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Toward Decent Housing: A  
Heuristic and Holistic View of  
Property Maintenance and  
the Right of Privacy in  
Mature Suburbs\*

Edward L. Symons, Jr.\*\*

*The provision of adequate housing has not been forthcoming from housing policies that focus primarily on new construction and substantial rehabilitation in the urban core. The author suggests that a property maintenance program directed toward mature suburbs would ultimately provide an increase in decent living units at a lower cost. The author notes, however, that a property maintenance code must be limited so that citizens' perceived right of privacy in their homes will be respected. Finally, guidelines for a successful property maintenance program, and suggestions as to how it should be funded, are presented.*

INTRODUCTION

PROVISION OF DECENT housing and a decent living environment for all Americans is one of the important objectives of our society.<sup>1</sup> The United States Supreme Court has acknowledged the importance of decent housing, but it has found no basis in the Constitution for declaring decent housing to be a fundamental right.<sup>2</sup>

Although there is no constitutional right to adequate housing,

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1. *E.g.*, Congress has declared:

The general welfare and security of the Nation and the health and living standards of its people require housing production and related community development sufficient to remedy the serious housing shortage, the elimination of substandard and other inadequate housing through the clearance of slums and blighted areas, and the realization as soon as feasible of the goal of a decent home and suitable living environment for every American family . . . .

The Housing Act of 1949, § 2, 42 U.S.C. § 1441 (1976).

2. "We do not denigrate the importance of decent, safe and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality. . . ." *Lindsey v. Normet*, 405 U.S. 56, 74 (1972).

the provision of adequate housing is an objective worthy of societal concern. The absence of a constitutional right, however, only results in the conclusion that the initiative in respect to the availability of adequate housing must come from the legislature rather than the judiciary.<sup>3</sup> In fact, the legislative bodies have focused substantial attention on the subject.

Since World War II our federal and state governments have engaged in a variety of efforts to improve the availability of decent housing. Congress and state legislatures have required federal and state chartered thrift institutions to invest a substantial portion of their assets in the housing market.<sup>4</sup> These institutions generally are permitted to pay their depositors higher rates of interest than are paid by commercial banks.<sup>5</sup> As a result, more money should be available for housing. Congress has also created the Department of Housing and Urban Development<sup>6</sup> and employed it to encourage and structure housing and community development programs at the federal level.<sup>7</sup> Those programs providing federal subsidy of housing have taken a variety of forms.

Shortly after World War II Congress effectively subsidized much new housing in the suburbs through both its mortgage practices and its highway construction programs.<sup>8</sup> These programs were followed by aid for urban areas in the form of urban renewal programs, and, more recently, by community development, housing rehabilitation and housing code enforcement programs.

All of these programs continue to be important and substantial. However, to meet housing needs present programs rely almost exclusively on new housing construction or on rehabilitation in urban neighborhoods where frequently both housing and non-

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3. *Id.*

4. Congress authorized the Federal Home Loan Bank Board to provide for the chartering of federal savings and loan associations "in order to provide local mutual thrift institutions in which people may invest their money and in order to provide for the financing of homes." 12 U.S.C. § 1464(a) (1976). Thus, the primary function of the savings and loan association is to finance the purchase or construction of housing. J. WHITE, *BANKING LAW* 44 (1976).

5. 12 C.F.R. § 217 (1979). Federal savings and loans' maximum interest rates are set by the Federal Home Loan Bank Board. The Federal Reserve Board sets the maximum interest rates payable by national banks and state-member banks. The Federal Deposit Insurance Corporation sets the maximum interest rates payable by state chartered non-member banks. Bank rates are generally set slightly below those allowed to savings and loans. J. WHITE, *supra* note 4, at 195.

6. 42 U.S.C. § 3532(a) (1976).

7. *Id.* at § 3532(b).

8. NATIONAL COMMISSION ON URBAN PROBLEMS, *BUILDING THE AMERICAN CITY*, H.R. Doc. No. 34, 91st Cong., 1st Sess. 66, 94-103 (1969) [hereinafter cited as REPORT].

housing problems are substantial.<sup>9</sup> The expense of rehabilitating existing housing in urban neighborhoods, whether or not the neighborhood has substantial non-housing problems, can be prohibitively high.<sup>10</sup>

Thus, despite massive infusion of federal monies into urban areas in the last three decades, disappointingly little progress has been made in providing decent housing and decent living environments for larger numbers of Americans.<sup>11</sup> Certainly, we should not cease to deal with the housing problems of the urban core simply because the record has been less than was anticipated. Comparatively little attention and government money have been directed toward the maintenance of existing housing in mature suburbs where housing and non-housing problems have been modest. Therefore, shifting a substantial portion of the focus and financial resources of government programs to the maintenance of presently sound housing in neighborhoods where the community's fabric is still intact and where only slight or isolated deterioration has occurred can be a viable alternative in the struggle to meet our housing needs.

While rehabilitation programs and housing codes may be more economically viable in mature suburbs, they are politically unenforceable in owner-occupied neighborhoods where their detailed provisions infringe unnecessarily on citizens' perceived right of privacy in their living environment. Limiting the scope of the police power under housing or property maintenance codes, in order to remove the perception of such codes as economically burdensome and threatening to the right to privacy, would change the image of such codes. It would also enable government to pursue

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9. For purposes of this article, non-housing problems are classified as (1) those concerning the "urban tissue," which encompasses basic public services such as schools, streets, sewers, garbage collection, and police and fire protection, and (2) those concerning the "neighborhood environment," which encompasses the private fabric of the community such as neighborhood groups, clubs, and churches. The combination of the terms "urban tissue" and "neighborhood environment" is hereinafter referred to as the "community environment." In subsequent discussions of housing units, the term "living environment" is used to encompass the internal physical facilities, amenities and arrangement of a person's home.

10. Pomeranz, *How to Tell if Low-Income Housing Rehabs Make Sense*, 9 REAL EST. REV. 87 (1980). The author notes that "rising property acquisition costs, combined with increasing rehabilitation costs, are steadily forcing up sales prices" of rehabilitated single-family homes. Further, "when insurance, taxes, maintenance, and utility costs are added to the mortgage payment, they result in a monthly housing cost well beyond the means of most low-to-moderate-income families." *Id.*

11. See Meeks, Ouderkerk & Sherman, *Housing Code Dilemmas*, 6 REAL EST. L.J. 297 (1978).

property maintenance on a broad scale, thereby protecting existing communities and their housing for future generations—a goal rarely accomplished today. In addition, since such a program should involve much less government expenditure per housing unit, it could prove a valuable adjunct to existing urban renewal, community development, rehabilitation, and conservation programs. Unfortunately, there is virtually no written material on how to shape, administer and finance such property maintenance programs.<sup>12</sup>

The purpose of this article is to explore housing-property maintenance in mature suburbs, hypothesizing a constitutional limitation on the reach of the police power in enacting property maintenance codes and, in any case, suggesting legislative means of respecting these citizen-perceived limitations.<sup>13</sup> Maintaining presently sound housing over the next several decades in neighborhoods where the urban tissue and neighborhood environment are still intact is a strategy that can be successfully employed to meet our housing needs.

If the housing stock in presently sound neighborhoods is not permitted to deteriorate over the next few decades, those housing units will continue to be available. Urban core redevelopment and rehabilitation plus conventional new construction in the outer residential rings will then result in net increases in the housing supply. Furthermore, the housing that has been preserved in the mature suburbs can be maintained at a lower cost per unit. Per-

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12. One author has advocated a "municipal point of sale inspection program" as a component of a program of code enforcement which, she concludes, would promote rehabilitation and property maintenance. Barber, *Inspecting the Castle: The Constitutionality of Municipal Housing Code Enforcement at Point of Sale*, 10 LOY. CHI. L.J. 1 (1978).

13. It is not suggested that we cease to deal with the housing problems of the urban core, nor that the urban core problems will be solved by the "trickle down" theory. This theory generally can be described as follows: The urban core is ringed by middle class neighborhoods composed of basically sound structures, most of which do not seriously violate housing code standards. These neighborhoods are, in turn, ringed by upper class neighborhoods. Because of new construction, primarily in the upper class neighborhoods, a number of additional upper class houses may open up for the middle class who previously resided in the first ring near the urban core. As the middle class moves to the dwellings once occupied by people now able to afford new housing, the first ring owners will find it profitable to rent or sell to urban core residents. Thus, some of the impact of new construction for the well-to-do will "trickle down" to middle and lower income persons as they move to the homes formerly occupied by the well-to-do. See Ackerman, *Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy*, 80 YALE L.J. 1093, 1113 n.24 (1971). For discussions of an appropriate definition of the "trickle down" theory and the extent to which this is occurring, see Lowry, *Filtering and Housing Standards: A Consensual Analysis*, 36 LAND ECON. 362 (1960); Sigal, *The Unchanging Area In Transition*, 43 LAND ECON. 284 (1967).

sons who could not afford to rehabilitate seriously decaying housing in the inner city are more likely to be able to bear the cost of maintaining a home in a mature suburb without a government subsidy. Thus, an increase in private contributions to the housing deficit, made possible by the continued availability of housing in the mature suburban rings, should have a real effect on the total number of viable housing units resulting from government subsidy programs designed to meet present and future housing needs.

The potential for saving houses from decay and abandonment, and for preserving sound urban communities, is far greater with a realistically framed suburban housing and property maintenance approach than with a costly new construction and rehabilitation program. Outer ring suburbs need property maintenance code enforcement for the same reasons that inner ring suburbs need such enforcement: there are frequently small pockets of deteriorating housing in the suburban rings which take years, if not decades, to degenerate. In such circumstances, limited expenditure property maintenance programs can help to maintain stable neighborhoods. An active suburban program may be expected to encourage voluntary maintenance by landlord-investors and owner-occupants, both of whom should recognize that consistent compliance with maintenance requirements protects property values and stabilizes the neighborhood. Code enforcement can create a climate that encourages investment in property maintenance, so long as owners are confident that compliance by adjoining property owners will be enforced. In urban areas costly housing and non-housing problems discourage voluntary maintenance. On the other hand, if the existing suburban environment is conducive to property maintenance without judicial enforcement,<sup>14</sup> then it would be wise to preserve and reinforce a favorable situation by enforcing property maintenance codes in mature suburbs.<sup>15</sup> Fur-

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14. See Gribetz & Grad, *Housing Code Enforcement: Sanctions and Remedies*, 66 COLUM. L. REV. 1254, 1256 (1966); Note, *Enforcement of Housing Codes*, 78 HARV. L. REV. 801 (1978).

15. In directing some attention to code enforcement in the suburbs, inner city owner-occupants might also be assisted. Their relationship to housing or property maintenance code enforcement, as compared with that of landlords and tenants, will receive more attention as greater emphasis is given to suburbs where owner-occupants dominate. Owner-occupant interest in the community development as well as in property values should create more of a cooperative venture atmosphere when government assistance rather than legal enforcement predominates. When this occurs, it is submitted that qualitative differences in code enforcement procedures in the inner city may result. See text accompanying notes 189-216 *infra* for a discussion of factors relevant to structuring a property maintenance program for owner-occupied dwellings.

thermore, continual maintenance fractionalizes the total rehabilitation cost by insuring that the housing stock does not deteriorate to the point where extensive repair programs are needed to bring the property to minimum requirements.

When properly limited, explained to the community, and administered, a property maintenance program should receive strong support from owner-occupants, most of whom regard their homes as their most important economic and family investment. Therefore, they may be expected to respond positively to property maintenance requirements, particularly if they perceive some demonstrable relationship to health, safety or general welfare in terms of maintaining both property values and the living environment of the community.

The basic thesis of this article is that an essential component of any rational housing program is a property maintenance code designed to alleviate housing deterioration in mature suburbs before the problems become too severe. The prospects for solving housing maintenance problems are more encouraging in a largely owner-occupied community, since a relatively slow decline in the quality of owner-occupied units has been documented.<sup>16</sup> Thus, home ownership plans for lower income families and other efforts to shift low income families from tenant to ownership status should be encouraged as a means for achieving continuing high standards of property maintenance.<sup>17</sup>

The article first analyzes housing code enforcement in urban areas,<sup>18</sup> and then discusses the social values that are intruded upon when these codes are applied to suburban areas.<sup>19</sup> The arti-

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16. W. GRIGSBY & L. ROSENBERG, URBAN HOUSING POLICY 62-64 (1975). Code officials also hold the opinion that owner-occupied dwelling units are better maintained than tenant-occupied units. B. LIEBERMAN, LOCAL ADMINISTRATION ENFORCEMENT OF HOUSING CODES: A SURVEY OF 29 CITIES (National Association of Housing and Redevelopment Officials, Washington, D.C., 1969). Maintenance, as contrasted to the absence of supplied facilities, is emerging as a major problem of housing code administration. See J. SLAVET & M. LEVIN, NEW APPROACHES TO HOUSING CODE ADMINISTRATION 25 (Nat'l Comm'n on Urb. Prob., Research Rep. No. 17, 1969).

17. Renters are the most frequent code violators, "and probably the most difficult category to bring into compliance are tenants, especially the low-rent paying ones." The second largest category of code violators "are the landlords, especially those associated with low-rental housing." U.S. DEP'T OF H.E.W., PUB. HEALTH SERVICE, PUB. NO. 1999-1970, HOUSING CODE ADMINISTRATION AND ENFORCEMENT 53 (1970). Even in the worst slum, it appears that owner-occupancy is the best guarantee of a well maintained building. Note, *Tenant Unions: Collective Bargaining and the Low-Income Tenant*, 77 YALE L.J. 1368, 1380 (1968). See J. SLAVET & M. LEVIN, *supra* note 16, at 1-25.

18. See notes 27-41 *infra* and accompanying text.

19. See notes 42-59 *infra* and accompanying text.

cle next examines the scope of the police power, upon which property maintenance codes are based.<sup>20</sup> A constitutional basis for the protection of suburban homeowners from overly intrusive housing codes is then posited.<sup>21</sup> The article concludes by presenting guidelines for a successful property maintenance program<sup>22</sup> and suggestions as to how it should be funded.<sup>23</sup>

## I. DEVELOPMENT OF HOUSING AND PROPERTY MAINTENANCE CODES

The concept of property maintenance has its genesis in housing codes.<sup>24</sup> As a rule, housing codes apply only to residential structures and are designed to assure minimal living standards by regulating required facilities. Typical regulations provide that living units must contain sinks, showers, toilets, electrical outlets, plumbing, and heating. They may also attempt to regulate such matters as light and ventilation, room size, overcrowding and vermin control.<sup>25</sup>

A basic assumption of this article is that different types of housing concerns should be dealt with by different types of legislative enactments. Consequently, distinctions should be drawn between building codes, housing codes, and property maintenance codes. Building codes are more common and have been in existence longer than housing codes. They are applicable to all buildings and are primarily concerned with the period of initial construction, regulating materials, equipment, methods of construction, and fabrication. Building codes also apply to subsequent structural changes, such as remodeling. In either case building codes typically are enforced against developers and builders in their professional capacities, rather than directly against the property owner. Housing codes, on the other hand, apply only to residential units but are applied on a continuing basis. They regulate the quality of the living environment available to the occupants of the dwelling in addition to the structural safety

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20. See notes 60-102 *infra* and accompanying text.

21. See notes 103-88 *infra* and accompanying text.

22. See notes 189-216 *infra* and accompanying text.

23. See notes 217-32 *infra* and accompanying text.

24. The development of housing codes has been well documented. See, e.g., Mood, *The Development, Objective and Adequacy of Current Housing Code Standards* in HOUSING CODE STANDARDS: THREE CRITICAL STUDIES 6-12 (Nat'l Comm'n on Urban Prob. Research Rep. No. 19, 1969).

25. See, e.g., THE BOCA BASIC HOUSING-PROPERTY MAINTENANCE CODE (3d ed. 1975).



of the building. Property maintenance codes are the least common, but probably also the most important, codes. They are applicable to all structures, commercial as well as residential, and they regulate the maintenance of areas outside the buildings, such as yards and accessory structures as well as vacant lots.

Local governments, induced by the incentive of federal aid, have moved toward adoption of housing codes.<sup>26</sup> This section of the article looks first at housing code enforcement in urban areas and then analyzes the tension generated by the application of similar provisions to suburban communities.

### A. *Housing Code Enforcement in Urban Areas*

Housing codes have presented only a putative means for government intervention in existing urban housing. The actual effectiveness of code enforcement in urban areas has been disappointing. One review of government programs revealed that in their attempts to meet housing needs, federal administrators have placed a much higher priority on urban renewal than on code enforcement and on the concomitant rehabilitation and maintenance of existing housing.<sup>27</sup> Scholars and administrators have expressed differing views regarding the utility of code enforcement in the inner cities.<sup>28</sup>

Generally, the failure of code enforcement appears to have been due to numerous complex urban problems, including lack of funding, fragmented administration, and lack of political support.<sup>29</sup> But more specifically, much of the blame must be placed

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26. See, e.g., Barber, *supra* note 12, at 3-4. See generally, Guandolo, *Housing Codes in Urban Renewal*, 25 GEO. WASH. L. REV. 1, 4-20 (1956); Landman, *Flexible Housing Code—The Mystique of the Single Standard: A Critical Analysis and Comparison of Model and Selected Housing Codes Leading to the Development of a Proposed Model Flexible Housing Code*, 18 HOW. L.J. 251, 255-66 (1974).

