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Preventing Demolition by Neglect: Strategies for Arizona

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INTRODUCTION

Demolition by neglect is one of the most significant, persistent, and universal challenges facing the historic preservation movement. Throughout Arizona and across America thousands of historic buildings are being actively demolished due to neglect. In Arizona the problem is particularly acute in rural communities with limited resources and in historic urban cores where the redevelopment value of underlying land creates an incentive for demolition.

Arizona, like many states, does not have a unified approach to preventing demolition by neglect. While both state statute and federal case law empower Arizona's communities to put in place measures to prevent demolition by neglect, few communities have done so and no guidance documents are available to assist them. This paper identifies three viable options available to Arizona's state, county, and municipal governments to help prevent demolition by neglect in Arizona's historic communities: local ordinances, enhanced code enforcement, and state legislation. Its purpose is to provide guidance to communities in Arizona that wish to establish demolition by neglect protections for historic properties, and also to contribute to the broader conversation within the preservation movement about the issue of demolition by neglect.

This paper does not provide a definitive course of action to prevent demolition by neglect in Arizona. Rather it acknowledges the diversity of Arizona's historic communities and the preservation challenges within them and seeks to present multiple approaches that are context sensitive. No one option discussed is exclusive of any other, as Arizona's case study supports previous assertions that "...no one 'tried and true' solution exists to the prevention of demolition by neglect".¹ The Arizona State Historic Preservation Office serves as the state's primary resource for communities that wish to develop specifically tailored protections against demolition by neglect, and the Arizona Preservation Foundation serves as the state's primary preservation advocacy body and can help advocate for their passage. Both entities are eager to assist any communities that wish to pursue their own efforts to prevent demolition by neglect.

WHAT IS DEMOLITION BY NEGLECT?

"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."² While conceptually straightforward, determining when a structure's "preservation becomes threatened" to a degree that it should be legally actionable is the core challenge of enacting laws to prevent demolition by

¹ Pg. 1, Miller, Julia, *Doing Away with Demolition By Neglect*, Preservation Books, The National Trust for Historic Preservation, 2010

² *Id.* at Pg. 5

neglect. There is substantial variability nationwide in how demolition by neglect is legally defined, and even more variability in how laws concerning it are enforced. This variability exists because it is fundamentally impossible to arrive at a universal, academic definition of a concept that is not only physically unique to each structure, but also legally defined primarily according to local tolerances.

Regardless of any specific academic or legal definition, there are three categories of demolition by neglect as an action: deliberate, inadvertent, and benign. Of those three, deliberate demolition by neglect is the most sinister. Perpetrated by property owners who purposefully neglect their structures with the goal of achieving permission to demolish them, deliberate demolition by neglect is openly used as a tool to circumvent historic preservation protections and other zoning laws that regulate demolition. Preventing the use of this tactic is in itself justification for the enactment of laws to prevent demolition by neglect, simply as a matter of good government.

Inadvertent demolition by neglect is by far the most common form of demolition by neglect. There are many understandable reasons why some property owners fail to maintain their properties. Insufficient financial resources are a nearly universal problem in inadvertent demolition by neglect cases, but other sensitive factors like mental illness can play just as big of a role. In some cases, failed ownership structures involving multiple individuals, corporations, or institutions can result in a vacuum of responsibility and inadvertent demolition by neglect.

In all cases of inadvertent demolition by neglect the mere existence of laws to prevent demolition by neglect and the opportunity they create to provide notice to property owners is of paramount value. Many property owners are simply ignorant as to the degree to which long-term neglect has imperiled their structures. Typically, the prospect of enforcement overwhelmingly incentivizes the desired conduct, whether that be the repair of a neglected structure or its sale to a party better equipped to maintain it. The deterrence factor of enforcement to prevent future instances of inadvertent demolition by neglect is also extremely valuable.

Lastly, it is important to recognize the existence of benign demolition by neglect. Benign demolition by neglect usually occurs intentionally, often with rural properties but sometimes with urban.³ What makes it benign is a relative impossibility or impracticability of repair, in contrast to structures that are deliberately or inadvertently suffering from a lack of reasonable repairs. Many instances of benign demolition by neglect can be classified as ruins, the aesthetic value of which have been recognized by the preservation movement since its inception.

³ For example, the interior of the sanctuary at First Baptist Church (1929), 302 W. Monroe St., Phoenix, AZ, damaged by fire, is an urban instance of benign demolition by neglect

PREVENTING DEMOLITION BY NEGLECT IN ARIZONA

Arizona's historic communities have overwhelming economic and cultural imperatives to stop the demolition by neglect of historic structures. Historic buildings and structures are irreplaceable resources that aesthetically inform our sense of place and help tell the story of Arizona. Economically, vacant, abandoned, and neglected buildings have been thoroughly documented to both decrease property values and to inhibit new business growth.⁴ Motivated by these factors, thousands of communities across the country have enacted laws to prevent demolition by neglect. These laws reflect a general public understanding and consensus that the preservation of historic resources is important and that neglected buildings are undesirable.

While the same understanding and consensus exists in Arizona, no communities in this state have enacted laws to prevent demolition by neglect. The reasons for this failure are myriad and complex. This paper aims to help cure the two most common ones: a general lack of understanding about demolition by neglect, especially as it relates to Arizona law, and a lack of guidance documents available to assist interested communities. But additional notable challenges remain that complicate the enactment of demolition by neglect laws in Arizona.

The most common argument put forth in Arizona to oppose laws preventing demolition by neglect is that doing so is offensive to the concept of private property rights. This argument however ignores the fact that structures suffering from demolition by neglect actively harm the property values, marketability, and full use and enjoyment of neighboring private properties and even whole communities. In the context of enacting laws to prevent demolition by neglect, private property rights must be understood to not just protect the rights of bad actors, but also the rights of the larger community of property owners affected by them. Even when this concept is accepted however, the strong value that Arizonans place on private property rights still impacts local land-use regulation, including efforts to establish laws to prevent demolition by neglect.

