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INTRODUCTION

It could happen on any street. A single home quietly becomes vacant or abandoned. The reason for the vacancy or abandonment could be one of any number of unfortunate circumstances: a lost job; a debilitating illness in the family; mismanagement of household finances; the death of a spouse or bread-winner; or perhaps an unanticipated reset of mortgage interest rates that raises the monthly payment to levels just out of reach.

In ordinary times, many of these homes would be refinanced or even sold by the owners, and the proceeds used to pay off the existing debt. As a result of the recent economic crisis, however, home prices dropped precipitously across the nation, leaving millions of homeowners with mortgage debt exceeding the current market value of their homes. North Carolina has been hit, too. Of 1.4 million North Carolina mortgages examined at the end of the second quarter of 2009, twenty-three percent were "underwater."[1] For these "underwater"

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1. *See* FIRST AMERICAN CORELOGIC, SUMMARY OF SECOND QUARTER 2009 NEGATIVE EQUITY DATA (2009), http://www.loanperformance.com/infocenter/library/facl%20

homeowners, refinancing or selling the home is not an option. No bank will refinance a home with less value than the debt to be refinanced. Similarly, selling the home in a down market is not a viable option because the proceeds will likely be insufficient to pay off the mortgage debt.

Faced with this situation, some owners resort to abandoning their homes, which leads mortgage lien holders to foreclose and add those homes to an already heavy load of bank-owned properties. Other owners attempt to stay in their homes, perhaps hoping to take advantage of recently enacted programs that delay rate resets or allow renegotiation of loan terms. But only a portion will actually avoid foreclosure.[2] When owners lose significant household income, no adjustment to loan terms can make the loan work. Regardless of an owner's choice, the end result is often a vacant, unattended home.

The effects of a vacant or abandoned home go well beyond the distress felt by the immediate homeowners. Vacant or abandoned dwellings reduce the property values of neighboring homes,[3] foster

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negative%20equity_final_081309.pdf (displaying data in "Table 1: Negative Equity by State").

2. According to recent studies evaluating the effectiveness of loan modifications and payment plans, these most recent foreclosure assistance efforts may help only half of homes facing foreclosure. *See* OFFICE OF THE COMPTROLLER OF THE CURRENCY & OFFICE OF THRIFT SUPERVISION, OCC AND OTS MORTGAGE METRICS REPORT: DISCLOSURE OF NATIONAL BANK AND FEDERAL THRIFT MORTGAGE LOAN DATA 5 (2008), http://www.occ.treas.gov/ftp/release/2008-150a.pdf (tracking newly initiated home retention loan modifications and payment plans, and finding for loans modified in the first quarter of 2008, over thirty-five percent of borrows had re-defaulted after three months by being more than thirty days past due; after six months, the re-default rate was over fifty-five percent). As one commentator has asked:

> The question is, why is the number of re-defaults so high? Is it because the modifications did not reduce monthly payments enough to be truly affordable to the borrowers? Is it because consumers replaced lower mortgage payments with increased credit card debt? Is it because the mortgages were so badly underwritten that the borrowers simply could not afford them, even with reduced monthly payments? Or is it a combination of these and other factors? We don't know the answers yet, but these are the types of questions that we have begun asking our servicers in detail.

John C. Dugan, Remarks Before the OTS 3rd Annual National Housing Forum 3 (Dec. 8, 2008) (transcript available at http://www.occ.treas.gov/ftp/release/2008-142a.pdf).

3. Recent studies have focused on the effects of foreclosures on neighboring property values. *See, e.g.*, CTR. FOR RESPONSIBLE LENDING, SOARING SPILLOVER: ACCELERATING FORECLOSURES TO COST NEIGHBORS $502 BILLION IN 2009 ALONE (2009), http://www.responsiblelending.org/mortgage-lending/research-analysis/soaring-spillover-3-09.pdf. For an overview of the price effects of foreclosure, see Kai-yan Lee, *Foreclosure's Price-Depressing Spillover Effects on Local Properties: A Literature Review* (Fed. Res. Bank of

criminal activity,[4] and push neighborhoods into decline.[5] Local governments suffer because of decreased property tax revenues, even as demand for government services, such as police patrols and code enforcement,[6] increases.[7] Vacant and abandoned properties have been recognized not only as symptoms of community distress, but also as a cause and accelerant of neighborhood decline.[8]

It is therefore not surprising that local governments have initiated efforts to contain the damage to their communities and to their budgets resulting from an unprecedented number of vacant and abandoned dwellings. Limited in their ability to change the foreclosure landscape, local governments have resorted to what amounts to property manage-

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Boston, Community Affairs Discussion Paper No. 2008-01, 2008), *available at* http://www.bos.frb.org/commdev/pcadp/2008/pcadp0801.pdf.

4. *See* Dan Immergluck & Geoff Smith, *The Impact of Single-Family Mortgage Foreclosures on Neighborhood Crime*, HOUSING STUDIES, Nov. 2006, at 16, *available at* http://www.chicagofed.org/cedric/files/2005_conf_paper_session1_immergluck.pdf (finding that each foreclosure in a 100-house neighborhood corresponded to a 2.33% jump in violent crime, holding all other factors constant); *see also* Jonathan Mummolo & Bill Brubaker, *As Foreclosed Homes Empty, Crime Arrives*, WASH. POST (Apr. 27, 2008), at A1, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/04/26/AR2008042601288.html (describing recent experiences of cities across the country).

5. For a summary of the costs of vacant properties, see NAT'L VACANT PROPERTIES CAMPAIGN, VACANT PROPERTIES: THE TRUE COSTS TO COMMUNITIES (2005), http://www.vacantproperties.org/latestreports/true%20costs_aug05.pdf; *see also* Maya Brennan, *Stabilizing Communities Affected by Foreclosures: Lessons Learned from Vacant and Abandoned Properties Initiatives*, FORECLOSURE RESPONSE, http://www.housingpolicy.org/assets/foreclosure-response/stabilizingcommunities_lessonsfromvacantproperties.pdf; John Accordino & Gary T. Johnson, *Addressing the Vacant and Abandoned Property Problem*, 22 J. URB. AFF. 301, 303 (2000) ("Ample evidence exists to suggest that [vacant and abandoned] properties also have social ramifications, as they tend to serve as 'magnets for crime' and to increase the risks of fire and vandalism in urban neighborhoods." (citations omitted)).

6. *See* Patrik Jonsson, *Vacant Homes Spread Blight in Suburb and City Alike*, CHRISTIAN SCI. MONITOR, July 1, 2008, http://www.csmonitor.com/2008/0702/p01s01-usgn.html ("Boarded-up homes are an expensive problem for Atlanta, which has already posted 'no trespass' signs at as many homes this year as in all of last year. . . . With 11 code enforcers laid off because of budget cuts, Atlanta police are working overtime to patrol blighted streets. 'The responsibility is falling more heavily on our shoulders,' says Atlanta Police Maj. Joseph Dallas.").

7. Brennan, *supra* note 5, at 5. Local governments have also lost property tax revenue due to increased unsold housing inventory. *See generally* DIV. OF CMTY. ASSISTANCE, N.C. DEP'T OF COMMERCE, SUBSTANTIAL AMENDMENT 2008 CONSOLIDATED ANNUAL ACTION PLAN (2008), http://www.nccommerce.com/nr/rdonlyres/4d062e9e-c3a8-4529-92b1-30472a3e82bf/0/actionplanupdated.pdf [hereinafter Neighborhood Stabilization Program Action Plan].

8. Accordino & Johnson, *supra* note 5, at 303.

ment functions. These functions include: buying and holding abandoned properties (also known as "land banking"), facilitating the redevelopment or reuse of abandoned properties, increasing police activity in troubled areas, and executing aggressive code enforcement.[9] It is this last activity, code enforcement, which is the focus of this Article.

Code enforcement, with regard to existing dwellings, can be divided into two stages of activity.[10] The "early" stage involves preservation activity; for example, the enforcement of maintenance requirements in order to preserve a home. The "late" stage, occurring once a dwelling is essentially beyond repair, relies on condemnation authority for demolition. The majority of this Article is devoted to the "early" stage of preservation activity.

In North Carolina, there are only two sources of statutory authority for the conduct of early stage code enforcement: (1) the general police power local governments may exercise for the regulation and abatement of "acts, omissions, or conditions, detrimental to the health, safety, or welfare of its citizens and the peace and dignity of the [city or county],"[11] and (2) minimum housing standards.[12] After dissecting and explaining this statutory authority, this Article will then explore how a local government might harmonize the governing statutes into a comprehensive policy regulating vacant and abandoned dwellings.

Part I of this Article provides a brief introduction to North Carolina's experience thus far with the foreclosure crisis and introduces the broad array of statutorily granted tools local governments might employ to deal with vacant or abandoned dwellings in varying stages of neglect. Part II discusses the general police power that serves as the first line of defense against the decline of vacant or abandoned housing, as well as how that power is limited by state statutes governing minimum housing standards. Part III then turns to those minimum housing statutes to examine their operation and limitations. Part IV analyzes the authority of local governments in North Carolina to implement a policy tool used in other states; namely, a vacant property

9. For a survey of practices employed by local governments nationwide, see UNITED STATES CONFERENCE OF MAYORS, VACANT AND ABANDONED PROPERTIES: SURVEY AND BEST PRACTICES (2009), *available at* http://usmayors.org/pressreleases/uploads/vacantandabandprop09.pdf.

10. This Article addresses minimum standards for the preservation of existing dwellings, not structures under construction. Accordingly, building codes are not discussed.

11. N.C. GEN. STAT. §§ 160A-174(a), 153A-121(a) (2007).

12. *Id.* §§ 160A-441 to -450. Code enforcement is also available in the commercial context, *see, e.g.*, *id.* § 160A-439, but this Article's scope is limited to dwellings.

registration program. Part V concludes by reflecting on the limitations of North Carolina's complex web of code enforcement mechanisms and proposes some ways in which the North Carolina General Assembly could enhance local governments' authority to regulate vacant and abandoned dwellings.

I. FORECLOSURES, VACANT DWELLINGS, AND A CODE ENFORCEMENT APPROACH

Compared with other states, North Carolina has not suffered the worst of the foreclosure crisis, but it has not escaped unscathed, either. The North Carolina Commissioner of Banks reports that there were 46,375 foreclosure starts in North Carolina from January through the end of September 2009—an increase of 11% (or 4,456 additional foreclosure starts) as compared to the same time period in 2008, which itself was a record-setting year for foreclosures in the state.[13] Overall, North Carolina is expected to experience a 10-20% increase in foreclosure starts due to sub-prime mortgage rate resets and spillover from the state's broader economic crisis.[14] In a bid to prevent home foreclosures, North Carolina enacted legislation to provide counseling and temporary assistance to homeowners.[15] North Carolina has also tinkered with the foreclosure process itself, regulating loan servicers and requiring periods of delay during the foreclosure filing process.[16] Nonetheless, in a May 2009 report to the General Assembly, the Commissioner of Banks continued to call the foreclosure situation "serious" and predicted increases in foreclosure activity due to rising levels of unemployment in the state.[17]

13. *See* Ctr. for Cmty. Capital, Univ. of N.C. at Chapel Hill, September 2009 Foreclosure Start Hotspots, http://ncforeclosurehelp.org/global/docs/aocreportinghotspots.pdf (last visited Oct. 17, 2009) (tracking data reported by the Administrative Office of the Courts for all 100 North Carolina counties).

14. Neighborhood Stabilization Program Action Plan, *supra* note 7, at 1.

15. *See* C. Tyler Mulligan, *2008 Legislative Action in Community and Economic Development*, CMTY. & ECON. DEV. BULL., Oct. 2008, at 1-3, *available at* http://www.nccda.net/pdf/fall08/2008legislationaction.pdf.

16. *Id.* at 3-5.

17. Mark Pearce, Deputy Commissioner of Banks, Presentation to North Carolina House of Representatives Financial Institutions Committee (Mar. 10, 2009), http://www.ncforeclosurehelp.org/global/docs/nc%20house%20fi%20mortgage%20march%202009.pdf. Severe job losses in North Carolina have contributed to the high rate of foreclosures. North Carolina's unemployment rate has hovered around 11% since February 2009. *See* News Release, Employment Sec. Comm'n of N.C., State's Unemployment Rate Unchanged at 11 Percent in July (Aug. 21, 2009), *available at* http://www.ncesc1.com/pmi/rates/pressreleases/state/nr_july09_strate.pdf. Moreover, 70% of counties are currently in double-digit unemployment. *See* News Release, Employment

Ongoing efforts to prevent foreclosures therefore remain important; however, it is equally important for state and local governments to address the aftermath of foreclosure activity. Increasing attention is now being given to the problem of maintaining or redeveloping empty homes. On July 30, 2008, President Bush signed into law the Housing and Economic Recovery Act of 2008, which devotes a title to "Emergency Assistance for the Redevelopment of Abandoned and Foreclosed Homes."[18] On September 26, 2008, the Department of Housing and Urban Development (HUD) announced procedures for the allocation of $3.92 billion, pursuant to the Act, to be disbursed under a new "Neighborhood Stabilization Program" designed to "provide targeted emergency assistance to state and local governments to acquire and redevelop foreclosed properties that might otherwise become sources of abandonment and blight within their communities."[19] North Carolina was allocated over $57 million in Neighborhood Stabilization Program grants,[20] and approximately $52 million of that amount was distributed through a competitive grants program administered by the North Carolina Department of Commerce's Division of Community Assistance (DCA).[21] The enactment of the American Recovery and Reinvestment Act of 2009 provided additional federal funding to the Neighborhood Stabilization Program.[22]

While this federal funding is significant, North Carolina's share will not cover all of its needs. The funding was intentionally funneled

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Sec. Comm'n of N.C., July Unemployment Rates Decrease in Over Half of North Carolina's 100 Counties (Aug. 28, 2009), *available at* http://www.ncesc1.com/pmi/rates/pressreleases/county/nr_july09_countyrates.pdf. Nationally, job losses are thought to be behind recent rises in the loan delinquency rate, which hit a record high in the first quarter of 2009 and portends greater foreclosure activity. *See* News Release, American Bankers Association, Consumer Delinquencies Continue Upward Climb in Second Quarter 2009 (Oct. 1, 2009), *available at* http://www.aba.com/press+room/100109dbull2ndqtr.htm.

18. Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, 122 Stat. 2654 (2008).

19. News Release, U.S. Dep't of Housing & Urban Dev., Preston Allocates Nearly $4 Billion to Stabilize Neighborhoods in States and Local Communities Hard-Hit by Foreclosure (Sept. 26, 2008), http://www.hud.gov/news/release.cfm?content=pr08-148.cfm.

20. U.S. Dep't of Housing & Urban Dev., Statewide Sum of Grants-Neighborhood Stabilization Program, http://www.hud.gov/offices/cpd/communitydevelopment/programs/neighborhoodspg/statewideallocations.xls (last visited Oct. 17, 2009) (providing figures in a downloadable spreadsheet document).

21. Neighborhood Stabilization Program Action Plan, *supra* note 7, at 1.

22. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009).

to a limited number of areas—those exhibiting the greatest need by DCA's formula—meaning that only twenty-three of North Carolina's 100 counties were eligible to receive the first round of funds.[23] Moreover, even those counties receiving money will be required to direct the limited resources to the most distressed neighborhoods, leaving other areas unassisted by the program.[24] Accordingly, when federal funding falls short, local governments are left with two options: (1) to the extent possible, use local government funds to purchase vacant dwellings outright or to offer grants to owners for repair and rehabilitation,[25] and (2) implement a code enforcement plan requiring owners to maintain or rehabilitate their dwellings at their own expense.[26] Regardless of whether a local government has sufficient revenue to fund the first approach (increasingly unlikely under current economic conditions), the code enforcement approach is a necessary component of any comprehensive policy designed to address vacant and abandoned dwellings.

For local governments adopting a code enforcement approach, several statutory tools are available. These options are best illustrated through a simple thought experiment. Imagine a dwelling that becomes vacant or abandoned. Assume that, at the moment it becomes vacant or abandoned, this dwelling is in good condition.[27] Over time, the vacant and unattended dwelling slips into increasingly worse states of disrepair. At each stage of deterioration, different types of local government authority come into play.

At the point of initial vacancy or abandonment, the dwelling may be in a reasonable state of repair. We will call this a "green condition" vacant dwelling to indicate that it is sufficiently maintained such that its outward appearance gives no indication that it is vacant, and the structure presents no obvious hazards. As explained in the Introduction, any vacant property, regardless of condition, presents a real risk to the community.[28] There is therefore a legitimate government interest in maintaining awareness of a green condition dwelling's state of repair and in ensuring that the property remains well-maintained.

23. Neighborhood Stabilization Program Action Plan, *supra* note 7, at 4.

24. *Id.* at 4-5.

25. In North Carolina, at least one local government has sought authority from the General Assembly to use eminent domain to acquire problem properties. *See* Act of May 26, 2009, sec. 1, N.C. Sess. Laws 2009-34.

26. Part IV, *infra*, describes a comprehensive code enforcement plan.

27. This assumption does not always play out in reality. In the days and months prior to abandonment, struggling owners are unlikely to have sufficient resources to make repairs or conduct regular maintenance.

28. *See supra* text accompanying notes 3-8.

However, no North Carolina statute provides specific authority to local governments for monitoring such properties. Therefore, if a local government wishes to establish a monitoring program for green condition vacant dwellings, it must devise its own regulations in reliance on its general ordinance-making authority derived from the general police power.[29]

Suppose that our green condition dwelling described above is neglected by its owners and falls into a state of minor disrepair. Minor disrepair, for our purposes, means the dwelling is structurally sound and still habitable; it is not yet "unfit for human habitation" (a defined term, associated with minimum housing standards, that will be explored in greater detail later).[30] We will refer to this dwelling as being in "yellow condition" to indicate that, although it exhibits visible signs of neglect or deterioration, it is still fit for human habitation. Thus, the visible signs of deterioration that signal that the house is unattended are the focus of local government concern. The government's interests, with respect to a yellow condition dwelling, consist of halting the decline of the dwelling, removing any visible signs of deterioration, inspecting the home for potentially hazardous conditions, and restoring it to a green condition state of repair. As seen with green condition dwellings, no statute addresses these local government functions with respect to a yellow condition dwelling; a local government would therefore need to develop its own regulatory program in reliance on its general ordinance-making authority.[31]

If the decline of a yellow condition dwelling is not halted, the dwelling may eventually become "unfit for human habitation" as defined in the minimum housing statutes.[32] A dwelling that is unfit for human habitation is called a "red condition" dwelling for our purposes; a term indicating that the dwelling has deteriorated to the final stage at which code enforcement tools have a reasonable likelihood of preserving the structure. For dwellings in this condition, there is a preexisting statutory regime. In North Carolina, red condition dwellings,

29. N.C. GEN. STAT. §§ 160A-174(a), 153A-121(a) (2007).

30. *See infra* Part II.C and Part III. Under North Carolina's minimum housing statutes, dwellings are defined as "unfit for human habitation" when they suffer from "defective conditions" such as "defects therein increasing the hazards of fire, accident, or other calamities; lack of adequate ventilation, light, or sanitary facilities; dilapidation; disrepair; structural defects; uncleanliness" which render them "dangerous or injurious to the health, safety or morals of the occupants of the dwelling, the occupants of neighboring dwellings, or other residents of the city." N.C. GEN. STAT. § 160A-444.

31. *See supra* note 29 and accompanying text.

32. *See supra* note 30.

or those "unfit for human habitation," are subject to regulation by local ordinances enacted pursuant to North Carolina's minimum housing statutes.[33]

Table 1

Vacant Dwelling Condition	Statute(s)	Applicable when a dwelling's condition is:	Comments
Green	General police power to regulate conditions detrimental to the health, safety, or welfare of citizens and peace and dignity of the city or county N.C. Gen. Stat. §§ 160A-174(a), 153A-121(a)	"detrimental to the health, safety, or welfare of its citizens and the peace and dignity of the city"	Although in good repair, vacant dwellings pose inherent risks justifying some form of reasonable regulation, primarily for monitoring and upkeep. (Part II, *infra*, discusses the general police power in detail.)
Yellow	General police power (same as above) N.C. Gen. Stat. §§ 160A-174(a), 153A-121(a)	"detrimental to the health, safety, or welfare of its citizens and the peace and dignity of the city"	These dwellings, in addition to being vacant, exhibit visible signs of disrepair posing risks that justify regulation to halt the decline and restore such dwellings to green condition.
Red	Minimum housing standards N.C. Gen. Stat. § 160A-441 through -450	"unfit for human habitation"	Local governments in North Carolina may utilize procedures established under the minimum housing statutes to regulate these dwellings. (Part III, *infra*, discusses minimum housing statutes in detail.)
Black and Blue (Condemnation)	Condemnation N.C. Gen. Stat. § 160A-425.1 *et seq.*	"especially dangerous to life because of its liability to fire or because of bad conditions of the walls, overloaded floors, defective construction, decay, unsafe wiring or heating system, inadequate means of egress"	This statutory authority permits a local government to condemn property in this condition and order its repair, closing, or demolition, as appropriate.
Black and Blue (Imminent danger)	Abatement of public health nuisances *E.g.*, N.C. Gen. Stat. § 160A-193	"dangerous or prejudicial to the public health or public safety"	Cities are authorized to "summarily remove, abate, or remedy" public health nuisances and may summarily demolish dwellings if they pose an "imminent danger." *Monroe v. City of New Bern*, 580 S.E.2d 372, 374–75 (N.C. Ct. App. 2003).

Dwellings that deteriorate further, to the point that they become candidates for demolition, are in "black and blue" condition. For these, there is ample statutory authority for the initiation of condemnation proceedings, and in cases posing imminent danger, for summary demolition.

It is helpful to see these stages of deterioration in context with the full array of statutory grants of power. Table 1, above, summarizes the

33. *See* N.C. GEN. STAT. §§ 160A-441 to -450.

preceding discussion and provides an overview of the statutory tools available to local governments for regulating vacant dwellings.

This Article focuses only on regulations governing green, yellow, and red condition vacant dwellings. It does not examine the regulation of black and blue dwellings. This limited scope is based on four premises. First, as a practical matter, dwellings in black and blue condition are unlikely to be repaired due to the high cost. They are, in fact, better candidates for demolition than for rehabilitation.[34] Second, and as a corollary to the first point, code enforcement actions on vacant dwellings in green, yellow, and red condition are more likely to elicit the desired response from a dwelling owner (i.e., repair and regular maintenance of the dwelling), because the cost of bringing such dwellings into full compliance with some standard will be less than for black and blue dwellings. Third, code enforcement action against black and blue dwellings is arguably too late. The negative externalities that early enforcement is designed to prevent—blighting influence, lower property values, and damage to neighborhood character—have likely already occurred. Fourth, social theory explains that a house in decline will actually deteriorate more quickly once it is in a visible state of disrepair, so early intervention is necessary. According to the "broken windows" sociological theory, highly contextual visible symbols lead to epidemics of disorder if they are not addressed early on.[35]

34. Redevelopment and reuse strategies are more appropriate for black and blue properties, and those topics fall beyond the scope of this Article. Statutory authority for redevelopment exists under North Carolina's redevelopment law. *See* N.C. GEN. STAT. §§ 160A-500 to -526.

35. *See* James Q. Wilson & George L. Kelling, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC MONTHLY, Mar. 1982, *available at* http://www.theatlantic.com/doc/198203/broken-windows; *see also* GEORGE L. KELLING & CATHERINE M. COLES, FIXING BROKEN WINDOWS: RESTORING ORDER AND REDUCING CRIME IN OUR COMMUNITIES (1996). With respect to vacant or abandoned properties, the danger of a sprinkling of neglected dwellings is that it could lead to more widespread blight. *See* MALCOM GLADWELL, THE TIPPING POINT: HOW LITTLE THINGS CAN MAKE A BIG DIFFERENCE 141 (2000) ("If a window is broken and left unrepaired, people walking by will conclude that no one cares and no one is in charge. Soon, more windows will be broken, and the sense of anarchy will spread from the building to the street on which it faces, sending a signal that anything goes."). For a recent critique of the broken windows theory, see PETER K.B. ST. JEAN, POCKETS OF CRIME: BROKEN WINDOWS, COLLECTIVE EFFICACY, AND THE CRIMINAL POINT OF VIEW (2007). There is a rich body of research devoted to exploring the broken windows theory. For a summary of some of the recent research, see *id.* at 251-55 (describing seven quantitative studies and three qualitative studies that were published between 1998 and 2003 about the broken windows theory and concluding that seven of the studies support the broken windows theory, two of the studies achieved "mixed results," and one of the studies did not support the broken windows theory).

In other words, if a few broken windows are not fixed, these visual symbols of blight will signal to bad actors that a dwelling is vacant, attracting (additional) vandalism and other criminal activity. Expanding this theory to a neighborhood context, a few houses in visible disrepair may lead to the decline of surrounding dwellings. The solution proposed by some is to fix the broken windows early on.[36] Based on these premises, local governments may therefore prefer early intervention and the immediate elimination of any visible signs of deterioration. Indeed, North Carolina law explicitly permits governing boards to make findings consistent with the broken windows theory.[37]

Focusing on green, yellow, and red condition dwellings, this Article will address how North Carolina local governments can best utilize the authority identified above in Table 1 to conduct code enforcement activities early and effectively to eliminate visible signs of deterioration in vacant or abandoned dwellings.

II. THE FIRST LINE OF DEFENSE: THE GENERAL POLICE POWER

As discussed above, the General Assembly has not enacted any specific statutory scheme for the regulation of vacant dwellings in green or yellow condition. Local governments seeking to regulate how the appearance[38] of such dwellings is maintained must develop their

36. Early intervention is the solution suggested by the authors of the broken windows theory. *See* KELLING & COLES, *supra* note 35, at 251 ("From the earliest efforts to eliminate graffiti in the New York City subway, every department was involved and committed. Station managers monitored conditions in their stations continuously to ensure that minimum standards were maintained. Maintenance and repair staff cleaned new graffiti promptly, secured token receptacles, and repaired and cleaned facilities . . . . The end result was not only order restored, but crime reduced, and most probably, prevented. . . . Taking our cue from the New York experience, we believe that order-restoration and maintenance attempts are most effective and most likely to lead to crime prevention and reduction when a community mounts an integrated and comprehensive effort.")

37. *See* N.C. GEN. STAT. §§ 160A-443(5a), (5b) (providing for the enactment of ordinances "if the governing body shall find . . . that the continuation of the dwelling in its vacated and closed status would . . . create a fire and safety hazard, would be a threat to children and vagrants, would attract persons intent on criminal activities, would cause or contribute to blight and the deterioration of property values in the area," etc.); *see also id.* §§ 160A-425.1, -426 (authorizing an inspector to declare unsafe a vacant or abandoned nonresidential building if it "appears to the inspector to be in such dilapidated condition as to cause or contribute to blight, disease, vagrancy, fire or safety hazard, to be a danger to children, or to tend to attract persons intent on criminal activities or other activities that would constitute a public nuisance").

38. References herein to "appearance," and later to "aesthetic" regulation, concern the *existing* aesthetic features of dwellings—for example, keeping the outward appearance of the dwelling in good order, regardless of design or architectural style. These

own regulatory programs in reliance on their general ordinance-making authority.[39] In order to fully explain this authority under the general police power, Section A provides a brief introduction to the larger context in which local governments function and are granted powers in North Carolina. Once the stage is set, Sections B and C will explore the possibilities and limitations of the general police power with respect to vacant and abandoned dwellings.

