

Foreclosure Blight: Code Enforcement Options

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Objectives

- Discuss problems associated with vacant dwellings
- Explore authority to address deterioration of vacant dwellings
- Apply existing authority to concept of vacant property registration

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Foreclosures and vacant dwellings

- Declining property values in surrounding areas
- Increased crime (theft of copper piping, arson, and others)
- Fire, flooding, and safety hazards
- Tipping points and broken windows theory

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Code enforcement

- Blight literature: Code enforcement is only part of the solution
 - Buy and hold abandoned properties (land bank)
 - Redevelopment and reuse
 - Increased city services and neighborhood support
- Is it possible to intervene with code enforcement at an early stage, and if so, how might it be done?

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Range of Authority

	<u>Dwelling Condition</u>	<u>Available Authority</u>
	Vacant but good condition	General ordinance-making power (GS 160A-174)
	Maintenance deficiencies but still "fit for human habitation"	General ordinance-making power (GS 160A-174)
	Dwelling is "unfit for human habitation"	Minimum Housing Standards (GS 160A-441 <i>et seq.</i>)
	Dwelling is "unsafe"; "in such dilapidated condition"; "dangerous"	Condemn (GS 160A-426), Public Health Nuisance (GS 160A-193)

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Review: General Police Power G.S. 160A-174 / 153A-121

- [Cities and counties] may by ordinance define, prohibit, regulate, or abate acts, omissions, or conditions, detrimental to the health, safety, or welfare of its citizens and the peace and dignity of the [city or county], and may define and abate nuisances.

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A-S-P Associates, 28 NC 207 (1979)

- When regulating private property:
 - Is the object of the legislation within the scope of the police power?
 - Is the means by which the governmental entity has chosen to regulate reasonable? This second inquiry is two-pronged:
 1. Is the statute in its application reasonably necessary to promote the accomplishment of a public good and
 2. Is the interference with the owner's right to use his property as he deems appropriate reasonable in degree?

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State v. Jones, 305 N.C. 520 (1982)

- Facts: Criminal regulation prohibiting operation of junkyards without a fence.
- Holding: Regs based *solely* on aesthetics permissible, subject to *A-S-P Associates* balancing test:
 - "...whether the aesthetic purpose [public benefit] ... outweighs the burdens imposed on the private property owner by the regulation."
 - Public benefit includes:
 - "protection of property values"
 - "preservation of the character and integrity of the community"
 - "promotion of the comfort, happiness, and emotional stability of area residents"

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Burden on private property owner

- *Responsible Citizens in Opposition to Flood Plain Ordinance v. City of Asheville, 308 N.C. 255 (1983)*. Additional building requirements in a flood plain.
- **"Even assuming that the cost of complying with the land-use regulations is prohibitive** (and we do not decide that it is) and recognizing that the market value of plaintiffs' properties has diminished (a fact found by the trial court), **these factors are of no consequence here.** As this Court noted in *A-S-P Associates v. City of Raleigh*, "the mere fact that an ordinance results in the depreciation of the value of an individual's property or restricts to a certain degree the right to develop it as he deems appropriate is not sufficient reason to render the ordinance invalid." (citations omitted)

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Burden on private property owner

- *Appeal of Parker*, 214 N.C. 51 (1938). Ordinance prohibited walls over a certain height.
- “The petitioner complains that the ordinance is an arbitrary and unreasonable restriction upon the petitioner's property rights. **That he, due to the particular circumstances of his case, may suffer hardship and inconvenience by an enforcement of the ordinance is not sufficient ground for invalidating it. The fact that the ordinance is harsh and seriously depreciates the value of complainant's property is not enough to establish its invalidity.**” (citations omitted)

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No need to rely on aesthetics argument

- *Summey Outdoor Advertising, Inc. v. County of Henderson*, 96 N.C.App. 533 (1989). Upheld regulation of outdoor signs despite First Amendment interests.
- **“We find *Jones* to be inapplicable to the case at bar, because the ordinance in question is not for aesthetics only.”**
- “Furthermore, we rely on Article II of the ordinance where aesthetics is listed as only one of several purposes.”