Another notable challenge to the enactment of laws to prevent demolition by neglect in Arizona is the widespread misunderstanding of the Arizona Private Property Rights Protection Act (PRPA).⁵ Passed in 2006 as a ballot initiative Proposition 207, the PRPA was explicitly reactionary to the landmark Supreme Court case *Kelo v. City of New London*, 545 U.S. 469 (2005), and was intended to limit the government's ability to take private property for third party development and to require just compensation for all regulatory takings. The most significant provision is ARS § 12-1134(a):

"If the existing rights to use, divide, sell or possess private real property are reduced by the enactment or applicability of any land use law enacted after the date the

⁴ *Vacant Properties: The True Cost to Communities*, National Vacant Properties Campaign, 2005

⁵ Ariz. Rev. Stat. section 12-1134

property is transferred to the owner and such action reduces the fair market value of the property the owner is entitled to just compensation from this state or the political subdivision of this state that enacted the land use law.”

Unfortunately, this provision has been widely interpreted across Arizona as prohibiting any extension of historic preservation zoning protections. This interpretation is persistent despite there being no case law codifying this interpretation, nor any evidence of legislative intent to support the idea that the PRPA was intended to prohibit the establishment of historic preservation zoning protections. This interpretation additionally ignores the fact that extensive data from across the country has quantifiably proven that historic preservation zoning protections actually *increase* rather than decrease property values, meaning the PRPA is quantifiably not applicable to historic preservation zoning protections. While it is also logically impossible to argue that requiring a property owner to adequately maintain their property diminishes its value, it must still be expected that any effort to enact new protections for historic structures (including demolition by neglect protections) will be met with opposition based on misinterpretations of the PRPA.

It is very important to understand the degree of misunderstanding surrounding the PRPA and the scope of its impact on historic preservation in Arizona. For example, the PRPA establishes that the process for making a claim for just compensation requires a property owner to submit a claim for the specific amount taken by government action (like a rezoning).⁶ If ninety days after that claim is submitted the government action is continuing, the property owner then has a legal cause of action and can pursue recovery in court. This process both challenges the property owner to allege a specific diminution in value, and allows the government ninety days to review that challenge and potentially grant a waiver prior to there being a valid legal cause of action.

Instead of adhering to this statutorily prescribed process, many Arizona municipalities have decided instead to require their planning and historic preservation departments to proactively obtain what are colloquially known as “Prop 207 waivers” from all affected residents prior to the enactment of any new restrictive zoning measures. This policy turns the statutory process on its head: it creates a substantial burden for municipalities seeking to enact new zoning laws, despite the PRPA assigning the burden of making a claim to the property owner, and it preemptively treats any claim for a diminution in property value as automatically valid, despite the PRPA giving the government time to review those claims and issue waivers when appropriate. The chilling effect on historic preservation that this misinterpretation has caused is extreme: there have been virtually no new extensions of local historic preservation zoning overlays in Arizona in the fifteen years since the PRPA’s passage.

This example of how the PRPA is widely misinterpreted to the detriment of historic preservation is illustrative of the challenges faced by efforts to enact new laws preventing

⁶ ARS § 12-1134(E)

the demolition by neglect. In Arizona, the primary challenge for local historic preservation initiatives is usually a lack of education about the value of historic preservation and its nuances, and the dispelling of inaccurate information is frequently required. Any efforts to enact laws to prevent demolition by neglect must be cognizant of this reality and be fully prepared to educate as well as advocate. The misunderstanding of the PRPA and its impact on preservation in Arizona demonstrates that it is just as important that solutions to Arizona's preservation challenges be communicable and practical as it is that they be comprehensive.

With those realities in mind, this paper identifies three effective strategies that Arizona's communities can employ to prevent the demolition by neglect of historic structures. All three are legally sound ways that Arizona's communities can prevent demolition by neglect, and acknowledging the diversity of Arizona's historic communities, each strategy requires different levels of resources and provides different ranges of protections. As mentioned above, no one option is exclusive from any other: communities that successfully enact local ordinances may still pursue enhanced code enforcement, and they should also still advocate for better state legislation addressing demolition by neglect. Even taking into account the challenges identified above, every historic community in Arizona is capable of employing at least one of the following strategies.

STRATEGY ONE: LOCAL ORDINANCE

The most common method used to prevent demolition by neglect is the enactment of a local ordinance. Innumerable communities across the country have done so, often referring to them as "affirmative maintenance" ordinances. Their federal legality was definitively confirmed in *Maher v. City of New Orleans*, 516 F.2d 1051 (5th Cir. 1975), cert. denied, 426 U.S. 905 (1976), "in which a federal appeals court upheld an affirmative maintenance provision for the French Quarter in New Orleans, ruling that the provision was constitutional as long as it did not have an unduly burdensome effect on the individual property owner."⁷

A substantial number of guidance documents and academic reviews have been published to assist communities with establishing local demolition by neglect ordinances. A selection of helpful resources and several model ordinances are included as supplemental materials to this paper. Of particular note are the National Trust for Historic Preservation's *Doing Away With Demolition By Neglect* (2010) and the National Alliance of Preservation Commission's *Establishing a Demolition By Neglect Ordinance* (2016). Both of these publications identify all of the legally required elements of demolition by neglect ordinances and describe the process of establishing a successful ordinance. In summary, while there is no consensus on a model ordinance to prevent demolition by neglect, the National Alliance of Preservation Commissions identified that "[A]n effective ordinance will contain specific

⁷ Pg. 2, *Demolition By Neglect*, Preservation Law Education Materials, National Trust for Historic Preservation, 2009.

elements: standards, petition and action procedures, economic hardship provisions, appeals, and enforcement.”⁸

Of those elements, “petition and action procedures, economic hardship provisions, appeals, and enforcement” are all procedural and thus constrained nationwide by Constitutional due process rights. This results in a degree of standardization, with variations between jurisdictions usually stemming from alignment with other local adjudicative processes and the satisfaction of state and local open meeting laws. Generally speaking, successful “petition and action procedures, economic hardship provisions, appeals, and enforcement” provisions provide property owners with adequate notice, the opportunity to be heard, and a fair hearing. Enforcement must not be overly burdensome and should take into account economic hardship; applications should not be evaluated in an “arbitrary and capricious” manner. These standards are universal nationwide, and substantially similar to the procedural rules for most quasi-judicial municipal adjudications. County and city legal counsels typically have the expertise needed to draft these types of procedural provisions and incorporate them into their community’s existing legal framework. The model ordinances included in the supplemental materials to this paper are additional resources for reference.