A. *Authority for the Exercise of the General Police Power by North Carolina Local Governments*

In a home-rule state, local governments are given broad authority—usually by the state constitution, sometimes by statutes, or both—to act on nearly all matters of local concern. This broad authority exists unless a state statute preempts local action.[40] Most states have some form of home rule, with the exception of Virginia and North Carolina, which do not provide home-rule authority in their constitutions or statutes.[41] In North Carolina, local governments are creatures of legislative benevolence—not constitutional mandate.[42] The North Carolina Constitution states: "The General Assembly . . . may give such powers and duties to counties, cities and towns, and other governmental subdivisions as it may deem advisable."[43] Accordingly, local governments in North Carolina do not enjoy home-rule and must be granted enabling authority from the state in order to act.[44]

For actions under the general police power, North Carolina local governments rely upon a broad legislative grant of ordinance-making authority:

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terms are not meant to refer to zoning-based appearance and aesthetic regulations such as architectural style, required design features, and other non-maintenance requirements such as buffer zones, landscaping, or open space. This point is discussed further in the discussion of "good repair" regulations in Part II.B, *infra*.

39. *See* N.C. GEN. STAT. § 160A-174 (for cities); *id.* § 153A-121 (for counties).

40. *See* Frayda S. Bluestein, *Do North Carolina Local Governments Need Home Rule?*, 84 N.C. L. REV. 1983, 1989-90 (2006).

41. *Id.* at 1990.

42. A. Fleming Bell, *Article 4: The Police Power*, *in* COUNTY AND MUNICIPAL GOVERNMENT IN NORTH CAROLINA 2 (UNC-Chapel Hill Sch. of Gov't 2007), *available at* http://www.sog.unc.edu/pubs/cmg/cmg04.pdf ("North Carolina is not a 'home rule' state, as that term is commonly understood. Its local governments exist by legislative benevolence, not by constitutional mandate.").

43. N.C. CONST. art. VII, § 1.

44. For an evaluation of North Carolina local government authority as compared to home rule states, see Bluestein, *supra* note 40.

> [Cities and counties] may by ordinance define, prohibit, regulate, or abate acts, omissions, or conditions, detrimental to the health, safety, or welfare of its citizens and the peace and dignity of the [city or county], and may define and abate nuisances.[45]

At first blush, this broad language appears to resolve most questions of authority for local governments. Unfortunately, this broad authority is also fraught with ambiguity—a problem further complicated in a non-home-rule state like North Carolina. How much authority did the legislature actually intend to grant to local governments? What does it mean to be detrimental to the "health, safety, or welfare" and the "peace and dignity" of a city or county?

The extent of a local government's power under such broadly-worded grants of authority depends on statutory interpretation, as applied by the courts. Under a broad interpretation, the statute might be construed to grant local governments the authority to act on any issue tangentially related to local health, safety, welfare, peace, or dignity. Under a strict or narrow interpretation, the statute might be read to limit local government authority to essential acts—not simply convenient, but indispensable—to local health, safety, welfare, peace, or dignity. In North Carolina, a strict canon of interpretation known as Dillon's Rule was regularly applied by the courts until the 1970s.[46] However, in 1971 and 1973, the North Carolina legislature enacted a call for broad interpretation. For counties, section 153A-4 of the General Statutes states:

> It is the policy of the General Assembly that the counties of this State should have adequate authority to exercise the powers, functions, privileges, and immunities conferred upon them by law. To this end, the provisions of this Chapter and of local acts shall be broadly construed and grants of power shall be construed to include any powers that are reasonably expedient to the exercise of the power.[47]

Similar statutory language applies to cities.[48] However, despite this legislative directive, courts today still occasionally apply a Dillon's Rule form of strict construction.[49]

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45. *See* N.C. GEN. STAT. § 160A-174(a) (2007) (for cities); *id.* § 153A-121(a) (for counties).

46. *See* Bluestein, *supra* note 40, at 2011. Under Dillon's Rule, local governments may only exercise three types of powers: (1) those granted to it by the legislature in express words, (2) those "necessarily or fairly implied in, or incident to the powers expressly granted," and (3) those "essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable." *Id.*

47. N.C. GEN. STAT. § 153A-4.

48. *See id.* § 160A-4.

49. *See* Bluestein, *supra* note 40, at 2012 ("North Carolina courts have not

With this in mind, we return to the general police power. Will this power be construed broadly or narrowly with respect to local government code enforcement programs to eliminate visible signs of deterioration? Case law suggests that local governments would receive the benefit of broad construction. Even in the pre-1970s era of Dillon's Rule, the general ordinance-making power of a city to "prevent nuisances"—even in the absence of specific state legislation—extended to regulation of the location of hog pens,[50] hospitals,[51] and gas stations.[52] Following the legislative call for broad interpretation of local government authority, North Carolina case law evolved to grant even broader authority under the police power.

The current test for examining the constitutional boundaries of police power regulation of private property was established by the North Carolina Supreme Court in *A-S-P Associates v. City of Raleigh*.[53] In this case, the court employed an ends-means reasonableness test to evaluate a comprehensive local ordinance governing aesthetic conditions in an historic district. In its analysis, the court explained that a regulatory activity must first be within the scope of the general police power.[54] Once that is established, then the regulation must meet a two-pronged test, which asks: "(1) Is the statute in its application reasonably necessary to promote the accomplishment of a public good and (2) is the interference with the owner's right to use his property as he deems appropriate reasonable in degree?"[55] The court answered these questions in the affirmative for the ordinance in question, but in doing so, it distinguished aesthetic regulation of historic property from other aesthetic regulation.[56] The court specifically declined to

consistently heeded this legislative directive to construe broadly local-enabling legislation. Instead, courts have intermittently applied Dillon's rule and other limiting rules of construction.").

50. State v. Hord, 29 S.E. 952 (N.C. 1898).

51. Lawrence v. Nissen, 91 S.E. 1036 (N.C. 1917).

52. Gulf Refining Co. v. McKernan, 102 S.E. 505 (N.C. 1920) (upholding a Sanford ordinance prohibiting aboveground storage of kerosene or gasoline within 1000 feet of any dwelling).

53. 258 S.E.2d 444, 448-49 (N.C. 1979) ("Several principles must be borne in mind when considering a due process challenge to governmental regulation of private property on grounds that it is an invalid exercise of the police power. First, is the object of the legislation within the scope of the police power? Second, considering all the surrounding circumstances and particular facts of the case is the means by which the governmental entity has chosen to regulate reasonable?" (citations omitted)).

54. *Id.* at 448.

55. *Id.* at 449.

56. *Id.* at 450.

expand the scope of the police power to permit regulation for aesthetic purposes alone.[57]

The court's position changed in 1982 when, in *State v. Jones*, it determined that regulation of private property based on aesthetic considerations alone was a valid exercise of the police power.[58] This decision was consistent with the general trend across the nation of judicial deference toward municipal police power during the second half of the twentieth century.[59] In deciding *Jones*, which concerned fencing around a junkyard, the court took the opportunity to explore the permissibility of aesthetic regulations generally, stating:

> Aesthetic regulation may provide corollary benefits to the general community such as protection of property values, promotion of tourism, indirect protection of health and safety, preservation of the character and integrity of the community, and promotion of the comfort, happiness, and emotional stability of area residents . . . . We therefore hold that reasonable regulation based on aesthetic considerations may constitute a valid basis for the exercise of the police power depending on the facts and circumstances of each case.[60]

The *Jones* court adopted the ends-means reasonableness test found in *A-S-P Associates*, but it elaborated on it, describing a separate balancing test to be applied to aesthetic regulations; namely that "the diminution in value of an individual's property should be balanced

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57. *Id.* (taking note of "the growing body of authority in other jurisdictions recognizing that the police power may be broad enough to include reasonable regulation of property for aesthetic reasons alone" but not endorsing "such a broad concept of the scope of the police power").

58. State v. Jones, 290 S.E.2d 675, 681-82 (N.C. 1982) (holding that a local government's ordinance requiring fencing around a junkyard for aesthetic reasons was a valid exercise of the police power).

59. *See* JOHN P. DWYER & PETER S. MENELL, PROPERTY LAW AND POLICY: A COMPARATIVE INSTITUTIONAL PERSPECTIVE 919 (1998). Dwyer and Menell explain the development of this trend as follows:

> After [*Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926)] held that municipalities could, consistent with due process, invoke the police power to regulate private land use, the balance of power between the community's right to shape land use and individual property and civil rights shifted dramatically in favor of municipal authority. Highly deferential judicial review as well as the underlying logic of *Euclid* quickly led municipalities not only to regulate uses that directly affected health and welfare, but also to regulate or even prohibit uses that reflect individual aesthetic judgment . . . .

Id. Prior to *Euclid*, most state courts had held that the police power did not extend to aesthetic regulation. *See id.*

60. *Jones*, 290 S.E.2d at 681.

against the corresponding gain to the public from such regulation."[61] The court explained, "[t]he test focuses on the reasonableness of the regulation by determining *whether the aesthetic purpose to which the regulation is reasonably related outweighs the burdens imposed on the private property owner by the regulation.*"[62] In weighing the burdens on the private-property owner, factors to consider include whether the most substantial part of the value of the individual's property is confiscated, or whether the individual is deprived of reasonable use of the property.[63] On the public benefit side of the equation, factors include the purpose of the regulation, the manner in achieving the permitted purpose,[64] and the aforementioned corollary benefits to the general community such as "protection of property values," "preservation of the character and integrity of the community," and "promotion of the comfort, happiness, and emotional stability of area residents."[65] For the junkyard fencing regulations in *Jones*, the court found that the balancing test weighed in the local government's favor.[66]

But with respect to vacant dwelling regulations, which test would a court apply? Would a court apply the stricter *State v. Jones* balancing test or the *A-S-P Associates* reasonableness test? An analysis of the purpose of vacant dwelling regulations suggests North Carolina courts would likely adopt the latter. As already pointed out, any vacant dwelling regulation designed to encourage owners to maintain the outward appearance of dwellings—including maintenance of existing components or features that serve aesthetic purposes, such as an existing exterior light fixture—is not made in service of aesthetic purposes alone. Recall that there are many other reasons for establishing vacant dwelling regulations, ranging from crime deterrence and reduction of fire and flooding hazards, to combating blight and preserving prop-

61. *Id.* This language first appears without elaboration in *A-S-P Associates v. City of Raleigh*, almost as an aside. 258 S.E.2d 444, 451 (N.C. 1979).

62. *Jones*, 290 S.E.2d at 681 (emphasis added). Although the test articulated in *Jones* can be viewed as an elaboration of the original *A-S-P Associates* test, the italicized language and the accompanying factors are frequently treated as an independent test for aesthetic regulations. *See, e.g.*, Summey Outdoor Adver., Inc. v. County of Henderson, 386 S.E.2d 439, 444 (N.C. Ct. App. 1989); Capital Outdoor, Inc. v. Tolson, 582 S.E.2d 717, 722 (N.C. Ct. App. 2003); Quality Built Homes, Inc. v. Village of Pinehurst, No. 1:06CV1028 2008 WL 3503149, at *8 (M.D.N.C. Aug. 11, 2008). The *Jones* balancing test will therefore be distinguished from the *A-S-P* reasonableness test for purposes of this Article.

63. *Jones*, 290 S.E.2d at 681.

64. *Id.*

65. *Id.*

66. *Id.* at 681-82 (holding that the "ordinance in instant case" is a valid exercise of the police power).

erty values.[67] When purposes other than purely aesthetic rationale exist, courts have declined to apply the stricter *State v. Jones* balancing test, and have instead applied the *A-S-P Associates* reasonableness test.[68] One appellate panel relied simply on a local ordinance's findings and purpose clause to convince itself that an ordinance served more than purely aesthetic concerns.[69] Where this has occurred, courts have then turned to the *A-S-P Associates* test and had little difficulty finding an ordinance to be reasonably related to a legitimate public purpose.[70]

Although we cannot know for certain in the absence of case law on point, there is little reason to think the result would be different for a vacant dwelling regulation. Nonetheless, out of an abundance of caution, it is helpful to examine vacant dwelling regulations under the stricter *State v. Jones* balancing test to convince us of the viability of such regulations. As demonstrated in the next Section, vacant dwelling regulations will likely hold up even under the more difficult test.

B. *The Police Power as Applied to Regulation of Vacant and Abandoned Dwellings*

A comprehensive vacant dwelling regulatory program would likely regulate two different aspects of a vacant dwelling: one aspect being existing components contributing to structural soundness or safety, and the other being existing components and features that serve primarily aesthetic purposes.[71] We will refer to regulations governing the

67. *See supra* Introduction and Part I.

68. *See, e.g.*, *Summey Outdoor*, 386 S.E.2d at 444-45 (finding *Jones* to be "inapplicable to the case at bar, because the ordinance in question [was] not for aesthetics only," and proceeding with an analysis under *A-S-P Associates*); *see also Capital Outdoor*, 582 S.E.2d at 722 (declining to apply the *State v. Jones* balancing test to billboard height regulations because they addressed safety concerns as well as an aesthetic purpose). In the cases just cited, the courts had little difficulty finding the ordinances under review were within the scope of the police power.

69. *See Summey Outdoor*, 386 S.E.2d at 444 ("Furthermore, we rely on Article II of the ordinance where aesthetics is listed as only one of several purposes.").

70. *See, e.g.*, *id.* at 444; *Capital Outdoor*, 582 S.E.2d at 722.

71. A further distinction exists here between two different types of aesthetic regulations: (1) "good repair" of *existing* dwelling components and features that serve only an aesthetic purpose such as an existing fence, existing light fixture, or existing accessory building; and (2) aesthetic architectural or landscaping regulations requiring *new* construction or repair to comply with a certain aesthetic standard, such as paint color, number of trees, or aesthetic design requirements. This Article's focus on *existing* dwellings means that we are concerned only with the former, which we term "good repair" regulations. For an exploration of architectural and landscaping regulations which is beyond the scope of this Article, see Quality Built Homes, Inc. v. Village of

latter type as "good-repair" regulations. For example, a good-repair regulation, aiming to eliminate visible signs of deterioration, might require an owner to repair an existing decorative fence with missing planks, or to replace a damaged exterior ornamental light fixture, even if such adorning items are not unsafe and serve only aesthetic purposes.[72] As already mentioned, such regulations should be evaluated under the *A-S-P Associates* ends-means reasonableness test because they serve more than just an aesthetic purpose.[73] But what if a court attempts—perhaps incorrectly—to apply the *State v. Jones* balancing test to a good-repair regulation or to some portion of it?