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Vacant Dwellings – not “unfit” “conditions” to “regulate”?

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“Conditions” to “regulate”

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Unfit: Minimum Housing Standards

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Min. Housing Preemptive Space

- Statutory construction argument
- Preemption argument

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Statutory construction: specific trumps general

- “Where there is one statute dealing with a subject in general and comprehensive terms, and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized ...; but, **to the extent of any necessary repugnancy between them, the special statute ... will prevail over the general statute....**” *Krauss v. Wayne County Dept. of Social Services*, 347 N.C. 371, 378-79 (1997)

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Preemption

- *Newton v. City of Winston-Salem*, 92 N.C. App. 446, 449–50 (1988) “The statute specifically states that cities and counties may exercise such [minimum housing standards] powers **only “in the manner herein provided”**....The enabling legislation provides that an ordinance adopted by a city **to regulate buildings unfit for human habitation “shall contain” certain provisions....**”
- *But cf.* GS 160A-450: “...the powers conferred by this Part shall be in addition and supplemental to the powers conferred by any other law.”

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Review: Minimum Housing

- Must enact an ordinance; “shall include the following provisions...”
- Designate an officer; petition by 5 residents triggers mandatory inspection by officer
- If dwelling unfit, officer “shall issue ... an order”

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Two orders

- Must enact an ordinance; “shall include the following provisions...”

Reasonable Cost?

If repair can be made “at a reasonable cost in relation to the value of the dwelling” (percentage set by local govt)

If repair cannot be made “at a reasonable cost in relation to the value of the dwelling” (percentage set by local govt)

“shall issue ...an order.”

“to repair, alter or improve the dwelling in order to render it fit for human habitation or to vacate and close the dwelling....”

“to remove or demolish such dwelling.”

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“Vacate and close” option and abandonment of intent to repair

- Municipality in a county with pop. over 71,000 (and a few others) may employ subdivisions 5a and 5b of GS 160A-443:
 - If owner has kept dwelling “vacated and closed” for one year
 - Find that owner has abandoned the intent and purpose to repair
 - Require owner to repair (cost not exceeding 50% value) or remove and demolish (cost exceeds 50% value) within 90 days
 - If owner fails to comply, public officer shall effectuate.
- In remainder of counties:
 - Wait is indefinite.
 - No authority to act until dwelling deteriorates further, to the point that cost of repair exceeds “reasonable cost” based on percentage assigned in the ordinance.
 - At that point, go through procedure again, and the only order available is “Remove or Demolish”

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Must orders include a “vacate and close” alternative?

- “If possible, a statute must be interpreted so as to give meaning to all its provisions.” *State v. Buckner*, 351 N.C. 401 (2000)
- GS 160A-443(5a)a. “...issued an order, ordering a dwelling **to be repaired or vacated and closed, as provided in subdivision (3)a**, and if the owner has vacated and closed such dwelling *and kept such dwelling vacated and closed for a period of one year pursuant to the ordinance or order....*”

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What is “unfit for human habitation?”

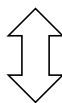
- GS 160A-441
 - Dilapidation
 - Increased risk of fire, accidents, or “other calamities”
 - Lack of ventilation, light, or sanitary facilities
 - Other conditions dangerous or detrimental to health, safety, morals, or otherwise inimical to citizen welfare
- GS 160A-444: other “defective conditions”
 - “dangerous or injurious” to health, safety or morals....
 - “dilapidation; disrepair; structural defects; uncleanness”
 - “may provide additional standards to guide the public officers”

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Tension: General Police Power and Minimum Housing Standards



- Detrimental but not “unfit for human habitation”



Adjust “unfit for human habitation”



- “**Unfit for human habitation**”
 - Can be repaired at “reasonable cost”
 - ORDER: repair OR vacate and close
 - Cannot be repaired at “reasonable cost”
 - ORDER: remove or demolish

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“Unfit” or not?

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“Unfit” or not? *Ultra vires* problem?