The element of “standards” is very different from that of “elements and procedures.” Establishing “standards” is synonymous with defining what will constitute demolition by neglect for legal purposes, which as mentioned above is a highly localized determination. Due to the influence of local factors there is a substantial degree of variability across the country in how communities define demolition by neglect. Generally, the standards established by local ordinances can be divided into three categories: general, strict affirmative maintenance, and structural. General demolition by neglect provisions are defined by their lack of specific standards. An example is this ordinance from Topeka, KS:

“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.”⁹

In Topeka’s ordinance, no specific standards define “the deterioration of the structure resulting in permanent damage” nor “injury or loss to exterior features”. The decision as to when those conditions occur is instead left to the reviewing body to determine. Many communities employ similar, general ordinances that empower historic preservation commissions and other entities to identify demolition by neglect based on their own subjective thresholds. While this type of ordinance can be effective, its lack of specificity can limit its effectiveness.

⁸ Becker, Dan, Pg. 6, *Establishing a Demolition by Neglect Ordinance*, National Alliance of Preservation Commissions, 2016.

⁹ *Topeka, KS, Topeka Code Ch. 80 § 80-2*, cited by Miller, Julia, *Doing Away with Demolition By Neglect*, Preservation Books, The National Trust for Historic Preservation, 2010

The most effective municipal ordinances specifically define what constitutes demolition by neglect. The strictest define demolition by neglect as occurring when there is any deterioration of a building's exterior finishes and architectural features, and can even include peeling paint and decaying mortar.¹⁰ These types of ordinances can be categorized as strict affirmative maintenance ordinances. Strict affirmative maintenance ordinances are not unique to large cities, and smaller municipalities like Charlottesville, VA, sometimes apply even higher standards. Charlottesville's ordinance goes further than most in also requiring the affirmative maintenance of landscaping:

Section 34-281. Maintenance and repair required.

Neither the owner of nor the person in charge of a structure or site in any of the categories set forth in section 31-127.2 of this Code shall permit such structure, landmark or property to fall into a state of disrepair which may result in the deterioration of any exterior appurtenance or architectural feature so as to produce or tend to produce, in the judgment of the appropriate board, a detrimental effect upon the character of the district as a whole or the life and character of the landmark, structure or property in question, including but not limited to:

- 1. The deterioration of exterior walls or other vertical supports;*
- 2. The deterioration of roofs or other horizontal members;*
- 3. The deterioration of exterior chimneys;*
- 4. The deterioration of crumbling of exterior plasters or mortar;*
- 5. The ineffective waterproofing of exterior walls, roofs and foundations, including broken windows or doors;*
- 6. The peeling of paint, rotting, holes and other forms of decay;*
- 7. The lack of maintenance of surrounding environment, e.g., fences, gates, sidewalks, street signs, accessory structures and landscaping (emphasis added);*
- 8. The deterioration of any feature so as to create or permit the creation of any hazardous or unsafe condition or conditions.¹¹*

Charlottesville's standards truly prescribe an aggressive affirmative maintenance requirement for historic structures that prohibits all deterioration on the subject parcel. While this aggressive approach has been very successful in many communities across the country and is in many respects ideal from a preservation perspective, many other communities apply a lesser standard that only prohibits neglect that directly threatens the structural integrity and/or continued existence of a structure. This lesser standard is sometimes the most appropriate preservation approach in built environments like New Orleans, where retaining the patina of decayed exterior finishes is sometimes desirable. New Orleans' ordinance is an excellent example of an ordinance that falls into the category of structural, since seeks only to prevent structural neglect:

¹⁰ For example, Washington, D.C. (DC Official Code 6-1102(a)(3A)), Detroit, MI (Detroit Code Ch. 25 25-2-2(g))

¹¹ Charlottesville, Virginia, Municipal Code § 34-281

Sec. 84-108. - Demolition by neglect (HDLC)

(a) Demolition by neglect is neglect in 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 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 ceilings, roofs, ceiling and roof supports, or other horizontal members which sag, split, or buckle due to defective material or deterioration.*
- g. Members of ceilings, 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 building structurally unsafe or not properly watertight.*

(3) Action by the city, the state fire marshal, or the department of safety and permits relative to the safety or physical condition of any building.¹²

The differences between Charlottesville and New Orleans' ordinances underscores the need to holistically evaluate a community's needs when developing a local ordinance to prevent demolition by neglect. This evaluation must not only consider preservation, but must also take into account a community's economic, social, cultural, and political conditions. For example, in communities with highly marketable historic properties a strict affirmative maintenance ordinance may make sense because there will likely be someone else willing to buy the property if the owner is unwilling or unable to maintain it. This is the case both in smaller communities like Charlottesville and in major urban areas like New York City, which like Charlottesville has a strict affirmative maintenance ordinance. In

¹² New Orleans, Louisiana, Code of Ordinances- Part II, Sec. 84-108. - *Demolition by neglect (HDLC)*

contrast, in rural communities like Clifton, Arizona, where entire historic streetscapes are abandoned, any ordinance that adds a burden to ownership ignores economic realities and will ultimately deter preservation objectives.