A good-repair regulation, such as a requirement that exterior ornamental light fixtures be kept in good repair, would likely survive court scrutiny even if evaluated under the *State v. Jones* test. Applying the first prong of the test, the court would examine the "gain to the public" from the good-repair regulation. Recall that "public benefits" may include such items as "protection of property values," "preservation of the character and integrity of the community," and "promotion of the comfort, happiness, and emotional stability of area residents."[74] In the case of a good-repair regulation, the elimination of visible indications of disrepair or neglect certainly preserves the character of the community (assuming that other, occupied dwellings are in a good state of repair) and promotes the comfort, happiness, and emotional stability of area residents by eliminating unsightly disrepair. But the regulation also generates other important benefits such as (1) eliminating a visible signal of neglect that could attract criminal activity, (2) creating repair activity at a dwelling that otherwise would go unmonitored, and (3) breaking a causal link in the spread of blighting conditions to other

Pinehurst, No. 1:06CV1028, 2008 WL 3503149, at *8-9 (M.D.N.C. Aug. 11, 2008) (unpublished) (undertaking a *Jones* analysis and upholding an ordinance containing architectural and landscaping requirements following a determination that the municipality presented sufficient evidence of "corollary benefits" and that the cost of compliance was not "so prohibitive that the burden to them outweighs the benefits to the community").

72. Other examples of aesthetic conditions which might be controlled by a vacant dwelling regulation include: removal of graffiti; maintenance of accessory buildings in a state of good repair; maintenance of driveways and sidewalks in good repair; repair of peeling or chipping paint; removal of non-combustible rubbish from the premises; landscaping to a neighborhood standard; and repair of cracked (but intact) window panes, to name only a few possibilities. These items, while arguably aesthetic in nature, would be regulated for the purpose of avoiding the negative externalities produced by a vacant dwelling in a visible state of disrepair, such as criminal activity.

73. *See supra* notes 67-69 and accompanying text.

74. *See* State v. Jones, 290 S.E.2d 675, 681 (N.C. 1982).

properties, as described by the broken windows theory.[75] Additionally, property values will be preserved to some degree by requiring existing aesthetic components of vacant dwellings to be maintained in good repair, though it is difficult to determine exactly how much value can be attributed to the good repair of a dwelling as compared to the price effects caused by its vacant state (and other related factors such as mortgage and property tax delinquency). Nonetheless, with all these factors taken together, the gain to the public from good-repair regulations is substantial.

The other prong of the balancing test measures the "diminution in value of an individual's property" or the "burdens imposed on the private property owner" due to the good repair regulation.[76] Using our exterior light fixture example, it would be difficult to argue that the regulation causes a "diminution in value" of the regulated property. After all, the value of a dwelling is normally sustained, if not increased, when it is well-maintained. By eliminating or reducing visible signs of neglect, the regulation also deters criminal activity, arson, and theft by disguising the property's vacant state. The whole point of a vacant dwelling regulation is to avoid waste and maintain the value of the vacant dwelling along with that of neighboring properties.

A case might be made, however, that a private owner with different priorities from the local government shoulders a "burden" of maintenance under a good-repair regulation that may outweigh the "gain to the public." Such a private owner could argue that the effort and immediate cash outlay for the maintenance of a dwelling creates a harm or burden that exceeds any loss in property value resulting from neglect. But the courts are unlikely to sympathize with the owner. In deciding due process or takings challenges to municipal land-use regulations, North Carolina courts are reluctant to find an ordinance unconstitutional even when the cost of compliance is "prohibitive" for the owner, or when compliance causes "hardship and inconvenience" for a particular owner.[77]

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75. *See supra* note 35 and accompanying discussion.

76. *Jones*, 290 S.E.2d at 681.

77. *See* Responsible Citizens in Opposition to Flood Plain Ordinance v. City of Asheville, 302 S.E.2d 204, 210 (N.C. 1983) ("Even assuming that the cost of complying with the land-use regulations is prohibitive (and we do not decide that it is) and recognizing that the market value of plaintiffs' properties has diminished (a fact found by the trial court), these factors are of no consequence here. As this Court noted in *A-S-P Associates v. City of Raleigh*, 'the mere fact that an ordinance results in the depreciation of the value of an individual's property or restricts to a certain degree the right to develop it as he deems appropriate is not sufficient reason to render the ordinance invalid.'" (citations omitted)); Appeal of Parker, 197 S.E. 706, 710 (N.C. 1938) ("The

A comparison to the facts in *State v. Jones* provides further support for this position. An owner of a vacant dwelling may protest any requirement to expend funds to maintain the dwelling, just as the junkyard owner in *Jones* resisted the requirement to expend funds for the erection of a fence. The key finding in that case for purposes here, however, was that the gain to the public from the aesthetic improvement alone, *outweighed* this private burden borne by the junkyard owner.[78] Compare these facts to the case of good-repair regulations for vacant and abandoned dwellings. The case for finding that public gain outweighs the private burden in the case of a good repair-regulation is actually *more compelling* than it was for the junkyard in *Jones*. After all, the private owner of a dwelling actually shares in the public gain since the owner's dwelling will likely have higher value if maintained rather than neglected. The junkyard owner, on the other hand, bore the expense of erecting a privacy fence for aesthetic purposes, but likely gained little or no property value through that action (as junkyards are not typically valued on appearance nor on the presence of

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petitioner complains that the ordinance is an arbitrary and unreasonable restriction upon the petitioner's property rights. That he, due to the particular circumstances of his case, may suffer hardship and inconvenience by an enforcement of the ordinance is not sufficient ground for invalidating it. The fact that the ordinance is harsh and seriously depreciates the value of complainant's property is not enough to establish its invalidity." (citations omitted)); *see also* Summey Outdoor Adver., Inc. v. County of Henderson, 386 S.E.2d 439, 445 (N.C. Ct. App. 1989) ("The fact that it will be costly for plaintiff to bring some of his signs into compliance with the ordinance does not rise to the level of an interference with his right to *use* the property as he deems fit."). These North Carolina Supreme Court decisions rest securely within the bounds of United States Supreme Court jurisprudence. *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 138 (1978) (holding that New York City's restrictions on the development of historic landmarks like Grand Central Terminal were constitutionally permissible and were not a "taking" because "[t]he restrictions imposed are substantially related to the promotion of the general welfare" and still permitted reasonable beneficial use of the property). In its analysis, the Supreme Court showed deference to legislative determinations of public interest, overriding individual real property interests: "[I]n instances in which a state tribunal reasonably concluded that 'the health, safety, morals, or general welfare' would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land-use regulations that destroyed or adversely affected recognized real property interests." *Id.* at 125 (citing Nectow v. City of Cambridge, 277 U.S. 183, 188 (1928)). The Court specifically noted: "States and cities may enact land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city." *Id.* at 129 (citing New Orleans v. Dukes, 427 U.S. 297 (1976); Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976); Village of Belle Terre v. Boraas, 416 U.S. 1, 9-10 (1974); Berman v. Parker, 348 U.S. 26, 33 (1954)).

78. *Jones*, 290 S.E.2d at 681-82.

aesthetic fences). Rather, the benefit accrued almost entirely to the surrounding property owners and the public at large, yet the court upheld the aesthetic regulation.[79] It seems likely, therefore, that good-repair regulations of abandoned or vacant dwellings would actually fare better under the court's balancing test than regulations pertaining to the appearance of junkyards.

Accordingly, even the stricter *State v. Jones* balancing test will not be an obstacle to the enactment of local regulations governing conditions—whether aesthetic or otherwise—found in vacant or abandoned dwellings. It thus appears safe to conclude that North Carolina local governments may enact reasonable regulations governing the maintenance of vacant and abandoned dwellings under the general police power, including regulations requiring that aesthetic features or components be maintained in good repair. In the case of green and yellow condition dwellings, this ends our analysis. This is because there is no other statutory authority upon which a local government may rely; in the absence of any other statutory authority, local governments have no choice but to employ their general ordinance-making authority under the police power in order to regulate green and yellow condition dwellings.[80]

The same cannot be said, however, for red condition dwellings. In those cases, the General Assembly has already provided specific regulatory authority through the minimum housing statutes. The next sections explore how this existing minimum housing authority occupies some preemptive space, thereby limiting the extent to which a local government may utilize its general ordinance-making authority to devise its own regulatory program for red condition dwellings.

C. *Limitations on the General Ordinance-Making Authority: Bumping Up Against North Carolina's Minimum Housing Standards Statutes*

Red condition dwellings are those that are "unfit for human habitation," as defined by North Carolina's minimum housing statutes.[81] There are two possible statutory authorities that may apply to the regulation of red condition vacant dwellings. First, a local government's general police power, as discussed in the prior Section, is broad enough to support the regulation of vacant dwellings in any condition. Second, the minimum housing statutes provide a mechanism for the

79. *Id.*

80. *See supra* notes 29-31 and accompanying text.

81. *See supra* notes 30-33 and accompanying text.

regulation of red condition dwellings specifically. This Section describes the tension between those two alternatives, explains the effect of statutory interpretation and state preemption law, and discusses the limits imposed by the minimum housing statutes on vacant dwelling regulations pursuant to the general police power.

When a North Carolina local government is authorized to carry out an activity by more than one statute, generally the local government may use any, or all of those statutes as the basis for its authority to act.[82] However, there are two instances in which a local government may be required to act under the authority of only one statute or statutory scheme. The first instance is preemption, and the second results from the application of the "specific trumps the general" canon of statutory interpretation. Preemption can occur when a local ordinance attempts to "regulate a field for which a State or federal statute clearly shows a legislative intent to provide a complete and integrated regulatory scheme to the exclusion of local regulation."[83] This preemption doctrine is codified and applied to cities[84] and has also been applied to county regulations.[85] Even if state statutes do not create a "complete and integrated regulatory scheme," some specific grants of authority impose precise requirements on local governments that may trump a more general power as a matter of statutory interpretation, particularly where a regulation adopted under a general power is "repugnant" to a more specific grant of authority.[86]

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82. Bell, *supra* note 42, at 5 ("In many of those cases in which a city or county is authorized to carry out a particular activity by more than one statute, the local government may use any of them as its authorization."). This approach is explicitly sanctioned for general laws and local acts in sections 153A-3 and 160A-4. *Id.*

83. N.C. GEN. STAT. § 160A-174(b)(5) (2007); *see also In re* Application of Melkonian, 355 S.E.2d 503, 507-08 (N.C. Ct. App. 1987) ("'Municipal ordinances are ordained for local purposes in the exercise of a delegated legislative function, and must harmonize with the general laws of the State. In case of conflict the ordinance must yield to the State law.' G.S. 160A-174 establishes, *inter alia*, that local ordinances are preempted by North Carolina State law when local ordinances are not consistent with State law; and that an ordinance is not consistent with State law when . . . [t]he ordinance purports to regulate a field for which a State or federal statute clearly shows a legislative intent to provide a complete and integrated regulatory scheme to the exclusion of local regulation." (quoting Davis v. City of Charlotte, 89 S.E.2d 406, 409 (N.C. 1955)).

84. N.C. GEN. STAT. § 160A-174(b).

85. *See generally* Sandy Mush Props., Inc. v. Rutherford County, 595 S.E.2d 233 (N.C. 2004).

86. *See* Krauss v. Wayne County Dep't of Soc. Servs., 493 S.E.2d 428, 433 (N.C. 1997) ("'Where there is one statute dealing with a subject in general and comprehensive terms, and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized . . . ; but, to the extent of

Thus, even though the general police power authorizes broad local government regulation of vacant and abandoned dwellings, as described above in Section B of this Part, the existence of other more specifically-drawn statutes may nevertheless exclude the use of procedures adopted under the police power authority. In the context of regulating vacant and abandoned dwellings, the minimum housing statutes raise precisely this issue. Those statutes authorize local governments to enact ordinances regulating the repair or demolition of dwellings that have become "unfit for human habitation."[87] However, the minimum housing statutes do not, importantly, regulate dwellings that remain "fit" for human habitation—dwellings that were described in Part I, *supra*, as being in green and yellow condition. Therefore, our analysis of the related issues of preemption and statutory interpretation raised by state minimum housing statutes pertains only to red condition dwellings.

As a result, with respect to red condition dwellings, the question becomes whether the North Carolina minimum housing statutes either (1) constitute a "complete and integrated regulatory scheme" to the exclusion of local regulation or (2) impose such precise requirements that, as a matter of statutory interpretation, must be followed in any regulations devised for vacant or abandoned dwellings.

As to the first question, there is nothing found in case law that suggests that the minimum housing statutes preempt the field. North Carolina appellate courts, when presented with an opportunity to do so, have stopped short of defining minimum housing statutes as a "complete and integrated regulatory scheme" designed to exclude all

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any necessary repugnancy between them, the special statute . . . will prevail over the general statute.'" (citing McIntyre v. McIntyre, 461 S.E.2d 745, 747 (N.C. 1995) (quoting Nat'l Food Stores v. N.C. Bd. of Alcoholic Control, 151 S.E.2d 582, 586 (N.C. 1966)))); *see also* Durham Land Owners Ass'n v. County of Durham, 630 S.E.2d 200, 203 (N.C. Ct. App. 2006) (reasoning that the general power under G.S. 153A-4 remains idle when a more specific statute is clear on its face); Bell, *supra* note 42, at 6 ("[I]n some cases other articles of Chapters 153A and 160A provide such detailed or different requirements for particular kinds of ordinances that it is clear that those procedures must be followed when cities and counties take the actions covered by those more specific statutes."). Examples of such specific grants of authority include hearing requirements in planning and development regulations and procedures for disposal of junked or abandoned motor vehicles. *Id.* ("[W]hile in theory local officials can control the disposal of junked or abandoned motor vehicles through either the general police power of G.S. 153A-121(a) and G.S. 160A-174(a) . . . . Since the legislature has provided specific rules in these statutes for junked or abandoned vehicle disposal, it is common practice for most officials to 'play it safe' and follow the guidelines.").

87. N.C. GEN. STAT. § 160A-441.

other regulation.[88] The answer to the second question, however, is more nuanced.

