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Housing Codes, Building Demolition, and Just Compensation: A Rationale for the Exercise of Public Powers Over Slum Housing

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HOUSING CODES, BUILDING DEMOLITION, AND JUST COMPENSATION: A RATIONALE FOR THE EXERCISE OF PUBLIC POWERS OVER SLUM HOUSING

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IN programs of housing[1] improvement and slum clearance, public agencies[2] must often make difficult choices between the exercise of public powers of land acquisition, which require the payment of compensation, and public powers of noncompensatory regulation, which require no payment of compensation.[3] This Article focuses on three of these programs—building demolition, urban renewal, and housing code enforcement. Public agencies may demolish slum dwellings, one at a time, without compensation. Title to the cleared site is not affected and remains in the owner after the building has been demolished. Under statutory powers of urban renewal, local public agencies may designate entire slum neighborhoods as urban renewal project areas. Within these project areas, slum dwell-

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1. While this Article concentrates on housing, it is not suggested that similar problems do not arise in connection with the valuation of substandard nonresidential property. What distinguishes the slum housing problem is the availability of a wide range of federal subsidies and federally assisted local programs which are directed toward housing improvement. These programs and subsidies have drastically affected the private market for slum housing and the character of local controls over substandard housing conditions. For example, local maintenance codes for nonresidential property are not common, but local codes for housing maintenance are required as a condition of eligibility for federal assistance in housing programs. *See* the discussion in text accompanying note 7 *infra*.

2. Problems of coordination at the local level often develop in the exercise of these powers because they have been conferred on different public agencies. A simple discussion of the programs included in this Article will emphasize this problem. Urban renewal powers may be exercised directly by municipalities but are usually conferred on an independent housing or urban renewal authority. Housing codes are enacted by municipal ordinance and enforced by a separate municipal agency. Demolition powers are also exercised by a municipal agency independent of the urban renewal authority. Counties seldom enact housing codes, but in some states they have been given powers of building demolition. State fire marshals or similar agencies have powers of demolition in about half the states. Moreover, demolition powers conferred on state agencies may be exercised in urban areas.

3. These problems have also been acute in programs for open-space control and preservation. For a summary, *see* Satterthwaite & Marcou, *Open Space, Recreation, and*

ings and the land on which they stand may be acquired for clearance or rehabilitation, but compensation must be paid. Finally, local governments may enact housing codes which impose minimum standards for housing maintenance, space and occupancy, and health and sanitary facilities. Without payment of compensation, the housing code enforcement agency may issue compulsory orders of repair which require the slum owner to bring his dwelling into compliance with the housing code on pain of suffering criminal and perhaps civil penalties. The dwelling may also be closed to occupancy by public order until it has been brought into compliance with housing code standards.

Until recently, tension did not develop between these potentially overlapping powers. While the public authority to demolish slum dwellings without compensation has its historic antecedents in nineteenth-century powers to abate public nuisances, the rate of individual building demolitions in American municipalities has been slow.[4] It has now accelerated with the enactment of a federal program of financial assistance to municipalities to meet demolition costs.[5] Housing codes date back to the housing reform movement that originated in New York at the turn of the century,[6] but they were not common until relatively recent years. Because of the impetus of federal requirements for urban renewal and related financial assistance,[7] housing codes have now been widely adopted.[8] Enforcement of housing codes, which also suffered because of financial stringencies at the local level, has increased under another program of federal aid[9] permitting code enforcement in selected neigh-

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Conservation, in PRINCIPLES AND PRACTICE OF URBAN PLANNING 185, 199-207 (1968). The author has also discussed the use of compensatory and noncompensatory controls in the context of public control of land use. Mandelker, *Planning the Freeway: Interim Controls in Highway Programs*, 1964 DUKE L.J. 439; Mandelker, *What Open Space? Where? How?*, in AMERICAN SOCIETY OF PLANNING OFFICIALS, PLANNING 21 (1963). *See* Mandelker, *Notes From the English: Compensation in Town and Country Planning*, 49 CALIF. L. REV. 699 (1961).

4. Conversations with local officials in St. Louis and Kansas City, Missouri, and else-*Where? How?*, in AMERICAN SOCIETY OF PLANNING OFFICIALS, PLANNING 21 (1963). *See* demolition and to undertake the necessary legal proceedings. This problem has now been remedied in part by the federal program of demolition assistance discussed in text accompanying note 5 *infra*.

5. Housing Act of 1949, § 116, 42 U.S.C. § 1467 (Supp. 1967).

6. L. FRIEDMAN, GOVERNMENT AND SLUM HOUSING chs. 1-3 (1968).

7. Housing Act of 1949, § 101(c), 42 U.S.C. § 1451(c) (Supp. 1967).

8. Note, *Enforcement of Municipal Housing Codes*, 78 HARV. L. REV. 801, 803 (1965); Comment, *Conservation and Rehabilitation of Housing: An Idea Approaches Adolescence*, 63 MICH. L. REV. 892, 894, 895 (1965) (reporting survey of cities undertaking rehabilitation projects).

9. Housing Act of 1949, § 117, 42 U.S.C. § 1468 (Supp. 1967).

borhoods which are similar to urban renewal project areas.[10] Extensive local activity in slum clearance and urban renewal dates from the enactment of the slum clearance title in the federal Housing Act of 1949.[11] In addition, renewal-based activities directed at housing improvement have expanded with the enactment of the federal Model Cities legislation in 1966[12] and the extension of the federal urban renewal program to permit unlimited acquisition of slum housing for purposes of rehabilitation in 1968.[13]

Because the statutes and the decisional law do not clearly distinguish the legal bases for these related but different programs, we can expect conflicts among them to intensify. For example, practically the identical language which defines buildings subject to demolition under demolition laws also defines slum and blighted dwellings which qualify for inclusion in project areas under urban renewal legislation.[14] Housing codes typically define minimum conditions of repair and occupancy rather than blight, but these definitions can be applied to buildings which would qualify, in the alternative, for demolition without compensation or for acquisition with compensation in urban renewal. Whether a slum dwelling is ordered to be repaired under a housing code, demolished without compensation, or acquired as part of an urban renewal program after compensation has been paid may well depend upon how the municipality chooses to exercise its slum housing powers.[15]

Many problems arise from the potential overlapping application

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10. U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, CODE ENFORCEMENT GRANT HANDBOOK 5-6 (1968). Demolition grants are also made for demolition "on a planned neighborhood basis." U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, DEMOLITION GRANT HANDBOOK 6 (1968).

11. Housing Act of 1949, tit. I, 42 U.S.C. §§ 1450-65 (1964).

12. Demonstration Cities and Metropolitan Development Act of 1966, tit. I, 42 U.S.C. §§ 3301-13 (Supp. 1967). This program contemplates the extension of renewal activities to entire city neighborhoods which are larger than conventional urban renewal project areas.

13. Housing Act of 1949, § 110(c)(8), *as amended*, Housing and Urban Development Act of 1968, 82 Stat. 476, § 504.

14. Thus, the draft slum clearance bill prepared by the U.S. Department of Housing and Urban Development defines a "slum" area as

> an area in which there is a predominance of buildings . . . which by reason of dilapidation, deterioration, age or obsolescence, inadequate provision for ventilation, light, air, sanitation, or open spaces, high density of population or overcrowding, or the existence of conditions which endanger life or property by fire and other causes . . . is detrimental to the public health, safety, morals or welfare.

Office of General Counsel, [U.S.] Department of Housing and Urban Development, Draft Slum Clearance and Urban Renewal Bill § 19(h) (Nov. 19, 1965). *Cf.* the language of state statutes authorizing building demolition without compensation, discussed in text accompanying notes 26-47 *infra*.

15. This statement must be qualified to the extent that a property owner who claims that his building was improperly demolished without compensation may bring an action by way of inverse compensation to claim his damages. McMahon v. City of Telluride,

of these three techniques. One is the problem of equity.[16] Uncle Jim may be ordered to repair his house with his own resources, while Aunt Jane may not only be paid full compensation for her home as part of an urban renewal project, but may also be reimbursed for the cost of finding new housing.[17] The mutually exclusive character of these programs creates difficulties on the public side of the process as well. Housing code enforcement is solely a local regulatory power over housing; it is never accompanied by the payment of compensation. Although housing codes have usually been held constitutional,[18] the courts have left open the possibility that the repairs and alterations required by a code enforcement agency may be so burdensome that they amount to an unconstitutional taking.[19] In this event, the alternative is likely to be no housing code enforcement at all. Under building demolition legislation, however, a finding is made that the structure either is or is not subject to demolition without compensation; a finding that the building has some value—and therefore is subject to demolition on payment of some compensation—is not possible. On the other hand, compensation at market values must be paid in urban renewal project areas, and reformers have argued that the law of just compensation does not take adequate account of the substandard condition of slum property.[20] As a result, they contend, eminent domain awards are exces-

79 Colo. 281, 244 P. 1017 (1926), noted, 46 A.L.R. 363 (1927). But such a cause of action must be based on an improper exercise of the building demolition power, not on the argument that the property should have been included in an urban renewal so that compensation could have been paid.

16. In some cities, extensive building demolitions under the demolition ordinance have preceded later acquisition of the cleared sites for urban renewal purposes, with the result that costs of acquisition have been substantially reduced. The use of this strategy in Detroit, Michigan, was reported to the author. Apparently this helped to produce the unfavorable judicial reaction in City of Detroit v. Cassese, 376 Mich. 311, 136 N.W.2d 896 (1965), discussed in text accompanying note 165 *infra*. Federal regulations for the federal demolition grant program indicate that federal assistance is available for demolition "in an urban renewal project area for which survey and planning activities are being carried out." DEMOLITION GRANT HANDBOOK, *supra* note 10, at 6.

17. This problem has been partially alleviated by a program of individual federal grants for property rehabilitation, up to a ceiling of $3,000. Housing Act of 1949, § 115, 42 U.S.C. §§ 1452(b), 1465 (1964), *as amended*, Housing Act of 1968, 82 Stat. 476, § 503. But federal grants are obviously not a complete solution.

18. *E.g.*, Apple v. City and County of Denver, 154 Colo. 166, 390 P.2d 91 (1964); Note, *Municipal Housing Codes*, 69 HARV. L. REV. 1115 (1956).

19. *See* Kaukas v. City of Chicago, 27 Ill. 2d 197, 188 N.E.2d 700, *appeal dismissed*, 375 U.S. 8 (1963). *See also* Sawyer v. Robbins, 213 S.2d 515 (Fla. App. 1968), holding that a violation of a local housing code is not necessarily an enjoinable nuisance in a case in which the defect alleged was a failure to provide hot water facilities.

20. The cry is not a new one. For a sampling of the literature, *see* PRESIDENT'S CONFERENCE ON HOME BUILDING AND HOME OWNERSHIP: SLUMS, LARGE-SCALE HOUSING AND DECENTRALIZATION 107 (1932); Dagen & Cody, *Property, Et Al. v. Nuisance, Et Al.*, 26 LAW & CONTEMP. PROB. 70 (1961); Johnson, *Rehabilitation Feasibility Studies in Fed-*

sive, owners of substandard dwellings are overcompensated, and the cost of new or rehabilitated housing is increased. These disparities between the compliance and compensation burdens are aggravated by the fact that, even though land reassembly is often required in housing improvement programs, title to the land may be taken by a public agency only in urban renewal.

This Article will attempt to reconcile the exercise of public powers over slum housing by proposing a basis for compensation that is applicable no matter what program treatment is selected. While not minimizing the difficult problems of land valuation in slum areas, the Article will focus on the problem of compensation for substandard slum dwellings. It will propose a sliding scale of compensation—one that permits a range of compensatory payments which are related to compliance with housing code requirements. Standardizing the basis for compensation will not only remove present inequities in program application; it will also permit a choice of the appropriate program treatment without the present concern that different programs visit widely disparate burdens on both property owners and public agencies. The discussion will begin with an analysis of the law of building demolition. Since judging a building suitable for demolition is a determination—in constitutional terms—that the structure has no value at all, the law of demolition should at least provide a starting point for constructing a standard measure of the compensatory interest in slum housing.

I. Demolition of Substandard Buildings

A. *Legal Basis for Demolition*

Legal authority for demolition of substandard buildings is found in a bewildering array of powers which can be understood only in light of their historical development. The authority to demolish substandard structures had its origins in the common-law power[21] of municipalities to demolish buildings as public nuisances. Of

erally-Assisted Areas, 34 Appraisal J. 183, 188 (1966); Levi, *Focal Leverage Points in Problems Relating to Real Property*, 66 Colum. L. Rev. 275 (1966).

21. The existence of this power at common law appears to be an exception to the usual rule that municipalities have only those powers which are conferred by statute or home-rule constitutional provisions, as implemented through charter or local ordinance. D. Mandelker, Managing Our Urban Environment 220, 221 (1966). The answer appears to lie in the fact that the power to demolish substandard buildings is merely an instance of equity jurisdiction, not dependent on statute, which municipalities invoke through appropriate court proceedings. For a modern example of the exercise of common-law powers of building demolition, *see* Takata v. City of Los Angeles, 184 Cal. App. 2d 174, 7 Cal. Rptr. 516 (1960) (avoiding challenge to retroactive application of ordinance).

course, the "common-law" adjective is not entirely accurate, as the power to order demolition was actually established in equity. These equity origins are critical, for the way in which equity shaped the power to order demolition still affects the constitutional basis of demolition law.

Early state statutes, local home rule charters, and local ordinances ratified the common-law power to demolish buildings by simply conferring the power to abate nuisances. Building demolitions still occur under these provisions.[22] More complex legislation directed solely to the demolition problem followed, either in local building [23] and housing [24] codes or in state statutes.[25] These statutes fall into two groups.[26]

One type, based on a model law drafted near the turn of the century,[27] authorizes state fire marshals and similar local agencies to

22. California and Florida do not have specific statutory authority for demolition of substandard buildings. *But see* FLA. STAT. ANN. § 167.05 (1966), authorizing municipalities to abate nuisances. The Florida court at one time suggested this provision as an alternative to slum clearance under eminent domain. Adams v. Housing Authority, 60 S.2d 663 (Fla. 1952). In City of Bakersfield v. Miller, 64 Cal. 2d 93, 410 P.2d 303 (1966), the court held that the state statute authorizing municipal abatement of nuisances conferred power on municipalities to adopt by reference a uniform building code containing provisions permitting the demolition of unsafe buildings. However, state enabling legislation for substandard building demolition need not always be implemented by local ordinance. Fairfield v. Wolter, 10 Wis. 2d 521, 103 N.W.2d 523 (1960).