27. REPORT, *supra* note 8, at 274. Frequently, after a code was adopted, little was done to enforce it. *Id.* at 293-94. See also J. SLAVET & M. LEVIN, *supra* note 16, at 26.

28. For example, there is a danger that landlords required to improve their properties will pass on the added costs to tenants by increasing rents, or that they will abandon the properties entirely, thereby depriving tenants of even subcode accommodations. Ackerman, *Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy*, 80 YALE L.J. 1093, 1095 (1971).

29. See Grad, *New Sanctions and Remedies in Housing Code Enforcement*, 3 URB. LAW. 577 (1971); F. GRAD, LEGAL REMEDIES FOR HOUSING CODE VIOLATIONS (Nat'l Comm'n on Urban Prob., Research Rep. No. 14, 1968). "In large measure the lethargy is itself a symptom of a more fundamental problem—most policy makers involved in housing code enforcement are themselves unsure whether code enforcement is a good thing. They are not convinced that strict enforcement of even an ideal code will really benefit the tenants whom the code is intended to 'protect.'" Ackerman, *supra* note 28, at 1095.

upon local governments<sup>30</sup> which often fail to appreciate the inter-relationships between housing and the other parts of the urban tissue for which they are responsible, such as streets, sanitation, schools, and police and fire protection.<sup>31</sup> In addition, local government may not anticipate the economic cost of enforcing a housing code. If the code requires rehabilitation based on building requirements geared to new construction, the cost is greater than if the requirements are based on maintenance of presently adequate units and the building requirements of an earlier day.

While all this can be viewed as a failure of local government to deal with the dynamics of community evolution, state and federal government must share the blame. Even when a few local governments have actively attempted to preserve residential areas, they have received comparatively little support from the state or federal government.<sup>32</sup> The shift of the federal government from categorical programs to community development block grants, beginning with the Housing and Community Development Act of 1974,<sup>33</sup> arguably permits local government units to develop approaches tailored to their own needs. Such programs are available, however, only to deal with the rehabilitation of concentrated

30. One commentator suggests, "But underlying the more immediate causes of slum and blight, the ultimate causation factor is the local government itself. Slums and blight develop where local governmental authorities fail to enforce effectively, with persistence and political courage, adequate police power measures to control bad housing, improper environments and overcrowding." Guandolo, *supra* note 26, at 3.

This Article raises the issue of which comes first—bad housing or decline in public services. In this writer's opinion, it is the latter. See note 31 *infra*.

31. There is good reason to believe that the deterioration of a community begins when local government withholds public services. The present saving of tax dollars undermines the future of the community. As public services are reduced, property values decline and private investment in housing lessens. Thus, deterioration of housing becomes an early physical manifestation of general community decay, set in motion by the reduction of local government services.

With regard to the relevance of the entire environment, and not just housing units, the National Commission on Urban Problems asked:

Is a unit correctly defined as standard under available data if the lot next door is littered with garbage; if police protection is limited; if street lights are not provided; if the sidewalk is buckled; if the street is full of potholes; if a liquor store is found on each corner; if sewers are nonexistent or inadequate; if the noise level is excessive; or if a rendering works is found in the block . . . ?

REPORT, *supra* note 8, at 68.

32. See generally, U.S. DEP'T OF HOUSING AND URBAN DEVELOPMENT, NEIGHBORHOOD PRESERVATION, A CATALOG OF LOCAL PROGRAMS (1975) [hereinafter cited as NEIGHBORHOOD PRESERVATION]. A review of a sampling of the programs described reveals limited state and federal financial support.

33. Pub. L. No. 93-383, 88 Stat. 633 (codified in scattered sections of 5, 12, 20, 31, 40, 42, 49 U.S.C.).

areas, typically found in urban centers, and are not available for scattered site deterioration, symptomatic of incipient blight in mature suburbs.<sup>34</sup> Congress and both the Ford and Carter Administrations reinforced this limitation by announcing the formation of task forces to examine ways in which federal aid programs for neighborhood preservation could accommodate the needs of central city residents.<sup>35</sup> President Carter's National Urban Policy, announced on March 27, 1978, was intended to channel various resources towards the central cities.<sup>36</sup> Ostensibly there appears to be no attempt by state or federal government to analyze the problems of the mature suburbs which are just beginning the long process of neighborhood decay.<sup>37</sup>

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34. See 24 C.F.R. § 500.6 (1979).

35. 4 Hous. & Dev. Rep. (BNA) 106, 1117. See also statements of Congressman Thomas L. Ashley, Chairman of the House Subcomm. on Housing and Community Development, favoring emphasis on inner city rehabilitation on a neighborhood by neighborhood approach, using block grants similar to community development block grants. Pittsburgh Press, Nov. 21, 1976, § G, at 6, col. 4.

36. This would be accomplished by a series of job programs, tax incentives, grants, public works, and loan guarantees. See N.Y. Times, March 28, 1978, § 1, at 1, col. 8.

37. Nevertheless, Congressman Ashley's implied suggestion that the handling of property maintenance and rehabilitation be decentralized into small governmental units might help to organize the confusing and conflicting statistics available on the precise state of the housing stock in the United States. It appears that literature and statistics can be found to support any position as to the quality of our housing stock. The Bureau of the Census, which has made a major effort to produce reliable indicators of housing quality, has admitted that its efforts have resulted in unreliable and inaccurate statistics with regard to structural conditions, at least in its 1950 and 1960 efforts. U.S. DEP'T OF COMMERCE, BUREAU OF THE BUDGET, AND U.S. DEP'T OF HOUSING & URBAN DEVELOPMENT, ANNUAL HOUSING SURVEY: 1973 UNITED STATES AND REGIONS, PART B: INDICATORS OF HOUSING AND NEIGHBORHOOD QUALITY XIV (Current Housing Reports, Series H-150-73B, 1973). For these reasons, data on the condition of structures were not even collected during the 1970 census. In its evaluations, the Bureau of the Census has hypothesized that the concept of inadequate or poor housing encompasses more than just structural conditions and plumbing facilities, and includes factors related to measurements of neighborhood quality and the evaluation of basic support systems such as water, sewerage, utilities, fire and police protection, education, health, public transportation, and shopping facilities.

The 1973 Annual Housing Survey was the first attempt to present statistics describing this broader concept of housing quality. Interestingly, the survey reflects only the personal opinions of persons interviewed, with no attempt to make an objective evaluation of actual conditions. Although after the passage of the Housing Act of 1949, 42 U.S.C. § 1441 (1976), the concept of housing quality was generally considered to be broader than mere structural condition, the 1973 Survey represented the first attempt to verify this idea with statistics.

The 1974 Annual Housing Survey again indicates opinions of households on the quality of their housing environment. Nationally, 89% of homeowners rated their homes to be in good or excellent condition. For renters, 67% rated their living units to be in good or excellent condition. U.S. DEP'T OF COMMERCE, BUREAU OF THE BUDGET, AND U.S. DEP'T OF HOUSING & URBAN DEVELOPMENT, ANNUAL HOUSING SURVEY: 1974 UNITED STATES AND REGIONS, Part B: Indicators of Housing and Neighborhood Quality Table A-2 at 6

Elected officials in all levels of government have obvious incentives to favor new construction and substantial rehabilitation over maintenance. First, construction and rehabilitation present the electorate with visible evidence of government housing programs, whereas most maintenance occurs at scattered sites and exhibits a less obvious change in housing quality. Second, while property maintenance places the financial burden directly on the property owner, new construction and substantial rehabilitation diffuse much of the real cost through government grants and subsidies, resulting in the real cost being allocated by the taxing power. Third, labor unions appear to favor new construction because it produces a greater number of jobs per resulting viable housing unit. Finally, government at all levels tends to deal with a problem only when it can be classified as having reached the crisis stage.<sup>38</sup>

A review of the housing programs in the 1950's and early 1960's demonstrate the limitations of massive, high-density projects as a solution to the substandard housing problem.<sup>39</sup> The later 1960's and early 1970's seem likewise to have demonstrated that small-scale, decentralized efforts in the inner city are not the answer either, since such projects provide a handful of new or rehabilitated units while leaving the original problems of decayed urban tissue and neighborhood environment untouched.<sup>40</sup> It is possible that in the former situation the community has been substantially destroyed and despite rehabilitation efforts has not been recreated, while in the latter case the rehabilitated "neighborhood" may be only a part of the whole "community," in the eyes of its residents. In such an instance, the rehabilitation effort essentially has failed because it has not been coterminous with an at-

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(Current Housing Reports, Series H-150-74B, 1974). It would seem, though, that these statistics are of limited value, since they make no attempt to provide an objective evaluation. *Id.* at XIII.

Finally, while the nondwelling unit/public service elements of the urban tissues (e.g., water, sanitation, and fire and police protection) make for a long term viable community and produce a significant effect on the viability of housing, these urban tissue elements also raise social concerns which, due to their complexity, seriously undermine the likelihood of the long term success of housing programs. *See* notes 30 and 31 *supra*.

38. Political pressure encourages the concentration of resources on the worst structures, yet these are often the structures which do not yield the greatest results. Note, *supra* note 14, at 829, n.145.

39. *See, e.g.,* REPORT, *supra* note 8, at 128. *See generally* PRESIDENT'S COMMITTEE ON URBAN HOUSING (Kaiser Committee), A DECENT HOME (1968).

40. *See generally* U.S. DEP'T OF HOUSING AND URBAN DEVELOPMENT, HOUSING IN THE SEVENTIES, SCATTERED VS. CONCENTRATED HOUSING REHABILITATION (1976).

tempt to keep or develop a community environment. In each case the structural problems of housing have been adequately met but "community environment" problems have not.<sup>41</sup> This should not prove to be the case in suburban neighborhoods where the community framework is still largely intact. It is reasonable therefore to expect that a property maintenance program in the suburbs will not suffer from the same defects as the programs that were undertaken during the last three decades.

This does not suggest that a suburban program might not face other obstacles. It must consider the relationship between property maintenance codes and the values as well as the political force of the people affected by them—the suburban owner-occupants.

### B. *Housing-Property Maintenance Codes and Community Values in the Suburbs*

Most present housing code standards were derived from the general experience or individual opinions of code writers or enforcers and do not have an empirical base. It is therefore not surprising to find little consistency between different codes dealing with the same subjects.<sup>42</sup> Many of the aspects of model codes, such as the Building Officials and Code Administrators International Inc., (BOCA) Basic Housing-Property Maintenance Code,<sup>43</sup> do not appear to be directed toward fulfilling clearly defined social needs. Rather, they are oriented toward satisfying program requirements in order to secure funds from federal agencies, or toward providing building officials with broad discretionary powers.<sup>44</sup>

The lack of an empirical base becomes particularly troublesome when detailed code requirements governing such matters as

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41. W. GRIGSBY & L. ROSENBERG, *supra* note 16, at 196. For an idea of the immense scope of the problem and the expense involved in an effective inner city total rehabilitation package, encompassing the entire relevant community, see *id.* at 89-91, 216-21.

42. The most significant study of prevailing code requirements found little consistency between various code provisions designed to remedy the same problems. Further, it found that little or no scientific research had been attempted to support the standards selected. The report's conclusion that "tradition, rule of thumb, and personal experience" play the preponderant role in the formulation of standards corresponds to the intuition of any person patient enough to read all the requirements imposed by an urban housing code. Landman, *supra* note 26, at 265; see also Mood, *supra* note 24, at 33.

43. BOCA is a nonprofit municipal service organization dedicated to professional code administration and enforcement, which periodically publishes a standard housing-property maintenance code.

44. Mood, *supra* note 24, at 12.

window size, room area, number of occupants, ceiling height, number of electrical outlets per room, and use of cooking facilities are contrasted with the primary needs of owners and residents of the housing stock. Unless a prospective code can meet the essential needs of people and respect their values, whether or not those values are recognized as constitutional rights, citizen resistance may prevent the enactment of a code. Alternatively, after enactment such resistance may render it politically unenforceable and thereby useless as a tool to preserve the existing viable housing stock. With this in mind, it seems particularly appropriate to determine the values of the citizens of a community prior to the casual implementation of a standard housing-property maintenance code. The development of new standards or the revision of existing standards, however, should not be delayed while awaiting scientific confirmation, otherwise more housing will deteriorate.

The promulgation of minimum property maintenance code standards is not the sole responsibility of any one element of our society. The translation of community and individual needs into stated values requires participation by community residents and a careful reexamination of present code standards. The participation of community residents is vital to this process because property maintenance codes are directly enforced against all property owners on a periodic basis. Affected property owners constitute a substantial number of citizens, particularly in the suburbs where home ownership will typically exceed the national average of sixty-five percent.<sup>45</sup> Accordingly, housing or property maintenance codes are politically sensitive. To be enforceable, they must be understood by and acceptable to a majority of the persons against whom they are enforced.

The substantive content of most housing codes includes three broad subject areas: (1) minimum facilities and installed equipment; (2) maintenance of the dwelling unit and of the facilities and equipment; and (3) use, maximum occupancy, and conditions of occupancy.<sup>46</sup> A standard property maintenance code also regulates nonresidential properties, imposes some aesthetic standards

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45. Approximately 65% of occupied housing units are owner-occupied. An additional 1% are condominiums or cooperatives, which can fairly be classified as owner-occupied. *1975 U.S. Dep't of H.U.D./Bureau of the Census Annual Housing Survey, Part A, General Housing Characteristics*, 4 HOUSING & DEV. REP. (BNA) 1177.

46. See Mood, *supra* note 24, at 13.

A comprehensive coverage of provisions related to minimum facilities and installed equipment usually includes: water supply and waste water disposal; garbage and rubbish disposal; kitchen and hand washing sinks; bathing facilities;

on residential and nonresidential properties—going beyond what would ordinarily be regulated in housing codes—and covers yard and vacant lot maintenance. Thus, a well-drafted property maintenance code partially regulates the surrounding environment as well as the housing itself.<sup>47</sup>

In order to foster general public acceptance of the code objectives and procedures and avoid the inadequacies of present code standards and enforcement, the values of the community residents must be understood.<sup>48</sup> Implicit in this analysis is the assumption that residents of presently sound neighborhoods want to maintain what they currently have. A proper analysis of community values

toilet facilities; means of egress; heating equipment for the dwelling unit and hot water supply; lighting; ventilation; and electrical service.

Most housing codes will contain specific provisions pertaining to maintenance of the dwelling and of the supplied facilities and equipment to include such items as: general sanitary conditions; chimneys, flues and other potential fire hazards; electrical wiring; insect and rodent infestation; internal structural repair; external structural repair; and dampness.

The sections of most housing codes that regulate use, maximum occupancy, and conditions of occupancy usually have provisions pertaining to: living space overcrowding; sleeping space overcrowding; doubling of families; separation of sexes; and mixed use of living space for business purposes.

Most, if not all, housing codes tend to rely on general words or phrases without defining them such as "good repair," "adequate" and "safe conditions." These terms are difficult to interpret and sometimes create confusion. Much is left to personal judgment.

*Id.* at 15–16.

The extensive detail of housing codes evidenced by the quoted material lends some support to the view that "[t]he general failure of city officials to embark on a sustained and comprehensive program of housing code enforcement may be explained by a variety of factors: housing codes often contain obsolete or impractical requirements . . ." Ackerman, *supra* note 28, at 1093.

47. Although property maintenance codes appear to be more effective in meeting the need for a totally maintained environment because they regulate nonresidential dwellings and exterior and yard maintenance, an incorporation of the detailed internal inspection provisions of urban housing codes should be expected to cause problems in the suburbs because internal inspections examine the way in which people have structured their living environment. For a discussion of the right to privacy issue, see text accompanying notes 103–88 *infra*.

48. Some hypothetical parameters of a typical inner ring, mature suburb should be useful in establishing a hypothesis. Such a community will have a solid school system with declining enrollment. There will be fewer families with children of school age because the residents, on average, tend to grow older and because those residents with children will have fewer children. Much of the aging population will be on a fixed income and, in our inflationary economy, will face the very real possibility of a lower standard of living as the years go by. This problem raises the possibility of a declining interest in maintaining the level of expenditures necessary to sustain the schools' quality level, particularly in view of rising school taxes. Similarly, increasing tax burdens at the local government level will cause governments to be oriented more to short term needs rather than to long term expenditures. Commercial areas, which frequently have been ignored in housing codes, will continue to deteriorate. There will be some initial shift from owner-occupant to tenant-occupant because of poorly maintained dwellings. Finally, unless financial subsidies are

should consider property values, aesthetic values, and public services such as schools, police and fire protection, street and sewer maintenance, and recreational facilities.<sup>49</sup> However, not all of these concerns are directly addressed in a property maintenance code. Considerations of schools and municipal services, although vital for maintaining community environment, are beyond the scope of property maintenance codes.<sup>50</sup>

The inability of property maintenance codes to address these important concerns leaves only visual appearance and structural integrity to be regulated by the codes. On the one hand, people want to look beyond their own property and see that other yards, structures, and business establishments are well maintained. They want assurances that their economic and family environment investments are protected. On the other hand, people believe they have a right to use their property as they please, provided that the use does not impair the rights of others.