While the process of tailoring a local demolition by neglect ordinance to a community is both essential and can create ideal protections, that process is also the primary challenge to enacting local ordinances to prevent demolition by neglect. The process of tailoring an ordinance to an individual community's needs requires local staff expertise, time, and political commitment. There is grant funding available to help communities develop local historic preservation ordinances through the National Park Service's Certified Local Government (CLG) grant program (administered in Arizona by the Arizona State Historic Preservation Office), but a community must still commit to expending resources in the form of staff time to help develop an ordinance and subsequently to engage in the transparent, public process of enacting a new law. While this paper is intended to assist in developing local planning and preservation staff's expertise to draft an affirmative maintenance ordinance, tailoring an ordinance to meet local needs is still challenging, as is the process of enacting any new law. For some communities, especially small, rural ones with extremely limited municipal staff, absent intervention by an entity like the Arizona State Historic Preservation Office or the Arizona Preservation Foundation those barriers may be insurmountable.

In Arizona, no community has yet enacted an ordinance to prevent demolition by neglect. There is no legal reason why: no state case law exists restricting the ability of counties and cities to enact ordinances to prevent demolition by neglect, and the statutory authority to do so is clear. The authority for Arizona communities to regulate demolition by neglect comes from ARS 9-462.01(A)(10)(b), which enables general regulation of the demolition of historic structures:

(b) A plan for the preservation of districts of historical significance shall identify districts of special historical significance, state the objectives to be sought concerning the development or preservation of sites, area and structures within the district, and formulate a program for public action including the provision of public facilities and the regulation of private development and demolition necessary to realize these objectives.
(Emphasis added)

Similar enabling statutes have been relied upon for decades in other states as granting authority for localities to enact affirmative maintenance ordinances. For example, Section 5 of the *Pennsylvania Historic Districts Act of 1961* enables a broad scope of preservation ordinances, including many local affirmative maintenance ordinances:

The agency charged by law or by local ordinance with the issuance of permits for the erection, demolition or alteration of buildings within the historic district shall have the power to institute any proceedings, at law or in equity, necessary for the enforcement

of this act or any ordinance adopted pursuant thereto, in the same manner as in its enforcement of other building, zoning or planning legislation or regulations.

The City of Phoenix is currently in the process of developing a local ordinance to prevent demolition by neglect with the goal of enactment by the end of 2021, but no draft ordinance has yet been completed. The definition of demolition by neglect currently being contemplated by Phoenix would employ a lesser standard than those found in strict affirmative maintenance ordinances, focusing more on cases of structural neglect. Once enacted, the definition adopted by Phoenix should serve as a model for other Arizona communities seeking to prohibit demolition by neglect that physically imperils historic structures. Phoenix's ongoing effort to enact an affirmative maintenance ordinance reaffirms that ARS 9-462.01(A)(10)(b) provides the necessary authorities for the prevention of demolition by neglect, and should spur other communities to take similar measures. There are truly no legal barriers preventing Arizona communities from enacting local ordinances to prevent demolition by neglect, and it is a strategy that has been proven to be successful in hundreds of communities nationwide.

STRATEGY TWO: ENHANCED CODE ENFORCEMENT

The most immediately accessible way that a community can combat demolition by neglect is through effective enforcement of existing code. The three codes that are relevant are the International Building Code (IBC), the International Property Management Code (IPMC), and the International Existing Buildings Code (IEBC). The IBC has been adopted by all of Arizona's counties and municipalities as the official building code (with some local amendments), and either the IPMC or the IEBC have been adopted by the majority but not all of Arizona's counties and municipalities.¹³ Using any of these codes to prevent demolition by neglect hinges on determining that a building is either unsafe or dangerous. While reliance on these codes will invariably exclude some instances of neglect that would be prohibited by strict affirmative maintenance ordinances, this strategy captures most cases of serious neglect that imperil the continued existence of a structure.

Universally adopted in Arizona (with local amendments), the model IBC requires that buildings be constructed to specific standards for the purposes of public health and safety and empowers code enforcement officers to conduct inspections and prosecute violations. Most notably for the purposes of combating demolition by neglect, Section 116 of the IBC defines when existing structures become unsafe and empowers the code official with substantial remeditive and punitive authorities. The model IBC definition of an unsafe structure includes inadequately maintained buildings:

“Structures or existing equipment that are or hereafter become unsafe, unsanitary, or

¹³See supplemental materials for a list of code adoption by Arizona counties and municipalities

deficient because of inadequate means of egress facilities, inadequate light and ventilation, or that constitute a fire hazard, or are otherwise dangerous to human life or the public welfare, or that involve illegal or improper occupancy or inadequate maintenance, shall be deemed an unsafe condition. Unsafe structures shall be taken down and removed or made safe, as the building official deems necessary and as provided for in this section. A vacant structure that is not secured against entry shall be deemed unsafe.”¹⁴
(Emphasis added)

Some of Arizona’s communities that have adopted the IBC have amended this section to more specifically define unsafe structures. None of Arizona’s locally adopted amendments diminish the model IBC’s definition of an unsafe structure; rather, they all expand upon it. The City of Peoria’s definition is a representative example of the more detailed definitions of unsafe structures adopted by many Arizona communities:

Conditions or defects that render a building or structure unsafe include, but are not limited to:

- 1. Where the stress in any materials, member or portion thereof, due to all dead and live loads, is more than one and one-half times the working stress or stresses allowed in this code for new buildings of similar structure, purpose or location.*
- 2. Where any portion thereof has been damaged by fire, earthquake, wind, flood or any other cause to such an extent that the structural strength or stability thereof is materially less than it was before such catastrophe and is less than the minimum requirements of this Code for new buildings of similar structure, purpose or location.*
- 3. Where any portion thereof has wracked, warped, buckled or settled to such an extent that walls or other structural portions have materially less resistance to winds or earthquake than is required in the case of similar new construction.*
- 4. Where the exterior walls or other vertical structural members list, lean or buckle to such an extent that a plumb line passing through the center of gravity does not fall inside the middle of one-third of the base.*
- 5. Where any building or structure which, whether or not erected in accordance with all applicable laws and ordinances or not, has any non-supporting part, member or portion less than 50 percent, or in any supporting part, member or portion less than 66 percent, of the strength or fire-resisting qualities required by law in the case of a newly constructed building of like area, height and occupancy in the same location.”¹⁵*