23. *E.g.*, INTERNATIONAL CONFERENCE OF BUILDING OFFICIALS, UNIFORM BUILDING CODE, VOLUME IV: DANGEROUS BUILDINGS (1967). Uniform model building codes, published by various national organizations of national and related officials, have been available since 1905. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, BUILDING CODES: A PROGRAM FOR INTERGOVERNMENTAL REFORM 71 (1966). For a survey of building code adoptions in the Puget Sound area of the State of Washington, *see* Puget Sound Governmental Conference, A Survey of Building Codes (April 1967). In contrast to the housing code, the building code establishes standards for new construction.

24. As part of this study, a survey of the housing codes of several major cities was conducted to determine whether the codes contained demolition provisions. For one such provision, *see* Cleveland Codified Ordinances § 6.1305(c) (1960). For an application of this provision, and a similar provision in the local building code, *see* State *ex rel.* Schulman v. City of Cleveland, 8 Ohio Misc. 1, 220 N.E.2d 386 (1966).

25. State attention to the demolition problem has been episodic. The earliest legislation dates from the turn of the century, when the housing reform movement originated. *See* L. FRIEDMAN, *supra* note 6, at 68-72, discussing a model tenement demolition law drafted in the state of New York in that period. Legislative activity also picked up during the depression of the 1930's, and in recent years under the spur of the federal housing program.

26. Some of the legislation to be discussed applies only to dwellings, while some is of more general application and applies to any building or structure. The state fire marshal laws, discussed at notes 27-28 *infra* and accompanying text, are in the second category. The federal eligibility requirements for demolition assistance grants should be compared with the state legislation authorizing demolition of substandard buildings. Federal regulations require that "[t]he structures to be demolished must constitute a public nuisance and a serious hazard to the public health and welfare." DEMOLITION GRANT HANDBOOK, *supra* note 10, at 1.

27. It has been suggested that a provision for the demolition of unsafe buildings first appeared in a model state fire marshal act drafted around 1916 by the Fire Marshals' Association of North America. Letter from Robert W. Grant, Executive Secretary, Fire Marshals' Assn. of North America to the author, Aug. 20, 1968.

demolish buildings in order to eliminate fire hazards. The model law on which these statutes are based authorizes the demolition of any building which "for want of repairs, lack of or insufficient fire escapes, automatic or other fire alarm apparatus or fire extinguishing equipment, or by reason of age or dilapidated condition, or from any other cause, is especially liable to fire, and which is so situated as to endanger other property . . . ."[28] Laws of this type are found in about half the states. While the authority to demolish buildings under these statutes is lodged primarily in the state fire marshal, in some states it has been extended to local fire departments or fire chiefs, or to other local officers.[29]

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28. Fire Marshals' Assn. of North America, Suggested State Fire Marshal Law § 7 (mimeo, undated). Several of the fire hazard demolition laws substantially follow this model. ALA. CODE tit. 55, § 39 (1958); FLA. STAT. ANN. § 633.081 (Supp. 1968); HAWAII REV. LAWS § 184-7(e) (1955); IND. ANN. STAT. § 20-807 (1964); KY. REV. STAT. §§ 227.380 (Supp. 1968), 227.390 (1966); LA. REV. STAT. ANN. § 40:1575 (1965); N.H. REV. STAT. ANN. § 153:14(II) (1955); TENN. CODE ANN. § 53-2417 (1966). Kentucky and Hawaii omit a reference to fire apparatus and equipment. Louisiana adds a reference to ingress and egress. Kentucky permits demolition only when repair is not feasible.

To the clause of the model act authorizing demolition for lack of sufficient fire escapes, apparatus, and equipment, the Michigan law adds a second clause authorizing demolition whenever the building contains "defective electrical wiring or electrical equipment, defective chimneys, defective gas connections, defective heating apparatus." MICH. COMP. LAWS § 29.8 (1967). Several statutes include only the second Michigan clause and omit the clause of the model act authorizing demolition for lack of fire escapes or other fire apparatus. Otherwise, these laws follow the model act. MINN. STAT. ANN. § 73.09 (1968); MONT. REV. CODES ANN. § 82-1219 (1966); NEB. REV. STAT. § 81-513 (1966); N.D. CENT. CODE § 18-01-14 (1960); OHIO REV. CODE ANN. § 3737.01 (Page Supp. 1967); WYO. STAT. ANN. § 35-426 (1959), or a model ordinance based on the Michigan version of the fire marshal law, but recommended for adoption as a general building demolition ordinance, *see* League of Oregon Cities, Abatement of Building Nuisances, Legal Bull. No. 1, at 4 (1936).

Still other laws omit both the fire escape and apparatus clause of the model act and the second Michigan clause. Otherwise, they substantially follow the model act. GA. CODE ANN. §§ 92A-724 to 726 (1958); IOWA CODE ANN. §§ 100.13 (Supp. 1968), 100.27 (1949); ME. REV. STAT. ANN. tit. 25, § 2393 (1964); MD. ANN. CODE art. 38A, § 9(b) (1964) (adds abandoned condition); OKLA. STAT. ANN. tit. 74, § 317 (1965); PA. STAT. ANN. tit. 35, § 1183(a) (1964); W. VA. CODE ANN. § 29-3-4a (1966). South Dakota authorizes demolition of "unusually hazardous or dangerous" buildings which are liable "to cause fire or explosion." S.D. CODE § 31.0305 (Supp. 1960).

The model law uses a series of cumulative causes and is not a model of clarity. After a reference to buildings with the indicated substandard conditions, it then provides that the state fire marshal or his deputies "shall order the same to be removed or remedied." Some of the adopted statutes more explicitly authorize demolition. The model law, and some of the state statutes, also refer in the same section to inflammable and combustible conditions in buildings, and similarly authorize that they be removed or remedied. It is doubtful, however, whether the presence of inflammable or combustible material would warrant demolition. The court would probably order abatement of the dangerous use. *See* Albert v. City of Mountain Home, 81 Idaho 74, 337 P.2d 377 (1959), and the discussion in text accompanying notes 61-63 *infra*.

29. *See, e.g.*, the Oklahoma and South Dakota laws, *supra* note 28. In urban areas, intensive campaigns have sometimes been waged under the authority of these statutes. For discussion of the demolition program of Milwaukee, Wisconsin, in the years from 1928 to 1948, *see* Lewis, *Condemnation of Dilapidated Buildings*, THE MUNICIPALITY, Feb. 1948, at 31. On the Portland, Oregon, program during the same period, *see* Letter

A second kind of statute, found in practically all the states, authorizes local government units to demolish dangerous, unsafe, or unfit buildings; of course, the language of the statutes in this group varies considerably in scope and complexity.[30] Many of the demolition statutes explicitly authorize demolition as an alternative to repair—a limitation on the power to demolish which is also reflected in some judicial decisions.[31] This second group of demolition statutes does not restrict building demolition to situations in which there is a finding of fire hazard, although fire hazard may appear as one of the grounds on which demolition can be ordered. Statutes in nine states authorize building demolition for a variety of substandard conditions, all of which contribute to a finding that the building is "unfit" for human habitation. The Alaska statute is typical. It authorizes demolition

> [w]hen a municipality finds that a dwelling exists which is unfit for human habitation due to dilapidation, defects increasing the hazard of fire, accident or other calamity, lack of ventilation, light or sanitary facilities, or any other condition [including those set out later in the statute] . . . which makes the dwelling unsafe or insanitary, or dangerous or detrimental to the health, safety or morals, or otherwise inimical to the residents of the municipality . . . .[32]

A later provision in this statute lists additional conditions which may lead to a finding of unfitness, such as "blighting" factors, over-

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from Fred W. Roberts, Fire Marshal, Portland, Oregon, to Arthur S. Harris, Boston Chamber of Commerce, Nov. 14, 1940. (A copy is on file with the *Michigan Law Review*.)

30. For the most part, statutory language using one or more of the typical phrases to describe a building subject to demolition has been upheld as providing a standard definite enough to avoid delegation of power objections. Keyes v. Madsen, 179 F.2d 40 (D.C. Cir. 1949), *cert. denied*, 339 U.S. 928 (1950); Springfield v. Little Rock, 226 Ark. 462, 290 S.W.2d 620 (1956); Moll Co. v. Holstner, 252 Ky. 249, 67 S.W.2d 1 (1934); Lyons v. Prince, 281 N.Y. 557, 24 N.E.2d 466 (1939); State *ex rel.* Schulman v. City of Cleveland, 8 Ohio Misc. 1, 220 N.E.2d 386 (1966); Eno v. City of Burlington, 125 Vt. 8, 209 A.2d 499 (1965); *cf.* Petrushansky v. State, 182 Md. 164, 32 A.2d 696 (1943). Statutes authorizing demolition of buildings constituting fire hazards have also been sustained against delegation of power objections. American Home Fire Assur. Co. v. Mid-West Enterprise Co., 189 F.2d 528 (10th Cir. 1951).

In some cases in which standards have been declared inadequate, the ordinance language appears to be properly open to objection. City of Evansville v. Miller, 146 Ind. 613, 45 N.E. 1054 (1897) (building partially destroyed by fire); Lux v. Milwaukee Mechanics Ins. Co., 322 Mo. 342, 15 S.W.2d 343 (1929) (discretionary power of building official not limited). On the other hand, a few cases, some of them modern, have found unconstitutional delegations of power in the face of fairly specific legislative language. People *ex rel.* Gamber v. Sholem, 294 Ill. 204, 128 N.E. 377 (1920); City of Saginaw v. Budd, 381 Mich. 173, 160 N.W.2d 906 (1968); Richards v. City of Columbia, 227 S.C. 538, 88 S.E.2d 683 (1955); Jones v. Logan City Corp., 19 Utah 2d 169, 428 P.2d 160 (1967). These cases are difficult to square with judicial acceptance of similar standards in zoning cases. Mandelker, *Delegation of Power and Function in Zoning Administration*, 1963 WASH. U. L.Q. 60.

31. *See* text accompanying notes 67-73 *infra*.

32. ALASKA STAT. § 18.55.750 (1962).

crowding, and "any violation of health, fire, building or zoning regulations, or any other laws or regulations, relating to the use of land and the use and occupancy of buildings and improvements."[33] Note that some of these conditions may relate to characteristics which are not necessarily structural. Additional standards on which to base a finding of unfitness may be provided by local ordinance.[34] Finally, demolition may not be authorized under the Alaska act if a dwelling can be repaired at "a reasonable cost in relation to its value,"[35] and local ordinances must fix a repair ratio to be used in determining whether repair is reasonable.[36] Other statutes modeled on the Alaska law follow its general format but omit some of the conditions on which a demolition order may be rested.[37]

To be compared with laws enacted on the Alaska model are the statutes which simply select one generic term—such as buildings which are "dangerous to life or health,"[38] unsafe,[39] or in some other

33. ALASKA STAT. § 18.55.860 (1962). The provision authorizes a determination that a dwelling is unfit for human habitation if . . . conditions exist which are dangerous or injurious to the health, safety or morals of the occupant of the dwelling, the occupants of neighboring dwellings or other residents of the municipality, or which have a blighting influence on properties in the area. These conditions may include the following without limitation: defects increasing the hazards of fire, accident, or other calamity; lack of adequate ventilation, light or sanitary facilities; dilapidation; disrepair; structural defects; uncleanliness; overcrowding; inadequate ingress and egress; inadequate drainage; or any violation of health, fire, building or zoning regulations, or any other laws or regulations, relating to the use of land and the use and occupancy of buildings and improvements.

34. ALASKA STAT. § 18.55.860 (1962).

35. ALASKA STAT. § 18.55.810 (1962). A finding of unfitness can lead either to an order for demolition or repair, or to an order that the building be closed to occupancy until repairs are made.

36. ALASKA STAT. § 18.55.820 (1962).

37. The Hawaii statute is identical to the Alaska law. HAWAII REV. LAWS § 143-60 (1955). All of the other statutes contain the primary conditions used to determine unfitness which appear in the Alaska statute, and which are quoted in the text accompanying note 32. However, New Hampshire and Washington omit the reference to unsafe buildings. The difference in the other statutes is that they all omit some of the secondary conditions leading to a finding of unfitness which are included in the Alaska statute quoted in note 33 *supra*. The statutes are listed below, with the omissions from the Alaska provision indicated. KY. REV. STAT. §§ 80.630, 80.680 (1966) (omits overcrowding, ingress and egress, drainage, and violation of laws); N.H. REV. STAT. ANN. §§ 48A: 2, 6, 7 (Supp. 1967) (omits blighting influence); N.J. STAT. ANN. § 40:48-2.3 (1967) (omits all secondary conditions and ordinance authority to state additional conditions); S.C. CODE ANN. §§ 36-502, 36-503(3), 36-505 (1962) (like Kentucky, but also omits blighting influences); TENN. CODE ANN. §§ 13-1202, 13-1203(c), 13-1204 (1955) (like South Carolina); WASH. REV. CODE § 35.80.030(d)(e) (Supp. 1967) (omits blighting influence, egress and ingress, violation of laws); W. VA. CODE ANN. § 8-4-10a (1966) (like New Jersey).

Kentucky, New Jersey, and West Virginia omit the reasonable-cost test as the basis for ordering demolition, and Washington permits a demolition order to be based, in the alternative, on the degree of structural deterioration. New Hampshire includes the reasonable-cost test but does not permit specification of the ratio of repair in local ordinances.

38. CONN. GEN. STAT. § 19-344 (1960); IOWA CODE ANN. § 413.80 (1949); LA. REV. STAT. ANN. § 33:4752 (1966) (cities over 100,000); N.Y. MULT. DWELL. LAW § 309(1b) (Supp. 1968). *See also* TEX. REV. CIV. STAT. art. 1015(24) (1963) (dangerous and liable to fall); WYO. STAT. ANN. § 15.1-3(24) (1965) (dangerous).

39. D.C. CODE ANN. § 5-501 (1967); VT. STAT. ANN. tit. 24, § 3111 (1959).

comparable condition[40]—to describe buildings subject to demolition. In about half the states, somewhat more complex statutes may contain as many as six or seven conditions which can justify the demolition of a dwelling.[41] Dwellings which are either "dangerous"

40. IND. ANN. STAT. § 35-2708 (1949) (unfit for human habitation, health agencies); OHIO REV. CODE ANN. § 715.26 (Page 1954) (insecure); TEX. REV. CIV. STAT. art. 1067 (1963) (dilapidated). *See also* R.I. GEN. LAWS ANN. § 45-2402(3)(9b) (Supp. 1967), which simply uses a reasonable-cost-of-repair standard as the basis for authorizing demolition.

