordinances, enforcing affirmative maintenance requirements, and integrating building safety programs with preservation laws, preservation commissions should have the tools they need to ensure that designated landmarks and properties in historic districts do not become victims of demolition-by-neglect.

FURTHER READING

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