Both the model IBC definition and the expanded Peoria definition of an unsafe structure clearly prohibit the substantial structural neglect of structures and should prevent the severe demolition by neglect of historic structures. Their provisions are not entirely

¹⁴ Section 116(a), *International Building Code, 2018*

¹⁵ Section 116.3, *International Building Code* as adopted by Peoria, AZ

dissimilar from structurally focused local ordinances like New Orleans'. While the model IBC broadly identifies buildings suffering from "inadequate maintenance" as unsafe structures, the IBC as amended by Peoria provides more specific definitions of inadequate maintenance. In particular, provisions 1-3 of the IBC Section 116.3 as adopted by Peoria should prevent all serious structural demolition by neglect, especially considering that they apply to interior as well as exterior materials.

The IPMC offers even more protection against demolition by neglect. Jurisdictions that have adopted it thoroughly empower building officials and code officers to ensure the adequate maintenance of structures and to engage in abatement.¹⁶ Section 108.1.3 of the model IPMC defines "Unsafe Structures and Equipment" even more broadly than the model IBC, including a structure that is "unsanitary, vermin or rat infested, contains filth and contamination, or lacks...sanitary or heating facilities...".¹⁷ Section 108.1.5, "Dangerous Structures or Premises", establishes thirteen criteria that- if independently met- will qualify a structure as dangerous. There is no envisionable scenario where a building could be suffering from substantial demolition by neglect and not be in violation of at least one of the thirteen provisions. Lastly, the IEBC adopts the same definition of an unsafe structure as the IBC, but also encourages preservation by providing specific exemptions from code compliance for "recognized" historic buildings, requiring that repairs to those buildings be made using "in-kind" materials.¹⁸

It is important to note that both the IBC and IPMC contain code exceptions for historic buildings. However, none of the exceptions contained in any of the three codes preclude the use of code enforcement to correct demolition by neglect. For example, Section 102.6 of the IPMC allows for the IPMC to be entirely waived for historic structures, but only "where such buildings or structures are judged by the code official to be safe and in the public interest of health, safety, and welfare." As discussed above, nearly all buildings suffering from demolition by neglect meet the IPMC definition of an unsafe building and thus do not qualify for this exemption. Similarly, while the IBC exempts projects on existing structures that are not "substantial improvements" (defined as costing less than fifty percent of the market value of the structure prior to the improvement), and even provides an additional exemption for historic structures undergoing substantial improvements, there is no exemption for unsafe structures. In all three codes- the IBC, the IPMC, and the IEBC- there are provisions that should prevent demolition by neglect by defining such structures as either unsafe or dangerous and empowering building officials to engage in appropriate abatement.

Utilizing code enforcement to combat demolition by neglect is thus not impeded by a lack of appropriate provisions in the building codes themselves. Rather it is a lack of

¹⁶ Section 106, 106.3 and 106.5 of the *International Property Maintenance Code (2018)* empower building officials to enforce the IPMC, including through abatement.

¹⁷ Section 108.1.3 of the *International Property Maintenance Code (2018)*

¹⁸ Section 202, *International Existing Building Code (2018)*; Chapter 12, *International Building Code (2018)*

enforcement that currently prevents these already-adopted laws from effective use as tools for preservation. The reasons why these codes are not invoked for curbing demolition by neglect will vary from locality to locality. However, in Arizona the most common reason is that there is no consistent or effective trigger for code enforcement against neglected structures.

In every jurisdiction surveyed for this paper, code enforcement does not occur against existing buildings unless they are severely structurally unsound and in a location where they threaten public safety.¹⁹ Code officials almost never engage in inspections of existing structures unless they require a permit for a “substantial improvement” as defined by the IBC, allowing most structures that meet the IBC, IPMC, or IEBC definition of being unsafe or dangerous to persist in a routinely uninspected status.²⁰ A chief reason for the lack of routine inspection is financial. Fees for code inspections of new construction and “substantial improvement” projects underwrite most code official positions and civic building departments. Conducting inspections to proactively enforce building codes and issue fines does not reliably generate revenues. Thus, nearly all code enforcement divisions at both the county and municipal levels across Arizona are oriented to almost exclusively inspect new construction and “substantial improvement” projects.

There is also a degree of uncertainty in building code departments across Arizona as to the legality of conducting code inspections on existing buildings, especially vacant buildings. During the 2020 legislative session, HB2705 sponsored by Reps. Pratt, Cook, Campbell, and Payne and supported by the League of Arizona Cities and Towns proposed to cure this via state law by explicitly empowering local code officials to conduct annual inspections of vacant properties. While such a law would provide a clear benefit to address the problem of owner neglect in Arizona’s communities, its necessity is debatable; building officials already have the authority to inspect structures that are potentially unsafe. The challenge for preservationists is getting local building officials to routinely perform inspections and issue fines against owners of neglected historic buildings.

In some communities, most notably in the Vieux Carre (French Quarter) of New Orleans, code enforcement officials are specifically assigned to the proactive enforcement of building codes and affirmative maintenance ordinances that implicate them. The Vieux Carre Commission, the historic preservation and design review commission for the district, has staff inspectors that respond to reported violations and proactively patrol the streets looking for violations.²¹ In addition to issuing citations for architectural and construction issues like demolition by neglect and unpermitted work, inspectors also cite property owners for liveability violations. This concept of dedicating building code enforcement officers- under the direction of a local preservation commission- to the task of ensuring the effective preservation of a community’s historic resources is the ultimate utilization of code

¹⁹ Calls made between September 2020 and April 2021 to fifteen Arizona counties and municipalities, identified in supplemental materials

²⁰ Section 202, *International Existing Building Code (2018)*

²¹ <https://nola.gov/vcc/>

enforcement to combat the demolition by neglect of historic resources. However, this approach requires a significant devotion of resources in the form of dedicated code enforcement officers, which is not feasible in all of Arizona's communities.