Other statutes authorize the demolition of buildings which are either dangerous or unsafe. ILL. ANN. STAT. ch. 34, § 429.8 (Smith-Hurd, Supp. 1967) (counties); Kan. Gen. Stat. Ann. § 12-1752 (1965); N.Y. TOWN LAW § 130(16) (1965); N.Y. VILLAGE LAW § 89(7-a) (1951).

41. Citations to the statutes follow. As there are minor variations in phraseology in these laws, the phrase used to describe the substandard building condition selected by the statute to justify demolition does not always correspond to the exact statutory authorization. For example, some of the statutes permit the demolition of buildings which menace the public health or safety—a ground for demolition which is taken as the equivalent of an authorization to demolish "dangerous" buildings. The substantive effect of the statutory substandard conditions varies. Usually the indicated conditions are available as alternative grounds for demolition. Other statutes simply authorize the demolition of buildings which are nuisances or which are injurious or detrimental to the health or general welfare, and then provide a variety of substandard conditions which can provide the basis for such a finding.

For example, one type of statute authorizes the demolition of buildings which are either dangerous or unsafe, and then includes additional grounds for demolition. These additional grounds are indicated for each statute following the citation: ILL. ANN. STAT. ch. 24, § 11-31-1 (Supp. 1967) (incomplete, abandoned); IND. ANN. STAT. § 48-6144 (Supp. 1968) (insanitary, fire hazard, violation of law); ME. REV. STAT. ANN. tit. 17, § 2851 (Supp. 1968) (unstable, insanitary, fire hazard, unsuitable for use, inadequate maintenance, dilapidation, obsolescence, abandonment); WIS. STAT. ANN. § 66.05(1)(a) (1965) (old, dilapidated, out of repair, insanitary, unfit, unreasonable to repair). The Wisconsin law also provides that repairs will be presumed unreasonable whenever the cost of repairs exceeds fifty per cent of the assessed value of the building. WIS. STAT. ANN. § 66.05(1)(b) (1965).

Another type of statute authorizes the demolition of buildings that are dangerous, and then includes additional grounds for demolition. These additional grounds are indicated for each statute following its citation: D.C. CODE ANN. § 5-622 (1967) (insanitary); GA. CODE ANN. § 69-1118 (1967) (unfit); IND. ANN. STAT. § 48-1407(24) (1963) (insecure, violation of law); IDAHO CODE ANN. § 50-335 (1967) (dilapidated, fire hazard); LA. REV. STAT. ANN. § 33:4761 (1966) (dilapidated); MASS. GEN. LAWS ANN. ch. 139, § 1 (Supp. 1968), ch. 139, § 3 (1958) (burnt, dilapidated); MASS. GEN. LAWS ANN. ch. 143, § 9 (Supp. 1968) (abandoned); MASS. GEN. LAWS ANN. ch. 111, § 127B (Supp. 1968) (noncompliance with state sanitary code); MICH. COMP. LAWS §§ 5.2843, 5.2858 5.2873(1) (1967) (disrepair); MINN. STAT. ANN. § 463.15(3) (Supp. 1968) (inadequate maintenance, dilapidation, physical damage, insanitary, abandonment, fire hazard); MISS. CODE ANN. § 3374-149 (1956) (insecure); N.H. REV. STAT. ANN. §§ 155-B:1, 155-B:2 (Supp. 1967) (inadequate maintenance, dilapidation, physical damage, insanitary, abandonment, fire hazard); N.Y. MULT. DWELL. LAW § 309(2) (1946) (abandoned, fire hazard); N.D. CENT. CODE § 40-05-02(24) (1968) (like Idaho); PA. STAT. ANN. tit. 53, § 14611 (Supp. 1967) (hazardous, structurally unsound, unfit, violation of law—first class cities); TEX. REV. CIV. STAT. art. 1175(25) (1963) (like Idaho—home rule cities); UTAH CODE ANN. § 10-8-52 (1962) (violation of law).

Two statutes authorize the demolition of unsafe buildings, and include additional grounds for demolition. These additional grounds are indicated for each statute following its citation: ARK. STAT. ANN. § 19-2803 (1956) (dilapidated, unsightly, insanitary, obnoxious, detrimental to public welfare); NEV. REV. STAT. § 266.335(3) (1967) (insecure).

A final type of statute makes no reference to dangerous or unsafe conditions, but includes a variety of other conditions as the basis for demolition. These conditions are

or "dangerous to life or health" may be demolished under most of these statutes; many of them also authorize the demolition of "unsafe," "dilapidated," "insanitary," or "unfit" dwellings. A few, like the Alaska statute, depart from a purely structural basis for demolition and authorize demolition whenever conditions such as age, abandonment, or obsolescence justify it.[42]

Model demolition ordinances drafted by national code-drafting agencies[43] usually follow one or another of the statutory patterns outlined above, and their provisions are also reflected in local ordinances.[44] One exception is the demolition provision found in the Uniform Building Code.[45] It lists seventeen "conditions or defects" which will lead to a finding that a building is so "dangerous" that it is subject to demolition.[46] Many of these conditions or defects echo the more general language of the state statutes, but some are

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indicated for each statute following its citation: N.M. STAT. ANN. § 14-17-4(A) (Supp. 1967) (ruined, damaged, dilapidated); N.Y. MULT. DWELL. LAW § 309(1a) (Supp. 1968) (overcrowded; inadequate access; insufficient for its use); WIS. STAT. ANN. § 66.05(8)(a)(b) (1965) (deteriorated, dilapidated, blighted, and vandalized). The Wisconsin statute also authorizes demolition whenever a building with the indicated substandard conditions "offends the aesthetic character of the immediate neighborhood or produces blight."

42. ALASKA STAT. § 18.55.680 (1962).

43. Most of these provisions have been drafted as part of suggested model building codes. BUILDING OFFICIALS CONFERENCE OF AMERICA, BASIC BUILDING CODE § 125.1 (4th ed. 1965) refers to "[a]ll buildings or structures that are or hereafter shall become unsafe, unsanitary, or deficient in adequate exit facilities, or which constitute a fire hazard, or are otherwise dangerous to human life or the public welfare, or which by reason of illegal or improper use, occupancy or maintenance . . . ." Vacant and unguarded buildings are also "deemed" unsafe. AMERICAN INS. ASSN., NATIONAL BUILDING CODE § 104.1 (1967 ed.) refers to buildings and structures "deemed structurally unsafe; unstable; unsanitary, inadequately provided with exit facilities; constituting a fire hazard; unsuitable or improper for the use of [or?] occupancy to which they are put; constituting a hazard of health or safety because of inadequate maintenance, dilapidation, obsolescence or abandonment; or otherwise dangerous to life or property." The code also applies to "[v]acant buildings . . . deemed to constitute a hazard." *See also* SOUTHERN BUILDING CODE CONGRESS, SOUTHERN STANDARD BUILDING CODE § 103.4 (undated) (similar).

A model demolition provision is also included in a recently proposed model housing code. AMERICAN PUBLIC HEALTH ASSN.-[U.S.] PUBLIC HEALTH SERVICE, RECOMMENDED HOUSING MAINTENANCE AND OCCUPANCY ORDINANCE § 16.02.01 (rev. ed., 1967): "Any dwelling [is] . . . unfit for human habitation when, in the judgment of the (appropriate authority) it is so damaged, decayed, dilapidated, insanitary, unsafe or vermin-infested as to created [sic] a hazard to the health, safety and welfare of the occupants or of the public, and where the structure is determined by the (Appropriate Authority) not to warrant repair . . . ." The code also authorizes demolition of any vacant building declared by the appropriate authority to be "detrimental to the public health, safety or welfare." *Id.* § 16.02.02.

44. *E.g.*, Dallas, Tex., Ordinance 11339, Jan. 24, 1966, *amending* DALLAS, TEX., REV. CODE § 27-38 (1960); Denver, Colo., Ordinance 170, June 13, 1955; Detroit, Mich., Ordinance 676-F, Feb. 27, 1962; Miami, Fla., Ordinance 6908, July 25, 1961; New Orleans, La., Ordinance 18,584, Jan. 10, 1963.

45. INTERNATIONAL CONFERENCE OF BUILDING OFFICIALS, UNIFORM BUILDING CODE, VOLUME IV: DANGEROUS BUILDINGS (1967 ed.).

46. *Id.* § 302.

more specific. For example, one of the conditions which will justify demolition is a "stress in any materials . . . more than one and one-half times the . . . stress allowed" in the Uniform Building Code.[47] This code also contains a repair standard; it directs public agencies to order repair rather than demolition if the building "reasonably can be repaired."[48] But if the cost of repair exceeds fifty per cent of the current replacement cost of the building,[49] demolition is the appropriate remedy.

B. *The Constitutional Basis for Demolition*

1. *In General*

While the constitutionality of statutes permitting building demolition has been established in principle,[50] the constitutional acceptability of the various legislative standards relied upon to authorize demolitions is less clear.[51] The problem is that the judicial decisions on the subject have taken a course independent of the statutory language;[52] some statutes, such as those following the Alaska model, have not even been tested. Most of the demolition cases are old. They were decided at a time when the constitutional basis for public regulatory powers was more primitive, and, as noted above, they take as their basic premise the origins of the demolition power in equity actions against public nuisances. Even if a statute does not explicitly provide that only buildings which are in fact nuisances may be demolished,[53] the courts often read such a limitation into the

47. *Id.* § 302(2).

48. *Id.* § 403(a)(1).

49. *Id.* § 403(a)(2). For a case involving a similarly detailed provision in a local ordinance, *see* Goldsberry v. City of Omaha, 181 Neb. 823, 151 N.W.2d 329 (1967). More detailed specification of the standards for demolition may help guard against a finding of unconstitutional delegation of power but would not seem to affect the problem of finding a constitutionally supportable basis for the demolition order.

50. *E.g.*, Polsgrove v. Moss, 154 Ky. 408, 157 S.W. 1133 (1913) (dangerous buildings law); Swett v. Sprague, 55 Me. 190 (1867) (same); Maxedon v. Rendigs, 9 Ohio App. 60 (1917) (same); City of Saginaw v. Budd, 3 Mich. App. 681, 143 N.W.2d 608 (1966), *rev'd on other grounds*, 381 Mich. 173, 160 N.W.2d 906 (1968) (stressing elimination of fire hazards); Jackson v. Bell, 143 Tenn. 452, 226 S.W. 207 (1920) (fire hazard law); Theilan v. Porter, 82 Tenn. 622 (1885) (law for condemnation of unhealthy buildings).

51. One reason for this is that demolition is usually based on a total assessment of building condition, so that appellate courts find it difficult to isolate for consideration the particular statutory criterion that contributed to the final judgment.

52. Statutes authorizing the demolition of buildings that are fire hazards may be an exception. *See* Runge v. Glerum, 37 N.D. 618, 164 N.W. 284 (1917); Commissioner of State Police v. Anderson, 344 Mich. 90, 73 N.W.2d 280 (1955).

53. But this interpretation has been read into building demolition statutes even though the statute does not specifically declare that dangerous buildings are nuisances. York v. Hargardine, 142 Minn. 219, 171 N.W. 773 (1919); State *ex rel.* Brown v. Armstrong, 206 Okla. 145, 241 P.2d 959 (1952); *cf.* Thornton v. Chase, 175 Misc. 748, 23 N.Y.S.2d 735 (Sup. Ct. 1940). The statute may declare that a structure which violates the dangerous building statute is a nuisance, *e.g.*, WIS. STAT. ANN. § 280.21 (Supp. 1968).

legislation.[54] To qualify for demolition under the statutory standard alone is not enough. This interpretation reflects the supposedly well-established principle that legislation may not declare to be a nuisance any use or condition which was not a nuisance at common law[55]—a principle that courts have discarded in other areas of land use regulation in favor of more modern due process interpretations which emphasize the reasonableness of the control. Zoning is perhaps the best case in point.[56] Some of the more recent building demolition cases[57] have been decided under modern doctrine, and demolition has been upheld if it is reasonable under all of the circumstances.[58] But this approach is not typical.

Because most of the demolition cases are based on the nuisance rationale originated in equity, they start with the basic equitable premise that demolition is an extreme remedy to be ordered only in

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Or the public nuisance standard may be stated as an alternative basis for demolition. IND. ANN. STAT. § 48-6144 (Supp. 1968).

54. *E.g.*, McMahon v. City of Telluride, 79 Colo. 281, 244 P. 1017 (1926); Western & Atlantic R.R. v. City of Atlanta, 113 Ga. 537, 38 S.E. 996 (1901); Cole v. Kegler, 64 Iowa 59, 19 N.W. 843 (1884); Maxedon v. Rendigs, 9 Ohio App. 60 (1917); State *ex rel.* Shulman v. City of Cleveland, 8 Ohio Misc. 1, 220 N.E.2d 386 (C.P. 1966); Cummings v. Lobsitz, 42 Okla. 704, 142 P. 993 (1914); Gow Why v. City of Marshfield, 138 Ore. 167, 5 P.2d 696 (1931); Township of Ridley v. Patrycia, 51 Del. Co. 474 (Pa. C.P. 1963); Crossman v. City of Galveston, 112 Tex. 303, 247 S.W. 810 (1923); *cf.* Yates v. Milwaukee, 77 U.S. 497 (1870); Ajamian v. Township of North Bergen, 103 N.J. Super. 61, 246 A.2d 521 (L. 1968) (closing order). *But cf.* City of Bakersfield v. Miller, 64 Cal. 2d 93, 410 P.2d 393, 48 Cal. Rptr. 889 (1966).

The requirement that the building which is destroyed must be a nuisance can be the basis for an action for the recovery of damages when the building is destroyed but is later found not to have been a nuisance. For a good discussion, *see* McMahon v. City of Telluride, *supra. Contra,* Moton v. City of Phoenix, 100 Ariz. 23, 410 P.2d 93 (1966).

55. For a modern echo of this doctrine, *see* Commonwealth v. Christopher, 184 Pa. Super. 205, 132 A.2d 714 (1957), invalidating an ordinance prohibiting the storage of junked automobiles within the municipality.

56. The United States Supreme Court said as much in the leading case of Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). *See also* Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962) (ordinance prohibiting pit excavation below water level); King v. Davenport, 98 Ill. 305 (1881) (fire limits); Udell v. Haas, 21 N.Y.2d 463, 235 N.E.2d 897, 288 N.Y. Supp. 888 (1968) (zoning case); *cf.* Allison v. City of Richmond, 51 Mo. App. 133 (1892), which suggests that cities may be given power by statute to declare nuisances which would not be considered such at common law.

57. Springfield v. City of Little Rock, 226 Ark. 462, 290 S.W.2d 620 (1956); Combs v. City of New Albany, 218 N.E.2d 349 (Ind. 1966); Boden v. City of Milwaukee, 8 Wis. 2d 318, 99 N.W.2d 156 (1959); *cf.* Goldsberry v. City of Omaha, 181 Neb. 823, 151 N.W.2d 329 (1967).

