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Fight the Blight & Make it Right

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Fight the Blight & Make it Right

To some degree, blight touches every community. In some places, it is the exception, and in other places, it is the rule. There is no one answer to address the variety of problems caused by and resulting in blight, but it is the goal of this paper and the corresponding presentation to remind the reader of the tools that are available, to shine light on common pitfalls, and to encourage innovation in finding new solutions.

I. An Ounce of Prevention: Property Inspection Policies.

One of the best devices in a municipality's toolbox to fight the rundown of residential structures is the adoption of a property inspection policy. The purpose of a property inspection policy is to require owners, landlords, tenants, and roomers to maintain and improve the quality and appearance of rental housing to protect the health and safety of persons. This purpose is accomplished by requiring a certificate of occupancy for the rental units covered by the policy. To obtain a certificate of occupancy, the rental-housing unit must be inspected for compliance with all technical codes adopted by the municipality.

Even without an express authorization to adopt a property inspection policy, there may be ample implied authority to sanction such policies. First, one of the most basic municipal functions is the enforcement of police or sanitary regulations and to prescribe fines and penalties for the violations of the regulations. *See* 6A MCQUILLIN MUN. CORP. § 24:2; § 24.12 (3rd ed.). Second, a municipality may generally adopt ordinances, rules, and regulations to license or control "businesses and occupations," "building construction, alteration and repair," and "activities and things of a noncommercial character but involving an element of menace or concern to the public safety, health, order or welfare." 9 MCQUILLIN MUN. CORP. § 26:65 (3rd ed.).

Property inspection policies should be carefully crafted to avoid running afoul of constitutional claims.

> Municipal building codes and ordinances usually provide for inspection to determine whether or not their requirements are being complied with, and may impose inspection fees. But the matter of inspections should be left to the discretion of the city official charged with that responsibility. However, the power of municipal building, fire, health, and other similar officials to enter any building without permission for the performance of their duties is, in the absence of an emergency, violative of the constitutional guaranties against unreasonable search and seizure, unless a search has

> been authorized by a valid search warrant. Held not subject to the warrant clause of the Fourth Amendment, however, is an inspection of vacant rental units pursuant to an ordinance requiring landlords to obtain a certificate of occupancy attesting to the dwelling's compliance with municipal building, plumbing, electrical and fire codes before rerenting the unit. An injunction may lie either to restrain interference with inspection, or to restrain an unjustifiable exercise of the inspection power.

7A MCQUILLIN MUN. CORP. § 24:553 (3rd ed.) (footnotes omitted).

In some jurisdictions, landlords may argue that a property inspection policy along the lines of the one outlined here runs afoul of laws governing landlords and tenants. In particular, some states may legislate that municipalities cannot adopt building code-related requirements that affect landlord-owned property differently than owner-occupied property. If that is the case in your jurisdiction, consider applying the property inspection policy to all residences that are licensed under the municipality's business license code. Although such a policy would affect home-occupations, it would also keep rental properties in the cross-hairs.

II. A Pound of Cure: Due Process Related to the Remediation of Dangerous Buildings and Unsafe Structures.

Before demolishing, repairing, or moving a structure, a municipality should very carefully consider the notice provisions that it employs. A case out of the United States District Court for the Middle District of Alabama has made it impossible for Alabama municipalities to rely on the relatively simple notice provisions required by the remediation statutes of the *Alabama Code*, and the due process analysis employed by the district court may have wide-spread application. *See Ellis v. City of Montgomery*, 460 F. Supp. 2d 1301 (M.D. AL 2006). In *Ellis v. City of Montgomery*, the district court held that a municipality's procedure of using a county revenue commissioner's records to identify owners of property is unconstitutional. *Id.* The City of Montgomery's reliance on state law was not a valid defense.

> It therefore appears that the city, in sending notice to the property owner as reflected in the revenue commissioner's records, was following state and local law.
>
> But, as previously stated, the State is not empowered to determine what constitutes adequate

> notice under the due process clause of the Federal Constitution. "[B]ecause minimum procedural requirements are a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action." *Logan*, 455 U.S. at 432, 102 S.Ct. 1148 (internal quotation marks and brackets omitted). Notwithstanding the language of the state statute, any notice procedure must be reasonably certain to inform real property owners of the pendency of demolition proceedings. The city's notice procedure [(i.e., to follow state law)], at the time Ellis's property was condemned and demolished, fell far short of that standard.

Id. at 1310-1311. Following *Ellis*, municipalities should rethink blindly following the steps set forth by state statutes for the demolition, repair, or move of dangerous buildings and structures.