A limited number of communities have adopted a superior approach that also connects building code enforcement departments with the work of historic preservation commissions to address demolition by neglect, but without requiring outlay of substantial resources and permanent dedication of building code enforcement staff. Communities such as Raleigh, NC and Charleston, SC, have empowered historic preservation commissions to refer properties suffering from demolition by neglect to the building code official for code enforcement. An excellent example of how this process can be established via local ordinance is Sec. 54-241 of the Code of the City of Charleston, South Carolina, which empowers the Board of Architectural Review thusly:

Sec. 54-241. - Powers of board to require repair of structures.

The Board of Architectural Review, on its own initiative, may file a petition with the chief building official requesting that said officer proceed under the public safety and housing ordinance to require correction of defects or repairs to any structure covered by this article so that such structure shall not experience demolition by neglect and be preserved and protected in consonance with the purpose of this article and the public safety and housing ordinance.

Charleston's ordinance effectively creates a line of communication between the Board of Architectural Review and the chief building official, enabling trained historic preservation commission members to identify instances of demolition by neglect and refer them for code enforcement. This solution is attractive because it avails itself of the expertise of historic preservation commission members and yet merely relies upon enforcement of existing building codes through normal code enforcement procedures. No substantial new local ordinance or state law is required: all that occurs is the enforcement of existing law. Furthermore, What this model does not do is also just as significant as what it does do; it does not empower the Board of Architectural Review with any quasi-judicial function. Rather, it directs them to submit a petition merely "requesting" enforcement. This petition is then enforced at the discretion of the chief building officer. In instances of disagreement between a historic preservation commission and the building officer, the political leadership of a community may intervene and exercise their ultimate administrative authority under the government's police power.

This hybrid solution is an attractive model for Arizona communities seeking to prevent demolition by neglect, especially those that lack the resources to enact comprehensive local ordinances. It allows for a case-by-case evaluation of neglected structures by trained historic preservationists and utilizes the existing legal framework and administrative process of code enforcement, leveraging both existing historic preservation commissions and existing laws. Compared to the effort required to enact a local ordinance

or pass state legislation, or the effort to educate local code officials about preservation and redirect resources to proactive patrolling, this simple referral from historic preservation commissions to code enforcement departments is far easier and potentially just as effective means for preventing demolition by neglect. This option is the primary strategy recommended for Arizona communities that are not able to enact a comprehensive local ordinance.

STRATEGY THREE: STATE LEGISLATION

The most powerful method to prevent demolition by neglect is through state legislation. Ideally, state legislation could establish a singular definition of demolition by neglect and a standardized process for its prevention. In reality, most states have opted instead to pass enabling laws that merely serve to empower municipalities and counties to create their own local regulations.

State enabling laws concerning demolition by neglect range from broad enabling statutes found in state planning acts like ARS 9-462.01(A)(10)(b) to targeted legislation that specifically addresses the issue of demolition by neglect. While both approaches achieve the same goal, the more that state law can define demolition by neglect and create legal parameters for its prevention, even if only within enabling legislation, the easier and more attractive it is for localities to adopt and enforce effective regulations.

The enactment of statutes with specific, targeted language has allowed some states to achieve close to the ideal of a unified statewide policy framework to prevent demolition by neglect. Mississippi, for example, has enacted the following state law (MS Code § 39-13-15) that establishes both a statewide definition for demolition by neglect and a review role for Mississippi State Historic Preservation Office (housed within the Mississippi Department of Archives and History Historic Preservation Division):

The governing authority of any county or municipality, individually or jointly, may enact local legislation governing "demolition by neglect," defined as improper maintenance or lack of maintenance of any property in a historic district, or any historic landmark or landmark site, which results in substantial deterioration of such a property and threatens its continued stability and preservation. The governing authority of any county or municipality, individually or jointly, is further authorized, in its discretion, to fine any property owner who has been found to own a property that has been determined to be threatened by demolition by neglect as defined herein. Such property owner, from the date such property is found to be in demolition by neglect by the governing authority until such repairs are made to remove the danger to the property, shall be in violation of the provisions of this section.

In addition to the powers specified in Section 21-19-11(1), a governing authority, if the Historic Preservation Division of the Department of Archives and History concurs,

*may make repairs necessary to correct demolition by neglect, and the cost of such repairs shall become a lien against the property in accordance with Section 21-19-11(3).*²²

While Mississippi's law fundamentally is enabling legislation that allows counties and municipalities to establish their own laws, it also contains specific provisions that make it more effective than general enabling laws like Arizona's ARS 9-462.01(A)(10)(b). Its broad definition of demolition by neglect as any "substantial deterioration" that threatens a historic building's "preservation" provides an important baseline. The inclusion of SHPO review authority for municipal actions that could lead to liens being placed on property also provides an important safeguard as a constraint to potential abuse. The inclusion of these relatively simple provisions makes Mississippi's law superior to state legislation that only empowers counties and municipalities to create their own regulations. For these reasons, MS Code § 39-13-15 is a model that should be adopted by other states, including Arizona.