58. The judicial approaches to building demolition cases may be altered by the availability of administrative procedures in more modern statutes and ordinances which predicate a demolition order on explicit findings of fact by an administrative tribunal. In one such case, the appellate court contented itself with a review of the facts used to justify the demolition without inquiring into the constitutionality of the ordinance under which the demolition was ordered. Keiner v. City of Anchorage, 378 P.2d 406 (Alaska 1963). This approach is correct only if the court is willing to accept as constitutional the statutory basis on which demolition is ordered. *See* Ukkonen v. City of Minneapolis, 160 N.W.2d 249 (Minn. 1968).

extreme cases.[59] Demolition has been strictly limited to buildings in such bad physical repair that they present a structural, fire, or other physical hazard. Whatever the statutory formula, the cases have generally held that mere dilapidation[60] or age[61] is not enough to justify demolition unless there is an imminent danger traceable to the structure's physical condition.[62] Another important limitation is the reluctance of equity to order demolition when the substandard condition arises from mere use of the building.[63] In this event, abatement of the use affords a sufficient remedy. While the objectionable use cases have usually involved nonstructural conditions such as accumulated rubbish, the presence of undesirable transients, or similar problems, the decisions can be extended to other conditions for which the statutes authorize demolition. For example, overcrowding[64] easily classifies as an improper use which can be abated; presumably lack of sanitary and other health and safety facilities[65] can be treated in the same way. Once the needed facilities have been supplied by the owner, it can be argued that the use of the building is legal and demolition unnecessary. This line of author-

59. For application and discussion of this principle in a recent case, *see* Village of Zumbrota v. Johnson, 161 N.W.2d 626 (Minn. 1968) (notice to property owner held insufficient). *See also* Polsgrove v. Moss, 154 Ky. 408, 157 S.W. 1133 (1913), explicitly applying common-law principles in the interpretation of a dangerous building statute, and Smith v. Irish, 37 App. Div. 220, 55 N.Y. Supp. 837 (1899).

60. Radney v. Town of Ashland, 199 Ala. 635, 75 S. 25 (1917); Commissioner of State Police v. Anderson, 344 Mich. 90, 73 N.W.2d 280 (1955); Maxedon v. Rendigs, 9 Ohio App. 60 (1917); Crossman v. City of Galveston, 112 Tex. 303, 247 S.W. 810 (1923).

61. *E.g.*, Radney v. Town of Ashland, 199 Ala. 635, 75 S. 25 (1917). Age, as a statutory condition justifying demolition, appears most frequently in the fire hazard acts. *See* notes 28 and 29 *supra*.

62. If the building is in a dangerous condition, that may be enough to justify demolition. Runge v. Glerum, 37 N.D. 618, 164 N.W. 284 (1917) (applying state fire hazard statute); *cf.* O'Rourke v. City of New Orleans, 106 La. 313, 30 S. 837 (1901). This line of authority casts doubt on those statutes which would authorize demolition of structures on the basis of nonstructural conditions, such as abandonment. *See* the statutes cited in note 41 *supra*.

63. Cuba v. Mississippi Cotton Oil Co., 150 Ala. 259, 43 S. 706 (1907); Echave v. City of Grand Junction, 118 Colo. 165, 193 P.2d 277 (1948); Albert v. City of Mountain Home, 81 Idaho 74, 337 P.2d 377 (1959); Welch v. Stowell, 2 Mich. 332 (1846); Allison v. City of Richmond, 51 Mo. App. 133 (1892); Health Dept. of City of New York v. Dassori, 21 App. Div. 348, 47 N.Y. Supp. 641 (1897); Miller v. Burch, 32 Tex. 208 (1869); Verder v. Ellsworth, 59 Vt. 354, 10 A. 89 (1887); *cf.* Eaton v. Klemm, 217 Cal. 362, 18 P.2d 678 (1933), in which the city attempted to demolish a building on the ground that it was a nonconforming use in violation of the zoning ordinance. These cases cast doubt on the propriety of a provision such as that found in the Maine law, which authorizes demolition of a building if it "is unsuitable or improper for the use or occupancy to which it is put." ME. REV. STAT. ANN. tit. 17, § 2851 (Supp. 1967). *But cf.* Nazworthy v. City of Sullivan, 55 Ill. App. 48 (1894), in which the court approved demolition because it found that the objectionable use—tramps and other undesirables frequented the building—was caused by the building's dilapidated condition; *cf.* Martin v. Foreman, 18 Ark. 249 (1856).

64. Several statutes authorize demolition of overcrowded buildings. *See* note 41 *supra*.

65. Several statutes authorize demolition of buildings having inadequate sanitary and other health and safety facilities. *See* notes 32 and 41 *supra*.

ity suggests that the courts will not look favorably upon statutes which call for demolition when serious structural disrepair is not present—at least to the extent that they continue to employ the nuisance rationale. Statutes such as the Alaska law authorizing demolition for a violation of zoning and similar ordinances are especially suspect.[66]

2. *The Repair Test for Demolition*

A corollary to equity's bias against the demolition remedy is a preference for repair as an alternative. Some of the legislation, as we have seen, follows equity by explicitly providing a reasonable repair test as the basis for exercising the demolition power, but the equity bias survives in the cases even in the absence of such an explicit provision. This judicial interpretation is supported by the typical statutory authorization of repair *or* demolition as alternative remedies, even in the absence of an explicit repair test;[67] similarly, statutes authorizing the removal of buildings as fire hazards force attention to the removal of the hazard rather than demolition of the building as the statutory objective.[68] Some courts will order repair rather than demolition whenever repair can eliminate the fire or other danger.[69]

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66. The nuisance basis of demolition decisions has considerable influence on another problem in the application of demolition laws—whether these laws may be applied retroactively to buildings in existence before they were enacted. The issue has not been raised in the demolition cases, probably because of the judicial insistence that the building must qualify as a nuisance to qualify for demolition. The issue has been presented by housing and safety codes, and the courts have usually held that these statutes may be applied retroactively to compel the repair of buildings which were in existence prior to enactment of the particular code. *E.g.*, Queenside Hills Realty Co. v. Saxl, 328 U.S. 80 (1946); Kaukas v. City of Chicago, 27 Ill. 2d 197, 188 N.E.2d 700, *appeal dismissed*, 375 U.S. 8 (1963); City of Louisville v. Thompson, 339 S.W.2d 869 (Ky. 1960); Adamec v. Post, 273 N.Y. 250, 7 N.E.2d 120 (1937); Note, *Municipal Housing Codes*, 69 HARV. L. REV. 1115 (1956). A few recent cases have held to the contrary in the housing code context. City of Columbus v. Stubbs, 223 Ga. 765, 158 S.E.2d 392 (1967) (cumulative minor violations); Dente v. City of Mount Vernon, 50 Misc. 2d 983, 272 N.Y.S.2d 65 (Sup. Ct. 1966); Gates Co. v. Housing Appeals Bd., 10 Ohio St. 2d 48, 225 N.E.2d 222 (1967) (may be applied retroactively only to eliminate nuisance). While these decisions can be dismissed as against the trend of authority, they exhibit a remarkable correspondence to nuisance-based approaches to the demolition power; they tend to limit the retroactive application of housing codes to conditions of structural disrepair.

67. *E.g.*, City of Aurora v. Meyer, 38 Ill. 2d 131, 230 N.E.2d 200 (1967); Application of Iverson, 151 Neb. 802, 39 N.W.2d 797 (1949). *Cf.* the provision that a municipality is not eligible for federal assistance in the demolition of a building unless all procedures to secure remedial action against the owner have been exhausted. DEMOLITION GRANT HANDBOOK, *supra* note 10, at 1.

68. *Cf.* Fields v. Stokley, 99 Pa. 306, 44 Am. Rep. 109 (1882).

69. Commissioner of State Police v. Anderson, 344 Mich. 90, 73 N.W.2d 280 (1955); York v. Hargadine, 142 Minn. 219, 171 N.W. 773 (1919); Application of Iverson, 151 Neb. 802, 39 N.W.2d 797 (1949); Application of Suffern, 12 App. Div. 2d 769, 209 N.Y.S.2d 599 (1961). Application of Suffern, *supra*, was decided under an unsafe-building statute.

Courts have isolated two other approaches to the alternative of repair as a test for demolition. One approach gives the owner an absolute election to make repairs, regardless of cost or of the relationship of cost to the value of the structure.[70] Another approach places sufficient limitations on the right to repair to make the demolition remedy effective against a nonconsenting owner: repairs may not be made whenever the cost of repair is excessive. While judicial consideration of excessive cost is usually offhanded and casual, the cases have variously suggested that repairs will not be allowed when repair requires the substantial reconstruction of the building,[71] when the cost of repair exceeds the value of the building,[72] or when repairs cannot be made at a reasonable cost.[73] Even this attempt to distinguish judicially imposed cost limitations on the right to repair pushes the cases too far; the courts simply accept the repair test which was recognized in equity—repair is held to be the preferable alternative whenever it is practicable.

As indicated above, some statutes have codified the repair test for demolition, often by expressing it in comparative terms. These statutes commonly provide that demolition may be ordered whenever the needed repairs exceed a fixed percentage of building value. This standard is not only easy to administer, but is also easily translated into a measure of compensation. For example, when the repair ratio is exceeded, the building should be subject to acquisition without compensation because, alternatively, it could be demolished without compensation. Because of its adaptability as a measure of compensation, the repair ratio demands further examination.

Repair ratio tests for demolition were first developed as part of local ordinances establishing so-called fire limits within a city. Some-

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All of the other cases were decided under fire hazard laws; *cf.* Iverson v. Keith County, 152 Neb. 565, 41 N.W.2d 858 (1950).

70. Smith v. Lippman, 222 Ind. 261, 53 N.E.2d 157 (1944); State *ex rel.* Brooks v. Crook, 84 Mont. 478, 276 Pac. 958 (1929); Abraham v. City of Warren, 67 Ohio App. 492, 37 N.E.2d 390 (1940); Maxedon v. Rendigs, 9 Ohio App. 60 (1917); *In re* Branham, 70 Ohio L. Abs. 491, 128 N.E.2d 671 (1953). *See especially* the comments of the court in Armistead v. City of Los Angeles, 152 Cal. App. 2d 319, 313 P.2d 127 (1957).

71. City and County of Honolulu v. Caveness, 45 Hawaii 232, 364 P.2d 646 (1961); City of Aurora v. Meyer, 38 Ill. 2d 131, 230 N.E.2d 200 (1967); Crossman v. City of Galveston, 112 Tex. 303, 247 S.W. 810 (1923); West v. City of Borger, 309 S.W.2d 250 (Tex. Civ. App. 1958).

72. Birch v. Ward, 200 Ala. 118, 75 S. 566 (1917); Takata v. City of Los Angeles, 154 Cal. App. 2d 174, 7 Cal. Rptr. 516 (1960); Perepletchikoff v. City of Los Angeles, 174 Cal. App. 2d 697, 345 P.2d 261 (1959); Stoetzner v. City of Los Angeles, 170 Cal. App. 2d 394, 338 P.2d 971 (1959); *cf.* People v. Vasquez, 144 Cal. App. 2d 575, 301 P.2d 510 (1956).

73. Polsgrove v. Moss, 154 Ky. 408, 157 S.W. 1133 (1913); *cf.* Paderefsky v. Scala, 129 N.Y.S.2d 661 (Sup. Ct. 1954).

times authorized by state statute,[74] these ordinances establish an area, usually in the center of the city, within which only fireproof buildings can be constructed.[75] To advance this objective, the fire limits ordinance or the authorizing statute prohibits the repair,[76] or authorizes the demolition,[77] of a nonconforming building within the fire limits whenever the building requires repairs in excess of a specified percentage of its value.[78] Usually the repair ratio is set at fifty per cent, but lower ratios have been used.

When the constitutionality of these repair ratios has been in issue, courts have approved them on the ground that legislation may, within reasonable limits, fix the level of deterioration which justifies demolition. Fifty,[79] and even thirty[80] per cent ratios have been accepted. This rationale has been extended to cover a fifty per cent repair ratio in a local demolition provision which was not part of a fire limits ordinance.[81] Judicial acceptance of repair ratios as the

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74. *E.g.*, MONT. REV. CODES ANN. § 11-928 (1968); N.D. CENT. CODE § 40-05-01(37) (1968).

75. *See* the ordinance provision quoted in City of Shenandoah v. Replogle, 198 Iowa 423, 199 N.W. 418 (1924).

76. *E.g.*, Zalk & Josephs Realty Co. v. Stuyvesant Ins. Co., 191 Minn. 60, 253 N.W. 8 (1934). Some of the more modern ordinances permit repair of a building if the repairs are in conformity with building and housing code standards. *E.g.*, Perepletchikoff v. City of Los Angeles, 174 Cal. App. 2d 697, 345 P.2d 261 (1959).

77. Since the fire limits ordinances are aimed at safety from fire, demolition under an application of the repair ratio may be available only following damage by fire. In other instances, the ratio may be applied to authorize demolition of any substandard and deteriorated building, even in the absence of fire or other casualty. For a modern example of a fire limits ordinance, *see* UNIVERSITY OF OREGON, BUREAU OF MUNICIPAL RESEARCH AND SERVICE, PROPOSED BUILDING CODE FOR SMALL CITIES § 32 (4th ed. 1964).

78. These ordinances have been sustained against the contention that they are an unconstitutional delegation of legislative power. West Realty Co. v. Ennis, 147 Conn. 602, 164 A.2d 409 (1960); State v. Lawing, 164 N.C. 492, 80 S.E. 69 (1913).

79. Perepletchikoff v. City of Los Angeles, 174 Cal. App. 2d 697, 345 P.2d 261 (1959); Baird v. Bradley, 109 Cal. App. 2d 365, 240 P.2d 1016 (1952); Zalk & Josephs Realty Co. v. Stuyvesant Ins. Co., 191 Minn. 60, 253 N.W. 8 (1934); Russell v. City of Fargo, 28 N.D. 300, 148 N.W. 610 (1914); City of Odessa v. Halbrook, 103 S.W.2d 223 (Tex. Civ. App. 1937); De Von v. Town of Orville, 120 Wash. 317, 207 P. 231 (1922); Annot. 14 A.L.R.2d 73, 80-82 (1950). *Cf.* First Natl. Bank of Mt. Vernon v. Sarlls, 129 Ind. 201, 28 N.E. 434 (1891), invalidating an absolute prohibition on repairs exceeding three hundred dollars. The ordinances in the two California cases permitted conforming repairs.