This basic tension in values must be recognized and accommodated by any property maintenance code that will be applied to mature suburbs. These apparently conflicting beliefs seem to support the assumption that government intervention in property

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made available, it is possible that some elderly persons will be forced to rent or sell their homes to supplement their income, or to move to a smaller house or an apartment.

These parameters suggest other aspects of the problem that must be considered in developing a viable and politically enforceable property maintenance code. Elderly persons who wish to remain in the community should have housing alternatives so that a constantly changing population that can better support the tax base and utilize the existing school buildings will be able to come into the community. New sources of tax revenues which reduce the emphasis on real estate might be considered; redevelopment plans for business areas might also be a valid concern. Thus, property maintenance financing mechanisms might allow elderly persons to remain in their homes and might also encourage young families to move in.

49. Related to this concept of residents desiring to "keep what they have" is the current acceptance of zoning in the suburbs. Essentially, zoning is designed to protect and enhance both the quality of the community environment and individual property values. Theoretically, zoning does not permit placement of a supermarket, a gas station, or a bar next to a single family home because such commercial establishments, at least in the minds of residents, clearly affect both the value of their adjoining properties and the general quality of life in the community. As a corollary, it would appear that a rationally designed property maintenance code, based on and limited to such "needs" of community environment and property values, should be as acceptable as zoning. Just as zoning excludes those land uses inimical to single family dwellings, property maintenance would preclude the continued existence of dilapidated single family dwellings in an area of otherwise well maintained dwellings. The property maintenance code would protect the same community values protected by zoning.

50. Nevertheless, these public services are essential to the success of any property maintenance code. Voluntary maintenance is unlikely when the neighborhood environment that supports property values and quality of life is not present. See note 31 *supra*.



maintenance will be supported only when "keeping what we have" is threatened. Zoning protects the status quo; it does not create something different. Similarly, a property maintenance code should also be most acceptable and effective when it protects the status quo and does not seek to create something different. Intervention should occur only when community environment and property values are *seriously* damaged or threatened.<sup>51</sup>

Code provisions aimed at protecting aesthetic values will be particularly sensitive areas. Aesthetic valuations cannot be made to conform to exact criteria in all cases. They do, however, affect the community environment. It has been suggested that an individual's or a local government's definition of beauty should be *prima facie* acceptable if it is backed with the force of community opinion.<sup>52</sup> This is consistent with the basic institutional settlement mechanism embodied in our Constitution—the idea of representative government, which assigns the policymaking function to the legislative bodies. After all, the institution closest to the people should be best able to ascertain important community values. Public acceptance or successful enforcement of the "aesthetic" provisions—yard and exterior maintenance—in a property maintenance code should therefore be a significant factor in a legislative body's consideration of what the community's most highly regarded aesthetic values are. This article suggests that aesthetic provisions of a code should focus solely on yard and external building maintenance. External inspection should have less impact on the right of privacy and personal choice than would internal inspection based on subjective, albeit important, values. External maintenance also has a greater immediate community impact than does internal maintenance.

Yard and exterior maintenance are necessarily a fundamental part of any property maintenance code. Their basic criteria should present little problem. Exterior maintenance might include requirements that weather susceptible surfaces be painted and that broken windows and missing gutters and downspouts be replaced. Yard maintenance might require that grass be cut below a certain height and that garbage cans, rubbish, and partly dismantled cars be kept out of front yards. Vacant lots would also be subject to yard requirements. These aesthetic criteria would not be the same in all communities, for all communities do not share

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51. Dukeminier, *Zoning For Aesthetic Objectives: A Reappraisal*, 20 L. & CONTEMP. PROB. 218, 224 (1955).

52. *Id.* at 226-27.

identical values.<sup>53</sup>

It is noteworthy that lenders and investors frequently have been reluctant to finance improvements in neighborhoods that lack or are expected to lose the attractiveness and amenities necessary to protect private investment. The recognized, devastating impact of a lack of amenities should result in the protection of these concerns.<sup>54</sup> Standards of exterior and yard maintenance should, however, be limited to minimum levels necessary to encourage the investment of private capital to finance home improvements in the area and to encourage voluntary maintenance by owners. This formula provides a rational basis for determining the economic and social validity of aesthetic regulations.<sup>55</sup>

In many instances, visual appearance cannot be separated from structural integrity. A sagging roof, for example, may not only be aesthetically unappealing, but may also be indicative of structural weakness. Likewise, wood lacking a protective coating not only damages economic and aesthetic values, but it also provides the potential for structural damage or vermin infestation. Thus, while some may argue that the aesthetic aspects of a property maintenance code will protect existing housing only in the short term, in fact, many aesthetic concerns are also structural maintenance provisions that provide long-term protection.

Several studies have confirmed that the owner-occupant concept encourages structural maintenance.<sup>56</sup> Seriously dilapidated dwellings, even with an acceptable external appearance, tend to become rental properties when the necessary maintenance exceeds the financial resources and maintenance skills of a potential owner. Consequently, basic protection of the structure for long-range preservation of the community is warranted. In order to protect structural soundness, the community has an interest in seeing that

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53. *Id.*

54. See Guandolo, *supra* note 26, at 37. The inability of the courts to deal with these concerns is another indication of the problems that courts have in obtaining sufficient information or empirical data necessary to make decisions on policy questions that have severe economic and social ramifications. If one assumes that certain aesthetic requirements are so important they ought to be respected, how are the courts to determine what requirements come within the protected category? One proposed solution to the problem of courts handling primarily legislative questions involves the creation of a new public agency. This agency would provide courts with the information and empirical data that "legislative facts," obtained from hearings, committees, and staff work, provide to legislatures. Rosenberg, *Anything Legislatures Can Do, Courts Can Do Better?*, 62 A.B.A.J. 588-90 (1976).

55. See Dukeminier, *supra* note 51.

56. See note 16 *supra* and accompanying text.

each dwelling is at least made weathertight (*i.e.*, requiring a sound roof and operable gutters and downspouts, allowing no serious breaches in the mortar, requiring a solid foundation, and coating the exterior portions that are subject to deterioration). Absent this minimal standard of property maintenance, severe structural damage resulting in the type of dilapidation which has so frequently struck the urban core, can occur.

At least initially, then, a suburban property maintenance code having the dual goals of sound housing and a decent environment should focus primarily on aesthetic and structural requirements which can be enforced by external inspection. While other aspects of property maintenance, such as internal inspections of wiring and plumbing, merit serious consideration when developing a comprehensive program, the two concerns noted above appear to be the present limit of *clearly* felt values of suburban residents.

Some indication of the validity of these concepts is founded in the experiences of the Baltimore Neighborhood Program. That program emphasizes exterior code enforcement and frequently uses residents of the neighborhood as informal inspectors. The exterior inspections are aimed at discovering weeds, unsanitary trash, improper provisions for garbage, rat infestation, and external deterioration of housing. The program also includes annual interior and exterior inspections of multiple-family dwellings and annual licensing to insure code compliance.<sup>57</sup>

Baltimore owner-occupants appear favorably disposed toward vigorous code enforcement programs. Such programs are felt to support the efforts of responsible owners. Residents favor a type of area-wide enforcement which stresses strict exterior inspections, but limits interior inspections to those aimed at correcting serious health and safety violations. Since residents frequently operate on restricted budgets, objections have been raised to inspections that compile so-called "laundry lists" of violations. In these lists, serious structural, plumbing, and wiring violations are mixed with less serious structural and cosmetic violations. Lengthy infraction notices leave residents little discretion in allocating limited maintenance and repair resources and ignore stark economic facts. Consequently, it has been suggested that interior inspections should be limited to core concerns such as furnaces, plumbing,

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57. See NEIGHBORHOOD PRESERVATION, *supra* note 32, at 7.

wiring, and plaster.<sup>58</sup> In short, the Baltimore experience suggests the importance of community values in structuring that government intervention which directly touches so many people.

The English experience with slum clearance has led to similar findings. Owner-occupants appear to resist housing improvement because detailed rehabilitation programs shift substantial costs to private owners. This result has produced political reactions which have sometimes led to the defeat of local council members.<sup>59</sup>

The detailed regulations of present urban housing codes are not necessarily applicable to suburban housing. Requirements such as direct access to outside light for every room, the presence of two electrical outlets per room, specified minimum ceiling heights and window sizes, and the prohibition of bedrooms in a basement does not affect the structural soundness of a dwelling. These requirements govern original construction or the way in which a family lives in its own home. Owner-occupants will not view such requirements as protective government intervention. Such requirements may be valid in landlord-tenant situations because the economic and family motivations of the landlord differ from those of the tenant, but they clearly do not support the values of owner-occupants. Such concerns do not appear to the individual owner-occupant or to the general community to have a clear and direct relationship to the health and safety of the occupants or the community and do not appear to have a serious effect on neighborhood environment. Finally, owner-occupants, without regulation, have sufficient incentive to structure the best possible living environment for themselves.

There is a substantial divergence between the emphasis in existing housing codes and the needs of suburban residents. The common goal is adequate housing in a decent environment. Owner-occupants, however, generally attempt to provide adequate housing and a decent environment for their families. Therefore, unless there is a clear threat to health or safety, internal inspection should not be necessary. External inspection, on the other hand, is vital to protect the environment of adjoining properties and to protect the long-term community interest in preserving existing adequate housing by maintaining structural soundness. Property maintenance codes that incorporate the limitations suggested

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58. Grigsby, *Economic Aspects of Housing Code Enforcement*, 3 URB. LAW. 533, 536-37 (1971).

59. Mandelker, *Strategies in English Slum Clearance and Housing Policies*, 1969 WIS. L. REV. 800, 824.

above should receive strong community support in mature suburbs. The next two sections of this article suggest that these limitations may have a constitutional basis.

## II. THE POLICE POWER

Having hypothesized the values that must be considered in order to make property maintenance codes acceptable in the suburbs, it is important to elaborate just how substantial government intervention has become in the application of housing codes to the urban core. By noting this intrusion, one can recognize how threatening the present state of the law appears to owner-occupants in the mature suburbs, and one can begin to develop a coherent thesis for property maintenance which acknowledges these values and may therefore be viable as applied to mature suburbs.

As a general principle of constitutional law, the term "police power" refers to the inherent power of government to promote the public health, safety, morals, and general welfare of its citizens.<sup>60</sup> When a governmental application of police power is challenged, it is subjected to a test of reasonableness. The governmental means used must bear a reasonable relationship to a legitimate end.<sup>61</sup> In this particular context the means are property maintenance codes, and the ends are the promotion of health, safety, morals and general welfare.

Individuals hold, enjoy and use property subject to the reasonable exercise of the police power.<sup>62</sup> In application, the police power has proven to be one of the least limitable powers of the state. The Supreme Court, in upholding a requirement that a sprinkler system be installed in a building constructed prior to the enactment of the ordinance requiring sprinklers, noted: "The police power is one of the least limitable of governmental powers, and in its operation often cuts down property rights."<sup>63</sup>

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60. J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 437 (1978). The doctrine of police power was first enunciated in *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 442 (1827), and describes the inherent power of state governments to legislate, limited by the specific prohibitions of the Constitution. Since the federal government is a government of enumerated powers, it has a police power only in relation to federal property. See also E. CORWIN, LIBERTY AGAINST GOVERNMENT (1948).

61. J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 60, at 397. This test of reasonableness is the substantive due process test discussed at notes 110-72 *infra* and accompanying text.

62. See 6 E. MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS §§ 24.02, 24.03 (3d rev. ed. 1980).

63. *Queenside Hills Realty Co. v. Saxl*, 328 U.S. 80, 83 (1946). "Subject to specific

While it cannot be gainsaid that a property maintenance code has the potential to provide effective protection of property values and property rights from the unreasonable acts of others, the lawful scope of such a code under the police power can constitute a significant intrusion on these rights and values. For example, a property owner can be required to install additional equipment and facilities such as sinks, lavatories, and electrical outlets, repair cracked plaster, restrict occupancy and use of rooms, enlarge windows, add handrails on stairs, and fulfill other responsibilities, all in the name of the police power.<sup>64</sup> Even this brief list underscores the significant economic imposition which can result from enforcement of a housing-property maintenance code. Nonetheless, under the doctrine of the police power, codes of such scope are constitutionally sustainable even though their effect is to impair property rights.

While it seems clear that most housing code standards are based on the goal of ensuring the health and safety of inhabitants, there is also a basis in the protection of the general welfare. This basis can be critical in determining the validity of code standards that appear to be only loosely related to health or safety. In *Boden v. City of Milwaukee*,<sup>65</sup> for example, the court found that a municipal order to paint exterior wood surfaces in need of a protective coating was sustainable solely on general welfare grounds. "[T]he prohibition of a condition that tends to depress adjoining property values falls within the scope of promoting the general welfare and does not violate due process."<sup>66</sup>

The growing judicial support of zoning for aesthetic purposes is another indication that the police power is being given an expansive constitutional base founded solely on the general welfare. *Suddell v. Zoning Board of Appeals of Larchmont*<sup>67</sup> upheld a regulation that required a special permit for the outside storage of mobile and house trailers in a single-family residential zone. In sustaining the lower court decision, the New York Court of Appeals reaffirmed the principle that matters that are unnecessarily offensive to the visual sensibilities of the average person and that

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constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive." *Berman v. Parker*, 348 U.S. 26, 32 (1954).

64. See generally, Boggan, *Housing Codes as a Means of Preventing Urban Blight: Constitutional Problems*, 6 WAKE FOREST INTRA. L. REV. 255, 257-59 (1970).

65. 8 Wis.2d 318, 99 N.W.2d 156 (1959).

66. *Id.* at 325, 99 N.W.2d at 160.

67. 36 N.Y.2d 312, 327 N.E.2d 809, 367 N.Y.S.2d 766 (1975).

materially and economically detract from the community or district pattern can be regulated.<sup>68</sup> It is notable that the court did not view this ordinance as unreasonable, even though the outside storage of boats and boat trailers in this Long Island Sound community was a common practice and was not subject to the same special permit requirements. Such a restriction would seem to be sustainable only as a protection of the general welfare and then only as a concern for "economic" aesthetics and property values in general.<sup>69</sup>

### A. *State Regulation of Aesthetics*

The general welfare rationale of cases like *Suddell* and *Boden* is also applicable to aesthetic considerations of property maintenance codes. There is a danger, however, that as the subject matter of ordinances becomes less justifiable on health and safety grounds and more a matter of aesthetic concern, the likelihood of arbitrary legislative and judicial decisions becomes greater. Although painting and weed removal may involve health and safety concerns, the regulation in *Suddell* does not appear to involve these concerns. It is suggested here that unless courts carefully relate aesthetics to economic impact on the community, citizens may find their own values of property and privacy arbitrarily and unreasonably threatened.

The case of *People v. Stover*<sup>70</sup> represents a decision which pushed the consideration of aesthetics and exterior property maintenance to an extreme limit. The appellants were prosecuted for violating an ordinance that prohibited clotheslines in front or side yards abutting a street unless a practical difficulty or unnecessary hardship would result.<sup>71</sup> The court held that the ordinance did not unconstitutionally abridge the free speech of property owners who had erected clotheslines in their front yards to protest their tax assessment.<sup>72</sup> Appellants also claimed that the ordinance exceeded the proper scope of the police power and amounted to a

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68. *Id.* at 316, 327 N.E.2d at 811, 367 N.Y.S.2d at 769.

69. *See also* *Township of Livingston v. Marchev*, 85 N.J. Super. 428, 205 A.2d 65 (1964) (upheld a zoning ordinance prohibiting the parking of trailers in a residential district as a valid exercise of police power); *Oregon City v. Harthe*, 240 Ore. 35, 400 P.2d 255 (1965) (a zoning ordinance wholly excluding automobile wrecking yards from the city was held a valid exercise of police power).

70. 12 N.Y.2d 462, 191 N.E.2d 272, 240 N.Y.S.2d 734 (1963).

71. *Id.* at 464-65, 191 N.E.2d at 273, 240 N.Y.S.2d at 735-36.

72. *Id.* at 469-70, 191 N.E.2d at 276, 240 N.Y.S.2d at 739-40.

taking of property without due process.<sup>73</sup> The ordinance was, however, sustained as an attempt to preserve the residential appearance of the city and protect property values by banning, insofar as practical, unsightly clotheslines.<sup>74</sup> The court explicitly based its decision on aesthetic considerations, but was also careful to rely on the more objective purpose of protecting real estate values.<sup>75</sup> This case was decided differently from prior New York cases which had held that aesthetics alone was not sufficient to justify exercise of the police power.<sup>76</sup>

The *Stover* case raises interesting questions about the extent to which a municipality can restrict the use of property. For example, an ordinance might prohibit a property owner from planting an organic garden or a forest of bamboo in his or her front yard. If aesthetics and real estate values are factors in the category of general welfare, it might appear that these situations would be within the scope of the police power. Might the police power also extend to types and places of planting of various shrubs? In these situations the courts will have to decide on a case-by-case basis whether the legislative body has, in the name of aesthetics, gone too far in seeking to create an attractive, efficient, and prosperous community.<sup>77</sup> It is suggested that the police power should not reach activities which involve an expression of one's life style and individuality—as opposed to a purposely offensive expression—unless a clear impact upon the general welfare can be proven.