A recent high-profile attempt to address the issue of demolition by neglect in Arizona through state legislation took a completely different approach than MS Code § 39-13-15. HB 2705, discussed above in the context of its proposed empowerment of building code officials to perform inspections, specified its application to vacant and abandoned buildings rather than neglected buildings in general. Moreover, the proposed legislation would have applied to all buildings, not just historic structures. HB 2705, as proposed, empowered municipalities to:

- 1. Allow yearly inspections of vacant and abandoned buildings to ensure the building is not a threat to public safety or to first responders entering the building in an emergency.*
- 2. Maintain a registry of properties with contact information so law enforcement has direct contact to owners or their agent if there is suspected illegal activity, unauthorized persons on the property, or if there is an emergency.*
- 3. Assess fees that may be escalated each year the property is vacant or abandoned to encourage absentee landlords to fix and place their property into productive use. Properties free of code violations and listed for sale or lease are not subject to fees or the requirements of the bill.*
- 4. Clearly outline the expectations of the property owner to maintain their buildings and property, including the exterior, windows, utilities, and keeping the property free of trash, junk, debris and hazardous substances.*
- 5. Provide property owners due process to challenge decisions made by the city or town.*

One Sheet, League of Cities and Towns

The approach of addressing all vacant and abandoned buildings instead of only historic properties is not novel. One of HB 2705's proponents, the League of Arizona Cities

²² MS Code § 39-13-15 (2016)

and Towns, noted in their advocacy materials “[T]o date, well over 300 cities and towns across the nation, including in states like Texas, Utah, West Virginia, Nevada, and Florida, have adopted and used similar models. The legislation adopts the best practices used in these states and models off their successes...”²³ The primary difference between HB 2705’s approach and enabling legislation that allows counties and municipalities to specifically address neglect of historic properties is that this proposed legislation is rooted solely in the code enforcement process without contemplation of historic preservation objectives. Theoretically, legislation like that proposed in HB 2705 should protect historic structures along with all other structures; however, in practice such legislation is not as effective as laws that specifically address historic structures. Laws that specifically address historic structures typically lead to the creation of local processes that involve historic preservationists in the review of demolition by neglect cases. Design review board and historic preservation commission members are much more likely to have received specific training in historic preservation than code enforcement officers, making this approach more effective at preventing the demolition by neglect of historic properties than relying exclusively on the code enforcement office and process. Still, the enactment of a bill like 2020’s HB2705 would be positive progress towards preventing demolition by neglect in Arizona.

The primary barrier to the enactment of any statewide legislation to prevent demolition by neglect is marshalling political will. However, recent victories for historic preservation at the Arizona State Legislature offer hope. In 2020 and 2021 bills restoring and funding the Arizona Heritage Fund passed into law thanks to the advocacy efforts of the Arizona Heritage Alliance, Rep. Joanne Osborn (R), the primary bill sponsor, and the bipartisan support of both the Senate and the House. With this goal achieved, there is hope in the Arizona preservation community that other pressing preservation issues, including demolition by neglect, may find legislative remedy in upcoming sessions. While the ideal of a detailed, statewide definition of demolition by neglect and a standardized process for its prevention may not be attainable given that no other states yet have achieved it, the enactment of a law modeled after Mississippi’s is a reasonable goal for Arizona in 2022 and beyond.

ADDITIONAL OPTIONS

Previous attempts to prevent demolition by neglect both in Arizona and nationwide have relied upon different legal theories and utilized different methods than the three methods evaluated in this paper. The two most common legal theories employed to combat demolition by neglect- nuisance and blight- are discussed here.

Structures suffering from demolition by neglect, especially those vacant or abandoned buildings, can meet the legal criteria of a public or private nuisance. However,

²³ *One-Sheet, HB 2705*, Arizona League of Cities and Towns, 2020 (included in supplemental materials)

pursuing a claim for public or private nuisance can often result in lengthy and expensive litigation. While injunctive relief can be used to preserve the neglected structure or structures during that process, the very act of engaging in the judicial process to remedy the issue is more complicated than using the government's police powers to prevent neglect. In some rare cases where the potential exists for recovery beyond the specific performance of repairing the neglected building, nuisance law may be the appropriate legal theory to pursue, but for the general and comprehensive prevention of demolition by neglect all three of the options identified by this paper are superior.

Declaring neglected structures to be blighted is a relatively common method of preventing demolition by neglect in Arizona. The Town of Superior (pop. 3,701) has a particularly effective program. Utilizing Community Development Block Grant (CDBG) funds, Superior regularly surveys its abandoned buildings and uses a rating system to score their deterioration. The Town then declares sufficiently neglected properties to be blighted, and exercises eminent domain authority to take control of the property. Buildings that are too dilapidated to be repaired are demolished. For structures deemed salvageable, the Town pursues private-sector adaptive reuse. The Town engages in consultation with the Arizona State Historic Preservation Office during the entire process to make sure that correct preservation decisions are made. In 2021, Superior's blight program identified sixteen buildings that were evaluated and either demolished or stabilized for adaptive reuse. Superior's program is a successful model of using blight remediation to combat demolition by neglect that could be replicated in other small, rural Arizona communities.

Using declarations of blight to stop cases of demolition by neglect is a legally sound strategy in Arizona. Blight is clearly defined both in Arizona state statute and in case law. A.R.S. § 36-1472(2) and (18) defines "blighted" and "slum" areas:

2. "Blighted area" means an area, other than a slum area, where sound municipal growth and the provision of housing accommodations is substantially retarded or arrested in a predominance of the properties by any of the following:

- (a) A dominance of defective or inadequate street layout.*
- (b) Faulty lot layout in relation to size, adequacy, accessibility or usefulness.*
- (c) Unsanitary or unsafe conditions.*
- (d) Deterioration of site or other improvements.*
- (e) Diversity of ownership.*
- (f) Tax or special assessment delinquency exceeding the fair value of the land.*
- (g) Defective or unusual conditions of title.*
- (h) Improper or obsolete subdivision platting.*
- (i) The existence of conditions that endanger life or property by fire and other causes.*

18. "Slum area" means an area in which both of the following are true:

- (a) There is a predominance of buildings or improvements, whether residential or nonresidential.*