80. Davison v. City of Walla Walla, 52 Wash. 453, 100 P. 981 (1909). A 40% ratio was approved in A. H. Jacobson Co. v. Commercial Union Assur. Co., Ltd., 83 F. Supp. 674 (D. Minn. 1949) (buildings damaged by fire or other cause); *cf.* Ironside v. City of Vinita, 6 Indian Terr. 485, 98 S.W. 167 (1906) (25% ratio; constitutionality not considered). *Contra*, Bettey v. City of Sidney, 79 Mont. 314, 257 P. 1007 (1927), holding unconstitutional a 35% ratio, in part because it was based on assessed value. The court suggested that an acceptable ratio of repair would have to provide the equivalent of the substantial reconstruction rule.

81. Soderfelt v. City of Drayton, 79 N.D. 742, 59 N.W.2d 502 (1953) (50%); *cf.* Keiner v. City of Anchorage, 378 P.2d 406 (Alaska 1963), which accepted, without discussion, the validity of a 50% cost-of-repair provision in a local building code.

basis for ordering demolition is surprising in view of the cases considering the constitutionality of demolition in the absence of such provisions. Even a fifty per cent ratio would prohibit repair at a level well below the "substantial reconstruction" and similar tests which some courts have selected to measure an excessive repair burden. Most courts, however, have not noticed this problem.[82] Perhaps the explanation lies in the fact that repair ratio provisions have usually been considered in the fire limits context, where their aim is to achieve a designated standard of building construction rather than to serve as an absolute basis for building demolition.[83]

Even more difficult problems have developed in the search for a formula to determine the building value against which the repairs are to be compared. Under the repair ratio test, the value of the building and the required repairs are interdependent variables. However, since a finding that a building is subject to demolition implies that it has no value at all, either an independent basis must be found for estimating building value or the value selected will be self-serving.

Several standards for measuring building value are available. The required repairs may be compared with the original value of the structure, the present value of the structure, or the value of a

82. *But see* Bettey v. City of Sidney, 79 Mont. 314, 257 P. 1007 (1927). *Cf.* the cases in which the municipality, without seeking demolition of the building, has sought to prohibit its repair. The courts have approved this remedy. *E.g.*, City of Shenandoah v. Replogle, 198 Iowa 423, 199 N.W. 418 (1924) (building substantially destroyed by fire); State v. Lawing, 164 N.C. 492, 80 S.E. 69 (1913) (ordinance prohibited "partial rebuilding"; construed to prohibit substantial repairs).

83. No constitutional difficulties are presented by the demolition of buildings constructed after the enactment of a fire limits ordinance and in violation of it. Maguire v. Reardon, 255 U.S. 271 (1921); Miller v. City of Valparaiso, 10 Ind. App. 22, 37 N.E. 418 (1894); Micks v. Mason, 145 Mich. 212, 108 N.W. 707 (1906); Klingler v. Bickel, 117 Pa. 326, 11 A. 555 (1887). A few cases have suggested, however, that the repair ratio may not be applied retroactively to buildings constructed before a fire-limits ordinance was enacted. Perepletchikoff v. City of Los Angeles, 174 Cal. App. 2d 697, 345 P.2d 261 (1959); Russell v. City of Fargo, 28 N.D. 300, 148 N.W. 610 (1914); *cf.* Allison v. City of Richmond, 51 Mo. App. 133 (1892); Crossman v. City of Galveston, 112 Tex. 303, 247 S.W. 810 (1923). Echoing the nuisance origins of the demolition power, these cases usually suggest that buildings existing on the date the fire limits are established may be demolished under the repair ratio provision only if they are a nuisance in fact. This limitation apparently derives from a statement in an early text. 2 H. WOOD, NUISANCES 976 (3d ed. 1893). The cases cited in the text are not pertinent to the building demolition problem; however, in one recent case, a repair ratio provision was applied without discussion to a building which antedated the fire limits ordinance. West Realty Co. v. Ennis, 147 Conn. 602, 164 A.2d 409 (1960). The analogy here may be to the nonconforming use provisions of zoning ordinances. Provisions in zoning ordinances which prevent the repair or reconstruction of substantially damaged nonconforming buildings have been upheld on the ground that the gradual elimination of nonconforming zoning uses is one of the objectives of the ordinance. *See* Mandelker, *Prolonging the Nonconforming Use: Judicial Restriction of the Power To Zone in Iowa*, 8 DRAKE L. REV. 23, 24-26 (1958). The gradual-elimination rationale has also been voiced in fire limits cases. Zalk & Josephs Realty Co. v. Stuyvesant Ins. Co., 191 Minn. 60, 253 N.W. 8 (1934).

new structure. Which base is selected will have a critical effect on the application of the repair ratio. Assume that the original value of a building was 10,000 dollars and that the building is presently worth 5,000 dollars, but that the reconstruction value of a similar new building is 20,000 dollars. If the repairs cost 6,000 dollars, a fifty per cent repair ratio is exceeded only if original or present value is used. These choice-of-valuation problems have been further complicated by the failure to relate repair ratio provisions to the standards of local housing and building codes. If building value is measured as if the building had been constructed in conformity with these codes, the value of the building will be substantially increased and the possibility that the repair ratio will be exceeded would be reduced accordingly.

A standard must also be found to determine the character and cost of the repairs which are required. Fire limits and building demolition legislation does not indicate how the cost of repair is to be measured. If the repairs must be made in conformance with building and housing codes, their cost will be substantially increased and the repair ratio will be more likely to be exceeded. But housing codes are less than helpful in defining applicable standards of repair. Usually these standards are expressed in general terms,[84] and the extent of the repair required can be determined only after a field inspection of the dwelling. An additional concern is that the relationship between cost of repair and the substandard conditions which qualify a building for demolition has not been made clear. Presumably, a substandard condition—such as an improper use—which does not qualify a building for demolition cannot be considered when estimating the cost of repair. However, the cases have not dealt with this question.

In the context of fire limits ordinances, no satisfactory solution of these problems has developed, although courts have given some attention to the building value question.[85] New-building value—that is, replacement value at current prices—is a frequently selected

84. Housing codes usually provide, in very general terms, that the structure and its various components must be kept "in good repair." *See* Housing Code of New Haven, Conn., par. 302, reprinted in D. MANDELKER, MANAGING OUR URBAN ENVIRONMENT 660 (1966).

85. One rule that has gained acceptance is that the value of the building should exclude the value of the foundation. West Realty Co. v. Ennis, 147 Conn. 602, 164 A.2d 409 (1960); Soderfelt v. City of Drayton, 79 N.D. 742, 59 N.W.2d 502 (1953); City of Odessa v. Halbrook, 103 S.W.2d 223 (Tex. Civ. App. 1937); De Von v. Town of Orville, 120 Wash. 317, 207 P. 231 (1922). This interpretation is questionable, since the condition of the foundation clearly must be taken into account when the structural condition of the entire building is evaluated. Excluding foundation value lowers the total value of the building and increases the possibility that the required repair will exceed the repair ratio percentage.

legislative standard,[86] but when new-building value is used the repair ratio is often not exceeded and decisions on demolition tend to be adverse to the public agency.[87] Present building value is also used; it has been interpreted to mean either present market value[88] or the cost of replacing the *original* structure. In one recent case,[89] the owner of a building alleged that the replacement cost of the structure should be taken as the cost of constructing a new building in conformity with local codes. Relying on the use of the word "original" in the local ordinance, the court held that the repair ratio should be applied to the value of the building as it had been before a damaging fire. Since the building had not conformed to the local codes at that time, the court prevented the owner from capitalizing on his noncompliance. Interpretations of this kind will tend to produce decisions favorable to public agencies seeking demolition.[90] Had the building been valued as if it had conformed, its value would have been substantially increased, thus minimizing the possibility that the cost of repairs would have exceeded the repair ratio.

II. Just Compensation for Slum Dwellings[91]

A. *The Market Value Approach*

Our analysis of building demolition legislation resulted in a quandary over value. We shall now examine the role that the concept of value plays in determining just compensation for properties which are to be acquired by public agencies, either through

86. The use of such standards may be found, for example, in A. H. Jacobson Co. v. Commercial Union Assur. Co., Ltd., 83 F. Supp. 674, 677-78 (D. Minn. 1949); Zalk & Josephs Realty Co. v. Stuyvesant Ins. Co., 191 Minn. 60, 64, 253 N.W. 8, 11 (1934); West v. City of Borger, 309 S.W.2d 250, 252 (Tex. Civ. App. 1958); City of Odessa v. Halbrook, 103 S.W.2d 223, 225-26 (Tex. Civ. App. 1937).

87. State Fire Marshall v. Fitzpatrick, 149 Minn. 203, 183 N.W. 141 (1921); West v. City of Borger, 309 S.W.2d 250 (Tex. Civ. App. 1937). But in Zalk & Josephs Realty Co. v. Stuyvesant Ins. Co., 191 Minn. 60, 253 N.W. 8 (1934), the result was favorable to the city. Another possibility is to lower the repair ratio when new building value is used. A. H. Jacobson Co. v. Commercial Union Assur. Co., Ltd., 83 F. Supp. 674 (D. Minn. 1949) (40%).

88. De Von v. Town of Orville, 120 Wash. 317, 207 P. 231 (1922). *See also* Fidelity & Guaranty Ins. Corp. v. Mondzelewski, 49 Del. 395, 117 A.2d 369 (1955) (assessed value interpreted to mean full market value).

89. West Realty Co. v. Ennis, 147 Conn. 602, 164 A.2d 409 (1960).

90. Takata v. City of Los Angeles, 184 Cal. App. 2d 154, 7 Cal. Rptr. 516 (1960). *See also* Keiner v. City of Anchorage, 378 P.2d 406 (Alaska 1963) (repair ratio applied to depreciated value of building).

91. This discussion focuses on the compensation to be paid to owners of substandard dwellings, not primarily on the relocation problems of owners who also happen to be residents of urban renewal project areas or who are displaced by urban highway, public housing, or similar projects. On relocation problems, *See Hearings on S. 698 Before the Subcomm. on Government Operations*, 90th Cong., 2d Sess., at 410-14 (1968). *See also* the discussion accompanying notes 163-69 *infra*.

negotiated purchase or in eminent domain proceedings. Although just compensation has not been equated constitutionally with value, the courts have usually accepted one species of value—market value —as the best evidence of what compensation is "just."[92]

Under the prevailing formula, market value is the price which a willing buyer would pay a willing seller under assumed conditions of balanced supply and demand for the property to be acquired.[93] Three approaches are commonly used to arrive at market value, each contemplating the use of different kinds of market evidence. Appraisers will often use all three approaches concurrently. Perhaps the most favored approach is to receive evidence of past sales of comparable property and to derive from that evidence a value for the property to be acquired.[94] A second approach, less favored, estimates the reproduction cost of the property to be acquired and then makes

92. *See generally* Cromwell, *Some Elements of Damage in Condemnation*, 43 IOWA L. REV. 191 (1958); Dettelbach, *Just Compensation for Real Estate Condemnation*, 15 CLEV.-MAR. L. REV. 171 (1966); McCormick, *The Measure of Compensation in Eminent Domain*, 17 MINN. L. REV. 461 (1933); Note, *Techniques of Measuring Just Compensation in Eminent Domain Proceedings in New England*, 42 B.U. L. REV. 326 (1962); Note, *Methods of Proving Land Value*, 43 IOWA L. REV. 270 (1958); Comment, *Valuation of Property in Eminent Domain*, 4 ST. LOUIS U. L.J. 325 (1957); Note, *Methods of Establishing "Just Compensation" in Eminent Domain Proceedings in Illinois: A Symposium*, 1957 U. ILL. L.F. 289; Comment, *The Measure of Damages in Eminent Domain Proceedings in Washington*, 2 WASH. L. REV. 192 (1927); Recent Case, *Value to Owner As a Basis for Compensation*, 32 N.D. L. REV. 59 (1956).

93. For good discussions of the general principles, *see* Sengstock & McAuliffe, *What Is the Price of Eminent Domain?*, 44 J. URBAN L. 185 (1966); Note, *Valuation Evidence in California Condemnation Cases*, 12 STAN. L. REV. 766 (1960).

94. *See generally* A. JAHR, LAW OF EMINENT DOMAIN AND VALUATION PROCEDURE §§ 137-42 (1957); L. ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN §§ 37-146 (2d ed. 1953); Dempsey, *Evidence of Prices in Pennsylvania Eminent Domain Proceedings*, 63 DICK. L. REV. 5 (1958); Recent Decision, *Evidence: Admission of Testimony of Sale Price of Similar Realty in Valuing Real Property in Condemnation Proceedings*, 46 CALIF. L. REV. 630 (1958); Note, *Methods of Proving Land Value*, 43 IOWA L. REV. 270 (1958); Note, *Evidence—Sales of Similar Land As Evidence of Value in Condemnation Proceedings*, 34 KY. L.J. 209 (1946); Recent Case, *Evidence—Eminent Domain—Admissibility of Sales of Other Land To Prove the Value of the Land About To Be Condemned*, 14 MINN. L. REV. 689 (1930); Note, *Admissibility of Prices Paid for Other Properties As Proof of Damages in Eminent Domain Proceedings*, 31 S. CAL. L. REV. 204 (1958); Note, *Valuation Evidence in California Condemnation Cases*, 12 STAN. L. REV. 766 (1960); Recent Decision, *Selling Price of Similar Property Held Admissible To Prove Value of Condemned Property*, 1 SYRACUSE L. REV. 528 (1950); Recent Case, *Eminent Domain—Evidence of Value—Prices Paid for Similar Tracts of Land*, 1 U. DET. L.J. 147 (1932); Note, *Methods of Establishing "Just Compensation" in Eminent Domain Proceedings in Illinois: A Symposium*, 1957 U. ILL. L.F. 289; Recent Case Note, *Eminent Domain—Evidence—Admissibility of Sales Price of Neighboring Property To Prove Value of Condemned Property*, 39 YALE L.J. 748 (1930).

To be considered for valuation purposes, a comparable sale must have been voluntary, the property which was sold must have had similar characteristics, and the sale must have been recent. Evidence of comparable sales has considerable probative value because it is capable of direct proof. But the choice of comparable property is often complicated in urban renewal project areas as uses may be transitional. For an illustrative case *see* Community Redevelopment Agency v. Henderson, 251 Cal. App. 2d 341, 59 Cal. Rptr. 311 (1967), noted in, 1968 WASH. U. L.Q. 180.

an adjustment for depreciation.[95] A third approach contemplates the capitalization of the income of the property to be acquired.[96] Here, the appraiser estimates net rentals for the remaining economic life of the building and then capitalizes them at an assumed capitalization rate to produce a value.