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73. *Id.* at 465, 191 N.E.2d at 274, 240 N.Y.S.2d at 736.

74. *Id.* at 470, 191 N.E.2d at 276, 240 N.Y.S.2d at 740.

75. *Id.* at 466-68, 191 N.E.2d at 274-76, 240 N.Y.S.2d at 737-38.

76. Although 26 other applications for clothesline permits were approved, *id.* at 470, 191 N.E.2d at 277, 240 N.Y.S.2d at 740, the intended use of the clothesline by the *Stovers* had no substantial social or economic utility. Since the *Stovers* were unable to demonstrate any substantial social or economic utility, the decision is not a significant departure from much earlier cases such as *Keeble v. Hickeringill*, 90 Eng. Rep. 908, 11 East 574, 3 Salk. 9 (K.B. 1707). In *Keeble*, the court held that one could not scare ducks away from a neighbor's pond solely to annoy the neighbor.

77. Some support for the inclusion of aesthetic considerations in housing-property maintenance codes can perhaps be drawn from similar considerations which influence some types of zoning regulations. These considerations typically involve zoning requirements, such as prescribing minimum set backs, side yards, and lot areas; maximum heights; and, to a lesser degree, some aspects of architectural control, such as fences. These concepts also seem to be based fundamentally on maintenance of property values. Therefore, perhaps it can be said that aesthetic controls will be permitted when it can be shown that there is a reasonable threat of economic harm to adjoining properties, which substantially outweighs any protectable interest of the property owner in question. It is a question of striking a reasonable balance between competing interests.



In the final analysis, aesthetics is not solely a matter of taste; rather it is primarily a matter of economics and the protection of community values. That which is attractive adds or maintains value; that which is undesirable depreciates value. Effectively enforced minimum standards tend to protect properties from depreciation caused by the deterioration of their surroundings. Minimum standards thereby stabilize and enhance property values and protect sources of municipal revenue. With this in mind, an increasing number of jurisdictions are accepting aesthetic considerations as a valid independent basis for exercise of police power—at least when tied to property values.<sup>78</sup>

On this basis, it appears that the hypothetical cases of an organic garden or a bamboo forest should not be subject to police power regulation. Aesthetic controls should be permitted where it can be shown that there is a reasonable threat of economic harm to adjoining properties that substantially outweighs any protectable interest of the property owner in question. The standard to be used in applying this test is the same standard applied in so many other fields of the law—what an ordinary, reasonable person in the community would regard as appropriate.<sup>79</sup> Application of the standard involves striking a balance between competing interests, recognizing both the utility of the interests and their impact on one another. On this basis the organic garden or bamboo forest should be protected, but not the Stover's clothesline.

### B. *Some Limits on Police Power*

Using a balancing process similar to the one suggested above, some courts have rejected the expansion of the police power where an absolute prohibition would have denied a citizen a right that society has an interest in protecting. For example, in *Village of Arlington Heights v. Schroeder*,<sup>80</sup> the defendant farmer owned acreage immediately adjacent to a residential area. The ordinance made it unlawful for any property owner to allow an improper growth of weeds or grasses. The defendant did not apply for an available exemption from the ordinance and permitted weeds to

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78. A list of cases indicating the level of receptivity of aesthetic legislation can be found in Note, *Beyond the Eye of the Beholder: Aesthetics and Objectivity*, 71 MICH. L. REV. 1438, 1440-42 nn.8-14 (1973).

79. It is important to note that society should be aware that ordinary usage and common experience are not the only tests. A balance must achieve order without forced conformity.

80. 28 Ill. App. 3d 1, 328 N.E.2d 74 (1975).

grow in his asparagus field where it was virtually impossible to remove them without destroying the asparagus plants.<sup>81</sup> The ordinance was held unconstitutional because it failed to impose any standards on the municipal Director of Health Services who granted the exemptions.<sup>82</sup> Dicta in the case clearly indicated, however, that ordinances with proper standards may give municipal officials the discretion to grant exemptions where agriculture or other activities that are deemed to have social utility would be affected.<sup>83</sup> Since there is a societal interest in facilitating agriculture, the balance is tipped more in its favor than in favor of aesthetics, at least when a substantial impact on surrounding property values is not evident.

In a similar but much broader view, economic due process cases have held housing code applications unconstitutional when they are so unreasonably burdensome as to amount to a taking of property without due process of law. There are two facts which most of these cases have in common.<sup>84</sup> First, the bulk of these cases concern interior housing code applications rather than exterior housing or property maintenance code applications. Second, the housing units in these cases were in neighborhoods where the expense of compliance far exceeded either the incremental increase in the value of the property or the ability of tenants to pay increased rent.

Only more recently has this view of economic due process found judicial support. A case that exemplifies the older view is *Adamec v. Post*,<sup>85</sup> where the court upheld a building regulation applied to the owner of a tenement built in compliance with former law. The building had an assessed valuation of \$13,500, and the extensive improvements required by the new law would have cost over \$5,000.<sup>86</sup> The court held that the economic hardship of the owner was immaterial and that the proportion of the cost of alteration to the present value of the property was not a valid criterion for measuring the reasonableness of the alteration require-

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81. *Id.* at 2-3, 328 N.E.2d at 75.

82. *Id.* at 5, 328 N.E.2d at 77.

83. *Id.*, 328 N.E.2d at 76-77.

84. These cases may be viewed as a recognition of the validity of or necessity for differential enforcement of housing codes in substandard areas of a community. See, e.g., Mandelker, Gibb & Kolis, *Differential Enforcement of Housing Codes—The Constitutional Dimension*, 55 U. DET. J. URB. L. 517 (1978).

85. 273 N.Y. 250, 7 N.E.2d 120 (1937).

86. *Id.* at 258, 7 N.E.2d at 124.

ment.<sup>87</sup> In the more recent case of *People v. Rowen*,<sup>88</sup> however, the New York Court of Appeals has at least limited *Adamec's* longstanding doctrine that economic considerations are irrelevant in determining whether code requirements will be enforced. In *Rowen*, the Court of Appeals reversed a lower court conviction of a landlord who had been unable to raise \$40,000 to finance required code improvements for two buildings assessed at less than \$30,000.<sup>89</sup> Decisions such as *Rowen* have the practical effect of giving cities the options of: 1) standing by while buildings are abandoned, 2) refusing to enforce the housing code, 3) taking over the buildings itself, or 4) ordering the demolition of the buildings.

Other courts have found changing economic circumstances to be a relevant consideration. A leading case is *City of St. Louis v. Brune*.<sup>90</sup> The opinion directly confronts the fundamental conflict between the tenant's interest in habitable conditions and the landlord's interest in the economic return from his property. The defendant in *Brune* was convicted of two violations of a city ordinance that prescribed minimum housing standards.<sup>91</sup> Brune admitted that the dwelling units did not have individual tubs or shower baths properly connected to hot water, as required by law. He claimed, however, that to install such facilities would cost far more than the buildings were worth or he could recover in rent, given the deteriorated condition of the neighborhood. Many properties in the area had been vandalized and many were abandoned. The residents of the particular units and of the area in general were poor. The buildings were seventy years old and virtually worthless. Furthermore, people had ceased moving into the neighborhood or buying property there. Yet the cost necessary to make the buildings conform was \$7,800 for each of the two buildings.<sup>92</sup> The Supreme Court of Missouri held that the application of the ordinance was an unconstitutional taking.<sup>93</sup> The court explained that the problem in the case was not actually one of public health—unlike cases involving outside privies or sewage—and really involved “a matter of inconvenience to those tenants who

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87. *Id.* at 259–60, 7 N.E.2d at 124.

88. 9 N.Y.2d 732, 174 N.E.2d 331, 214 N.Y.S.2d 347 (1961).

89. 9 N.Y.2d 732 (1961).

90. 515 S.W.2d 471 (Mo. 1974). For a more complete discussion of the case, see Comment, *The Landlord's Economic Inability to Meet Housing Code Requirements: The "Hot Bath" Ordinance, An Illustration*, 23 ST. LOUIS U.L.J. 163, 179 (1979).

91. 515 S.W.2d at 476–77.

92. *Id.* at 476.

93. *Id.* at 476–77.

choose to pay a minimum rent in return for incomplete facilities."<sup>94</sup>

### C. *The Relationship Between General Welfare and Health and Safety*

Courts faced with a legislative determination that certain conditions are injurious to the public health, safety and welfare have begun to articulate certain factors relevant in determining the outer limits of the police power. First, exterior maintenance regulations based on the general welfare aspect of the police power are sustained where aesthetic considerations can be shown to have an economic impact.<sup>95</sup> A second factor is the balancing of economic feasibility of compliance with the seriousness of the violation as a threat to public health and safety.<sup>96</sup> A third factor relates to code provisions dealing with internal maintenance as applied to owner-occupied dwellings. It is suggested here that, in order to be sustained, these internal maintenance provisions should be more directly related to health and safety than to the general welfare aspect of the police power. This third factor reflects both the expense of compliance with internal maintenance standards and a belief that internal conditions have a much less obvious impact on the well-being of the general community and will be satisfactorily provided for by owner-occupants.

One example of the failure of courts to recognize this third factor is *Nolden v. East Cleveland City Commission*.<sup>97</sup> The City of East Cleveland adopted a housing code which included standard requirements for the minimum habitable floor area. The code required 150 square feet for the first occupant and at least 100 square feet for each additional occupant.<sup>98</sup> The ordinance also stated that no part of the third floor area of a double house or a two-family dwelling could be used to compute compliance with the floor area requirements.<sup>99</sup> The appellants, husband and wife, lived with their seven children on the second and third floors of a home which they owned, while renting out the first floor. The court held that the absolute prohibition against counting third floor areas as habitable space was unreasonable because it could

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94. *Id.* at 476.

95. See notes 70-79 *supra* and accompanying text.

96. See notes 80-90 *supra* and accompanying text.

97. 12 Ohio Misc. 205, 232 N.E.2d 421 (1966).

98. *Id.* at 207, 232 N.E.2d at 423.

99. *Id.*

not be assumed that all such space is uninhabitable; rather, it may be habitable when measured against sufficient standards.<sup>100</sup> The general floor area requirement, however, was held to be reasonably related to the community's health and welfare.<sup>101</sup> This required appellants either to move to other quarters or to cease renting the first floor of the two-family home. The court's balancing of the desire to prevent overcrowding against the integrity of the family unit and its lifestyle is questionable. The decision gives insufficient weight to the family's economic limitations and ignores any presumption that a family will establish satisfactory living accommodations for itself.

This analysis of *Nolden* should not suggest that no relationship exists between the general welfare and the public health and safety. In fact, it can be argued that the first line of protection of the public health and safety is in the area of exterior maintenance of dwellings where the primary basis for the police power regulation is the general welfare. The injury to the general welfare caused by an unpainted exterior, broken gutters and downspouts, and breaches in the foundation and mortar can be expected to lead to conditions that would be harmful to the public health and safety. Such defects permit water, weather, and insects to attack the structural soundness of the dwelling and permit the entry of vermin and rodents. Furthermore, such a rundown appearance can cause surrounding property values to depreciate—beginning the decline of an entire neighborhood of once sound housing, and ending with numerous resultant violations of code requirements designed to protect public health and safety. Once this level of blight is reached, it may be impossible or uneconomical to rehabilitate through code enforcement. An area that could have been preserved through the initial application of "public welfare" standards may ultimately become a neighborhood where clearance is the most economical answer. While other factors may contribute to the decline of a neighborhood, it is clear that a consistent and early application of exterior and yard maintenance requirements could help prevent deterioration by preserving housing and protecting the total community environment.

This emphasis on exterior maintenance and the public welfare aspect of the police power, along with the deemphasis of interior inspection in owner-occupied dwellings, is consistent with a factor

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100. *Id.* at 212, 232 N.E.2d at 426.

101. *Id.* at 211-12, 232 N.E.2d at 426.

rarely mentioned in the cases. That factor is society's perception of a threat to its privacy in the implementation of extensive interior inspection housing-property maintenance code standards.<sup>102</sup> This concern becomes particularly important when property maintenance is applied to the suburbs. Along the same line, the problem of defining sufficiently specific standards in housing or property maintenance codes raises a practical concern, particularly in the suburbs, regarding the amount of discretion which will be given to the municipal authority to determine what must or need not be done. Owner-occupants will see "vague" standards as a threat to their privacy and property rights. Specific standards are particularly important when it is recognized that voluntary compliance is a substantial goal of property maintenance codes.

### III. PROPERTY MAINTENANCE CODES AND THE RIGHT OF PRIVACY

#### A. *Introduction*

It has been suggested above that the application of property maintenance codes to owner-occupied dwellings in mature suburbs should be viewed differently from the application of housing codes in urban areas.<sup>103</sup> Because there are different individual and community values operating and the residents of mature suburbs have greater incentives to maintain the value of their properties, code provisions applied to owner-occupied dwellings should have a different focus. Internal inspection should not be warranted unless there is a clear, direct impact on health or safety. Rather, there should be an emphasis on structural soundness of buildings with an eye toward maintaining real estate values.

This article has suggested that this redirection of focus in property maintenance codes is constitutionally sustainable under the general welfare aspect of police power.<sup>104</sup> It is posited that individual property rights should not always have to yield to property maintenance codes, especially where the property rights involved are closely associated with human liberty and dignity. The right of the homeowner to privacy should weigh heavily in any balancing of interests. Bernard Schwartz, in *The Rights of Property*, concludes:

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102. For a more complete discussion of this perceived threat to privacy, see notes 103-88 *infra* and accompanying text.

103. See notes 27-59 *supra* and accompanying text.

104. See notes 60-102 *supra* and accompanying text.

[I]t should not be lost sight of that . . . the ultimate social interest in our system is that in the individual life, nor that the fulfillment of such social interest is impossible without the institution of private property. Property is the natural fruit of individual labor—the pivot of civilization . . . . The very maintenance of individuality . . . is closely entwined with the property rights of the individual.

. . . The society which has a clear interest in furthering the general progress and the individual life also has an interest in securing property rights insofar as they contribute to the advance of such interests.<sup>105</sup>

Either the courts or local government must ultimately recognize and protect the right of privacy if there is to be societal support for housing-property maintenance codes in predominately owner-occupied communities.

It is submitted that the typical, detailed housing-property maintenance code, such as BOCA,<sup>106</sup> is politically—and may even be constitutionally—infirm when applied in its full scope to owner-occupied housing. Because courts may fail to apply a flexible standard of review, however, legislators should be aware of the vital importance of the interests affected by such codes. Legislators do have, and should exercise, the power to give legal recognition and protection to the perceived right of privacy by tailoring any housing-property maintenance code to fit within the analytical framework suggested below.<sup>107</sup> Legislatures have the primary policy-making function in our society and should be best able to define and protect rights perceived to be important. If legislative bodies fail to recognize this right, it is possible that the more intrusive code provisions may not be sustainable when applied to owner-occupied dwellings for reasons of substantive due process analysis analogous to the “newer” equal protection.<sup>108</sup> If concepts of due process were limited to procedure, then any law would be valid so long as the proper procedure was followed. Therefore, if due process is to serve any significant function in protecting property rights, a substantive limitation on legislation enacted under

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105. B. SCHWARTZ, A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES PART II, THE RIGHTS OF PROPERTY 233 (1965).

106. See note 43 *supra*.

107. See notes 122–188 *infra* and accompanying text.

108. For a discussion of the newer equal protection standard, see Gunther, *The Supreme Court, 1971 Term, Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972). See also Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection and the Indigent*, 21 STAN. L. REV. 767 (1969).

the police power must somehow be imposed.<sup>109</sup>

In the late nineteenth century, substantive due process emerged as a means of controlling governmental regulatory measures. The substantive due process test can be simply stated: there must be a rational relationship between the legislation enacted or the action taken under it and the societal ends that may be served. For a period of almost fifty years, the Supreme Court used this test to invalidate a number of state regulatory measures.<sup>110</sup> In the famous case of *Lochner v. New York*,<sup>111</sup> the Court struck down a state law that sought to limit the number of hours a baker could work because it was an arbitrary interference with the liberty to contract between an employer and an employee.<sup>112</sup> In the late 1930's the court abruptly changed direction and applied the substantive due process test in such a manner that judicial scrutiny of legislation was more fiction than fact.<sup>113</sup> In *Williamson v. Lee Optical Co.*,<sup>114</sup> the Court was willing to hypothesize possible reasons for an Oklahoma statute that limited the ability of opticians to fit or duplicate eyeglasses so that the law could have a rational connection to a societal end sought.<sup>115</sup> In the last twenty years, there is evidence of a revival of substantive due process at a level somewhere between *Lochner* and *Williamson*.<sup>116</sup>

This new analytical approach to due process seems to be structured along the lines of the balancing approach long advocated by Justice Harlan.<sup>117</sup> In applying this new approach to the question of the proper scope of property maintenance codes, it is suggested that due process protection should extend to property rights involving one's living environment when closely associated with one's individual liberty and dignity.<sup>118</sup> While the hypothesized right of privacy in one's living environment is not a fundamental right deserving *Lochner*-type scrutiny, neither is the right so trivial that it deserves only *Williamson*-type scrutiny. Judicial recogni-

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109. See, e.g., B. SCHWARTZ, CONSTITUTIONAL LAW 165 (1972).