The *Ellis* Court found that in Alabama it is the county probate office, and the probate office alone, that can provided "record notice" of when real property undergoes a change in ownership or becomes encumbered. *Ellis*, 460 F. Supp. 2d at 1306. Therefore, the court concluded that, before demolishing a structure, a municipality should search the probate office's records at the time that it declares a property unsafe and send notice to its owners. *See id.* As for relying upon the procedures contained in the *Alabama Code*, the district court found that "by using the public records of the county revenue commissioner to identify the property owner, the City of Montgomery did not employ notice procedures 'reasonably certain to inform those affected' by its action." *Id.* at 1305.

The district court was also concerned about notice given to subsequent purchasers of the subject property after a finding that the property should be demolished. Consequently, the district court opined that the municipality should go one-step further to put potential future purchasers on notice.

> The city's notice procedure would be "reasonably calculated" to inform the person whose interests are affected by the demolition if, in addition to searching title in the probate office before sending notice to the property owner, the city were to take some additional measures to ensure that subsequent purchasers are on notice of pending demolition proceedings.

> For instance, the city could itself record, in the probate office, notice of the pending demolition proceedings. That way, any subsequent purchaser of the property would be on record notice that demolition could occur. Once notice from the city becomes a part of the public record, properly filed with the probate office, the city would be under no further obligation to ensure that the property did not change hands prior to demolition. "[A] purchaser or other person to whom notice is imputed by recordation is presumed to have examined the records in the office of the judge of probate." Jesse P. Evans III, *Alabama Property Rights & Remedies* § 5.4[e], at 5-16 (3d ed. 2004).

Id. at 1307. The district court hypothesized that such notice might be given through a *lis pendens*[1] type of filing as is used with civil actions involving an interest in real property. *See id.* However, the district court conceded that it was relying upon some degree of conjecture as to whether a *lis pendens* filing would be required (or even accepted by the probate court). *See id.*

A dangerous buildings/unsafe structures ordinance should also make it a violation of the ordinance for any person who has received a notice pursuant to the ordinance to sell, transfer, mortgage, lease, encumber, or otherwise dispose of such building, structure, part of building or structure, party wall, or foundation that is the subject of notice to another until such person shall first provide the grantee, transferee, mortgagee, or lessee a true copy of the notice and shall provide to the city building inspector official a signed and notarized statement from the grantee, transferee, mortgagee, or lessee acknowledging the receipt of the notice and fully accepting the responsibility without condition for making the corrections or repairs required by such notice. Similarly, the *International Property Maintenance Code*, which many municipalities have adopted, prohibits the sale or transfer of any property that is under a "compliance" order from the municipality.

III. Creating a "Clean Break" from the Past to Enforce the Zoning Ordinance of the Future.

For many municipalities, there comes a time when its officials look around and realize that they have not been as ardent in the enforcement of their zoning ordinances as they should have been. They want to repent and change their ways,

[1] *Black's Law Dictionary* defines a "*lis pendens*," in pertinent reference, as "A notice, recorded in the chain of title to real property, required or permitted in some jurisdictions to warn all persons that certain property is the subject matter of litigation, and that any interests acquired during the pendency of the suit are subject to its outcome. LIS PENDENS, *Black's Law Dictionary* (9th ed. 2009).

but they wonder whether having ignored their zoning problems for many years will prevent them from beginning to enforce their zoning laws again. The good news is that policy generally supports a renewed enforcement of zoning law.

> Estoppel, waiver or laches ordinarily do not constitute a defense to a suit for injunctive relief against alleged violations of the zoning laws, unless the circumstances are exceptional. The zoning ordinances are governmental acts which rest upon the police power, and as to violations, any inducements, reliances, negligence of enforcement, or like factors are merely aggravations of the violation rather than excuses or justifications.

8A MCQUILLIN MUN. CORP. § 25.349.10 (3rd ed.) (footnotes omitted). However, this rule is not absolute, such as in cases where the party claiming estoppel "exercised due diligence in ascertaining the legality of the proposed or new use of the premises." *Id.* Therefore, a renewed push for zoning enforcement should be given reasoned consideration.