Not even these three approaches to market value tell the whole story, however. Eminent domain awards are based on findings of fact; consequently, when eminent domain awards are challenged they come to the appellate tribunal with all of the presumptions that protect findings of fact. Appellate courts and trial judges have only indirect and limited controls over these awards through rules of law restricting the evidence which the trier of fact may consider in determining just compensation.[97] The several approaches to market valuation outlined above provide one set of controls. Another important control which can have an effect on the valuation of slum property is the unit rule of valuation.[98] Under this rule land and building must be valued as a unit, and an award of compensation may not be based on a summation of the value of the land and the value of the building as separate items. A qualification of the unit rule requires that no value be attributed to the building if it does not enhance the value of the land;[99] this qualification may operate

95. *See generally* A. JAHR, *supra* note 94, at §§ 155-58; L. ORGEL, *supra* note 94, at §§ 188-99; Curtis, *Just Compensation in Eminent Domain Proceedings*, 35 NEB. L. REV. 250 (1956); Note, *Valuation Evidence in California Condemnation Cases*, 12 STAN. L. REV. 766 (1960); Note, *Methods of Establishing "Just Compensation" in Eminent Domain Proceedings in Illinois: A Symposium*, 1957 U. ILL. L.F. 289.

96. *See generally* L. ORGEL, *supra* note 94, at § 185; Curtis, *supra* note 95; Note, *Techniques of Measuring Just Compensation in Eminent Domain Proceedings in New England*, 42 B.U. L. REV. 326 (1962); Comment, *Real Estate Valuation in Condemnation Cases—The Place for the Expert*, 43 NEB. L. REV. 137 (1963); Note, *Valuation Evidence in California Condemnation Cases*, 12 STAN. L. REV. 766 (1960).

Notice, however, that profits and other nonrental income are excluded. A. JAHR, *supra* note 94, at §§ 146-51.

97. For a vivid illustration of this point in the context of a review of an award for slum tenements, *see In re* City of New York, 1 N.Y.2d 428, 136 N.E.2d 478, 154 N.Y.S.2d 1 (1956).

98. Devou v. City of Cincinnati, 162 F. 633 (6th Cir.), *cert. denied*, 212 U.S. 577 (1908); City of Chicago v. Giedraitis, 14 Ill. 2d 45, 150 N.E.2d 577 (1958); Saathoff v. State Highway Commn., 146 Kan. 465, 72 P.2d 74 (1937); Texas Pac.-Missouri Pac. Terminal R.R. of New Orleans v. Rouprich, 166 La. 352, 117 S. 276 (1928); J. SACKMAN, NICHOL'S LAW OF EMINENT DOMAIN § 13.11 (rev. 3d ed. 1964). *See generally* H. KALTENBACH, JUST COMPENSATION REVISED § 1-6-2 (1964); Winner, *The Rules of Evidence in Eminent Domain*, 32 DICTA 243 (1955); Note, *Methods of Establishing "Just Compensation" in Eminent Domain Proceedings in Illinois: A Symposium*, 1957 U. ILL. L.F. 289, 294. *But see* State *ex rel.* State Highway Commn. v. Dockery, 300 S.W.2d 444 (Mo. 1957); Annot., 1 A.L.R.2d 878, 884 (1948).

Whether the unit rule is inconsistent with the use of the reproduction-cost-less-depreciation method of valuing buildings and structures has never been settled; *cf.* State v. Red Wing Laundry & Dry Cleaning Co., 253 Minn. 570, 93 N.W.2d 206 (1958) (held not inconsistent).

99. United States v. Certain Lands in Orangetown Township, 69 F. Supp. 815

in the case of slum dwellings to exclude any award of compensation for the building. The owner will be awarded compensation for only the site. It is worth noting that this separation of site and building for purposes of valuation is implicitly recognized in building demolition legislation, which operates only against the structure and leaves the cleared building site in the hands of the owner.

B. *Inadequacies of the Market-Value Standard in Slum Areas*

For a variety of reasons, none of the conventional approaches to market value can be expected to produce a realistic valuation for property in slum areas.[100] The problem is created partly by deficiencies in the conventional approaches to market value, and partly by the nature of the market for slum housing itself.[101] To illustrate this point, assume a typical deteriorated tenement in a slum neighborhood. Because the biulding is obsolete and violates local housing and building codes, it is not likely to be reproduced in the market. Therefore, any attempt to estimate its cost of reproduction must necessarily be artificial; an attempt to calculate depreciation on the basis of reproduction cost would be equally unrealistic.[102]

Nor does the income-capitalization approach produce more reliable answers. The income-capitalization method of valuation either ignores the role of borrowed capital or assumes that the market for

(S.D.N.Y. 1947); Honolulu v. Bishop Trust Co., 48 Hawaii 444, 404 P.2d 373 (1965); Department of Public Works & Bldgs. v. Hubbard, 363 Ill. 99, 1 N.E.2d 383 (1936); Hayes v. Chicago, R.I. & P. Ry. Co., 239 Iowa 149, 30 N.W.2d 743 (1948); Kentucky Dept. of Highways v. Branham, 380 S.W.2d 213 (Ky. 1964); Kentucky Dept. of Highways v. Stamper, 345 S.W.2d 640 (Ky. 1961); *In re* Blackwell's Island Bridge Approach, 198 N.Y. 84, 91 N.E. 278 (1910); *In re* Bd. of Supervisors of Chenango County, 6 N.Y.S.2d 732 (Sup. Ct. 1938); Lower Nueces River Water Supply Dist. v. Sellers, 323 S.W.2d 324 (Tex. Civ. App. 1959); Chesapeake & O. R.R. Co. v. Johnson, 134 W. Va. 619, 60 S.E.2d 203 (1950); J. SACKMAN, *supra* note 98, at §§ 13.11, 16.101[1], 20.1; Annot., 172 A.L.R. 236, 257-58 (1948). The rule has been codified in California. CALIF. EVID. CODE § 820 (1966).

100. The critique of conventional approaches to market value which follows is based principally on the work of Professor Richard Ratcliff. *See* R. RATCLIFF, CURRENT PRACTICES IN INCOME PROPERTY APPRAISAL—A CRITIQUE (1967); R. RATCLIFF, A RESTATEMENT OF APPRAISAL THEORY (1963); R. Ratcliff, Condemnation Awards and Appraisal Theory (mimeo, undated); Ratcliff, *Capitalized Income Is Not Market Value*, 36 APPRAISAL J. 33 (1968). For a more limited criticism of methods of valuation in California, *see* California Law Revision Commn., A Recommendation and Study Relating to Evidence in Eminent Domain Proceedings (1960).

101. We have very little empirical evidence on the operation of the housing market in slum areas. Perhaps the most thorough recent study is G. STERNLIEB, THE TENEMENT LANDLORD (1966), on which the following discussion is primarily based. The Sternlieb study was carried out in the Newark slums. *See also* W. GRIGSBY, HOUSING MARKETS AND PUBLIC POLICY (1963).

102. *See In re* Bellevue Hosp. Psychopathic Pavilion, 132 Misc. 774, 230 N.Y. Supp. 411 (Sup. Ct. 1928), holding that the cost of reproduction method of valuation was improperly applied to a group of old, cold-water New York City tenements. *See also* Sackman, *The Limitations of the Cost Approach*, 36 APPRAISAL J. 53 (1968).

financing is operating normally.[103] Yet in slum areas the character and availability of financing is the primary determinant of market value.[104] Since conventional low-interest financing is usually unavailable, mortgages on slum property are first inflated and then discounted to offset the high risk of lending and to increase the legal interest rate. Inflated mortgages produce a corresponding inflation of sales prices.[105] Furthermore, slum property is not usually bought for an income return on investment; investors in slum real estate are more interested in quick turnover which permits the fast recapture of their cash outlay.[106] In these circumstances, selection of a capitalization rate is a risky venture,[107] especially since the geo-

103. "There is no provision in the formula for independent variables which represent the exogenous factors such as business conditions, credit conditions and other market restraints." Ratcliff, *Capitalized Income Is Not Market Value*, 36 APPRAISAL J. 33, 36 (1968).

104. G. STERNLIEB, *supra* note 101, at 79.

105. *See* W. Lehman, Mortgage Availability in Racially Transitional Areas (mimeo; 1962); G. STERNLIEB, *supra* note 101, ch. 5. Prices have often been inflated by as much as 50% or 100%, sometimes in successive transactions very close together in time.

106. Mandelker & Heeter, *Investment Activities of Relocated Tenement Landlords—A Pilot Study*, 1968 URBAN L. ANN. 33, 44-46 (relocation of slum property owners in St. Louis). According to this study, only the owners of large numbers of slum properties tended to have high turnover rates. Sternlieb found low turnover rates in the Newark slums. G. STERNLIEB, *supra* note 101, at 98-101. For a summary of investment and trading patterns in slum real estate, *see* Johnson, *Acquisition Appraisals for Urban Renewal*, 29 APPRAISAL J. 221 (1961).

Note that owner-occupants and large-scale investors may have very different expectations in their properties, yet both types of owner are widely distributed and commingled throughout slum areas. Nor is the problem made any easier by the fact that properties shift frequently from owner-occupiers to absentee investors and back again. To complicate matters further, the purchase of slum properties by owner-occupiers on installment land contracts is a frequent substitute for landlord-tenant relationships.

107. *See In re* City of New York, 1 N.Y.2d 428, 135 N.E.2d 478, 154 N.Y.S.2d 1 (1956), in which the rent-capitalization method had been applied in the valuation of tenements taken for an urban renewal project. The New York Court of Appeals held that the state appellate division had improperly reduced the compensation award by applying a capitalization rate which was higher than the rate adopted by the city's own witness. In an ambiguous paragraph, the appellate division had noted that income on these properties had remained high because space was at a premium and had indicated that the substandard condition of the neighborhood should have been considered as a factor affecting prices for the buildings.

The action of the appellate division is especially interesting in view of Sternlieb's findings that the purchase price of slum property, usually taken as a multiple of the gross rent, has been falling at the same time that the expected rate of return has been increasing. He points out that "[t]he profitability of investment in slum properties is as much a function of the financial leverage as the percentage of return on gross income." G. STERNLIEB, *supra* note 101, at 79. For his analysis of trends in rent multipliers, *see id.* at 103-04.

Sternlieb concludes that

> [t]he high rate of current return demanded by investors in slum tenements can be summarized as a compound of the fear of costly code crackdowns; the basic weakness of the market, both in terms of rental increases and securing full tenancy; the risk of outright loss through the complete abandonment of the parcel; and in substantial part, the pejoratives which society heaps on the "slum lord."

Id. at 95-96 (emphasis in original).

metric leverage of the rate yields dramatic variations in capitalized value from even slight variations in the rate selected.

Finally, the comparable-sales method of estimating value has meaning only if the market for the property under consideration is functioning normally. In slum areas, to characterize the operation of the real estate market as normal blinks reality. A variety of factors serve to limit the number of purchasers who are willing to make conventional investments in blighted neighborhoods.[108] In some cities, housing shortages tend to drive the price of slum properties up. Elsewhere, increasing vacancy rates in the slums may force prices down. In almost every large city, Negroes and other minority groups are confined to ghetto areas in which real estate prices are artificially affected by the inability of minority renters and purchasers to live where they choose. The increasing pace of governmental activity in slum neighborhoods also tends to distort normal market conditions. Sometimes these activities have a depressing effect; the very risk of housing code enforcement, building demolition under public order, or urban renewal activity may reduce the number of investors willing to operate in substandard neighborhoods. Dwellings may be sold or abandoned in the face of intensified housing improvement efforts.[109] On the other hand, successful public renewal and other improvement activities may lead to a general inflation of inner city values; slum owners may hold on to their real estate in the hope that they will be compensated at inflated prices should their properties be acquired as part of a local urban renewal project.[110] In other instances, the effect of public activity in the housing field may be more indirect. Slum clearance, by diminishing

108. Yet evidence of supply and demand for urban housing is usually not admissible. In a condemnation proceeding involving a proposed subdivision, it was held to be error (but not prejudicial error) to admit evidence of the housing and subdivision needs of the community as an element bearing on the size of the condemnation award. Department of Public Works & Bldgs. v. Dust, 24 Ill. 2d 119, 180 N.E.2d 499 (1962).

109. This tendency has been documented in a code enforcement area that was part of a large urban renewal project in Nashville, Tennessee. G. J. Hannon, Urban Renewal and Household Mobility 59, 60 (rough draft of thesis presented to Department of Urban and Regional Planning, University of Wisconsin, Feb. 1965).

110. G. STERNLIEB, *supra* note 101, at 164-70. This attitude appears to be characteristic of the owners of large amounts of slum property. Similar attitudes were expressed during interviews of slum property owners in St. Louis. Holding property in anticipation of its acquisition by public agencies will be encouraged whenever the effect of urban renewal programs is inflationary rather than deflationary. Increased land values within an urban renewal project area must be ignored if they can be traced to and are induced by the project. United States v. Miller, 317 U.S. 369 (1943); *In re* Addition to Lincoln Square Urban Renewal Project, 22 Misc. 2d 619, 198 N.Y.S.2d 248, *motion for reconsideration denied*, 23 Misc. 2d 690, 199 N.Y.S.2d 225 (Sup. Ct. 1960). But successful urban renewal activity may serve as an inflationary stimulant on property values in contiguous neighborhoods, which may later be drawn into the urban renewal program.

the supply of low-rent housing, may create artificial shortages that tend to increase the rents of the remaining low-income housing stock.[111] As one section of the inner city after another becomes subject to programs of urban renewal and housing improvement, the areas left to "normal" market processes gradually disappear.[112]

C. *Applications of the Market-Value Standard to Slum Housing*

Because conventional approaches to determining market value do not produce reliable values in slum areas, courts and legislatures—while not questioning the adaptability of the market-value standard—have attempted to adjust its application on an ad hoc basis to take account of slum housing conditions. Policy makers have given little thought to a comprehensive re-examination of the slum value problem; the assumption has been that the market-value standard can be made to work. The technique of adjusting market valuation to take account of slum housing conditions is derived from established precedent in a majority of jurisdictions that compensation in eminent domain proceedings need not be paid for the illegal use of property.[113] While the market may attach a premium to a profitable

111. *See* the discussion in Downs, *Uncompensated Non-Construction Costs Which Urban Highways and Urban Renewal Impose upon Residential Households*, in *Hearings on Urban Highway Planning, Location, and Design Before the Subcomm. on Roads of the Senate Comm. on Public Works*, 90th Cong., 2d Sess., pt. 2, at 313, 335-41 (1968). Presumably, owners of slum tenements will rely on increased rentals to claim that a larger amount of compensation is required when their properties are taken.