Although courts have not gone so far as to suggest that the minimum housing statutes preempt local regulation, they have looked unfavorably upon local activities found to be inconsistent with the statutes' precise procedural requirements. In *Newton v. City of Winston-Salem*, the North Carolina Court of Appeals held that a local government was required to follow the procedural requirements of the minimum housing statutes when regulating dwellings unfit for human habitation, declaring that "[t]he statute specifically states that cities and counties may exercise such powers *only* 'in the manner herein provided.'"[89] The court, in making this finding, noted the statutory requirement that "an ordinance adopted by a city to regulate buildings unfit for human habitation 'shall contain' certain provisions" found in the minimum housing statutes.[90] These judicial declarations suggest that the procedural provisions found in the minimum housing statutes occupy some preemptive space.

The *Newton* decision can be explained in accordance with accepted principles of statutory construction. Specifically, the mini-

88. In cases dealing with the issue of whether local governments must follow the specific procedures set forth in the minimum housing statutes, as opposed to locally-generated procedures, courts have resolved the question by requiring local governments to follow the statutory procedures. Nonetheless, in doing so, the courts have not taken the additional step of explicitly declaring that minimum housing statutes "preempt the field." *See* Newton v. City of Winston-Salem, 374 S.E.2d 488, 490-91 (N.C. Ct. App. 1988); *see also* Town of Hertford v. Harris, 611 S.E.2d 194, 196-97 (N.C. Ct. App. 2005) ("Regardless of the specific wording of the town's ordinance, the town must comply with the statute's requirement [in N.C. GEN. STAT. § 160A-443(6)(c)] that any personal property or appurtenances be salvaged and the proceeds applied to the cost of removal or demolition."); Dean v. City of Charlotte, No. COA04-931, 2005 WL 465906, at *2-3 (N.C. Ct. App. Mar. 1, 2005) (unpublished opinion).

89. 374 S.E.2d at 490-91 (emphasis added). The word "only," emphasized in the quoted text, appears in the opinion but does not appear in the cited minimum housing statute. *See id.*

90. *Id.* at 491. *See also Dean*, 2005 WL 465906, at *2 ("The enabling legislation provides that an ordinance adopted by a city to regulate buildings unfit for human habitation must contain certain procedures that the city must follow prior to demolition of a dwelling including providing the owner with notice, a hearing, and a reasonable opportunity to bring his or her dwelling into conformity with the housing code."). This result may not have been intended by the statute's drafters. *Cf.* N.C. GEN. STAT. § 160A-450 ("Nothing in this Part shall be construed to abrogate or impair the powers of the courts or of any department of any city to enforce any provisions of its charter or its ordinances or regulations, nor to prevent or punish violations thereof; and the powers conferred by this Part shall be in addition and supplemental to the powers conferred by any other law.").

mum housing statutes provide detailed procedural protections for property owners of unfit dwellings[91] that would be eviscerated if local governments could simply act under the general police power. To permit a local government to evade those procedural protections would either be "repugnant" to the minimum housing statutes,[92] or would violate the canon requiring statutes to be interpreted in a way that avoids meaningless construction.[93] Therefore, to lend meaning to the state's minimum housing statutes, local governments must utilize the procedures set forth in those statutes when establishing regulations governing the repair of red condition dwellings that are "unfit for human habitation."

This does not, however, wholly resolve the question. How do the two regulatory schemes apply to a red condition dwelling that simultaneously exhibits conditions rendering it unfit for human habitation (like a gaping hole in the roof) and conditions that do *not* contribute to its "unfit" state (such as damaged ornamental exterior light fixtures)? Does the fact that the dwelling is classified in red condition and unfit for human habitation require the application of the procedures set forth in the minimum housing statutes to all repairs, however minor or aesthetic? Or are the minimum housing statutes' procedures applied only to repairs pertaining to a dwelling's fitness, or unfitness, for human habitation? Examination of the statute suggests that it must be the latter. The plain language of the minimum housing statutes permits local governments to issue orders to repair a dwelling "*in order to*

91. *See Newton*, 374 S.E.2d at 491-92 (holding that Winston-Salem was required to follow the specific notice and service requirements for minimum housing ordinances as set forth in section 160A-443, particularly since "[s]tatutes authorizing service by mail or publication are strictly construed and must be followed with particularity" (citing Hassell v. Wilson, 272 S.E.2d 77, 82 (N.C. 1980)).

92. *See supra* note 86 and accompanying text.

93. *See* TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant. . . . We are reluctant to treat statutory terms as surplusage in any setting . . . ." (internal quotations and citations omitted)); State v. Buckner, 527 S.E.2d 307, 311 (N.C. 2000) ("If possible, a statute must be interpreted so as to give meaning to all its provisions."); *see also* Five C's, Inc. v. County of Pasquotank, 672 S.E.2d 737, 741 (N.C. Ct. App. 2009) (holding that the broad grant of police power authority in N.C. GEN. STAT. § 153A-4 must remain idle to give meaning to the provisions of an existing statute and stating that "[a] county may not therefore use its broad police powers as a guise to enact zoning regulations for manufactured homes inconsistent with N.C. Gen. Stat. § 160A-383.1").

render it fit for human habitation."[94] Those statutes are silent, however, on how to address repairs that could not, by themselves, "render [a dwelling] fit for human habitation," such as a good-repair regulation of existing ornamental features.[95] Indeed, the minimum housing statutes appear not to contemplate good-repair regulations at all.

Therefore, it can be concluded that the reach of the minimum housing statutes extends only to conditions that, if repaired, would "render [a dwelling] fit for human habitation." Accordingly, the minimum housing statutes would not preempt good-repair regulations applied to red condition dwellings. Returning to the specific example used in the previous section, a good-repair regulation—created under the general police power and requiring the repair of all damaged ornamental exterior light fixtures on vacant dwellings—could be implemented under procedures developed independently of the minimum housing statutes, even if applied to a red condition dwelling. The good-repair regulation would draw its authority from, and would need to be consistent with, the general police power alone.

This important point is potentially confusing, but might be clarified with a simple illustration. The universe of regulations governing the maintenance of vacant or abandoned dwellings, applied to all dwelling conditions ranging from green to red, can be viewed as the empty volume of a container.[96] To represent the subset of regulations pertaining to the repair of red condition dwellings under minimum housing standards, imagine solid bricks placed into the container. Then imagine pouring water into the container until the container is completely full. The bricks in the container represent the coverage of the minimum housing statutes, which is limited to the repair of dwellings in order to render them fit for human habitation. In that space occupied by the bricks, local governments must adhere to the procedures found in the minimum housing statutes. The water surrounding the bricks, however, is governed by the general police power, because the coverage of the minimum housing statutes does not extend any further than the space occupied by the bricks. It is therefore important to understand how much space is actually occupied by the bricks. Figures 1 and 2 provide further illustration of the same point.

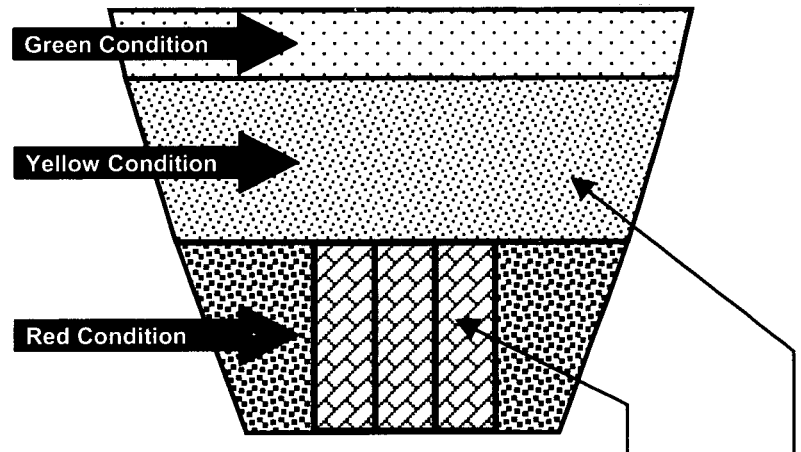
94. N.C. GEN. STAT. § 160A-443(3)(a) (emphasis added). Under the minimum housing statutes, a public officer may issue an order "requiring the owner, within the time specified, to repair alter or improve the dwelling *in order to render it fit for human habitation* . . . ." *Id.* (emphasis added).

95. *See supra* notes 71-72 and accompanying text.

96. For purposes of this illustration, regulations pertaining to the demolition of such dwellings are not considered.

Figure 1

The container below illustrates the universe of maintenance regulations governing vacant or abandoned dwellings



The bricks represent space governed by the minimum housing statutes: conditions of a "red condition" dwelling that, if repaired, would render the dwelling "fit for human habitation."

All remaining space, in green, yellow, and even red condition, is governed by the general police power and represents regulations governing conditions that do not affect a determination that the dwelling is "unfit for human habitation" (e.g., "good repair" regulations).

In summary, local governments seeking to regulate vacant or abandoned dwellings in green or yellow condition could enact regulations based solely upon the general police power. With respect to red condition dwellings, the statutory authority applied will depend upon the condition: regulation of conditions that render a dwelling unfit for human habitation must adhere to the procedures set forth in the state's minimum housing statutes, whereas good-repair regulations (or others covering items with no bearing on the fitness of a dwelling) could rely upon the general police power.

Our discussion could end here if the minimum housing statutes established a well-defined and unalterable scope of regulation—in other words, if the size of the "bricks" were fixed and could not be changed. If that were the case, the limits of the minimum housing

Figure 2
Applicability of the General Police Power and Minimum Housing Statutes

	Conditions not determinative of a dwelling's fitness or unfitness for human habitation (e.g., aesthetic or "good repair" regulations)	*Conditions determinative of a dwelling's fitness or unfitness for human habitation*
Green Condition Dwellings	General Police Power	General Police Power
Yellow Condition Dwellings	General Police Power	General Police Power
Red Condition Dwellings	General Police Power	Minimum Housing Statutes

statutes would be reasonably certain, and regulation of certain repairs could be categorized as either determinative of the fitness of a dwelling for human habitation, or not. However, as demonstrated in Part III below, local governments have been granted some authority to manipulate the definition of "unfit for human habitation" in their individual local ordinances.[97] Conditions regulated under good-repair ordinances in one community could be described as "unfit for human habitation" in another. In other words, each local government can potentially expand or narrow the applicable scope of its local minimum housing ordinance—essentially changing the size of the "bricks." Thus, further examination of the minimum housing statutes is necessary in order to fully understand the regulatory authority of a local government with respect to red condition dwellings.

III. MINIMUM HOUSING STANDARDS FOR VACANT OR ABANDONED DWELLINGS

Section A of this Part describes the operation of local minimum housing ordinances enacted pursuant to the state's minimum housing statutes. Section B, recognizing that local governments are permitted to manipulate certain definitions within their minimum housing ordinances, analyzes the effects of such modifications. This examination

97. *See infra* note 104 and accompanying text.

is intended to illuminate the scope of local authority under the minimum housing statutes, which in turn will help us to understand the line between regulations derived from minimum housing authority and those derived from the general police power.

A. *The Basic Operation of Minimum Housing Ordinances*

As a threshold matter, authority under the minimum housing statutes lies dormant until a local government enacts an ordinance, which must contain certain provisions.[98] For example, all ordinances must designate an officer to exercise the statutorily-prescribed powers.[99] Additionally, all ordinances must require the appointed officer to conduct a preliminary investigation into the condition of any dwelling for which a petition signed by five citizens has been filed.[100] Uniform procedures for ordering a repair or other corrective action for a substandard dwelling are set forth in the statute and must appear in any local ordinance.[101] As explained above in Part II, Section C, these procedures apply whenever a local government seeks to regulate a dwelling that is unfit for human habitation.

While the statutes prescribe many provisions, there is some room for local government creativity. For instance, what is perhaps the most important defined term, "unfit for human habitation," is described at length in the statute, but it can also be customized within each local ordinance. The statutes note that dwellings which are unfit for human habitation pose a threat to the health and welfare of the state's citizens, and that a "public necessity exists for the repair, closing or demolition of such dwellings."[102] These "unfit for human habitation" dwellings suffer from "defective conditions" such as "defects therein increasing the hazards of fire, accident, or other calamities; lack of adequate ventilation, light, or sanitary facilities; dilapidation; disrepair; structural defects; uncleanliness" which render them "dangerous or injurious to the health, safety or morals of the occupants of the dwelling, the occu-

98. N.C. GEN. STAT. § 160A-443 ("Upon the adoption of an ordinance finding that dwelling conditions of the character described in G.S. 160A-441 exist within a city, the governing body of the city is hereby authorized to adopt and enforce ordinances relating to dwellings within the city's territorial jurisdiction that are unfit for human habitation. These ordinances *shall include* the following provisions . . . ." (emphasis added)).

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* § 160A-441.

pants of neighboring dwellings, or other residents of the city."[103] This language, which emphasizes the rather extreme character of unfit dwellings, might be considered somewhat limiting, perhaps restricting the application of the ordinance to dwellings which are in extremely bad condition, were it not for the presence of a discretionary relief valve. By statute, local governments are granted authority to provide "additional standards" in a local ordinance to guide public officers with respect to the definition of "unfit for human habitation."[104] This discretion is important and will be explored in more detail below.[105]

Once a local government determines that a property is "unfit for human habitation," in accordance with the statutory procedures and the local government's ordinance,[106] the designated public officer must issue one of two possible orders: an order to "remove or demolish," or an order to "repair." The type of order issued depends on whether the dwelling can be repaired at "reasonable cost," with local governments exercising discretion here, as well, by defining in the ordinance what percentage of a dwelling's value constitutes a "reasonable cost."[107]

Order to remove or demolish. If the cost of repair *exceeds* the "reasonable cost in relation to the value of the dwelling," then the public officer *shall* issue an order requiring the property owner to "remove or demolish" the structure.[108] Note that there is no option to order the "repair" of the dwelling if the cost exceeds the defined "reasonable

103. *Id.* § 160A-444; *cf. id.* § 160A-441 (referring to conditions which are "dangerous or detrimental" rather than those which are "dangerous or injurious").