The Supreme Court of Alabama has considered under what circumstances a municipality can take a renewed approach in the enforcement of its zoning. In *City of Foley v. McLeod*, the City of Foley, Alabama, "sought to enforce nonconforming-use provisions of its zoning ordinance to prevent the replacement of mobile homes in a nonconforming mobile home park." *City of Foley v. McLeod*, 709 So.2d 471, 472 (Ala. 1998). The mobile home park in that case was built in 1955 and pre-existed the city's original zoning ordinance, adopted in 1967. *See id.* Foley later adopted a new zoning ordinance in 1987. *See id.* Although both ordinances generally prohibited the location of the mobile home park in the zone in which it was placed, the mobile home park was allowed to continue to operate as a preexisting use. *See id.* In 1994, the owners of the mobile home park replaced six of the existing manufactured homes located in the park with new manufactured homes. *See id.* The city objected, contending "that its zoning ordinance prohibits the replacement of mobile homes within a mobile home park if the replacement would extend the life of a nonconforming use." *Id.*

The *McLeod* Court first examined the relevant provisions of the city's zoning ordinance, which reads as follows:

> "6.2 Non-Conforming Uses of Land and Buildings
>
> "Within the districts established by this Ordinance or amendments that may be later adopted, there exist lots, structures, uses of land and structures, and characteristics of use which were lawful before the Ordinance was passed or amended, but which

> would be prohibited, regulated or restricted under the terms of this Ordinance or future amendment. It is the intent of this Ordinance to permit these non-conformities to continue until they are removed, but not to encourage their survival. It is further the intent of this Ordinance that non-conformities shall not be enlarged upon, expanded, nor be used as grounds for adding other structures or uses prohibited elsewhere in the same district.
>
> "6.2.1 Continuance. A lawful non-conforming use existing at the effective date of this Ordinance may be continued, except as hereafter provided, although such use does not conform with the provisions of this Ordinance.
>
> "6.2.2 Restoration to Safe Condition. Nothing in this Ordinance shall prevent the restoration of any building or structure to a safe or sanitary condition when required by the proper authorities.
>
> "6.2.3 Restoration After Damages, No non-conforming building or structure which has been damaged by fire or other causes to the extent of more than 50 percent of its current replacement value at the time of such damage shall be rebuilt or restored except in conformity with the provisions of this Ordinance. If a non-conforming building is damaged less than 50 percent of its current replacement value it may be rebuilt or restored and used as before the damage, provided that such rebuilding or restoration is completed within 12 months of the date of such damage."

McLeod, 709 So.2d at 473. The court held that, under the language of the zoning ordinance, "the City may generally enforce the zoning ordinance to prevent the [owners of the mobile home park] from replacing mobile homes at [the mobile home park]." *Id.* at 474. This allows for a municipality to take advantage of a type of "clean break" approach by the adoption of a new zoning ordinance.

For the City of Foley, unfortunately, that was not the end of the court's analysis. The court next considered whether "the City should be estopped from enforcing the ordinance because the City has allowed similar replacements at various times since the ordinance was adopted in 1987." *McLeod*, 709 So.2d at 474-475. Furthermore, the owners of the mobile home park argued that the city had never previously objected to the replacement of mobile homes at the park and

that they informed the city's building inspector of their plan to purchase the replacement mobile homes and the building inspector did not object. *See id.* at 474. Under these facts, the court found that the City of Foley was estopped from enforcing its zoning ordinance:

> Thus, although the doctrine of estoppel is rarely applied against a municipal corporation, it may be applied in a proper case when justice and fair play demand it and where there has been a misrepresentation or concealment of material fact. In the present case, the evidence indicates that numerous mobile homes had been moved into and out of [the mobile home park] over the years. Nonetheless, the City had declined to enforce the zoning ordinance against [the mobile home park] after [the mobile home park] became a nonconforming use in 1967. Even when the City objected in 1994, it objected only after the [mobile home park owners] had already purchased the mobile homes and had prepared them for rental. Taken as a whole, these factors cause us to conclude that the City's continued acquiescence amounted to a misrepresentation of a material fact, namely that it would not enforce the zoning ordinance to prevent the [mobile home park owners] from replacing mobile homes at [the mobile home park]. Moreover, it would be unjust and unfair at this point to allow the City to force the [mobile home park owners] to remove the six mobile homes. Therefore, we hold that as to the installation of these six mobile homes the City is estopped from enforcing the zoning ordinance against the [mobile home park owners].

Id. at 474-475. However, even where estoppel applied for this discrete occurrence and even where the city had failed to previously uniformly enforce its zoning ordinance, there was light at the end of the tunnel.

> Although we hold that the City is estopped in this case, we note that the City will not be forever barred from enforcing the zoning ordinance against the [mobile home park owners] or against mobile home parks generally. While the City had long remained silent in the face of the perpetuation of [the mobile home park] as a nonconforming use, the City's action in the present case indicates a

> departure from that acquiescence. Consequently, even though the [mobile home park owners] may retain and use the six mobile homes that are the immediate subject of this case, the City is not estopped from taking prospective action to prevent future replacements, repairs, or similar activities that violate the zoning ordinance.