110. See generally J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 60, at 397-404; L. TRIBE, AMERICAN CONSTITUTIONAL LAW 421-49 (1978).

111. 198 U.S. 45 (1905). For a discussion of the *Lochner* era, see G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 511-27 (10th ed. 1980).

112. 198 U.S. at 53.

113. See generally J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 60, at 404-10; L. TRIBE, *supra* note 110, at 450-55.

114. 348 U.S. 483 (1955).

115. *Id.* at 487-88.

116. See G. GUNTHER, *supra* note 111, at 603-46.

117. See, e.g., *Poe v. Ullman*, 367 U.S. 497, 542-43 (1961) (Harlan, J., dissenting).

118. See text accompanying notes 105-88 *infra*.



tion of this right of privacy would supply a meaningful constitutional limit to the reach of police power when applied to housing.

This section of the article suggests some possible bases for the hypothesized due process protection of the right of privacy,<sup>119</sup> analyzes the middle-tier scrutiny of the "newer" equal protection,<sup>120</sup> and then applies this analytical framework to property maintenance codes.<sup>121</sup>

### B. *Privacy and Substantive Due Process*

For several decades now, property rights have been relatively quiescent while personal rights have grown in importance. If Thomas Shaffer is correct in viewing property as an extension of personality, then "[t]he line between rights in things and rights in persons is functionally obscure."<sup>122</sup> Significantly, since 1940 the percentage of owner-occupied dwellings has risen steadily.<sup>123</sup> Today almost two-thirds of all housing units in the United States are owner-occupied.<sup>124</sup> In recent years, as an increasing number of people have come to have a major stake in real property, those rights that protect homeownership have become more important. It may fairly be suggested that for most homeowners, freedom from unwarranted governmental intrusion into the private home is as important as freedom of speech. If this is so, Justice Story's statement in 1829 that "the fundamental maxims of a free government seem to require that the rights of personal liberty and private

119. See notes 122-72 *infra* and accompanying text.

120. See notes 173-84 *infra* and accompanying text.

121. See notes 185-88 *infra* and accompanying text.

122. Shaffer, *Men and Things: The Liberal Bias Against Property*, 57 A.B.A.J. 123, 125 (1971).

123. The 1970 United States Census showed a steady increase since 1940 in the percentage of owner-occupied units for both the white and black populations.

#### CENSUS YEAR

Percentage of Households Residing in

Owner-Occupied Units	1890	1900	1910	1920	1930	1940	1950	1960	1970
White	51%	50%	NA	48%	50%	46%	57%	64%	65%
Negro	19%	24%	NA	24%	25%	24%	35%	38%	42%

1 U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, HOUSING CHARACTERISTICS FOR STATES, CITIES AND COUNTIES, pt. 1, at S6 (1972).

124. The following figures are from the 1975 ANNUAL HOUSING SURVEY:

property should be held sacred"<sup>125</sup> must be given new credence.

More recently, President Kennedy remarked: "Both human rights and property rights are foundations of our society."<sup>126</sup> Clearly there is an historical basis for holding property rights—including the right to be free from unwarranted governmental intrusion while in the home—to be essential to the entire scheme of ordered liberty in the United States.

In one of the Supreme Court's earliest and most significant interpretations of the fourth amendment, *Boyd v. United States*,<sup>127</sup> it explicitly linked the concept of privacy to the fourth amendment. Justice Bradley, writing for the Court, termed the protections against unreasonable search and seizure "the very essence of constitutional liberty and security,"<sup>128</sup> not confined to a physical invasion of a home and the carting away of private papers. He stated that these principles

apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense,—it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment.<sup>129</sup>

The philosophical bases of a right to privacy in one's home pre-date *Boyd*. William Pitt, the Elder, an eighteenth-century English statesman, is supposed to have said in support of the common law right of privacy:

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GENERAL CHARACTERISTICS OF THE  
HOUSING INVENTORY

(Numbers in Thousands)

	Total		Urban		Rural	
	1975	1970	1975	1970	1975	1970
United States	1975	1970	1975	1970	1975	1970
Total Occupied Units	72,523	63,445	52,294	47,567	20,229	15,878
Owner-Occupied Units	46,867	39,886	31,107	27,785	15,761	12,100
(Percentage of Total)	(64.6)	(62.9)	(59.5)	(58.4)	(77.9)	(76.2)

U.S. DEP'T OF H.U.D./BUREAU OF THE CENSUS, 1975 ANNUAL HOUSING SURVEY, *Part E, Urban and Rural Housing Characteristics* (1976).

125. *Wilkinson v. Leland*, 27 U.S. (2 Pet.) 627, 657 (1829).

126. *N.Y. Times*, June 20, 1963, at 16, col. 3.

127. 116 U.S. 616 (1886).

128. *Id.* at 630.

129. *Id.*

The poorest man may in his cottage bid defiance to all the force of the crown. It may be frail—its roof may shake—the wind may blow through it—the storm may enter—the rain may enter—but the King of England cannot enter—all his forces dare not cross the threshold of the ruined tenement!<sup>130</sup>

The seminal Supreme Court opinion expressly based on a separate constitutional right of privacy was *Griswold v. Connecticut*.<sup>131</sup> Privacy was described as a composite right that drew its substance from the penumbra of the first, third, fourth, fifth, and ninth amendments.<sup>132</sup> The right of privacy was described in language which appeared to create a strong constitutional presumption against any manner of governmental infringement.

Justice Douglas, writing for the Court, expressly declined an implicit invitation to “*Lochnerize*” and sought to give the right of privacy a textual basis in the Constitution.<sup>133</sup> Of particular importance were the first amendment freedom of association, the fourth amendment protection from unreasonable searches and seizures, and the fifth amendment prohibition of compulsory self-incrimination.<sup>134</sup> Once this textual basis was found, the right of privacy could be applied to the states through the due process clause of the fourteenth amendment.<sup>135</sup> The Court held that Connecticut’s attempt to ban the use of contraceptives swept too broadly, infringing upon married persons’ rights of privacy, and therefore violated due process.<sup>136</sup>

Justice Harlan, concurring in the judgment, took a different approach. Relying upon the reasoning of his dissent in *Poe v. Ullman*,<sup>137</sup> he held that the Connecticut law violated due process because it violated basic values “implicit in the concept of ordered liberty.”<sup>138</sup> Unlike Douglas, he saw no need to ground the right of privacy in the penumbra of the Bill of Rights; the only textual basis Harlan required was the due process clause. Although the

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130. J. BARTLETT, FAMILIAR QUOTATIONS 426 (14th ed. 1968).

131. 381 U.S. 479 (1965).

A director of a Planned Parenthood Center and a doctor were convicted under a statute which sought to prevent the use of contraceptives. *Id.* at 480. The defendants appealed their conviction, arguing that the statutes violated the due process clause of the fourteenth amendment. *Id.*

132. *Id.* at 484.

133. *Id.* at 482.

134. *Id.*

135. *Id.* at 481.

136. *Id.* at 486.

137. 367 U.S. 497, 539–45 (1961) (Harlan, J., dissenting).

138. 381 U.S. at 500 (Harlan, J., dissenting).

means he used to get there were different, Harlan reached the same result — a revitalization of substantive due process.

The importance of *Griswold* in the present context is twofold. First, a constitutionally based right of privacy was expressly recognized by the Supreme Court. The right of privacy in the marital relationship was deemed so important that a state's attempt to regulate it was scrutinized very closely. Presumably, a right to be free of intrusion from maintenance code inspections would not be given as much protection. It is suggested here, though, that this right deserves some measure of protection. The means of vindicating this right are supplied by the second important facet of *Griswold* — the revival of substantive due process. Through a balancing of the homeowner's interest in privacy and the state's interest in protecting the health, safety, and welfare of its citizens, a property maintenance code could be more limited in a state's power to make internal inspections than in its power to make external inspections.

This suggested right of privacy has been most directly tested in the fourth amendment administrative search warrant cases, which frequently involved housing codes. First, in a pre-*Griswold* decision, the Supreme Court required only a limited protection from administrative searches. In *Frank v. Maryland*<sup>139</sup> the health authorities received a complaint about rat infestation in Frank's home. From outside the house, the inspector observed both that the dwelling was in an extreme state of decay and that there was evidence of rat infestation. The inspector informed Frank that he had evidence of rodent infestation and asked for permission to inspect the basement area.<sup>140</sup> When permission was denied, the inspector obtained a warrant for Frank's arrest. The Supreme Court, in a five-to-four decision, upheld the validity of warrantless administrative searches under housing and health codes.<sup>141</sup> In the Court's view, these were "civil" and not "criminal" inspections, which "touch at most upon the periphery of the important interests safeguarded by the Fourteenth Amendment's protection against official intrusion. . . ."<sup>142</sup> The Court felt that the primary purpose of this type of inspection was to correct defects and not to seek evidence for a criminal prosecution.<sup>143</sup> The searches were

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139. 359 U.S. 360 (1959).

140. *Id.* at 361.

141. *Id.* at 373.

142. *Id.* at 367.

143. *Id.* at 366.

considered "civil" even though a person could be prosecuted if either the inspection showed that he or she was violating the code or for refusal to permit the inspection itself.<sup>144</sup>

Reasoning that the motive for the search would be unrelated to its impact upon an individual's privacy, the dissenters rejected any distinction based upon motive. Justice Douglas stated: "The decision today greatly dilutes the right of privacy which every homeowner had the right to believe was part of our American heritage. We witness indeed an inquest over a substantial part of the Fourth Amendment."<sup>145</sup> Douglas believed that the fourth amendment "protects the citizen against unreasonable searches and seizures by government, whatever may be the complaint."<sup>146</sup> Furthermore,

[The Fourth Amendment] was designed to protect the citizen against uncontrolled invasion of his privacy. It does not make the home a place of refuge from the law. It only requires the sanction of the judiciary rather than the executive before that privacy may be invaded. History shows that all officers tend to be officious; and health inspectors, making out a case for criminal prosecution of the citizen, are no exception. . . . One invasion of privacy by an official of government can be as oppressive as another. Health inspections are important. But they are hardly more important than the search for narcotics peddlers, rapists, kidnappers, murderers, and other criminal elements . . . . It would seem that the public interest in protecting privacy is equally as great in one case as in another.<sup>147</sup>

Thus, the dissent made clear that the violation of the right of privacy, and not the purpose for which the violation was accomplished, should be the controlling criterion. Douglas concluded by suggesting that the standards applicable for a health official to obtain a warrant to make an inspection might not be the same as those involved in a criminal investigation.<sup>148</sup> Probable cause might arise from experience showing the need for periodic inspections.<sup>149</sup>

In 1967 two Supreme Court decisions substantially altered the requirements for an administrative search warrant as described in *Frank. Camara v. Municipal Court*<sup>150</sup> concerned an apartment

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144. *Id.* at 367.

145. *Id.* at 374 (Douglas, J., dissenting).

146. *Id.*

147. *Id.* at 381-82.

148. *Id.* at 383.

149. *Id.*

150. 387 U.S. 523 (1967).

house tenant residing in a ground floor commercial rental unit despite an ordinance restricting that area to commercial use.<sup>151</sup> The defendant, Camara, refused to permit an inspection of the premises unless a search warrant was presented. Camara was arrested for his refusal to allow an inspection authorized by the San Francisco housing code.<sup>152</sup> The Supreme court reversed the conviction, concluding that the administrative searches involved were significant intrusions upon the interests protected by the fourth amendment, and overruled *Frank v. Maryland*.<sup>153</sup>

Since fourth amendment interests were implicated, a "probable cause" search warrant had to be obtained.<sup>154</sup> The Court, however, defined "probable cause" in this context to include not only a request based on specific facts, but also a request based on "reasonable legislative or administrative standards for conducting an area inspection . . ." <sup>155</sup> The Court also required that before a warrant is sought, the occupant must have denied a request to enter, unless an emergency situation required otherwise.<sup>156</sup>

The standard for administrative warrants was created by "balancing the need to search against the invasion which the search entailed."<sup>157</sup> The Court noted three factors which supported the legality of the inspections: 1) "a long history of judicial and public acceptance;" 2) the public interest in having effective means to discover unsafe or unhealthful conditions; 3) the use of inspections that "involved a relatively limited invasion of the urban citizen's privacy."<sup>158</sup> Justice White's efforts at balancing are important because they recognize a need for different standards when different levels of privacy interests are implicated by administrative inspections. In the companion case of *See v. City of Seattle*,<sup>159</sup> the Court implied that inspections of commercial settings may require less justification than inspections of private residences because of a lesser privacy interest.<sup>160</sup> It is suggested below that because of a greater privacy interest in predominantly owner-occupied dwellings, code inspectors should bear a heavier burden

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151. *Id.* at 526.

152. *Id.*

153. *Id.* at 534.

154. *Id.*

155. *Id.* at 538.

156. *Id.* at 529.

157. *Id.* at 537.

158. *Id.*

159. 387 U.S. 541 (1967).

160. *Id.* at 545-46.

before permission to make an internal inspection is granted.<sup>161</sup>

In two more recent decisions, the Supreme Court upheld one ordinance which sought to regulate the relational composition of persons living in one residence and invalidated another, largely because of the different levels of privacy interests—in the context of family relationship—involved.<sup>162</sup> The ordinance that was challenged in *Village of Belle Terre v. Boraas*<sup>163</sup> restricted land use to a single-family dwelling and defined “family” to exclude more than two unrelated individuals living together. The Court upheld the ordinance because it bore a rational relationship to the permissible state objective of establishing “zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.”<sup>164</sup> Since the Court refused to find the defendant’s right of privacy implicated, the ordinance was subjected to minimal scrutiny.

In *Moore v. City of East Cleveland*,<sup>165</sup> however, the Court struck down a city zoning ordinance that limited the occupation of a dwelling to a single family, but defined “family” so as to exclude a grandmother living with a son and two grandsons who were only cousins—an extended family.<sup>166</sup> Evaluating the interests of the government in this ordinance, the Court found that the value of the classification to the city—protection against overcrowding, traffic, and overburdening the schools—was slight when balanced against the regulation’s substantial intrusion on the family.<sup>167</sup> This imbalance caused the provision to be invalidated as an unconstitutional deprivation of liberty in violation of the Due Process Clause of the fourteenth amendment, a clear use of substantive due process.

*Moore* is a substantive due process successor to *Griswold* because in both cases state regulation touched the lifestyle of the family unit. The balancing of interests seen in *Griswold* and *Moore* shows the willingness of the Court, in certain extreme instances, to apply a balancing approaching strict scrutiny to regulations that infringe upon the right of privacy.

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161. See notes 185–88 *infra* and accompanying text.

162. *Moore v. City of East Cleveland*, 431 U.S. 494 (1977). See generally Note, *The Collision of Zoning Ordinances and Constitutional Rights of Privacy and Association: Critique and Prognosis*, 30 CASE W. RES. L. REV. 155 (1979).

163. 416 U.S. 1 (1974).

164. *Id.* at 9.

165. 431 U.S. 494 (1977).

166. *Id.* at 499.

167. *Id.* at 500.

Dissenting in *Moore*, Justice White argued that "whenever the Judiciary does so, it unavoidably pre-empts for itself another part of the governance of the country without express constitutional authority."<sup>168</sup> In response to Justice Powell, who relied upon Justice Harlan's description of due process as "the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke,"<sup>169</sup> Justice White remarked: "What the deeply rooted traditions of the country are is arguable; which of them deserve the protection of the Due Process Clause is even more debatable."<sup>170</sup> This is a real problem the Court must confront in trying to balance conflicting government and private interests. Yet, as Justice Douglas wrote in *Griswold*: "We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions."<sup>171</sup> Only in the rare instances where legislative enactments threaten important private interests will the Court apply something other than minimum rationality. In *Griswold* and *Moore* the Court found such a threat to be present; in *Belle Terre* it found no such threat.<sup>172</sup>

An individual's assertion of his or her right of privacy raises the issue of aversion to governmental intrusion and challenges substantive regulatory power. For purposes of evaluation, it is both possible and necessary to arrange the interests of privacy and government order along separate continuums. The individual's privacy interests range from core concerns, such as using contraceptives or being able to live with one's grandsons, to lesser concerns, such as a search of exterior areas of a house. Government concerns range from serious health and safety matters to such matters as the height of ceilings and the size of windows. It is asserted that the Court should develop a sliding scale of review in the substantive due process area rather than apply only minimal scrutiny where it finds no privacy interests or strict scrutiny where it finds some privacy interests. The Court appears to apply such varying levels of scrutiny in the equal protection area, a topic which is discussed in the next section.

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168. *Id.* at 544 (White, J., dissenting).

169. *Id.* at 501 (quoting *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)).

170. 431 U.S. at 549.

171. 381 U.S. at 482.

172. For a discussion of fundamental values, see Ely, *The Supreme Court 1977 Term, Forward: On Discovering Fundamental Values*, 92 HARV. L. REV. 5 (1978).