104. *See id.* § 160A-444 ("The ordinances [adopted by a city under this Part] may provide additional standards to guide the public officers, or his agents, in determining the fitness of a dwelling for human habitation.").

105. This power to manipulate the definition of "unfit for human habitation," and its possible consequences, will be discussed in Part III.B.

106. There are certain notice and public hearing requirements associated with making this determination. *See* N.C. GEN. STAT. § 160A-443(2) (2007). Complaints that state the dwelling is unfit for human habitation must be served on all property owners and parties of interest. *Id.* After service of the complaint, a public hearing must be held within ten to thirty days. *Id.* At the public hearing, all property owners and parties of interest have the right to file answers and give testimony as to whether the dwelling is unfit for human habitation. *Id.* The minimum housing statutes provide detailed guidance for service of complaints and orders. *See id.* § 160A-445. *See also* ANITA R. BROWN-GRAHAM, AFFORDABLE HOUSING AND NORTH CAROLINA LOCAL GOVERNMENTS 6-7 (2006).

107. Act of July 1, 2009, sec. 7, § 160A-443(3), N.C. Sess. Laws 2009-279 ("[T]he ordinance of the city may fix a certain percentage of [the value of the dwelling] as being reasonable."). The consequences of manipulating this percentage will be discussed in Section B, *infra*.

108. *Id.*

cost."[109] Because case law suggests that unfit dwellings may be regulated "only" in the manner provided by the minimum housing statutes,[110] it would be impermissible for the public officer to order "repair" of dwellings if the cost of repair would exceed the defined "reasonable cost." Practically speaking, however, repair by the owner would probably end the matter.

If the property owner fails to comply with an order to remove or demolish, the local government may effectuate the order—by demolishing, not repairing—with any costs converted to a lien on the property, and collected as a special assessment (similar to a property tax lien).[111] The collection methods available for these liens are more robust than for mechanics liens (the collection mechanism available under the general police power), and special assessment liens, unlike mechanics liens, survive foreclosure.[112]

As noted in the Introduction, however, this Article's purpose is to describe efforts to preserve housing, not demolish it. Accordingly, let us turn our attention to the minimum housing procedures to be followed in situations in which a dwelling can still be preserved.

Order to repair. If the dwelling can be repaired at "reasonable cost in relation to the value of the dwelling," then the public officer *shall* issue an order requiring the property owner "to repair, alter or improve the dwelling in order to render it fit for human habitation."[113] At the time that a local government issues an order to repair, it may supplement that order with an order to vacate and close the dwelling, but only if it is determined that "continued occupancy during the time allowed for repair will present a significant threat of bodily harm."[114]

109. Although the local government must order the owner "to remove or demolish" the unfit dwelling, the owner is entitled to "a reasonable opportunity to bring it into conformity with the housing code." N.C. GEN. STAT. § 160A-443(5).

110. *See supra* notes 88-92 and accompanying text.

111. N.C. GEN. STAT. § 160A-443(6)(a) ("[T]he amount of the cost of repairs, alterations or improvements, or vacating and closing, or removal or demolition by the public officer shall be a lien against the real property upon which the cost was incurred, which lien shall be filed, have the same priority, and be collected as the lien for special assessment provided in Article 10 of this Chapter."). Special Assessment liens are identical to property tax liens except for the fact they are by statute junior to any local, state or federal tax liens. *Id.* § 160A-233(c). Special assessments may be collected "in the same manner as property taxes," which means local governments may use garnishment and attachment of personal property (including bank accounts, wages, and other assets) in addition to real property foreclosure remedies. *See id.* § 160A-228.

112. *See id.* §§ 105-362, -375(i).

113. Act of July 1, 2009, sec. 7, § 160A-443(3)(a), N.C. Sess. Laws 2009-279.

114. *Id.* The "significant threat of bodily harm" calculus takes into account not only the current condition of the property, but also the nature of the repairs that are

The use of the phrase "during the time allowed for repair" suggests the drafters intended this "vacate and close" order to be temporary, lasting only until the ordered repairs are completed.

If the property owner fails to make the ordered repairs within the time allotted in the order, the local government is provided two options: it "may" (1) "cause the dwelling to be repaired, altered, or improved," essentially effectuating the repair order, or (2) cause the dwelling to be "vacated and closed" without effectuating the repair order.[115]

If the government opts to effectuate the order by repairing the dwelling, then that essentially concludes the matter. Here, as with effectuation of an order to demolish, the local government's costs become a lien on the property that may be collected as a special assessment.[116]

If the local government elects to vacate and close the dwelling without effectuating the repair order, then any costs associated with boarding up the structure become a lien on the property, with the lien collected as a special assessment as described above for other orders.[117] Once the dwelling is vacated and closed, unless it is repaired by the owner, the local government must leave it in its vacated and closed state until either (1) the dwelling deteriorates to the point that the cost of repair exceeds a "reasonable cost," in which case the local government must start over with new proceedings to obtain an order to demolish the dwelling,[118] or (2) the local government qualifies for, and avails itself of, the "abandonment of intent to repair" procedures, which assign special processes for repairing or demolishing dwellings which have been vacated and closed.[119]

"Abandonment of the intent to repair" procedure for qualifying municipalities. Prior to amendments enacted in 2009, the minimum housing procedures required local governments to give every owner of an unfit dwelling a choice whether to repair the structure or to vacate

required and additional risks due to the presence of minors under the age of eighteen or occupants with physical or mental disabilities.

115. Act of July 1, 2009, sec. 7, § 160A-443(4), N.C. Sess. Laws 2009-279.

116. N.C. GEN. STAT. § 160A-443(6)(a) (2007). *See supra* notes 111-13 and accompanying text.

117. *Id.*

118. *See* Newton v. City of Winston-Salem, 374 S.E.2d 488, 490-91 (N.C. Ct. App. 1988) (asserting that an order to demolish is a different determination from an order to repair and requires a new hearing).

119. Act of July 1, 2009, sec. 7, § 160A-443(5a), N.C. Sess. Laws 2009-279.

and close it.[120] Not surprisingly, many owners without sufficient resources to repair a dwelling simply opted to vacate and close it, leaving it in its unfit state. When those vacated and closed dwellings became blighting influences in the community, a local government had no recourse but to wait until the dwelling deteriorated further, to the point that it became eligible for demolition. This result was untenable to many local governments.

To address this specific problem, a remedy was developed and remains available to municipalities in counties with populations of over 71,000 and municipalities with populations exceeding 190,000,[121] as well as to certain enumerated smaller municipalities.[122] If one of these eligible local governments finds that a property owner has "abandoned the intent and purpose to repair" by keeping a dwelling vacated and closed for one year pursuant to an order to "repair or vacate and close," and certain other findings are made about the dwelling's blighting influence, then the local government may enact one of two ordinances. The first ordinance, applicable only if repairs can be made at a cost not exceeding 50% of the "then current value of the dwelling," is an order to "either *repair* or *demolish and remove* the dwelling within 90 days."[123] The second ordinance, applicable if repairs would exceed the 50% threshold described above, orders the owner to "demolish and remove the dwelling within 90 days."[124] If an owner fails to comply with any of these orders, then the appointed public officer "shall effectuate" the orders with the costs becoming a lien on the property and collected as a special assessment.[125] The one-year waiting period places a limit on the amount of time that a local government must suffer the blighting influence of a vacated and closed dwelling. Prior to the amendments, local governments without access to the abandonment of intent to repair procedures were stuck—they had to wait until the dwelling deteriorated to the point that it became

120. Prior to October 1, 2009, when the amendments became effective, local governments were not permitted to order an owner solely to repair a dwelling; rather, the order was required to give owners a choice: either repair or vacate and close an unfit dwelling. *See id.*

121. N.C. GEN. STAT. § 160A-443(5a) (2007).

122. *Id.* § 160A-443(5b) (granting the same power as section 160A-443(5a) and noting that "[t]his subdivision applies to the Cities of Eden, Lumberton, Roanoke Rapids, and Whiteville, to the municipalities in Lee County, and the Towns of Bethel, Farmville, Newport, and Waynesville only").

123. *Id.* § 160A-443(5a) (emphasis added).

124. *Id.*; *see also id.* § 160A-443(5b) (authorizing enumerated smaller municipalities to employ identical procedures).

125. *Id.* § 160A-443(6)(a).

eligible for demolition, at which time they could restart the original process to obtain an order to demolish.[126]

The enactment of the 2009 amendments has made the abandonment of intent to repair procedures less important, because owners are no longer granted the option to vacate and close an unfit dwelling; now they are ordered simply to repair it. If an owner fails to perform the ordered repair, the local government—not the owner—decides whether to repair or to vacate and close the dwelling. All local governments can therefore avoid the vacate and close problem by simply repairing unfit dwellings rather than vacating and closing them. Unfortunately, this may not be a viable option for local governments with insufficient resources to pay for repairs. Some local governments will therefore continue to order dwellings vacated and closed, so the abandonment of intent to repair provisions remain relevant. These special provisions, which were left intact by the 2009 amendments, continue to provide the only means of addressing a vacated and closed dwelling that acts as a blighting influence but is not yet eligible for demolition under standard procedures.[127]

One exception must be mentioned. The 2009 amendments introduced a new concept to the minimum housing statutes by creating a *temporary* vacate and close order *for the purpose of protecting occupants during the time allowed for repair*.[128] If applied, a dwelling will be subject to an outstanding order to repair at the same time that it is under a temporary vacate and close order. Since the vacate and close order is by definition a *temporary* order for the purpose of making repairs, it must be the case that any local government may effectuate a repair order for dwellings subject to this *temporary* vacate and close order, even if the local government is not eligible to employ the abandonment of intent to repair procedures. What is not clear is how much time a local government has to effectuate a repair order following an owner's failure to repair a dwelling under a *temporary* vacate and close order. It is probably safe to say that the time period is very brief. After all, the abandonment of intent to repair procedures become applicable once a dwelling has been vacated and closed for one year, so the time period

126. *See supra* note 118 and accompanying text.

127. To interpret the statute otherwise—e.g., to suggest that a local government could effectuate a repair order at any time even after it has ordered a dwelling vacated and closed—would essentially render the abandonment of intent to repair procedures meaningless, violating a cardinal principle of statutory interpretation. *See supra* note 93.

128. Dwellings may be vacated and closed "during the time allowed for repair" if there exists a threat of bodily harm or additional risks posed to occupants.

for effectuation without resorting to abandonment of intent to repair procedures must stop short of the one year point.[129] Unfortunately, we do not know how far short.

We cannot be sure how local governments will adapt to the revised statutory regime. Local governments unable to employ abandonment of intent to repair procedures may try to avoid issuing orders for dwellings to be vacated and closed, since it is uncertain to what degree such an order would tie their hands. With an abundance of resources, the obvious answer for these jurisdictions is to effectuate all repair orders immediately following an owner's failure to repair. For jurisdictions unable to pay for repairs, however, choices are limited. Without resources to effectuate a repair order immediately, and without clear authority to enforce a repair order once a dwelling is vacated and closed, these local governments may instead seek to delay or avoid taking any action after an owner fails to comply with a repair order. Their hope in delay would be that the repair order would remain valid until such time that the local government secured sufficient resources to effectuate the repair. The time period available for effectuating such a repair order is itself an unknown, but it is likely limited by reasonableness and, in any event, subject to due process considerations.[130]

B. Manipulating Minimum Housing Ordinance Definitions

The minimum housing statutes grant local governments authority to modify two important parameters in minimum housing ordinances: (1) "reasonable cost," which is the percentage of a dwelling's value that determines which order is to be issued by the local government, either "remove or demolish" or "repair," and (2) "additional standards," which guide public officers with respect to the definition of "unfit for human habitation." What is the effect of modifying these definitions in local ordinances?

"Reasonable Cost" Percentage. Adjustments to the "reasonable cost" threshold influence the level of deterioration at which a local government may no longer issue an order to repair, and instead must issue an order to remove or demolish. For example, a local government may consider lowering the reasonable cost threshold to 20%. In this example, once the cost of repairing a dwelling exceeds 20% of its current value, the local government must order the dwelling's demoli-

129. Act of July 1, 2009, sec. 7, § 160A-443(5a), (5b), N.C. Sess. Laws 2009-279.

130. Due process considerations may include any changes over time in the status of a dwelling, changes in ownership of a dwelling, and excessive periods of delay between the expiration of the time allowed for repair and the moment at which a local government seeks to effectuate the repair order.

tion, as ordering the dwelling's repair would not be authorized.[131] This low reasonable cost threshold has the effect of narrowing the availability of the "repair" option and speeding the arrival of the moment at which the remove or demolish order must be applied to a troubled property. Imagine that the public officer determines that a dwelling "unfit for human habitation" could be repaired for 25% of its current value, thereby exceeding the 20% threshold. Such a dwelling might not be terribly dilapidated and therefore might be a good candidate for preservation; yet an order to repair would not be an option. The local government would hold only the power to order the dwelling to be removed or demolished.[132]

For this reason, we would expect a lower reasonable cost threshold to result in more demolition orders, and hence more demolitions. Thus, a lower threshold might appeal to a local government facing a shrinking populace, with excess housing capacity. However, most cities and counties in North Carolina face the opposite problem. The U.S. Census Bureau has forecast that North Carolina will increase its population by more than four million people between the years 2000 and 2030,[133] so North Carolina local governments would be expected to embark on housing preservation initiatives rather than demolition programs. A higher threshold would be more consistent with preservation efforts, because it would lead to greater numbers of initial orders to repair rather than to remove or demolish.

Additional standards for the definition of "unfit for human habitation." The minimum housing statutes permit local governments to provide "additional standards" in their minimum housing ordinances to guide public officers with respect to the definition of "unfit for human habitation," producing two primary consequences.[134] First, this flexibility may lead to confusion over the regulatory coverage of the general police power, as compared with the minimum housing statutes, simply because the definition of unfit for human habitation plays a substantial role in determining whether a particular condition may be regulated under the general police power or under the mini-

131. *See supra* note 109 and accompanying text. For purposes of this example, we will ignore the possibility that demolition of a building in such relatively good condition might give rise to a constitutional taking.