Id. at 475. Thus, by making its plan of enforcement known, the City of Foley was able to set the stage for a "clean break."

For any municipality considering making its own "clean break," there are several important lessons to learn from the *McLeod* case. First, take an inventory of the existing exceptions in the municipality. Second, pass an amended ordinance that includes a section similar to that in the *McLeod* case to address grandfathered uses and that expresses a strong disfavor for the continuance of nonconforming uses. Announce the new policy, and tell everyone. Third, once the ordinance is adopted, do not deviate from it. Do not allow the new placement (or replacement) of exceptions where they are not allowed (or no longer allowed) under the new zoning ordinance. Apply the ordinance uniformly and without discrimination. Fourth, do not turn a blind eye to information that an exception is being moved in or is under construction. If the municipality remains silent and the exception is installed, it may be too late.

IV. Conclusion

As leaders in government, we are called to be good stewards of those things that have been entrusted to us. Accordingly, this paper, more than a presentation, is a prayer; for our families, our friends, our neighbors, and this world in which we live.

V. Presentation References.

For further information regarding efforts and resources to address and remedy urban blight and the overall condition of our cities and neighborhoods, I recommend the following resources, which are also included, in part, in my presentation:

- Martin Swant, *The Birmingham News*, "Alabama Poverty Rate Hits 17.3 Percent," http://blog.al.com/businessnews/2011/09/post_99.html (Sep. 14, 2011).

- Firehouse Shelter, http://www.firehouseshelter.com/.

- Habitat for Humanity, http://www.habitat.org/.

- Birmingham Hospitality Network, http://birminghamhospitalitynetwork.com/.

- "Finding Simon and Garfunkel's 'America' In Saginaw, Mich.," *All Things Considered*, http://www.npr.org/2010/12/19/132168299/finding-simon-garfunkels-america-in-saginaw-mich (NPR Dec. 19, 2010).

- "Envisioning a Prosperous Future for Detroit," *Talk of the Nation*, http://www.npr.org/templates/story/story.php?storyId=113398823 (NPR Oct. 1, 2009).

- Kelly Nolan, *The Wall Street Journal*, "Alabama County's Woes Threaten Its Neighbors" (June 21, 2011).

- Ohio City Farm, http://www.ohiocityfarm.com/.

- Kristin Choo, *ABA Journal*, "Plowing Over: Can Urban Farming Save Detroit and Other Declining Cities? Will the Law Allow It?" http://www.abajournal.com/magazine/article/plowing_over_can_urban_farming_save_detroit_and_other_declining_cities_will/ (Aug. 2011).

- Madison, Wisconsin, Graffiti Removal Program, http://www.cityofmadison.com/bi/grafProg.html.

- Long Beach, California, Free Paint/No-Cost Graffiti Removal Program, http://www.longbeach.gov/cd/neighborhood_services/free_graffiti_removal.asp.

- The Hypothetical Development Organization, http://hypotheticaldevelopment.com/.

VI. Biographical Information about the Author.

Ben Goldman is a member in the law firm of Hand Arendall LLC, a full-service civil firm with offices throughout Alabama in Birmingham, Mobile, Athens, and Fairhope and in Jackson, Mississippi. Since 2001, Ben has practiced in Birmingham as a litigator, successfully defending clients through all stages of federal and state court litigation, including trial and appeal. A member of the Alabama Association of Municipal Attorneys since beginning practice, Ben presently holds public appointments as the City Attorney and Prosecutor for Tarrant, Alabama, and as the Town Attorney for Mulga, Alabama. In addition, he has represented over fifty Alabama municipalities, utilities, development boards, and other governmental entities in various matters. Ben has also served as corporate counsel to local, regional, and national businesses, representing them in such matters as contract negotiations, employment issues, and collections, and he has represented and advised lenders and large creditors in bankruptcy proceedings.

Ben was selected by the *Birmingham Business Journal* as one of the "2012 Top 40 Under 40" and *Super Lawyers* has recognized him in multiple years as an "Alabama Rising Star." One of Ben's municipalities, the City of Tarrant, has been awarded the Alabama League of Municipalities' 2012 Municipal Quality of Life Award for cities of its size for its submission, "Making Blight Right." Currently, he is a Director on the Board of the Legal Aid Society of Birmingham, a Director on the Board of the Birmingham Hospitality Network, and (thanks to being the father of two daughters) the rising Chair of the Girl Scouts of North-Central Alabama's Board Development Committee and a member of the Council's Board of Directors.