112. As more and more neighborhoods in the core areas of most large cities are covered by federally assisted improvement programs of one kind or another, it becomes most difficult to characterize the market in any section of the inner city as normal. This pattern is vividly illustrated in the maps of St. Louis renewal and rehabilitation areas which accompany Mandelker & Heeter, *supra* note 106, at 51-56. The impact of publicly sponsored housing improvement programs has been heightened, moreover, by the increasingly sophisticated tools that have been made available. Thus, public housing authorities may now lease dwellings for rental to public housing tenants throughout the area of their jurisdiction. Christensen, *The Public Housing Leasing Program: A Workable Rent Subsidy?*, 1968 URBAN L. ANN. 57. Federal aid is also available for immediate assistance short of renewal in blighted areas. Housing and Urban Development Act of 1968, 82 Stat. 476, § 514. Other examples could be mentioned.

113. For general discussion, *see* U.S. HOUSING & HOME FINANCE AGENCY, ADMISSIBILITY OF EVIDENCE OF ILLEGAL USE OR CONDITION OF PROPERTY IN EMINENT DOMAIN PROCEEDINGS (1951); Dagen & Cody, *Property, Et Al. v. Nuisance, Et Al.*, 26 LAW & CONTEMP. PROB. 70 (1961); Legislation & Administration, *Determination of Just Compensation in Eminent Domain Proceedings for Land Subjected to Illegal Uses or Conditions*, 38 NOTRE DAME LAW. 196 (1963); Note, *Condemnation of Slum Land—Illegal Use As a Factor Reducing Valuation*, 14 U. CHI. L. REV. 232 (1947). For textual discussion and citations to cases, *see* A. JAHR, *supra* note 94, at § 79; J. SACKMAN, *supra* note 98, at §§ 12.3143, 12.3143[1], 19.21; L. ORGEL, *supra* note 94, at § 33.

Evidence of the illegal use or dilapidation of adjacent property is also admissible as tending to show the general condition of the neighborhood, which in turn has a bearing on market value. Wilmington Housing Authority v. Nos. 312-314 East Eighth St., 191 A.2d 5 (Del. Super. 1963). If the comparable-sales approach to valuation is used, the court will not consider a sale of other property for illegal purposes as an aid in valuing

illegal use in order to reflect the expectation that it will continue unmolested,[114] most courts have managed to deny any increment in compensation arising from the illegality. This is true even though the result is to award compensation which is less than the value assigned to the property by the market. The cases rely principally on the proposition that no one can profit from his own wrongdoing, or from speculation that a law will continue to be unenforced.[115]

Most of the illegal-use cases in the compensation context have considered either uses which are bad in themselves, such as illegal gambling,[116] or physically severable uses which can easily be disregarded in arriving at a value.[117] For instance, some courts have refused to award compensation for such physically severable uses as illegal encroachments on public ways.[118] Because the illegal use of a structure does not, strictly speaking, qualify it for demolition, this line of authority is difficult to correlate with building demolition legislation.[119] Nevertheless, several older cases did refuse to place a value on illegal uses which amounted to a nuisance or which were injurious to third parties.[120] While the factual circumstances of these old cases differ from cases involving the demolition of dwell-

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the property under consideration. Muccino v. Baltimore & O. R.R., 33 Ohio App. 102, 168 N.E. 752 (1929).

114. For this reason, the argument has been made that the appraiser should value slum property as the market does; if the market is willing to take the risk of nonenforcement of the housing code, the appraiser should value the property accordingly. Nelson, *Commentary on "Appraiser's Role in Urban Renewal"*, 30 APPRAISAL J. 20, 21, 22 (1962). This point of view had judicial support in one jurisdiction for a time. Freiberg v. South Side Elevated R.R. Co., 221 Ill. 508, 77 N.E. 920 (1906), overruled by Department of Public Works & Bldgs. v. Hubbard, 363 Ill. 99, 1 N.E.2d 383 (1936).

115. *E.g.*, Kingsland v. Mayor Alderman, & Commonwealth of City of New York, 110 N.Y. 569, 18 N.E. 435 (1888). For further discussion, *see* Legislation & Administration, *Determination of Just Compensation in Eminent Domain Proceedings for Land Subjected to Illegal Uses or Conditions*, 38 NOTRE DAME LAW. 196 (1963).

116. *E.g.*, McKinney v. Mayor of Nashville, 102 Tenn. 131, 52 S.W. 781 (1899).

117. *See, e.g.*, Appeal of Phillips, 113 Conn. 40, 154 A. 238 (1931) (encroachment over building line); Department of Public Works & Bldgs. v. Hubbard, 363 Ill. 99, 1 N.E.2d 383 (1936) (hedges over legal height); Joly v. City of Salem, 276 Mass. 297, 177 N.E. 121 (1931) (unlawful filling of land).

118. *E.g.*, *In re* Pearsall St. in City of New York, 135 N.Y. Supp. 763 (Sup. Ct. 1912).

119. *But see* Gear v. City of Phoenix, 93 Ariz. 260, 379 P.2d 972 (1963) (excessive parking of cars in violation of city ordinance); *cf. In re* Throgs Neck Expressway, 16 App. Div. 2d 570, 229 N.Y.S.2d 947 (1962) (no decrease in value allowed when building occupied without certificate of occupancy).

120. Burke v. Sanitary Dist. of Chicago, 152 Ill. 125, 38 N.E. 670 (1894) (diking of condemnee's land would overflow land of others); Castle Heights Water Co. v. Price, 178 App. Div. 687, 165 N.Y. Supp. 816 (1917) (condemnee claimed compensation for water lying under land of others); Portland & Seattle Ry. Co. v. Ladd, 47 Wash. 88, 91 P. 573 (1907) (mining would have thrown rock on other properties). Consider, in this context, the demolition statutes which authorize the demolition of buildings which are dangerous to nearby properties. Such buildings would not be compensable in eminent domain proceedings on the grounds that they are a nuisance; *cf.* Harvey v. Lackawanna & Bloomsburg R. Co., 47 Pa. St. 428 (1864).

ings, at least they correlate with the nuisance basis of demolition law.

It may be easier to reconcile housing code requirements with judicial attempts to adapt the market-value standard to slum housing conditions. For example, the housing code prohibits overcrowding. If overcrowding is considered an illegal use, its effect can be disregarded when the rent-capitalization approach to market valuation is used; rents are simply calculated on the basis of the legally *permitted* occupancy of the building.[121] This approach would produce a valuation which is below market levels in slum areas. In other cases, noncompliance with the housing code is difficult to quantify unless the illegality of the use is expressed as the cost of bringing the dwelling into compliance with housing code standards. But this interpretation assumes the constitutionality of the housing code requirements. It also assumes that courts will be willing to accept the application of housing code standards in advance of eminent domain proceedings, when the application of those standards will lead to a reduction in the compensation payable. We return to this problem later.[122]

When the rent-capitalization approach to valuation has been used, some courts have considered the influence of cost of repair on net rentals, without indicating just how this influence should be calculated.[123] However, the assumption underlying these decisions seems to be that since the cost of repair will either increase the capital investment in the property or the debt charges against gross

121. For an analagous situation, *see* Gear v. City of Phoenix, 93 Ariz. 260, 379 P.2d 972 (1963).

122. *See* text accompanying notes 149-169 *infra*.

123. Buena Vista Homes v. United States, 281 F.2d 476 (10th Cir. 1960) (holding that an allowance is to be made for cost of repair if a building is not in good condition); Kaperonis v. Iowa State Highway Commn., 251 Iowa 39, 99 N.W.2d 284 (1959) (affirming a low award based on rentals received on physically deteriorated buildings on the ground that it was not unjust); Moore v. State, 23 App. Div. 2d 525, 255 N.Y.S.2d 524 (1965) (where the city had prohibited the residential use of the buildings because of their hazardous condition and had advised that rehabilitation might not be allowable, the court suggested that a failure by the property owner's appraiser to consider the cost of rehabilitation had exaggerated the amount of net rentals.); *In re* Lincoln Square Slum Clearance Project, 15 App. Div. 2d 153, 222 N.Y.S.2d 786 (1961) (striking down the use of the rent-capitalization method and awarding site value on the ground that a heating installation needed to keep the building in operation was too expensive for the building as an economic unit). *But cf.* Application of Port Authority Trans-Hudson Corp., 48 Misc. 2d 485, 265 N.Y.S.2d 925 (Sup. Ct. 1965), in which rehabilitation was found to be feasible and the court permitted consideration of the effect of rehabilitation on rents. Here, however, the appraiser had deducted the cost of rehabilitation from the capitalized value. *Cf.* Housing Authority of New Orleans v. Polmer, 231 La. 452, 91 S.2d 600 (1956), in which a substandard residential dwelling was assigned a value under the rent-capitalization method, but the value of the site for a "higher" industrial use also equalled the capitalized value of the building. *See also In re* City of New York, 1 N.Y.2d 428, 136 N.E.2d 478 (1956), discussed in note 107 *supra*.

rent, the net rentals will be reduced accordingly. Another possible adjustment in the rent-capitalization approach is to use evidence of substandard condition as the basis for a judgment that a building has little or no remaining economic life. In one case, only site value was awarded for a physically deteriorated property on the ground that the investment required to keep the building operative was not economically justified. The court held that the building could not be considered as a rent-producing structure.[124]

The unit rule has also been applied successfully to adjust the market value of substandard properties. Recall that under the unit rule, land and building are to be valued together and no value is to be attributed to the building unless it enhances the value of the land. When a building has become obsolete due to changes in the surrounding area, courts ordinarily disallow any value for the building and award only site value.[125] These cases do not always turn on the physical condition of the building. In some instances, courts have found large residential structures worthless because they were located in areas that had turned to slums; in others, the physical deterioration of the building has been the basis for holding that the structure has no value. In such cases, building inspectors' reports have been introduced in evidence to demonstrate the futility of repair.[126]

A few state statutes provide explicit legislative authority for a consideration of illegal building use and substandard building condition. While the statutory language varies, all of these laws authorize introduction in an eminent domain proceeding of evidence of unsafe and insanitary conditions and of illegal uses.[127] Two states

124. *In re* Lincoln Square Slum Clearance Project, 15 App. Div. 2d 153, 222 N.Y.S.2d 786 (1961). In this kind of case the court can control the compensation award more closely by simply refusing to admit evidence of the value of the building. When the building is deteriorated but still has some value, the award will be more difficult to control because the evidence introduced will go to the trier of fact.

125. St. Louis v. Turner, 331 Mo. 834, 55 S.W.2d 942 (1932); McSorley v. School Dist. of Avalon Borough, 291 Pa. 252, 139 A. 848 (1927). The effect of the ruling may simply be to exclude evidence of the original cost of the structure. Devou v. City of Cincinnati, 162 F. 633 (6th Cir. 1908); Commonwealth v. Stamper, 345 S.W.2d 640, 643 (Ky. 1961) (dictum). *See also* Moss v. New Haven Redevelopment Agency, 146 Conn. 421, 151 A.2d 693 (1959) (discussing functional obsolescence from extrinsic factors). *But cf.* Bridges v. Alaska Housing Authority, 375 P.2d 696 (Alaska 1962).

126. State *ex rel.* State Highway Commn. v. Schutte Inv. Co., 334 S.W.2d 241 (Mo. 1960); Hance v. State Roads Commn., 221 Md. 164, 156 A.2d 644 (1959). *See also* Commonwealth v. Bagley, 261 Ky. 812, 88 S.W.2d 920 (1935).

127. One group of statutes authorizes the introduction of evidence of "any unsafe, unsanitary, substandard or other illegal condition, use or occupancy . . . ." ILL. REV. STAT. ch. 47, § 9.5(2) (Supp. 1969) (eminent domain law). The other statutes are similar: KY. REV. STAT. § 99.240(4) (1966) (redevelopment corporations); MICH. COMP. LAWS § 125.917(3)(d) (1967) (redevelopment corporations); N.Y. PRIV. HOUS. FIN. LAW § 216(4)(d) (1955); N.Y. PUBLIC HOUS. LAW § 125(4)(e) (1939); R.I. GEN. LAWS ANN. § 45-29-32(d)

explicitly authorize the introduction in evidence of a public order requiring the demolition of an unsafe or insanitary building;[128] three states, less explicitly, authorize the introduction of evidence that an unsafe or insanitary building is subject to "elimination."[129] All of the statutes make evidence of illegal use and substandard condition admissible even though no public action has been taken against the building. Some make such action prima facie evidence of the existence of the illegal use or substandard condition.[130]

What is missing from these statutes is a comprehensive legislative basis for translating evidence of substandard condition or illegal use—whether by showing the existence of a demolition order or otherwise—into a quantitative measure which can be applied in determining just compensation. Most statutes do provide that the effect of overcrowding on rentals may be considered,[131] and a few others permit introduction of evidence showing the "cost to correct" any substandard condition which may give rise to a demolition order.[132] But, as indicated above, a demolition order may turn on a comparison of cost of repair with building value. If the demolition order is based on a comparative evaluation of this kind, it is of no help in an eminent domain proceeding in which the value of the building is the unknown quantity that must be determined.[133] A

(1957) (housing authorities); WIS. STAT. ANN. § 66.414(2)(b) (1965) (redevelopment corporations).

Another group of laws authorizes the introduction of evidence of "any use, condition, occupancy or operation [subject to correction or abatement under state or local law] as being unsafe, substandard, [or] insanitary . . . ." NEV. REV. STAT. § 279.290(2) (1967) (urban renewal). Other statutes are similar, *e.g.*, N.D. CENT. CODE § 40-58-08(2) (1968) (urban renewal); OKLA. STAT. ANN. tit. 11, § 1613(d) (1959) (same).

Two states admit evidence that a building is "unsafe or unsanitary or a public nuisance, or is in a state of disrepair . . . ." ARIZ. REV. STAT. ANN. § 12-1150(A) (1956) (public works law); N.C. GEN. STAT. § 40-40 (1966) (same).

128. Arizona and North Carolina; *see* note 127 *supra*.

129. Nevada [NEV. REV. STAT. § 279.290(2) (1967)], North Dakota [N.D. CENT. CODE § 40-58-08(2) (1968)], and Oklahoma [OKLA. STAT. ANN. tit. 11, § 1613(d) (1959)].

130. Nevada [NEV. REV. STAT. § 279.290(3) (1967)], North Dakota [N.D. CENT. CODE § 40-58-08(3) (1968)], Oklahoma [OKLA. STAT. ANN. tit. 11, § 1613(e) (1959)], and Wisconsin [WIS. STAT. ANN. § 66.414(2)(b) (1965)].

In the absence of some official action against the building, the eminent domain tribunal will have to estimate the cost of repair under the applicable housing code, if any —a difficult judgment to make considering the tribunal's lack of expertise and the generalized standard of repair which housing codes usually contain. The problem is no easier under most demolition legislation.