### C. *The Equal Protection Experience*

Traditionally, the Supreme Court has used two alternative standards of review when faced with an equal protection challenge. The more widely used standard is the "rational relationship" or "minimal scrutiny" test.<sup>173</sup> When applying this standard, courts require merely that the classification in the law being challenged be reasonably related to the legislative purpose.<sup>174</sup> This requirement is almost invariably met, since courts seem prepared to give legislatures the flexibility to act on the basis of rather broad generalizations. For most of the early years of its existence, the equal protection clause generally supported only minimal judicial intervention.

During the height of the Warren years, however, the equal protection clause became the major interventionist tool of the Supreme Court.<sup>175</sup> In applying the "strict scrutiny" test, the Court often focused not only on the means used to achieve a certain legislative end, but also on the propriety of that end. Every conceivable legislative purpose would not be sufficient to support a legislative classification; rather, the government had to demonstrate a compelling purpose if a "suspect classification" or "fundamental interest" was involved. Even if the government was able to meet this part of the test, the statute would be struck down unless the legislature had used the "least intrusive means" to accomplish that purpose.

Armed with this two-tiered approach, the Court usually applied minimal scrutiny and reserved strict scrutiny for instances when the challenged legislative classification was "suspect" because it was drawn along constitutionally impermissible lines,<sup>176</sup> or when it impacted on fundamental rights.<sup>177</sup> Professor Gunther has noted that minimal scrutiny was "minimal in theory and none in fact," while strict scrutiny was "strict in theory and

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173. See generally G. GUNTHER, *supra* note 111, at 670-76; J. NOVAK, R. ROTUNDA & J. YOUNG, *supra* note 60, at 522-27; L. TRIBE, *supra* note 110, at 994-99.

174. See, e.g., *Railway Express Agency v. New York*, 336 U.S. 106 (1949).

175. See generally, G. GUNTHER, *supra* note 111, at 670-76; J. NOVAK, R. ROTUNDA & J. YOUNG, *supra* note 60, at 522-27; L. TRIBE, *supra* note 110, at 1000-02.

176. The following are classifications which have been found to be "suspect": alienage, illegitimacy, indigency, national origin and race. *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 61 & nn.4-7 (1973) (Stewart, J. concurring).

177. The following have been identified as "fundamental interests": the right to vote, the right to procreate, rights with respect to criminal procedure, first amendment rights, and the right to travel interstate. See *id.* at n.8. See also Comment, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1127-28 (1969).

fatal in fact.”<sup>178</sup> Therefore, under this rigid two-tiered approach to equal protection adjudication, the Court was faced with an all-or-nothing dilemma.

Because of this two-tiered formula—and a growing recognition of rights and interests which deserved more protection than minimal scrutiny gave, yet not as much as strict scrutiny required—the Court has seemingly developed a middle tiered scrutiny.<sup>179</sup> Professor Gunther, the most noted analyst of this development, has characterized the new level of scrutiny as “means scrutiny with bite.”<sup>180</sup> Essentially, this new test requires the challenged classification to “rationally further some legitimate, *articulated* state purpose,”<sup>181</sup> rather than requiring the Justices to postulate justifications for the classification.

It is suggested that this type of sliding scale approach would be desirable in substantive due process analysis. With its adoption a court would have the flexibility to adjudicate cases involving different levels of personal interests in privacy and different levels of state interests in protecting health, safety, and welfare.

A constitutional analysis of any case will involve considerations of the nature of the classification or interest to be protected, the nature of the rights adversely affected, and the nature of the state interest which is urged in support of the classification or imposition. As the right affected approaches “fundamental interest” status or as the classification becomes more “suspect,” the state interest will have to increase commensurately in order to sustain the classification. Strict scrutiny typically will not apply, either because there will be no highly suspect classification or because the right affected will not be viewed by the courts as a fundamental guarantee of the Constitution. Such a standard will enable courts to solve problems with the flexibility which has previously been absent in housing code cases. The courts will not completely abdicate their judicial role but will, to some extent, guarantee the integrity of fundamental expectations in our society.<sup>182</sup> Other-

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178. Gunther, *supra* note 108, at 8.

179. See Gunther, *supra* note 108.

180. See *id.* at 46.

181. *E.g.*, McGinnis v. Royster, 410 U.S. 263 (1973).

182. In Gunther's noted article (*see* note 108), there was not much of an attempt to formulate a third layer of scrutiny; rather, Gunther was suggesting that the gap between strict scrutiny and deferential scrutiny be closed. In short, Gunther argued that the Court could do more by not hypothesizing conceivable purposes. See FORUM, *Equal Protection in the Burger Court*, 2 HAST. CONST. L.Q. 645, 657 (1975). It might even be a return to

wise, there appears to be no meaningful constitutional limit to the reach of the police power when applied to housing, for it has already been held that decent housing is not a fundamental right.

There is a possibility that this test would encounter the same problems associated with the older formalistic application of the substantive due process doctrine,<sup>183</sup> which resulted in the Court imposing on the nation its own particular philosophy in order to invalidate "laws fixing minimum wages and maximum hours in employment, laws fixing prices, and laws regulating business activities."<sup>184</sup> On the other hand, the judicial abdication of the post-*Lochner* era<sup>185</sup> has left the government broad leeway in constructing regulatory programs. As personal rights and liberties come to be recognized, however, they may conflict with the broad leeway found in regulatory programs. This undesirable result demonstrates the need for a flexible judicial approach that can weigh the importance of all public and private interests involved, balance them, and accommodate them.

The adoption of this type of flexible judicial approach would aid in distinguishing between the potentially different protections afforded to homeowners and renters based on the different levels of community interests sought to be protected. While the right to privacy and the integrity of the home is just as substantial whether the property is tenant or owner-occupied, the equation may be significantly altered when rental properties are involved, because of concerns such as the reduced economic incentive for tenants to improve their living environment and the expectation that landlords typically will not do so either. This creates a stronger state interest in internal facilities and their maintenance that is not present with owner-occupied residences. Applications of different standards to rental units should not necessarily be a denial of equal protection because there is a substantial basis for a separate legislatively created class.

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substantive due process, as Professor Kurland argues. *Id.* at 661. However, while this may be true, it is also unavoidable if the Court is to have any input into the balancing of interests in our society. Yet, there must be some safeguards so that those judgments are based on the clearly felt needs of society, and not on the individual opinions of Justices. This problem raises the important question addressed in *Rosenberg*, *supra* note 53, which suggested the creation of a judicial resource center so that value judgments could be based on some empirical or objective base beyond mere judicial opinion.

183. Goodpaster, *The Constitution and Fundamental Rights*, 15 ARIZ. L. REV. 479, 484-86 (1973).

184. *Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 535 (1949).

185. *See, e.g.*, J. NOVAK, R. ROTUNDA & J. YOUNG, *supra* note 60, at 398-410.

#### D. *The New Constitutional Approach Applied*

Urban areas and mature suburbs are two distinct sections of a metropolitan geography, and so should be regulated by property maintenance codes with distinct emphases. The greatest difference to be taken into account when applying property maintenance codes to these two areas is the higher percentage of owner-occupied units in the suburban areas. A second major difference is a greater concern with aesthetics in the suburbs, and a greater concern with health and safety in urban areas. These two fundamental differences are at the core of this article's thesis that property maintenance codes must focus on different aspects of these two types of communities.

For a housing-property maintenance code to be politically palatable in the suburbs, it must recognize that a substantial percentage of residents in owner-occupied dwellings have strong feelings about the "invasion" of their homes by government officials. In short, the right to personal privacy must weigh heavily in a balance with the protection of the public health and safety. It may be argued that the procurement of a search warrant by an inspector solely because he or she was refused entry to conduct an inspection is justifiable since the protection of public health and safety would necessitate a lesser infringement of individual/personal privacy than would a search for evidence of a crime. It is suggested, however, that with regard to owner-occupied dwellings—as opposed to renter-occupied units—a different and higher level of concern for the public health and safety ought to be evident before an inspection is made or a search warrant requested. The basis for the lesser requirement in regard to rental units is the greater expectation of violation in these units,<sup>186</sup> and therefore the greater possibility that the public health and safety is in danger. Consequently, in areas where renter-occupied residences predominate, the societal interest in public health and safety has a stronger base. Additionally, the right of privacy would appear to be more complete and substantial in the owner-occupied dwelling than in rental property. For example, the landlord retains an estate in land. Furthermore, the typical lease reserves to the landlord the right to enter at any reasonable time for a variety of purposes. While the landlord does not have the exclusive right to present possession of the premises, he or she

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186. See note 16 *supra* and accompanying text.

does possess some residual rights which are greater than those of the state.

Another essential distinction between the two types of property relates to the incentive for the owner-occupant to maintain the property. Not only is the owner concerned with the welfare of his or her family, but there is also concern for the success of the financial investment. Therefore, a presumption that people will be able to take better care of their own health, safety, and welfare as owner-occupants should be recognized and result in different standards of review for determining when a search warrant is obtainable, when an inspection is permissible, and for what purposes inspections ought to be made. Presumably an owner will provide electrical outlets, ventilation, heat, and similar housing necessities and amenities to the extent that he or she can. Although a tenant may have similar family concerns, the financial incentives and idea of permanence do not weigh so heavily, since a tenant will not reap the economic or long term amenity benefits of any such improvements.

Taken together, these differences between primarily renter-occupied communities (urban areas) and primarily owner-occupied areas (mature suburbs) should be reflected in different types of property maintenance codes. Basically, a presumption should exist that owner-occupants will provide a decent living environment. Such a presumption should be rebutted only on a clear showing that either the individual's or the public's health, safety, or welfare is significantly endangered. Property maintenance codes in suburbs are more properly concerned with the structural soundness of buildings and aesthetic amenities. Should the appropriate legislative bodies fail to consider these differences, it is hypothesized that a balancing approach to a substantive due process right of privacy would mandate this disparate treatment.

Clearly, the right of privacy held by owner-occupants is not so "fundamental" that a code provision which infringed upon it should be subject to strict scrutiny. Such a provision should, however, be subject to more than minimal scrutiny. Under the approach suggested by this article, a court should require articulated state purposes for any code provision which sought an internal inspection. While the nature of a rental agreement makes such an inspection reasonably related to police power goals of health and safety without special circumstances, the nature of homeownership would require carefully delineated circumstances to justify an internal inspection. Similarly, the nature of mature suburbs is

such that provisions regarding yard and external inspections would be sustainable without special circumstances. Only where the substantiality of the state interest is without serious question should police power intrusions upon individual privacy be sustained.<sup>187</sup>

When implementing housing and property maintenance codes, legislators need to be concerned with the welfare of the individual as well as the welfare of the community. In fact, the clearly felt need of privacy should be considered as an element of the community welfare, not just as an individual interest to be balanced against a broader community interest. Although government is permitted to promote the public welfare, it is possible for a housing or property maintenance code to be implemented not only at the cost of "mere" economic property rights but also at the cost of those individual rights inextricably interwoven with the property rights of the home. By lowering the value of property rights under the police power, government lowers the value of the person. Thus, if the ultimate social interest is that of the individual life in our society, then it should be recognized that the exercise of the police power through housing and property maintenance codes infringes not only on individual property rights, but also on the general societal interest in the privacy of the individual's living environment.<sup>188</sup>

These community values should be respected by legislators as well as by judges. Although this section asserted that these values should have a constitutional basis, it would be preferable for legislatures to legislate with them in mind. The next section of the article examines the factors that legislators should consider when developing a housing or property maintenance code for a mature suburb.

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187. A somewhat analogous application of this theory is found in the case of *West Goshen Township v. Bible Baptist Church of West Chester*, 11 Pa. Commw. Ct. 74, 313 A.2d 177 (1973). The church sought a variance to use on-site water in the operation of a parochial school. The zoning ordinance required off-site water which was not available. Although the Zoning Hearing Board denied the request for a variance, both the Court of Common Pleas and the Commonwealth Court held that if the water was pure and potable and there was no danger to the public health, safety, morals, or welfare, denial of the variance was an abuse of discretion and constituted an unnecessary hardship. The court reached this decision even though the ordinance requiring off-site water had a rational relation to the police power over public health.

188. See B. SCHWARTZ, *supra* note 105, at 231-33.

#### IV. A PRIMER FOR STRUCTURING A PROGRAM OF PROPERTY MAINTENANCE FOR THE SUBURBS

Even where housing-property maintenance codes have been enacted in the suburbs, they have not been consistently enforced. Many of these codes either have unnecessarily particular provisions or are poorly administered.

When initially structuring a code, it is important to distinguish between property maintenance codes and zoning or building codes. A property maintenance code primarily is enforced against individual citizens who lack the expertise of professional developers, against whom zoning ordinances and building codes are most commonly enforced. As a consequence, responses to enforcement will be quite different. Second, it is important to recognize the difference between the predominantly rental housing in the inner cities, and the largely owner-occupied homes of the suburbs. These suburban homes are generally well maintained and their surrounding neighborhoods appear more desirable. Consequently, there is less need for the detailed regulations often found in codes aimed at inner city housing. Accordingly, in the suburbs, where privacy and aesthetics are of greater concern, code emphasis should be upon exterior maintenance.<sup>189</sup>

Above all, a housing-property maintenance code should be politically realistic. This is consistent with the Constitution's assignment of policy-making functions to the representative branches of government. The potential for saving housing from decay and for preserving viable urban communities is far greater with a realistic, politically framed maintenance approach than with a costly construction program that yields highly visible but often limited results. Rehabilitated housing has recently been more successful,<sup>190</sup> but serious efforts to conserve the best of our older housing resources have been limited.

Ultimately, a feasible maintenance strategy for the suburbs must focus on the goal of having a community with long-range

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189. Most housing codes cover three broad areas: (1) minimum facilities and installed equipment; (2) maintenance of the dwelling unit, facilities, and equipment; and (3) use, conditions of occupancy, and maximum occupancy. A comprehensive system of provisions regulating minimum facilities and installed equipment usually includes: water supply and waste water disposal; garbage and rubbish disposal; kitchen and hand-washing sinks and bathing facilities; toilet facilities; means of egress; heating equipment for the dwelling unit and hot water supply; lighting; ventilation; and electrical service. See note 47 *supra* and accompanying text.

190. See *Movement to Restore Older Urban Housing Grows with U.S. Help*, Wall St. J., June 20, 1977, at 1, col. 1.

stability. To this end, a housing-property maintenance code should have long-range, clearly defined, and well rationalized objectives which are based upon assumptions acceptable to the community. In structuring a program of property maintenance, then, it is important to recognize that a code is merely a means to this end and not an end in itself.

In designing its maintenance strategy, the municipality should consider not just buildings or front yards: if deterioration is to be completely stopped, the entire community environment must be maintained.<sup>191</sup> While a codified definition of the relevant environment may be difficult, each community that proposes to adopt a property maintenance code should attempt to recognize those parts of the environment that it wishes to preserve. In a study of the property maintenance codes of Baltimore, one commentator has stated:

The residential environment may be defined broadly to include all factors, other than physical quality of the dwelling unit itself, which directly affect the level of consumer satisfaction realized from occupancy of that dwelling unit. So defined, the residential environment embraces both social and physical elements. Many of the physical elements are closely related to the housing inventory [and thus properly considered as part of the housing program]. They would include at least the following:

- Quality of yard or other private outdoor space associated with the given structure and with surrounding structures;
- Quality of sidewalks, alleys, and streets in the immediate vicinity;
- Quality of other structures in the immediate vicinity; cleanliness of streets, yards, sidewalks, and alleys;
- Quality of physical services such as sewerage and street lighting;
- Quality of public, residentially related open space;
- Presence or absence of nonconforming uses, traffic, abandoned structures, abandoned cars, littered vacant lots, air and noise pollutants, etc.;
- Density of development;
- Availability of parking space;
- Presence or absence of natural amenity;
- Presence or absence of rodents.<sup>192</sup>

Indeed, it is often the case that the environment surrounding the dwellings will be of greater community concern than the dwellings themselves.<sup>193</sup>

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191. See note 31 *supra*.

192. W. GRIGSBY & L. ROSENBERG, *supra* note 16, at 89-90.

193. *Id.* at 95.



Because many existing housing code provisions lack an empirical basis<sup>194</sup> and are often written under the unwarranted assumption that all provisions are vital to the maintenance of the public health, safety, and welfare, residents of a suburb should be cautious about accepting the "superior wisdom" of the standardized codes. Rather, they should come to grips with their own unique problems and determine what conditions would be so intolerable as to be a substantial imposition on the community and themselves; in essence, the residents should formulate their own goals. For example, a community with a significant number of older citizens living in apartment buildings may wish to provide for minimum standards of security within those buildings—a common concern not touched by standard codes. Additionally, for those older citizens living in their homes, the community may wish to ease the financial burden of maintenance through administrative means. In dealing with its own problems, a municipality should develop a housing strategy directed toward the ongoing provision of housing services rather than one-time state or federal financing of new or substantially rehabilitated housing.