- (b) *The public health, safety or welfare is threatened because of any of the following:*
- (i) *Dilapidated, deteriorated, aging or obsolescent buildings or improvements.*
 - (ii) *The inadequate provision for ventilation, light, air, sanitation or open spaces.*
 - (iii) *Overcrowding.*
 - (iv) *The existence of conditions that endanger life or property by fire and other causes.*

The matter of what constitutes blight under the above statutes and how such a determination is made has been litigated thoroughly in Arizona. In *City of Phoenix v. Superior Court, Maricopa County*, 137 Ariz. 408, 671 P.2d 387, Supreme Court of Arizona, In Banc., 1983, the Arizona Supreme Court confirmed that municipalities may acquire property for “slum clearance and redevelopment” as a valid public use of both public funds and eminent domain authority. The Arizona Supreme Court also, relying in part on *Apostle v. City of Seattle*, 70 Wash.2d 59, 64, 422 P.2d 289, 292 (1966) and *Tucson Community Development and Design Center, Inc. v. City of Tucson*, 131 Ariz. 454, 459, 641 P.2d 1298, 1303 (App.1982), found that municipalities have wide authority to make such declarations of blight with limited grounds for judicial review:

“We hold, therefore, that the function of the judiciary in determining whether an area is a slum or blighted area is to review the findings of the governing body, rather than to make an original determination. We hold further that the standard of review is limited to questions of fraud, collusion, bad faith or arbitrary and capricious conduct by the governing body. If evidence taken at the hearing before the trial court indicates that the findings of the governing body have some reasonable support in the facts, even though those findings may be reasonably doubtful or fairly debatable, the findings of the governing body must be sustained.”

The limits on municipal power to declare properties blight in Arizona were further defined in *Bailey v. Myers*, 206 Ariz. 224, 76 P.3d 898, 901 (Ariz.App. Div. 1, 2003). Two years before the landmark Supreme Court case *Kelo v. City of New London*, 545 U.S. 469 (2005), the Arizona Court of Appeals opined that Article 2, § 17 of the Arizona Constitution prevented the taking of private property through eminent domain for the purpose of private redevelopment. While *Kelo* later concluded that the pursuit of economic benefits in such situations constitutes a public use and purpose, *Bailey v. Myers* established the opposite precedent in Arizona. The Arizona Private Property Protection Act, discussed at length previously, was passed as a ballot initiative in 2006 explicitly to contradict *Kelo* legislatively, statutorily codifying the “public use and purpose” standard for the exercise of eminent domain that was established in *Bailey v. Myers*.

While the use of declarations of blight to stop demolition by neglect in Arizona is clearly a legally valid method, its effectiveness is severely limited by two factors. First and foremost, any municipality that uses declarations of blight to exercise eminent domain

authority must both pay just compensation to the owner and also have a plan for use of the buildings it has taken. This requires significant resources. The Town of Superior's reliance on CDBG funds for their blight mitigation program demonstrates that many communities cannot engage in these types of actions without outside funding. Secondly, properties cannot be declared blight until they are in an advanced state of decay. By the time a municipality can act a historic structure may already be lost, and because of this high threshold declarations of blight provide little preventative value. Compared with the protections provided by local ordinances, state law, or even enhanced code enforcement, declarations of blight are far more challenging for municipalities and provide fewer protections for historic structures.

CONCLUSION

This paper has identified three effective strategies for Arizona communities seeking to prevent demolition by neglect: local ordinances, enhanced code enforcement, and state legislation. For each strategy this paper provides guidance, model laws, and a discussion of the benefits, limitations, and challenges associated with each strategy. While this paper recommends three strategies, no one is exclusive from any other, and no single, universal solution to the problem of demolition by neglect exists. Each community must decide what strategy is most appropriate for itself based on its desired level of protections against demolition by neglect and its capacity to pursue historic preservation initiatives.

For communities that have the resources to do so, enacting a local ordinance offers the most customized and comprehensive protection against demolition by neglect. Communities can enact protections ranging from prohibition of all exterior degradation to limited monitoring of significant structural decay, and can customize their protections based on the needs of their particular built environment and local social, cultural, and political tolerances. This paper has provided both model ordinances and guidance for communities that wish to pursue this strategy.

For communities that lack the resources to enact their own local ordinances, existing building codes often provide all of the necessary authorities to combat demolition by neglect. Issues with enforcement however traditionally complicate the effectiveness of employing this method. Targeted education and outreach to building code officials can potentially cure those issues, but the establishment of a review and referral pathway from local historic preservation commissions to building code departments is a superior solution. This strategy is especially attractive from an advocacy standpoint, as all that is being requested is the enforcement of existing law. This paper has provided a model ordinance that establishes that referral pathway and has also identified provisions of multiple building codes that can be enforced to help prevent demolition by neglect.

No matter what Arizona's historic communities do locally to combat demolition by neglect, the entire Arizona preservation community should advocate for a new state law that

specifically addresses demolition by neglect. A reasonable goal is the enactment of an expanded enabling law modeled on Mississippi's that provides a baseline definition for demolition by neglect, and that creates a strong appeals process involving the Arizona State Historic Preservation Office. Such a law would encourage the adoption of additional local protections across the state and would discourage frivolous legal and political challenges to measures taken locally by communities to prevent demolition by neglect. In addition to identifying Mississippi's statute as a model, this paper has examined similar recent legislative initiatives in Arizona and noted that recent legislative successes for historic preservation indicate that there is an opportunity for a statewide demolition by neglect law to succeed.

For communities that are interested in exploring the strategies discussed in this paper, further assistance is available. The Arizona State Historic Preservation Office serves as the state's primary technical resource for historic communities, and the Arizona Preservation Foundation serves as the state's primary historic preservation advocacy body. Both entities are eager to assist any interested communities, and grant funding is also available for the study and development of new preservation ordinances through the National Park Service's Certified Local Government grant program (administered in Arizona by the Arizona State Historic Preservation Office). Arizona's historic communities truly have all of the tools and resources needed to effectively protect their historic structures from demolition by neglect, and now need only to act.

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