132. *Id.*

133. Press Release, U.S. Census Bureau, Florida, California and Texas to Dominate Future Population Growth (Apr. 21, 2005), http://www.census.gov/press-release/www/releases/archives/population/004704.html.

134. *See* N.C. GEN. STAT. § 160A-444 (2007) ("The ordinances [adopted by a city under this Part] may provide additional standards to guide the public officers, or his agents, in determining the fitness of a dwelling for human habitation.").

mum housing statutes. Second, this flexibility provides a local government with an opportunity to expand or reduce the scope of its local ordinance according to its preference. On one hand, the flexibility is beneficial because it permits a local government to customize its response to substandard housing. On the other, it may tempt a local government to expand the coverage of its ordinance, for example, to conditions that might not actually be classified as unfit for human habitation as a matter of statutory interpretation, which ultimately invites claims that the activities authorized by the ordinance are *ultra vires*.

The point is best illustrated by describing the effects of a hypothetical municipality's additional standards that relate to the definition of "unfit for human habitation." Imagine a municipality defining unfit for human habitation as follows: A dwelling shall be unfit for human habitation if it fails to meet one or more of the following standards: (1) no deterioration due to the elements because of a lack of preventive maintenance, consisting of painting, weatherproofing, and repair; (2) windows shall have panes without cracks or holes; (3) accessory buildings are maintained in a state of good repair; (4) driveways and sidewalks are maintained in good repair; and (5) combustible and noncombustible rubbish is removed from the premises.[135]

Some may view these as surprisingly broad standards. A public officer could conceivably declare a dwelling as unfit for human habitation for having a cracked window pane; or perhaps for a lightly deteriorated panel on the exterior of a dwelling due to worn paint; or perhaps for an accessory building found in disrepair, even though it is not used for human habitation. We cannot say for certain that these standards are overbroad, because there is no judicial precedent clarifying at what point a minimum housing ordinance becomes *ultra vires* for applying an overly-expansive definition of "unfit for human habitation."

The effect of manipulating "additional standards" must also be understood with respect to the line dividing the applicability of the general police power and the minimum housing statutes. The additional standards listed above serve to broaden the applicability of the local government's minimum housing ordinance to conditions that might not be considered "unfit" in another municipality. Accordingly, the local government employing these standards would apply its minimum housing ordinance and the procedures outlined in the minimum

135. While the list provided is hypothetical, these conditions are derived from existing minimum housing ordinances in North Carolina, copies of which are on file with the author.

housing statutes to this expanded set of conditions. For local governments that prefer to operate within the confines of the minimum housing statutes, this creates a perceived benefit because the minimum housing statutes would apply to a broader range of conditions.

At the same time, these broader minimum housing standards would have the effect of removing the defined conditions from the purview of the general police power. As we learned above in Part II, Section C, any conditions contributing to the fitness of a dwelling for human habitation may only be regulated by the minimum housing statutes. Figure 3, below, compares the original container diagram found in Figure 1 to a revised container, illustrating a minimum housing ordinance employing additional guidance to expand the definition of unfit for human habitation. The bricks have expanded into space previously considered yellow, thus illustrating the fact that the minimum housing ordinance, as modified by additional guidance, now covers dwellings that previously would have been considered yellow condition dwellings.

The trade-offs are worth considering. Minimum housing ordinances have their advantages: the statutory procedures are already established; some case law exists; notice requirements are clearly set forth; hearings are administrative in nature rather than judicial;[136] and any costs incurred to effectuate orders following noncompliance become a high-priority lien.[137] On the other hand, the general police power has some appeal of its own: it can seamlessly regulate aesthetic and non-aesthetic conditions at an early stage before a dwelling becomes unfit for human habitation; the ability to levy fines or civil penalties may also be a powerful tool;[138] the absence of an existing regulatory regime and procedures allows for some creativity in design and implementation; and jurisdictions with limited resources and not eligible to use the "abandonment of intent to repair" procedure may run into difficulty using the minimum housing statutes to regulate dwellings.[139]

136. *See supra* note 106.

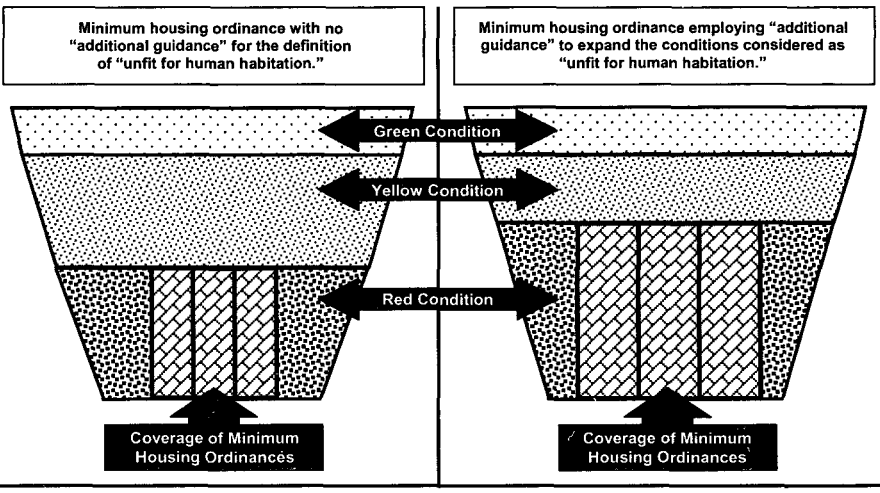
137. *See* N.C. GEN. STAT. § 160A-443(6)(a).

138. *See id.* §§ 160A-175(a), (c) (for cities); *id.* §§ 153A-123(a), (c) (for counties). *See infra* Part IV for a discussion of the authority to assess fines or civil penalties under the general police power, and why there may not be authority to assess fines and civil penalties for violations of minimum housing ordinances.

139. *See supra* notes 120-30 and accompanying text. This list is not exhaustive, but rather provides an overview of the advantages and disadvantages of each regulatory regime.

Figure 3

The container on the left is taken from Figure 1 and illustrates a minimum housing ordinance not employing "additional guidance." The container on the right illustrates a minimum housing ordinance employing "additional guidance" to expand the definition of "unfit for human habitation," which in turn expands the coverage of the minimum housing ordinance (represented by the enlarged bricks). Note that some dwellings previously considered to be in a "yellow condition" would now be categorized as being in "red condition" (illustrated by encroachment of red space into formerly yellow space).



Despite any comparative advantage one authority may have over the other, a local government seeking a comprehensive approach to the regulation of vacant and abandoned dwellings does not face an "either-or" choice. Rather, in constructing a comprehensive regulatory program, a local government must rely upon its authority under both the minimum housing statutes *and* the general police power. The need to use both authorities produces some interesting and difficult challenges.

IV. PUTTING IT ALL TOGETHER: WORKING WITHIN EXISTING STATUTORY AUTHORITY TO ENACT A VACANT PROPERTY REGISTRATION PROGRAM

A large portion of this Article thus far has been devoted to explaining the general police power and North Carolina's minimum housing statutes. The foregoing analysis, standing alone, is worthwhile, as it sheds light on a confusing area of North Carolina law with significant practical importance to local governments and citizens. However, just as important is that the analysis provides the necessary context for the following discussion illustrating a novel approach in North Carolina to regulating vacant or abandoned dwellings known as "vacant property registration programs." As explained below, this approach draws on

local government authority under both the general police power and the minimum housing statutes. The intent of this discussion is not to detail every aspect of a vacant property registration program, but rather to use the vacant property registration concept as a means of illustrating the interplay of the two authorities and how the complexity of North Carolina's statutory regime confounds local government efforts to implement a comprehensive regulatory program for vacant and abandoned housing.

Although not yet attempted in North Carolina, vacant property registration programs have been employed by municipalities in other states to address the problem of vacant or abandoned housing.[140] A vacant property registration program typically consists of the following components:[141]

(1) A requirement for owners to register their vacant property—gardless of the property's condition—with a local government official within some short period of time following vacancy and to designate an agent for service of process.

(2) A requirement for owners not located in the local jurisdiction to hire a local professional maintenance company to provide twenty-four-hour maintenance service for the property; to notify the local government of the contact information for the retained maintenance company; and to carry liability insurance coverage to protect against potential vandalism or other damage resulting from abandonment.

(3) Enumeration of standards by which the property must be maintained, such as maintaining existing features of a dwelling in good repair and maintaining the exterior appearance of a dwelling, along with procedures for effectuating orders in the event of noncompliance.

(4) A periodic fee to fund costs associated with the regulatory program (i.e., program administration and inspectors' time). Some programs refund a portion of the fee if the property is

140. For a list of vacant property registration programs established in the United States, see Safeguard Properties, Vacant Property Registration Ordinances, http://www.safeguardproperties.com/vpr/city.php (last visited Oct. 18, 2009) (indicating that no North Carolina programs have been established, though the author continues to work with one local government interested in establishing a program).

141. *See generally* Joseph Schilling, *Code Enforcement and Community Stabilization: The Forgotten First Responders to Vacant and Foreclosed Homes*, 2 ALB. GOV'T L. REV. 101, 128-45 (2009). *See also* ALAN MALLACH, METROPOLITAN POLICY PROGRAM AT BROOKINGS, TACKLING THE MORTGAGE CRISIS: 10 ACTION STEPS FOR STATE GOVERNMENT 13-15, 26 nn.50-52 (2008), *available at* http://www.brookings.edu/~/media/files/rc/papers/2008/0529_mortgage_crisis_vey/0529_mortgage_crisis_vey.pdf.

re-occupied within a certain period of time. The inspections may consist of frequent police patrols and periodic fire and code inspections to ensure that the vacant property remains secure and undamaged.

(5) Penalties for violations.

Each of these components will be addressed in turn and evaluated in light of local government authority to conduct these activities in North Carolina.

Registration. We have already established that vacant and abandoned dwellings pose a serious threat to communities.[142] Vacant property registration programs mitigate the threat by establishing local government awareness of vacancies, and if designed into the program, by triggering a program of regular monitoring by government officials, such as code inspectors, police, and fire officials. A registration requirement would be enacted by a local government under its police power authority. Registration serves purposes greater than mere aesthetics, so the *A-S-P Associates* reasonableness test is applied to determine if it is a valid exercise of the police power.[143] Since the regulation requires an owner to do little more than register a vacant property, there is little doubt that it would be viewed as a reasonable means of achieving a legitimate government purpose.[144]

Having established that the registration component is a valid exercise of the police power, is it preempted by the minimum housing statutes? There is no risk of preemption, because registration of a vacant dwelling in any condition (whether green, yellow, or red) is not done for the purpose of rendering the dwelling fit for human habitation. Rather, it is done to trigger awareness by the local government. Furthermore, registration applies to green and yellow condition dwellings as well as to red, so a dwelling's fitness or unfitness for human habitation is irrelevant for the purposes of registration. Registration therefore falls outside of the scope of the minimum housing statutes. Even when registration is applied to a red condition dwelling, the dwelling likely simultaneously exhibits conditions rendering it "unfit" as well as conditions with no bearing on fitness (such as good repair of existing aesthetic or non-structural features). Hence, a local registration requirement can be enacted for the purpose of regulating conditions not related to determinations of fitness or unfitness, thereby avoiding

142. *See supra* notes 3-7 and accompanying text. Recall that even green condition dwellings pose a threat if vacant.

143. *See supra* Part II.A.

144. *Id.*

any interference with the preemptive space of minimum housing statutes.

Retain a professional maintenance company and carry insurance. Using similar preemption analysis as that described above for registration, a local government regulation requiring an owner to hire a professional maintenance company to maintain a vacant dwelling and to carry insurance is unrelated to minimum housing standards. It would therefore fall outside the scope of the minimum housing statutes. The relevant inquiry is whether it would be a valid exercise of the general police power. We can be reasonably sure that such a requirement, properly tailored, would pass the *A-S-P Associates* reasonableness test in light of the purpose served.[145] If, however, the stricter *State v. Jones* balancing test for aesthetic regulations is applied, we cannot be certain whether a court would find that the public benefit outweighs the private burden.[146] Recall that *Jones* requires a case-by-case analysis of aesthetic regulations, so judicial determinations would necessarily be highly contextual.[147] For example, courts would likely be sympathetic to an owner, perhaps living within a few miles of her registered vacant dwelling, who argues that she can maintain her vacant dwelling adequately on her own without hiring a local maintenance company. As another example, an owner could argue that she has complied with the maintenance requirement by hiring a *non*-professional to maintain the property (e.g., by contracting with a neighbor for the maintenance of the dwelling). Through creative ordinance drafting, reasonable accommodations can be made to address these circumstances, such as waiving the requirement to hire a professional maintenance company for owners who (1) reliably demonstrate an ability to maintain the property and (2) have not received any citations for maintenance violations in the previous quarter. Building in such accommodations should improve the regulation's chances of overcoming either the *A-S-P Associates* reasonableness test or the *Jones* balancing test.

Maintenance standards and local government effectuation in the event of non-compliance. The third component—enumeration of maintenance standards and procedures for effectuation in the event of non-compliance—must fully address the tension between the general police power and minimum housing statutes in North Carolina law.[148] In establishing maintenance standards, local governments may wish to be explicit about which standards address a dwelling's fitness or unfit-

145. *See id.*
146. *See supra* Part II.B.
147. *See supra* note 60 and accompanying text.
148. *See supra* Part II.C.

ness for human habitation, and which do not. We know this distinction has no bearing on the regulation of green or yellow condition dwellings, as illustrated above in Figure 2. The distinction only matters once a dwelling is declared unfit for human habitation and enters red condition. At that point, any condition which, if repaired, would render the dwelling fit for human habitation, would be regulated pursuant to the procedures of the minimum housing statutes. All other substandard conditions (such as those regulated by a good repair regulation of non-structural or aesthetic features) would continue to be regulated under the authority of the general police power. The procedures would necessarily be different for each of the two sets of conditions. To illustrate the point, for conditions regulated pursuant to the minimum housing statutes, local governments may avail themselves of administrative (rather than judicial) proceedings all the way through enforcement.[149] For repair of other substandard conditions regulated pursuant to the general police power, a court order must be obtained for local government effectuation.[150] This provides the clearest demonstration of how the tension between the general police power and the minimum housing statutes complicates local government efforts to enact comprehensive code enforcement measures.[151]

Periodic fee. The fourth component assesses on registrants a periodic fee calculated to defray the costs of administering the registration program and the costs associated with regular inspections (such as dedicated public safety resources, fire inspections, and code inspections). Such fees are permitted in North Carolina, provided that the fees are calculated only to defray the costs of the regulatory pro-

149. *See supra* notes 94-95 and accompanying text. For a discussion of the administrative procedures, see *supra* note 106.