Once a municipality has ascertained the goals of its maintenance code, it must then communicate them to the residents. No code that directly touches such a mass of citizens can fully succeed without general public support. If the code is perceived as so rigid that it creates either a severe economic burden or a perceived infringement of the right of privacy, it will be ignored by enforcement officials and residents alike. Similarly, if detailed code requirements appear arbitrary and unreasonable, they will generally be disregarded.<sup>195</sup> However, if residents perceive that the code applies primarily to exteriors, they will see the value of their

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194. See note 42 *supra*.

195. Indicative of arbitrary requirements in the codes are the standards for natural ventilation, which typically require that a specified portion of the required window area of the room be openable. This requirement ignores the possibility of other sources of ventilation. Air conditioning, a forced hot air system, or a few openable windows in a room with a large number of windows, can supply adequate ventilation. Thus, the standard codes avoid the true question—air movement—and consider only one of its sources—open windows. Similarly, the electrical facilities requirements of model housing codes typically require two outlets per room, yet state that a ceiling fixture may be one of these outlets. The American Public Health Association-Public Health Service (APHA-PHS) Recommended Housing Maintenance and Occupancy Ordinance, on the other hand, generalizes the requirements for electrical supply, simply stating that every habitable room must have "electric service and outlets and/or fixtures capable of providing at least three watts per square foot of total floor area." APHA-PHS RECOMMENDED HOUSING MAINTENANCE AND OCCUPANCY ORDINANCE 21 (1969).

property enhanced by the maintenance of neighboring homes, and the right to privacy in the home will be affected only slightly.

In addition to general considerations about public acceptance and administrative costs, authorities must also determine the specific scope of their code—for example, whether exterior inspections should include yard maintenance as well as exterior maintenance of the dwelling; whether interior inspections should be limited to rental rather than owner-occupied units; whether, if interior inspections of owner-occupied units are made, they should be limited to such items as plumbing, wiring, and heating facilities; and whether inspections should be made on a periodic basis or only upon change of owner.<sup>196</sup> From such determinations would come a hierarchy of goals, some of which could be implemented immediately and others which might require time for public acceptance. A list of these goals in order of acceptability, might include: 1) ensuring the health and safety of residents from exterior hazards (covering owner-occupied as well as rental and commercial properties, this concern focuses on such hazards as broken sidewalks, broken exterior steps, broken porches, improper rubbish disposal, accumulations of trash, overhanging branches, and unstable retaining walls); 2) ensuring exterior maintenance of buildings (this goal would require examination of such unacceptable conditions as breaches in mortar, curved chimneys, sagging roof lines, broken gutters and downspouts, rotted facing boards, and other similar elements which cause a nonweatherproof building); 3) ensuring exterior aesthetics (while many of these elements would have some relation to health and safety, the immediate impact would be upon aesthetic concerns such as exterior painting of weather susceptible surfaces, cutting most growing shrubs at least once a year, cutting grass to below six inches, and banning auto rebuilding in the yard); 4) ensuring elimination of obvious interior health and safety hazards in commercial and rented residential property by periodic inspection (this would include heating, wiring, plumbing, stairways, sewage disposal, broken plaster, accumulations of trash and rubbish, and broken floor boards); 5) ensuring elimination of obvious health and safety hazards in owner-occupied homes (this would contemplate inspection of unsafe wiring, unsafe heating, and unsafe plumbing. Note, though, that

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196. For a discussion of the fourth amendment problems involved in various types of inspection programs, see 3 W. LAFAYE, SEARCH AND SEIZURE, § 10.1 (1978). For a discussion of the unique problems inherent in administrative housing inspections, see *id.* at 195, n.56. See generally Barber, *supra* note 12.

this should occur either for probable cause or on change of occupancy, but not on a periodic basis).

Once residents comprehend both the ends and the means of maintenance codes, citizen involvement in community organizations is likely to be an important factor in successful code enforcement programs, especially in suburban communities.<sup>197</sup> One study has concluded that a high degree of citizen involvement in neighborhood improvement is three times more likely in sound areas than in areas requiring extensive renewal.<sup>198</sup> In small municipalities where local government officials know a comparatively high percentage of the residents and where officials are especially vulnerable to political attack, resident support will be critical to the implementation of a property maintenance code. Therefore, residents must be involved in the planning of the program. It should be expected that such citizen participation will have widespread impact, since property maintenance, unlike urban renewal, is not likely to result in a large-scale displacement of residents from the area.<sup>199</sup>

In the suburbs, the inspection ought to be the easiest part of the program—difficulties will occur before and after inspection. Hence, preinspection activities should be an important part of any maintenance program since they can dispel any notion that harassment is the code's primary goal. Similarly, because residents are generally not real estate specialists, the municipality must become active in a consulting and educational role after inspection has occurred in order to help residents understand the importance of the repairs. Such educational activity would show residents how to avoid recurrence of the problem, how to select contractors to do the work, and possibly how to make appropriate financial arrangements. This sort of citizen involvement might avoid any indication that, once again, government was arbitrarily imposing regulations on the citizens without consideration of their concerns.<sup>200</sup>

There is less reason to resort to enforcement measures against suburban owner-occupants than against inner city landlords. The arguments in favor of home ownership are well known—ownership of a home promotes self-reliance, affords greater privacy and control over one's immediate environment,

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197. See J. SLAVET & M. LEVIN, *supra* note 16, at 48-51.

198. *Id.* at 48.

199. *Id.*

200. Notably, the present detailed housing codes lend support to this belief.

gives the family a stake in community affairs, and reduces certain out-of-pocket expenses. Thus, a majority of home owners will voluntarily respond to intelligently defined maintenance requirements, at least if there is some demonstrable relationship to health or safety.

As a consequence, some codes exempt owner-occupied homes from certain code requirements. Little Rock, Arkansas, includes the following statement in the section on minimum standards for space, use, and locations:

Section 306.6 Single Family Dwellings: Board of Directors finds further that healthful and sanitary conditions in relation to space, use and location generally prevail in single family dwellings occupied by one family only. Therefore the provisions of subsections 306.2, 306.3 and 306.4 (required space per occupant; required space for sleeping room; and ceiling height for habitable rooms) shall not be applicable for single family dwellings occupied by one family only. For the purpose of this subsection a single family dwelling means a dwelling containing no more than one dwelling unit; and a family as hereby used means husband, wife, children and mother and father of the husband and wife.<sup>201</sup>

Even nearly impoverished owner-occupants of single family dwellings will probably not sit by while their homes deteriorate. Their normal inclination is to fix what they can and use outside help when it can be afforded.

An impediment to voluntary compliance with a new maintenance code is the prevalent, but arguably false, belief that rehabilitation or maintenance will lead to increased property taxes. Certainly, major improvements typically result in a rise in assessed value and a corresponding increase in taxes. A property maintenance code, however, gives greater protection against tax increases to those who have always maintained their homes. First, those few who have not maintained their property and who now have low tax assessments as a result, will have to improve their properties significantly to comply with the code and thus ought to have significant increases in property taxes. Second, municipal government services require a certain number of dollars, not a certain tax millage. As properties are more uniformly maintained, those with historically well maintained homes should have a smaller proportion of the total tax burden. Therefore, a property maintenance code should not increase taxes for the majority of individuals who always have maintained their homes.

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201. Little Rock, Arkansas Ordinance No. 11, 422 § 306 (1963).

Realistically, however, the widely held belief that a property maintenance code will increase taxes is likely to discourage voluntary maintenance. New York has responded to this problem with a tax abatement plan that declares a moratorium on assessment increases for buildings in which certain code repairs have been completed.<sup>202</sup> Through this type of tax abatement, local government is able to subsidize a substantial portion of the cost of rehabilitation. However, the effectiveness of tax abatement as a stimulant to maintenance and rehabilitation is difficult to estimate. Tax considerations would seem to be a weak basis for a property maintenance program. Moreover, there are substantial arguments against abatement policies.

Abatement cuts against a traditional justification for rehabilitation—to increase the local tax base—and for some states it may be contrary to state constitutional provisions requiring equal assessments.<sup>203</sup> More importantly, abatement unjustly benefits owners who have damaged the community and its environment with poorly maintained property while placing an unabated tax burden on owners who have maintained properties and enhanced the community. Thus, for a tax abatement system to be acceptable, at minimum all property improvements would have to be placed on the same tax abatement standard as code compliance repairs. Even then, a proportionately greater benefit would be given to those properties which had been poorly maintained. Over the long run, however, gain from the elimination of incipient blight should more than compensate for this loss, and such a tax abatement plan may quell resistance to property maintenance based on fear of tax increases.

Elderly homeowners on a fixed income present a particularly difficult planning problem, since fixed incomes often are not able to withstand the cost of code improvements or concomitant tax increases. There are several ways to cope with this problem. One way is to keep an open file on the property until such time as the individual dies or moves. Then the property would be brought up to code standards, although interim conditions that are extremely hazardous would have to be corrected when found. Another alternative would require the municipality to give special assistance to the elderly by making a particular effort to secure the best contracting for them, or, if maintenance cannot be paid for, by offer-

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202. N.Y. REAL PROP. TAX LAW § 489 (McKinney 1972).

203. *See, e.g.*, Mass. Const. pt. II, ch. 1, § 1, art. IV.

ing to place a lien on the home which cannot be executed upon until the home is sold or the person has moved. A third approach would be to ease the cost of maintenance by recruiting volunteer community organizations to do substantial portions of the work, such as glazing windows and painting.

To facilitate effective enforcement of a new code, a municipality may find it helpful to offer incentives for maintenance. One possibility is to grant a warning period preceding an enforcement phase. During this time, owners of all types of properties may request advance inspections, and receive a guarantee that those who voluntarily submit to inspection during the warning period and comply in the interim will not be reinspected until the following periodic inspection. The program should also offer advice to property owners interested in doing their own repairs. For those who prefer to contract out their repairs, it would be helpful if the municipality maintained a list of reputable housing contractors, prepared from reinspections of completed maintenance work, as a basis for determining performance and reliability. Similarly, since many people are not in a position to evaluate the reasonableness of the cost or competence of the work, the municipality should, upon request, review the construction contract in order to ensure that the cost and quality standards are reasonable.

Enforcement of maintenance codes could also be achieved through a system of centralized records, which would facilitate the rapid retrieval of all relevant information on a particular piece of property. Such a system would consolidate in one folder inspection records, building permits, zoning board decisions, and the like for each piece of property. It would also be worthwhile, in order to identify problem areas, to keep a list of rental properties indexed by landlord so that multiple violations by one owner or manager of numerous buildings could be recognized quickly.

Inspections will not uncover every code violation. They may, however, help to create an environment conducive to voluntary maintenance of housing. When such a climate is created there is no need, as in the inner city, for widespread government intervention in housing and neighborhood programs. Other enforcement techniques such as annual licensing for rental properties and time-of-sale inspections for owner-occupied properties<sup>204</sup> may be effec-

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204. Certificate inspections for owner-occupied properties have run into some difficulty. Madison Heights, Michigan, with a population of approximately 39,000, adopted an ordinance in September, 1971, which required property owners to obtain a certificate of code compliance prior to sale. However, the ordinance was repealed in June, 1974, due to

tive in municipalities where there is not a large proportion of multi-dwelling structures and where an adequate number of inspectors is available for initial inspections and periodic reinspections.<sup>205</sup> The licensing and time-of-sale inspections would also encourage lending institutions to continue loan programs in the area and would have a deterrent effect on speculation in the area.<sup>206</sup>

One enforcement possibility which must be approached carefully is the power to repair. This technique involves correction of code violations by the municipality itself—after notice and a reasonable compliance period. The owner is subsequently billed for the cost of repairs. This power has seldom been used because of the expense of repairs and the difficulty in establishing some type of repair fund from which the municipality may draw. In fact, a power to repair is, in political terms, impossible if the municipality does not have the authority to give its lien for repairs priority over other liens on the property.

Several states now give repair liens such priority. Louisiana's slum clearance law, for example, expressly provides that the cost of repairs constitutes a lien against the real estate to be "assessed and collected as a special tax."<sup>207</sup> However, some repair lien laws have encountered difficulties.<sup>208</sup>

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the dissatisfaction on the part of home buyers who had discovered building deficiencies after code compliance had been certified. There was also opposition from homeowners who did not want to make the financial investment necessary for compliance, opposition from the real estate industry and lack of political support. NEIGHBORHOOD PRESERVATION, *supra* note 32, at 26. On the other hand, time-of-sale inspections appear to be working in other communities. See Barber, *supra* note 12, at 8-13.

205. The APHA-PHS Ordinance also incorporates annual licensing for the operation of multiple dwellings. APHA-PHS RECOMMENDED HOUSING MAINTENANCE AND OCCUPANCY ORDINANCE 55 (1969).

206. It is interesting to note, however, that many financial institutions in such areas are requiring inspections as a condition to granting mortgages. NEIGHBORHOOD PRESERVATION, *supra* note 32, at 27. For an interesting case involving such a condition and a claim of government incompetence in its time-of-sale inspection program, see *Thomas v. Mayor of Wilmington*, 391 A.2d 203 (Del. 1978).

207. LA. REV. STAT. ANN. § 40:564(5) (West 1977).

208. *E.g.*, under the so-called Murray Prior Lien Law, 1929 N.Y. LAWS, ch. 713 *as amended by* 1937 N.Y. LAWS, ch. 353, § 2 (current version at N.Y. MULT. DWELL. LAW § 309 (McKinney 1974)), the City of New York was authorized to make repairs to tenement houses if the owner failed to observe orders to make the repairs. The statute provided that the city would thereby have a lien for the cost of such repairs that was superior to the interest of the mortgagee of the property, yet failed to provide notice or a hearing for either the owner or the mortgagee. The statute purported to make these repair expenses a tax assessment. The New York Court of Appeals in *Central Savings Bank v. City of New York*, 279 N.Y. 266, 18 N.E.2d 151 (1938), *amended on remittitur*, 280 N.Y. 9, 19 N.E.2d 659 (1939), held the act to be an unconstitutional impairment of contractual obligation and

If such lien power is available, it ought to be especially useful in the suburbs. There would characteristically be fewer repairs necessary, and since the magnitude of each repair would probably not be substantial, the economic value of the repairs would be recoverable from the property through the lien. Moreover, it may be feasible to hire private contractors to make the repairs and then lien those costs against the property.<sup>209</sup> For example, in Rochester, New York:

[c]ontractors who perform the work on behalf of the city are paid from a special sinking fund and the owner is billed for cost plus a 5 percent handling charge. If the owner fails to pay the costs within the stated period, the bill is referred to the City Comptroller's office where a 10 percent penalty is added and the assessment appears on the subsequent tax bill. The annual budget for the government repairs program has reached \$675,000. City officials report that, despite delinquencies, the overall cost of repairs is being recovered because of the penal-

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a taking of property without due process of law. Applying substantive due process theory, the court stated that even notice to the mortgagee and an opportunity to be heard could not save the law. The court stated, "The rights of the mortgagee, however, go much further than to require the mere service of notice and an opportunity to be heard. No lien under this law can be placed upon the property which supersedes the lien of the mortgage." 279 N.Y. at 278, 18 N.E.2d at 155.

In 1964, the same court unanimously upheld the validity of the 1962 Receivership Law, 1946 N.Y. LAWS, ch. 950, *as amended by* 1962 N.Y. LAWS, ch. 492 (current version at N.Y. MULT. DWELL. LAW § 309 (McKinney 1974)), in *In re Department of Bldgs.*, 14 N.Y.2d 291, 200 N.E.2d 432, 251 N.Y.S.2d 441 (1964). That law provided that a receiver, after notice to the mortgagee, would be entitled to recoup his or her expenses from the rent on the property. The statute was attacked primarily on the authority of *Central Savings*. The court first rejected the impairment of contract argument, holding the law to be a valid exercise of the state's police power. It then dismissed the due process argument, rationalizing *Central Savings* to conform with modern constitutional notions of procedural due process: "The court [in *Central Savings*] found the statute procedurally defective in that the mortgagee was given no opportunity to be heard and could not even question the amount of the lien placed ahead of his mortgage." *Id.* at 299, 200 N.E.2d at 438, 251 N.Y.S.2d at 448. Of course, as noted above, this was not the court's position in *Central Savings* at all: the court there believed that a mortgagee's rights could not be altered by law.

*Central Savings* has not been treated deferentially by subsequent courts. There are no cases following it, but two cases distinguished it in upholding priority liens where no personal notice to the mortgagees was given. *In re Jefferson Houses*, 208 Misc. 757, 143 N.Y.S.2d 346 (Sup. Ct. 1955); *Thorton v. Chase*, 175 Misc. 748, 23 N.Y.S.2d 735 (Sup. Ct. 1940). Nevertheless, if a state has created the lien in favor of the mortgagee, surely it ought to be able to reduce such a grant without service of notice, at least to the extent of giving the city priority for an emergency repair program. Moreover, these repair costs should be considered personal charges against the responsible owner, lessee, or occupant—a lien on the fee which, if recorded in the manner of a mechanics lien, precedes all encumbrances except taxes and assessments.