- Graffiti
- Damaged fencing (missing planks)
- Exterior fixtures in good repair
- Part of railing on low porch missing
- No deterioration because of lack of paint, preservation, or repair
- Outside porch in good repair
- Chipped or flaking exterior paint
- Cracked but not broken window
- Rubbish (not garbage)
- Sidewalks and driveways in good repair
- Accessory/storage buildings in good repair
- No loose siding

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Quandary #1: Who is “owner?”

- GS 160A-442(4): “‘Owner’ means the holder of the title in fee simple *and every mortgagee of record.*”
- GS 160A-443(3): “...requiring the *owner* ... to repair, alter or improve the dwelling....”
- “It is the holding in this jurisdiction that the legal title to mortgaged premises, for purposes of security, is vested in the mortgagee.” *Federal Land Bank v. Jones*, 211 NC 317 (1937).
- “[Mortgagee] may file a suit in equity to restrain waste.” This applies “certainly after default” and “before foreclosure.” *Id.*

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Mortgagee as “owner?”

- “A mortgagee after default is entitled to possession of the mortgaged premises.... When he takes possession he becomes liable to keep such premises in usual repair....” *Gregg v. Williamson*, 246 NC 356 (1957).
- Fannie Mae form deed of trust gives bank right to enter property to prevent waste (but reserves right not to act).

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Quandary #2: Enforcement Limits?

- Can fines and civil penalties be applied to violations of minimum housing standards? Isn't a remedy (gov't action with special assessment lien) already provided?
- Recall *Newton* ("only in the manner herein provided" and min. housing ordinances "shall contain certain provisions")
- Versus G.S. 160A-450 (min. housing powers are in "addition and supplemental to the powers conferred by any other law").

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A code enforcement proposal: vacant property registration

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Vacant Property Registration

- All vacant properties must be registered – *even those in good condition*
- Hire local property management company to maintain the property; post contact information
- Maintenance standards (not "unfit")
- Penalties for violations
- Pay an annual or monthly fee to cover the cost of additional, regular inspections/monitoring (code, police, fire)

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Vacant property registration issues

- Preemptive space of minimum housing standards
- Reasonable basis for exercise of power
- Registration and inspection fee

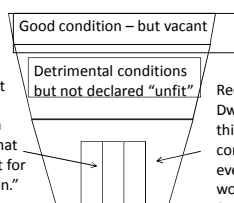
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Preemptive space of min. housing?

- GS 160A-443(3): "...requiring the owner ... to repair, alter, or improve the dwelling **in order to render it fit for human habitation....**"



Bricks: Represent conditions contributing to a determination that dwelling is "unfit for human habitation."



Red outside of bricks: Dwelling is unfit, but this space represents conditions which, even if repaired, would not render it fit for human habitation.

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Bases for regulation of vacant dwellings, regardless of condition

- Protection of property values
- Prevent theft (copper piping) and other crime
- Prevent damage from fire, flooding, other
- Aesthetics/ "community's aesthetic character"
 - *State v. Jones*, 305 N.C. 520 (1982).
 - *CMH Mfg., Inc. v. Catawba County*, 994 F.Supp. 697 (W.D.N.C.1998)
- "Vacant Properties: The True Costs to Communities" (2005).

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Registration and Inspection Fees

- “Even though we conclude that the City does have the authority to assess user fees to defray the costs of regulation, such fees will not be upheld if they are unreasonable.” *Homebuilders Assoc. of Charlotte, Inc. v. City of Charlotte*, 336 N.C. 37, 46 (1994)
- “...a rough limit to ‘reasonableness’ is the amount necessary to meet the full cost of the particular regulatory program.” *Id.* (citing Lawrence).

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Flexible provisions

- Waive (or city reimburse) for fee if dwelling reoccupied within set period of time
- Permit alternatives to professional maintenance company, provided:
 1. No violations in prior quarter
 2. Demonstrated ability to maintain property through alternative arrangement

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Challenges (aside from political)

- Boundary with minimum housing ordinance
- How define “vacant” dwelling?
 - How much time between occupancy?
 - What about rental property in between tenants?
 - What qualifies as occupancy?
 - What about tourist destinations?
- Small towns
 - What is a reasonable fee?
 - Cooperate with neighboring towns to run a consolidated program?

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Questions and Comments

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