150. *See* N.C. GEN. STAT. § 160A-175(d)-(e) (2007) (for cities); *id.* § 153A-123(d)-(e) (for counties).

151. The dividing line between the two authorities is a condition unique to North Carolina. In other states, there is no dividing line at all, so vacant property registration ordinances enacted in those other states will look different from the North Carolina ordinance envisioned here. *See, e.g.*, CAL. CIV. CODE § 2929.3(b) (West 2008) (defining "failure to maintain" in a way that blends aesthetic or "good repair" elements with elements that might contribute to a determination that a dwelling is "unfit for human habitation," specifically: "failure to care for the exterior of the property, including, but not limited to, permitting excessive foliage growth that diminishes the value of surrounding properties, failing to take action to prevent trespassers or squatters from remaining on the property, or failing to take action to prevent mosquito larvae from growing in standing water or other conditions that create a public nuisance").

gram.[152] It would seem appropriate for such fees to be assessed against the owner of the affected dwelling in the same way that fees for other inspection programs are assessed. A program of regular inspections for a vacant dwelling is, after all, a service for the owner of the dwelling as much as for the surrounding community, as it is designed to improve the chances that the owner's vacant property remains secure and well-maintained.

The fee structure deserves some attention. Local governments in other states have built creative incentives into their fee structures.[153] Some of these incentives, such as fee waivers for dwellings that are reoccupied within a certain period of time after falling vacant, can be replicated in North Carolina.[154] Others, such as successive fee increases for dwellings remaining vacant for longer periods of time, are not permitted in North Carolina, unless the fees are tied to actual costs of administering the regulatory program.[155]

One additional wrinkle bears mentioning. Just as local governments must be mindful under which authority (general police power or minimum housing) they are acting when establishing maintenance standards, so too must they pay attention to the dividing line when establishing fees. As already mentioned, a local government may establish a fee to offset costs of regulatory activities undertaken pursuant to the general police power, such as the vacant property registration and inspection program envisioned here.[156] However, it is not clear whether fees are permissible for activities undertaken pursuant to the minimum housing statutes. This wrinkle arises because of language in the minimum housing statutes suggesting that local governments will fund minimum housing standards inspections and activities with appropriations from their general revenue fund.[157] Costs of effectuating orders become liens on affected property, but there is no mention of fees *per se*.[158] Recall that *Newton* suggests that unfit dwellings may be regulated "only" in the manner provided by the

152. *See* Homebuilders Ass'n of Charlotte, Inc. v. City of Charlotte, 442 S.E.2d 45, 51 (N.C. 1994) (concluding that a city has authority to assess user fees to defray the costs of regulation, provided such fees are reasonable).

153. *See* Schilling, *supra* note 141, at 132.

154. *See supra* note 152 and accompanying text.

155. *See id.*

156. *See id.*

157. *See* N.C. GEN. STAT. § 160A-449 (2007).

158. *Id.* § 160A-443(6).

minimum housing statutes.[159] The ability to establish fees for activities under the minimum housing statutes is therefore in question. In contrast, we have no such concerns about fees with respect to activities undertaken pursuant to the general police power. Therefore, fees may be charged for a vacant property registration program, but when calculating the fees, the costs of minimum housing activities should not be included.

Penalties. The final component, civil penalties (or fines) for noncompliance, raises similar concerns with respect to the distinction between activities undertaken pursuant to the general police power, as opposed to the minimum housing statutes. There exists clear authority to assess civil penalties against owners for violations of ordinances enacted pursuant to the general police power,[160] such as the vacant property registration program envisioned here. For minimum housing activities, however, we cannot be so certain. No authority to assess civil penalties (nor fines) is found within the minimum housing statutes. Following the same reasoning applied above for periodic fees, case law suggests that local governments may "only" exercise minimum housing powers in the manner provided in the minimum housing statutes.[161] Accordingly, it is probably not permissible to use civil penalties (or fines) to enforce violations of minimum housing ordinances.[162] This is yet another example of a notable difference between

159. *See* Newton v. City of Winston-Salem, 374 S.E.2d 488, 491 (1988) ("The statute specifically states that cities and counties may exercise such powers *only* 'in the manner herein provided.'"). *See also supra* notes 89-90 and accompanying text.

160. *See* N.C. GEN. STAT. § 160A-175(c) (for cities); *id.* § 153A-123(c) (for counties).

161. *See supra* note 159 and accompanying text.

162. Some North Carolina local governments have nonetheless enacted fines or civil penalties for violations of minimum housing ordinances. Cities and counties probably rely upon the general authority granted by sections 160A-175 and 153A-123, respectively, which permit them to enforce violations of ordinances with fines or civil penalties. As a matter of statutory interpretation, however, this argument rests on shaky ground. The minimum housing statutes were enacted during the Dillon's Rule era when the general enforcement mechanisms just mentioned were not available to local governments. At that time, Dillon's Rule restricted local government authority to that specifically granted by statute. The statute contained no authority for fines, so an argument can be made that the legislature never intended to permit local governments to use fines to enforce minimum housing standards. Additionally, fines and civil penalties could be considered repugnant to the procedures set forth in the minimum housing statutes. Protections for owners—such as notice, hearings, required findings, and wait periods prior to effectuation under abandonment of intent to repair procedures—would essentially be eviscerated if a local government could simply fine an owner for each day's continuing violation of an order to repair. *See id.* §§ 153A-123(g), 160A-174(g). Consider, finally, the result of *Newton v. City of Winston-Salem* (decided after the date that the General Assembly over-ruled Dillon's Rule) that "only" the minimum

general police power authority and minimum housing authority, further illustrating the challenge local governments face in seeking to enact comprehensive regulations governing vacant and abandoned dwellings.

One comment should be made regarding the amount of penalty set by local governments. Proponents of vacant property registration programs advise local governments to maximize the punitive effect of these programs.[163] In North Carolina, civil penalties for violations of ordinances are currently capped at five hundred dollars,[164] but a local ordinance may provide that each day's continuing violation is a separate and distinct offense.[165] Therefore, these penalties may be a powerful enforcement mechanism, particularly given the collection tools available to local governments.[166]

A common thread runs through the above examination of components of a vacant property registration program: local governments must pay close attention to differences between actions taken pursuant to the general police power and those taken pursuant to minimum housing statutes. We have now seen several examples of program components—maintenance standards, effectuation in the event of noncompliance, fees, and civil penalties—for which the tension between the general police power and minimum housing statutes complicates local government efforts to establish a comprehensive regulation governing vacant and abandoned dwellings. Implementation of these basic components sometimes hinges on which underlying authority, either the general police power or minimum housing statutes, serves as the basis for regulation.

V. CONCLUSION AND POLICY RECOMMENDATIONS

Local governments in North Carolina have been granted sufficient authority under existing statutes to implement adequate regulation of vacant and abandoned dwellings. However, as highlighted in this Article, the statutory authority is convoluted, and cobbling together a

housing procedures may be used to regulate unfit dwellings. *See* 374 S.E.2d at 491. Taken together, these authorities make it difficult to argue that fines or civil penalties are permitted for enforcement of minimum housing ordinances.

163. *See* MALLACH, *supra* note 141, at 14, 26 n.50; *see also* CAL. CIV. CODE § 2929.3(a)(1) (West 2008) ("A legal owner shall maintain vacant residential property purchased by that owner at a foreclosure sale, or acquired by that owner through foreclosure under a mortgage or deed of trust. A governmental entity may impose a civil fine of up to one thousand dollars . . . per day for a violation.").

164. *See* N.C. GEN. STAT. §§ 14-4, 153A-123(b), 160A-174(b).

165. *See id.* §§ 153A-123(g), 160A-174(g).

166. *See, e.g., id.* §§ 105A-1 to -16 (containing the Setoff Debt Collection Act).

coherent and comprehensive policy is a complicated matter. It may be worthwhile to examine ways to provide clarity and to enhance the authority of local governments to regulate vacant and abandoned dwellings. Two basic approaches are considered: (1) making minor modifications to enhance local government authority without dismantling the existing regulatory regimes, and (2) enacting an overhaul or replacement of the existing regimes.

In the first approach, some minor modifications could be made to the existing regulatory framework, currently governed by the general police power and the minimum housing statutes, to enhance local government regulatory authority and flexibility without dismantling the existing systems. Without attempting to address every possible scenario, this article has shed light on two general areas that could benefit from a statutory remedy.

One modification involves the "abandonment of intent to repair" procedure.[167] Currently, this procedure is available only to populous jurisdictions and a few select municipalities.[168] As explained above,[169] jurisdictions not eligible to employ this special procedure may try to avoid issuing orders to vacate and close dwellings, because they will not be certain to what degree such an order would tie their hands. The problem could be eliminated by making the procedure available to all local governments regardless of population. This is not to suggest that every local government should be *required* to adopt the abandonment of intent to repair procedure. In the same way that the minimum housing statutes remain dormant until a local government enacts an ordinance pursuant to the statutes, the abandonment of intent to repair procedure could remain dormant until adopted formally by a local governing body. The option to employ abandonment of intent to repair procedures would prove helpful to those local governments currently stymied in their efforts to deal with vacated and closed dwellings.

Another helpful modification would address the difficulties posed by the imprecise seam between the general police power and the minimum housing statutes. It would be a difficult task for any public official to define precisely the boundaries of regulatory activity under each authority. As explained above, this boundary truly matters to local governments developing a comprehensive regulatory scheme because powers and processes are different depending on whether the local government is acting under the general police power or the mini-

167. *See supra* notes 120-30 and accompanying text.

168. Act of July 1, 2009, sec. 7, § 160A-443(5a), (5b), N.C. Sess. Laws 2009-279.

169. *See supra* notes 120-30 and accompanying text.

mum housing statutes. If, for example, a local regulator gets it wrong and attempts to apply the general police power in an area covered by the minimum housing statutes, then the local regulator's activity could be voided as inconsistent with the minimum housing statutes. The consequences of getting it wrong—and even the uncertainty of getting it right—could dissuade local governments from enacting comprehensive policies addressing vacant and abandoned housing. Given the negative externalities inflicted on communities by vacant and abandoned housing, it is difficult to believe that this uncertainty was intended by the General Assembly.

It should be a simple matter to provide clarity: the General Assembly could explicitly overrule *Newton* and permit local governments to regulate red condition dwellings under either (or both) of the general police power and minimum housing statutes. The consequence of such legislative action would not be to expand the regulatory reach of the minimum housing statutes, as those statutes would continue to apply only to conditions that render a dwelling unfit for human habitation. The effect, rather, would be an expansion of the general police power into the area previously excluded by the minimum housing statutes. As a result, local governments would not have to fret over the dividing line between the general police power and the minimum housing statutes. For those cases in which public officials were unsure whether the general police power or the minimum housing standards apply, this approach would allow them to move forward with confidence under the general police power.

A second approach suggests more sweeping changes to the existing statutory regimes. While a comprehensive policy proposal is beyond the scope of this Article, some of the existing complexities could be alleviated by enacting legislation to permit local governments to devise their own procedures for minimum housing standards, and for all types of regulations governing vacant and abandoned dwellings, subject to reasonable due process requirements. Freed from the restrictions imposed by the current minimum housing statutes, local governments could experiment with policies for the regulation of dwellings found "unfit for human habitation" and for dwellings in other conditions, perhaps developing seamless regulations covering dwellings from green to red. Each governing board could evaluate for itself the ideal level of regulation required to achieve its goals and to meet the needs of its citizens, developing a variety of regulatory mechanisms and perhaps inventing new, more efficient, and more effective

models of regulation.[170] They might adopt mechanisms long used in other states, such as receivership.[171] The best models would rise to the top in a market-like competition among localities, as each citizen voted "with his or her feet" and gravitated toward the jurisdiction providing the ideal mix of regulation and services based on that resident's specific preferences.[172] One drawback to this approach is that it would further dismantle whatever procedural uniformity now exists statewide. A more limited version of this proposal would involve authorizing pilot programs and then selecting the top few for implementation statewide. Either way, opening up the regulatory options would require deliberate action by the General Assembly.

Whether the General Assembly retains the current regulatory scheme, tinkers with it, or overhauls it, North Carolina local governments will continue to seek means for regulating vacant and abandoned dwellings. Current authority under the general police power and minimum housing statutes is sufficient for the development of a comprehensive approach to vacant dwellings such as a vacant property registration program, but the task is complicated by the tension and imprecise boundaries between the general police power and the minimum housing statutes. With communities struggling in the midst of an economic crisis that has caused unprecedented numbers of foreclosures in North Carolina, it may be the right time to revisit the statutory authority granted to local governments to regulate vacant and abandoned dwellings.

170. Winston-Salem presents a case in point. *See* Laura Graff, *City Wants State Permission to Renovate Rundown Homes*, WINSTON-SALEM J., Jan. 13, 2009, http://www2.journalnow.com/content/2009/jan/13/city-wants-state-permission-to-renovate-rundown-ho ("City officials asked the Forsyth County legislative delegation yesterday to consider pushing for a bill that would allow the city to take over severely dilapidated homes and renovate them into homes for low- and moderate-income people."); *see also supra* note 25.

171. For a discussion of the merits of receivership, see James J. Kelly, *Refreshing the Heart of the City: Vacant Building Receivership as a Tool for Neighborhood Revitalization and Community Empowerment*, 13 J. AFFORDABLE HOUSING & CMTY. DEV. L. 210 (2004), *available at* http://www.vacantproperties.org/resources/ppts/kelly_refreshing.pdf.

172. *See generally* Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECONOMY 416 (1956) (suggesting that citizens shop among various localities and then settle in the one that best suits their preferences).