209. On the question of the power to impose a first lien if the municipality does the repair, see NAT'L ASSOC. OF HOUSING AND REDEVELOPMENT OFFICIALS, *THE CONSTITUTIONALITY OF HOUSING CODES* 65-66 (2d ed. 1964).



ties added. The cost of required paper work, however, is not being recovered.<sup>210</sup>

With regard to rental properties, one innovation has been to take a lien on rents. In New York City, when emergency repairs are made, the city instructs the tenants to pay rent directly to the city, thereby recouping a large part of the repair costs.<sup>211</sup>

It is important to have an adequate conflict resolution system to handle problems that arise concerning the performance of inspections and to maintain public support. The goal is to have a system that is both inexpensive, to protect the resident, and efficient, to protect the interest of the public in correcting the situation. A first step might be to call code violations "shortcomings" or "noncomplying items" or any other term that does not carry a criminal connotation, as does the word "violation."

Many dispute settlement proposals have been advanced. One such proposal suggests a three step process. First, a municipal representative and the resident would meet for an informal conference following inspection. At this conference the resident would be given an opportunity to present his viewpoint and the municipality would have an opportunity to explain, informally, the reasons for noting the shortcomings<sup>212</sup> and to provide guidance to the resident on future code compliance. This conference would not have the appearance of a judicial setting, which many people fear. The second step in this dispute resolution would be the establishment of a citizen review board. This panel, similar to a zoning board, would hold formal hearings and would, at minimal cost to the resident, resolve any dispute not resolved at the informal conference with the municipal officials.<sup>213</sup> Finally, if the resident was not satisfied with the results of the informal and formal local hearings, there would be a right of appeal to an appropriate court.<sup>214</sup>

In situations where enforcement mechanisms are necessary to achieve code compliance, the focus should be on the factors that will stimulate rehabilitation. Recommendations in this area are: 1) the use of civil rather than criminal penalties so that the burden of proof is merely "preponderance of evidence" rather than "beyond a reasonable doubt;" 2) the use of the mandatory injunction

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210. J. SLAVET & M. LEVIN, *supra* note 16, at 56.

211. N.Y. CITY ADMINISTRATIVE CODE § D26-54.05 (1970).

212. J. SLAVET & M. LEVIN, *supra* note 16, at 54.

213. *Id.* at 53.

214. *Id.* at 55.

to require rehabilitation or repair; and 3) making each day of violation a separate offense with a civil penalty, so that the economic cost of the civil fine is greater than the cost of correcting the violation.<sup>215</sup>

In summation, the suburbs that have public support for the objectives of their property maintenance codes will usually have voluntary compliance, and exterior inspections will rarely result in conflicts between the municipal government and residents. In situations where compliance is not voluntary, a process that entails the use of warnings, civil fines, and ultimately repair liens by the municipality would offer a responsible solution to the problem of code enforcement. While establishing general policies in a property maintenance code may prove fairly easy, administering the code will present numerous difficulties to the municipality whenever it attempts to handle the multitude of individual situations that will arise.<sup>216</sup>

#### V. A PRIMER ON FINANCIAL ASPECTS OF PROPERTY MAINTENANCE

Resolution of financial problems will play a significant part in the success or failure of any housing or property maintenance code strategy in the suburbs or the urban core. Financing home improvements will also play a substantial part in any initial public education program. Citizens should be informed of the federal, state, local, and private institutional monies that are available for home maintenance and improvements. Home inspections should be coordinated with assistance from financial counselors.

One of the chief objectives of any housing or property maintenance program in the suburbs should be the preservation or creation of an environment that stimulates the involvement of private financial institutions in the home maintenance and improvement programs. This objective is essential since, presently, much of the financial analysis of financial institutions is based on the neighborhood in which the structure is located and the characteristics of neighborhood residences.

In the absence of a neighborhood environment attractive to

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215. The validity of an ordinance prohibiting open storage of junk automobiles, which provided a separate violation for each day of storage, was upheld by the court in *Commonwealth v. Bruski*, 354 Mass. 416, 237 N.E.2d 686 (1968). It is not clear, however, whether provisions making each day a separate offense are actually enforced. See Note, *Enforcement of Housing Codes*, 78 HARV. L. REV. 801, 821 (1965).

216. Barzun, *Administering and the Law*, 62 A.B.A.J. 625 (1976).

private financing, local conditions may entitle the neighborhood to federal funds. One of the problems with Federal Housing Administration (FHA) guarantee programs has been the restrictive statutory channeling of these funds to designated federal urban renewal projects.<sup>217</sup> To date, the federal government has offered little help to those areas where blight has not yet reached crisis proportions. During the early 1960's, federally assisted programs made no provisions for subsidizing modest rehabilitation. Beginning in 1964, however, the federal government began to develop programs to subsidize modest rehabilitation of substandard units. Amendments to the Housing Act of 1949, enacted in 1964<sup>218</sup> and 1965,<sup>219</sup> contained subsidy provisions for modest rehabilitation in federally assisted urban renewal and concentrated code enforcement areas. Two types of subsidies were provided by these amendments: 1) rehabilitation grants for low income home owners,<sup>220</sup> and 2) direct rehabilitation loans at three percent interest for owners and long-term lessees of residential properties located in designated urban areas.<sup>221</sup> These programs, however, did little to finance repair and rehabilitation of units located outside of seriously deteriorated neighborhoods. Federal resources were not made available for use in those mature neighborhoods where the return on the rehabilitation dollar could be the greatest.

Before 1968, Congress attempted to meet the housing goals of the 1949 Act primarily by authorizing construction of new dwelling units. With the passage of the Housing and Urban Development Act of 1968,<sup>222</sup> Congress finally altered its legislative program and established as its goal for the next decade "the construction or rehabilitation of 26 million housing units, 6 million of these for low and moderate income families."<sup>223</sup> While construction remained the primary focus of the 1968 Act, the importance of rehabilitation as a second avenue for providing decent housing was clearly emphasized in a 1971 Report by the Subcommittee on

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217. *See, e.g.*, Housing Act of 1954, ch. 649, tit. II, § 220, 68 Stat. 590 (codified at 12 U.S.C. § 1715K (1976)).

218. Housing Act of 1964, Pub. L. No. 88-560, 78 Stat. 769 (codified in scattered sections of 15, 20, 38, 40, 42 U.S.C.).

219. Housing and Urban Development Act of 1965, Pub. L. No. 189-117, 79 Stat. 451 (codified in scattered sections of 15, 20, 38, 40, 42, 49 U.S.C.).

220. 42 U.S.C. § 1466 (1976).

221. *Id.* § 1452(b).

222. Pub. L. No. 90-448, § 1, 82 Stat. 476 (codified in scattered sections of 5, 15, 18, 20, 31, 38, 40, 42, 49 U.S.C.).

223. 42 U.S.C. § 1441a (1976).

Housing of the House Committee on Banking and Currency.<sup>224</sup> The Report raised the possibility that new dwelling construction requirements would exceed the estimate of 26 million units in the next decade if the nation failed to preserve its housing inventory. The Report emphasized that “[t]he volume and standard of housing services that is provided by more effective utilization of the existing stock will affect significantly the time in which a broader goal of ‘a decent home and suitable living environment for every American family’ can be achieved.”<sup>225</sup> In short, Congress acknowledged that both facets of housing policy must be pursued in order to achieve housing goals. The committee’s concern for preservation was well founded. First, six million housing units had been removed from the housing market during the previous decade, offsetting by more than one-third the number of new dwelling units constructed.<sup>226</sup> Second, the abandonment of dwelling units by financially strapped landlords in the larger metropolitan areas continues to remove additional units from the market at an alarming rate.<sup>227</sup>

Money has gradually become available for municipal rehabilitation and property maintenance programs in nondesignated areas. An important basis for community expectations in this area has been the Housing and Community Development Act of 1974 and its Block Grant Program.<sup>228</sup> Typically, however, the same “specified neighborhood” problem that was evident in the earlier federal programs is present in the local programs. For example, the Allegheny County, Pennsylvania, Neighborhood Preservation Program requires that monies be directed to a concentrated neighborhood, much like the older designated federal urban renewal areas, resulting in a lack of funds to remedy scattered site problems of incipient blight that have appeared in many communities. In general, there is some federal money available for rehabilitation programs, but none for the scattered site incipient blight problem facing the mature suburbs.<sup>229</sup>

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224. SUBCOMM. ON HOUSING, HOUSE COMM. ON BANKING AND CURRENCY, 92ND CONG., 1ST SESS., HOUSING AND URBAN ENVIRONMENT 6 (Comm. Print. 1971).

225. *Id.* at 5.

226. *Id.* at 5-6.

227. *Id.* at 6.

228. Pub. L. No. 93-383, § 1, 88 Stat. 633 (codified at 42 U.S.C. § 5304 (1976)).

229. The Community Development Act of 1977, however, may permit funding of scattered site rehabilitation. Section 105 of the Housing and Community Development Act of 1974 provided a list of eligible activities, and as to rehabilitation parenthetically included “[p]rivately owned properties when incidental to other activities” which seemed to limit the

The federal government presently offers little or no incentive for rehabilitation through tax reductions. Section 167(k) of the Internal Revenue Code, as amended by the Tax Reform Act of 1969,<sup>230</sup> provides that a taxpayer may elect to compute depreciation for rehabilitation expenditures on low and moderate income rental units using a five-year useful life under the straight line method, and disregard any salvage value. The total amount of rehabilitation expenditures which are utilized in this computation may not exceed \$20,000 per dwelling unit, but must exceed \$3,000 per dwelling unit over a period of two consecutive years.<sup>231</sup> While this computation may reflect actual risks inherent in urban core investments, it does not affect the owners of most substandard dwellings in most communities.

The most obvious way to finance property maintenance, but the method that should be considered only as a last resort, is a municipal revolving, low-interest loan fund. Local financing has the advantage of providing an opportunity to exhibit unusual initiative and resourcefulness in the development of individualized loan programs which encourage maintenance and rehabilitation.<sup>232</sup> Local financing, however, faces the substantial problem of locating available funding, since municipal budgets are typically strained. If local money is available, it can be used either to finance direct loans or to provide subsidies for private lending arrangements. For example, under a direct loan plan the municipality may borrow funds and pay a reduced interest rate because the interest earned is not subject to federal income tax. The municipality may pass the savings on to individuals in the community by loaning these funds to property owners at a lower interest rate and securing the loan by a mortgage on the property.

Under a subsidy plan, a private financial institution makes a loan at standard rates to a homeowner. The public money is used as a front end payment from the municipality to the lender on the

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availability of funds to concentrated neighborhoods. 42 U.S.C. § 5305(a)(4) (Supp. 1975). As amended by the Housing and Community Development Act of 1977, the parenthetical now reads as follows: "including interim assistance, and financing public or private acquisition for rehabilitation, of privately owned properties." Pub. L. No. 95-128, § 105(b), 91 Stat. 1117 (codified at 42 U.S.C. § 5305(a)(4) (1976)). Since such financial assistance need no longer be incidental to "other activities" it now appears to be possible to fund scattered site rehabilitation.

230. I.R.C. § 167(k).

231. *Id.*

232. See NEIGHBORHOOD PRESERVATION, *supra* note 32, at 193.

homeowner's loan, thus reducing the effective interest rate to the homeowner.

There are advantages and disadvantages to either of these funding methods. The advantage of direct loans is that available funds may be continually re-used: as old loans are paid off, new loans can be made. The disadvantage is that a stated amount of money provides fewer loans than would be available under a subsidy plan. The advantage of a subsidy plan is that a larger number of loans can be made at one time. However, the disadvantage is that once utilized as a subsidy, the money is no longer available for future loans.

The type of program offered is dependent upon whether, in the municipality's judgment, significant federal financing of maintenance and rehabilitation will be available in the future. If such financing is anticipated, then a subsidy plan will generate immediate property maintenance and federal money would provide financing for the future. If the availability of federal financing is not anticipated, a direct loan plan would be better suited for the future needs of a community.

If low interest loans through municipal borrowing are made available, they can be used in a variety of ways. Examples of such loans might include: 1) low interest loans to match funds supplied by the home owner; 2) low interest loans for modernization if the owner supplies funds for code compliance; 3) low interest loans to match bank loans, with the municipal loan being repayable on a graduating payment basis so that younger families can pay off only the bank loan in the earlier years, and phase in repayment of the municipal loan as income goes up; 4) one hundred percent low interest loans for older citizens; and 5) low interest loans as mortgage funds to make newly purchased homes comply with the code.

The costs of maintenance and rehabilitation are so massive in aggregate that if property maintenance codes are generally applicable, state and local sources cannot be the primary provider of funds, even if federal community development monies are included. Therefore, the realistic application of property maintenance codes to the suburbs will necessarily require commitments from private financial institutions. These local institutions may provide assistance by agreeing to make conventional loans for property maintenance to all home owners with a satisfactory credit rating. For those who could not afford to pay market interest rates, the financial institutions may offer loans to a designated local public agency at a reduced, tax-free rate, which could in turn

be loaned by the local public agency to the homeowners. All loans would be secured by a note and a mortgage. For those with a sufficient credit standing, the bank would take the note and mortgage. For those receiving funds under the low interest loan program, the note and mortgage would run to the local public agency.

It is important to have the financial institution act as servicing agent for all loans, including the local public agency loans, because servicing is a sophisticated process. One of the key actions that the local municipality could take to induce financial institutions to participate in such a program would be to have well trained loan preparation employees, so that the lending institution would be presented with a complete loan package that required only minimal processing by its personnel.

Another alternative would be to have the loans financed by the lending institutions on a pooled basis, in order to spread both the commitment and the risk among a number of local financial institutions. This plan would also avoid the potential problem of some institutions not having the statutory power to take second mortgages for properties on which the institution does not hold the first mortgage. Each institution's participation in the pool could be pro rata, based on deposits generally, or deposits from the community. One institution would be designated as originator of all loans as well as the recipient of payments, and it would have the primary responsibility for servicing the loans.

Finally, one of the most important reasons for utilizing local financial institutions to provide maintenance and rehabilitation funding is that a long term commitment by such institutions should have a lasting effect on the community. There is a much greater likelihood of their continued presence, as compared to that of federal programs.

Overall, code enforcement is simply not feasible without adequate financial mechanisms. Often the private financing market in the urban core will not provide the financing for the required improvements. Many of the building owners are either incapable or unwilling to use their own funds to meet code standards because of the general deterioration in the neighborhood. In such areas, even if codes are enforced, the cost of compliance will ultimately be passed through to the renters, many of whom will be unable to afford the increases. The problem is particularly acute with the elderly who may wish to maintain their property but are unable to do so because they must operate on fixed incomes that

are not substantial enough to meet repair costs. For elderly homeowners, the use of federal, state, local, or private loans is unrealistic unless the loan is a lien on the property and can be satisfied upon the death of the owner or the disposition of the property. Otherwise, grants are the only alternative.

The mature suburbs are currently starting to appreciate the ills of the urban core. Yet in these neighborhoods, where decent housing can be preserved without massive spending, federal funds are severely limited. If neighborhood deterioration is to be stopped, the suburbs must organize local funding programs that feature private and public cooperation and more local decision-making and control.

In sum, the following elements are essential for financial success in suburban areas: 1) a consortium of local financial institutions committed to making all bankable loans; 2) provision for a system of administration covering, among other things, counseling and technical help on maintenance and repairs, packaging of loan documentation, and servicing of loans; 3) a local public agency to make the loans that banks would not finance; and 4) municipal commitment to the systematic enforcement of the property maintenance code.

## VI. CONCLUSION

Despite the massive infusion of federal monies into urban areas in the last twenty or more years, only slight progress has been made in saving "neighborhoods."<sup>233</sup> Often the neighborhoods receiving attention were beyond remedial action, but this was not the only reason for the limited success of earlier programs. In most instances, both the public and the private sector have had little commitment to, or involvement in, *continuing* efforts to maintain neighborhoods.

Few elected officials are actively urging effective code programs. Most money under federal community development appears to be channeled toward public works programs such as streets, sewers, recreation facilities, and bridges. Even when money has been designated for community rehabilitation, it often arrives long after the need becomes apparent, and thus cannot "save" the neighborhood.

For a local government to commence a successful property maintenance program it should be aware of both the potential of

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233. Meeks, Ouderkerk & Sherman, *supra* note 11, at 312-13.



property maintenance codes and the limitations on their use by local government. These limitations are caused not only by financing difficulties, but also by the citizen's perceived threat to a right of privacy in his or her home. The right of privacy can be more readily respected if property maintenance is implemented before the problem reaches the crisis stage—before the urban tissue and neighborhood environment begin to collapse and private financing ceases to be available. Exterior maintenance, yard maintenance, and certificates of compliance on change of occupancy of owner-occupied dwellings, coupled with exterior maintenance, yard maintenance, and periodic internal inspections of rental and commercial units, can effectively protect the public health, safety, and welfare while respecting important individual rights.

Legislative bodies as well as the courts need to become more sensitive to the dynamics of property maintenance in mature suburbs, so that substantive provisions as well as inspection procedures are more protective of the right of privacy. Recognition of privacy is an important first step toward attacking the problems of housing deterioration at an early stage in stable, owner-occupied neighborhoods. Such a program of property maintenance is feasible only if begun before a complex, multifaceted approach to housing is required. If more attention and resources are committed to the preservation of existing housing, new construction will produce a more effective addition to our net housing stock. Inflationary pressures on housing costs may be dampened, and the housing so preserved can be an important factor in satisfying the goal of a decent home for more Americans.