131. The exceptions are Nevada [NEV. REV. STAT. § 279.290(2) (1967)], North Dakota [N.D. CENT. CODE § 40-58-08(2) (1968)], Oklahoma [OKLA. STAT. ANN. tit. 11, § 1613(d) (1959)], and Rhode Island [R.I. GEN. LAWS ANN. § 45-29-32(d) (1957)]. However, all of these states except Rhode Island explicitly authorize consideration of "[t]he effect on the value of such property" of the illegal use or condition. Even the statutes which authorize consideration of building condition on rentals do not explicitly indicate what effect that condition is to have.

132. Rhode Island and Wisconsin are the exceptions.

133. Another point to stress is that these statutes do not always match well with the

final comment is that these statutes approach the problem of valuing substandard buildings simply by expanding the rules of evidence in eminent domain proceedings. Since the statutes do not indicate the weight to be given to evidence of illegal use and substandard condition, it may be completely disregarded by the trier of fact. Moreover, a failure to take this evidence into account will be difficult to control. There is little empirical evidence on the impact of these laws,[134] and while experience with the Illinois statute[135] produced substantial reductions in acquisition costs in Chicago,[136] doubt has been cast on the utility of this legislation.[137]

III. Code Standards of Housing Maintenance as a Basis of Compensation for Slum Housing

A. *Implementation of the Housing Maintenance Standard*

Among the most serious difficulties presented by ad hoc attempts to adjust the market valuation of slum housing by considering the impact of housing codes and demolition laws is the necessary assumption that both the codes and the market speak from the same premise—that the standards imposed by the codes may serve as a corrective to the market's autonomous pricing system. This assumption cannot stand scrutiny, for it is the hallmark of the slum housing market that investors are willing to disregard the existence of housing codes and risk the chance of enforcement. At the same time, housing code requirements are imposed independent of what the

legislation authorizing demolition. While they usually refer to an "unsafe and insanitary" basis for demolition, the demolition statutes are not always so limited, and they may authorize demolition on different grounds. *Cf.* the North Dakota statute authorizing demolition, note 41 *supra*. Arizona is the only state which has no statute which explicitly authorizes demolition.

134. A letter from the author to public agencies in each of the states having laws authorizing consideration of substandard building conditions in eminent domain proceedings brought only one response. Of some interest is the fact that only a few of the states having these laws are dominantly urban in character. In addition, a few of these provisions appear in redevelopment corporation laws, which are largely dormant. Only the Illinois law is of general application.

135. Ill. Rev. Stat. ch. 47, § 9.5(2) (Supp. 1969).

136. Dunham, *From Rural Enclosure to Re-enclosure of Urban Land*, 35 N.Y.U. L. Rev. 1238, 1251, n.41 (1960). *See also* Levi, *The Impact of Urban Renewal on Real Property Law*, 41 Chi. B. Rec. 443, 446 (1960).

137. Legislation & Administration, *Determination of Just Compensation in Eminent Domain Proceedings for Land Subjected to Illegal Uses or Conditions*, 38 Notre Dame Law. 196, 198, n.7 (1963), reporting a comment by the Chicago urban renewal commissioner that the statute conflicts with the unit rule of valuation in eminent domain and has not been helpful. The Oklahoma law used by the Tulsa urban renewal authority has not been helpful either. Letter from James R. Jessup, Assistant City Attorney, Tulsa, Oklahoma, to the author, Nov. 7, 1968. Both respondents commented that evidence of the substandard condition of slum dwellings could be brought to the attention of court and jury without the statute authorizing the introduction of evidence of illegal use.

market can absorb in the way of housing repair and rehabilitation. What needs recognition is the fact that housing standards legislation provides a basis independent of the market's pricing system for judging the compensatory interest in housing. Even if the market were able to provide an accurate index of value in slum housing areas (and it is not conceded that it can), the public judgment of housing condition, expressed in housing maintenance codes, would be a more appropriate index of building value on policy grounds. No in-depth justification for this preference will be attempted in this Article; however, implicit in the judicial acceptance of housing codes as the basis of public intervention may be the suggestion that these codes necessarily determine the compensatory interest in substandard housing as well.[138]

A first step in evaluating housing code standards as a measure of compensation is to reconsider the treatment alternatives of repair and demolition. Treatment choices in housing programs must not be totally dependent on constitutional necessity, but rather should reflect other social and economic factors. To consider demolition and repair as mutually exclusive treatment possibilities—as the equity bias against demolition suggests—does not take account of modern housing practice; for under more sophisticated approaches to housing improvement, the choice between demolition and repair is often made independent of the physical condition of the building or even the cost of necessary repairs. A slum dwelling that is demolished without compensation in an old Irish district of St. Louis would be lovingly rebuilt in the Georgetown section of Washington, D.C. One major advantage of the plan to relate levels of compensation to compliance with housing repair standards is that treatment choices in housing programs can be made on their merits. Selection of repair and rehabilitation rather than demolition as the necessary cure for substandard conditions depends on a variety of factors: the nature of the market for the rehabilitated structure, the availability of direct and indirect state and federal subsidies,[139] and the nature of the comprehensive strategy for housing improvement. This strategy may select rehabilitation as the desired measure for policy reasons, such as the desire to minimize the relocation prob-

138. This approach gains support from the reliance on need for repair as the basis for noncompensable building demolition.

139. Indirect subsidies through governmental action can be provided through federal mortgage insurance programs which encourage lenders to finance rehabilitation properties on more favorable terms. Direct subsidies are provided through a variety of federal programs. Especially significant as a direct subsidy are the payments authorized under Housing and Urban Development Act of 1968, 82 Stat. 476, title I. In part, the title authorizes direct subsidies of interest payments on rehabilitated dwellings.

lems created by demolition and clearance or the desire to strengthen existing low-income neighborhoods.[140]

Let us next turn to the constitutional problem. Does judicial preference for repair, as expressed in the demolition cases, necessarily mean that the courts, as a next step, will accept the standards of maintenance required by housing codes? The demolition cases necessarily leave this question unsettled, and the courts that have passed on the constitutionality of housing codes have not precisely indicated what repair burden can constitutionally be imposed. They have tended to evaluate the burden of repair in relation to building value[141]—an approach which has all of the difficulties, discussed above,[142] inherent in cost-of-repair ratios in demolition legislation.

A more helpful perspective on the constitutional acceptability of utilizing housing codes as standards for repair can be achieved by comparing the constitutional burden imposed by these codes with the constitutional burden of noncompensatory building demolition. If needed repairs to a building are so burdensome that the building may constitutionally be demolished as an alternative to repair, could the public agency have elected to compel the repair of the building rather than its demolition? For example, assume that the cost of repair is found to be sixty per cent of the cost of the building, putting aside for the moment the difficulties of applying the repair-ratio formula. If the building demolition legislation permits demolition when the cost of repair exceeds fifty per cent of the value of the building, the building may be demolished. As an alternative, could the public authority have ordered the owner to repair the structure under the housing code? This problem has never been explicitly considered, but an argument can be made that no constitutional distinction should be drawn between the exercise of compulsory demolition and compulsory repair powers.[143] Demolition of a building takes the physical structure from the owner, depriving him of the capital asset which produced his income flow and compelling him either to rebuild or to sell the land at site value to someone who will. The owner's situation may not differ significantly in eminent domain proceedings. The eminent domain tribunal may

140. In this context, it is significant that the urban renewal and Model Cities programs contain preferences for rehabilitation rather than clearance. 42 U.S.C. § 1460(c) (Supp. II, 1967) (urban renewal); MODEL CITIES ADMINISTRATION, U.S. DEPT. OF HOUSING AND URBAN DEVELOPMENT, IMPROVING THE QUALITY OF URBAN LIFE: A PROGRAM GUIDE TO MODEL NEIGHBORHOODS IN DEMONSTRATION CITIES § 1.4-8 (Dec. 1967) (model cities).

141. *See* cases cited in notes 66 and 67 *supra*; Apple v. City & County of Denver, 154 Colo. 166, 390 P.2d 91 (1964); State v. Schaffel, 4 Conn. Cir. 234, 229 A.2d 552 (1966); Paquette v. City of Fall River, 338 Mass. 368, 155 N.E.2d 775 (1959).

142. *See* text accompanying notes 74-90 *supra*.

143. The court took this position in York v. Hargadine, 142 Minn. 219, 171 N.W. 773 (1919).

attach no value to the building and award only compensation for the site. Compulsory enforcement of the housing code forces the owner to invest in his structure if he is to continue to derive income from it. Indeed, as in the example just set forth, the capital investment required to rehabilitate a substandard building may be substantially greater than the loss which would be produced by its demolition. Under closer scrutiny, however, this analysis disregards the fact that the owner retains both the land and the building following compliance with a repair order. For this reason, the constitutional impact of a repair order should be evaluated in light of the owner's ability to recoup the cost of repair from future rentals.[144]

Implementation of the housing maintenance standard for valuing slum property must begin with a code definition of a realistic minimum level of housing maintenance.[145] Theoretically, this minimum standard can be determined by considering all the elements relating to fitness for habitation that are required by the housing codes—elements such as required space and occupancy, sanitary facilities, ingress and egress, plumbing, heating equipment, and structural strength. Considered together, all of these required elements should permit a public agency to define a model minimum structure for single or multiple dwelling units.[146] The value of each element in

144. Another solution to this problem would be to value the building as a rehabilitated structure and then to deduct the cost of repair. The residue would represent the value of the structure before rehabilitation. This approach was suggested in Johnson, *supra* note 20, at 188. But the value of a building after rehabilitation is itself a fictional construct which depends on a variety of factors independent of the cost of rehabilitation. One of these factors is the availability of a federal subsidy which will reduce rent levels and thus help assure a demand. *Cf.* City of Gainesville v. Chambers, 162 S.E.2d 460 (Ga. App. 1968), where the condemnee urged the abandonment of the market-value approach and argued that his property should be valued at an amount higher than market value because it was slum property producing a high return on investment. The court rejected this argument.

145. Most housing codes impose minor obligations that probably are not essential to minimum standards of maintenance; accordingly, these should not be included in the definition of the minimum standard. For example, the housing code in one major city requires a peep hole in every front door. While the courts have not had extensive opportunities to evaluate the constitutional acceptability of the housing code compliance burden, there are indications that the courts may balk at forcing compliance with minor requirements of good housekeeping and repair. *See* cases cited in note 67 *supra*. Compliance with some of these standards can be quite expensive. One large midwestern city requires lights in all closets. For purposes of determining appropriate levels of compensation, the compliance burden may simply have to be evaluated on a case-by-case basis. Another approach is the more widespread adoption of state housing codes, accompanied by state administrative determination of maintenance and repair requirements.

Space and occupancy requirements of housing codes are also troublesome. Overinflation of rentals through overcrowding can produce excessive valuations when the rent-capitalization approach is used. Under the proposal put forward here, value depends on building condition, and overcrowding of the building can be disregarded except to to extent that it is reflected in substandard maintenance or inadequate facilities.

146. Surprisingly little work has been done in the United States to translate the minimum requirements of housing codes into rehabilitation and repair costs, although some innovative work along these lines has been carried out in Philadelphia. The

the model structure could then be separately estimated. When the public agency is faced with a decision about a particular building in a slum area, it could estimate the repair cost—element-by-element—necessary to bring the structure into conformity with the minimum standard defined by the aggregation of required elements. The building owner would be entitled to compensation equal to the amount by which the value of a comparable structure conforming to the minimum standard of housing maintenance exceeds the cost of repair. This figure would approximate the degree to which the owner had complied with the housing code. For example, assume that a heating plant, or any other single required element, which is constructed in compliance with housing code standards would cost 2,000 dollars. Assume also that a slum building has a defective heating plant which would cost 1,000 dollars to repair. The owner of the building would be entitled to half of the value of a code-complying heating plant, or 1,000 dollars, no matter what technique the public agency decided to employ with regard to the property.

In an eminent domain proceeding, the owner would be awarded compensation which reflects the extent to which the building complies with housing maintenance standards. The site would be valued separately—an approach which directly contradicts the unit rule, but which reflects the reality that in slum areas the site has a value independent of the building that stands on it. If the public agency preferred demolition—the cleared site to stay in the owner's hands —the demolition order would similarly be accompanied by payment of compensation which reflects the extent of housing code compliance. However, the housing authority would have to select a tipping point with reference to the housing maintenance standards: if all or most of the required elements are missing or in serious disrepair, the building as it stands will contribute nothing to the value of the structure after rehabilitation. In such a situation, the building could still be demolished without compensation.[147] If a repair order were selected as the appropriate remedy, an additional adjustment

English Ministry of Housing and Local Government, however, is developing a method of measuring housing blight in which a cost comparison with a model dwelling is the key element. Unfortunately, the English method is still in the experimental stage.

147. Implementation of these proposals will require a substantial reworking of demolition, housing code, urban renewal, and related legislation. For example, it would probably be desirable to delegate the authority to fix appropriate levels of compensation to a state or local administrative agency with expertise in housing in order to avoid the vagaries of eminent domain awards by lay tribunals. For the text of an early District of Columbia statute, now repealed, which created a similar board to make demolition orders, *see* Metzger v. Markham, 38 App. D.C. 383 (1912).

would be required to take account of the owner's opportunity to recoup his investment. Before deducting repair cost from the value of a code-conforming structure, the capitalized (but discounted) value of the increase in rentals which can reasonably be anticipated after rehabilitation should be deducted from the estimated repair cost. The owner should receive compensation only to the extent that it would be unfair to expect him to recoup the repair burden in this way; to this end, the repair order would be enforceable only upon payment of compensation representing that portion of the repair burden which is excessive.[148]

This proposal is, of course, not without its difficulties. One problem is that the application of minimum housing maintenance standards as a basis for compensation may constitute an unconstitutional manipulation of value unless compensation is paid as if the minimum standards had not been activated prior to the time compensation is determined. Valuing slum dwellings on the basis of the code standards of housing maintenance may also work hardship on owner-occupants of, and investors in, slum property. These persons may find that the compensation which is awarded is not sufficient to retire existing indebtedness or to secure replacement housing. These problems will be discussed in turn.

B. *The De Facto Taking Problem*

The constitutional difficulties likely to arise in the use of housing maintenance standards to determine levels of compensation can best be understood in the context of eminent domain takings for urban renewal. Compensation in eminent domain has a time as well as an evidentiary dimension. Compensation is not payable until the date of taking,[149] variously defined "as the date the petition for condemnation is filed, the date of issuance of summons, time of trial, date of the deposit of assessed damages, final decree of condemnation, or date of possession by the condemnor . . . ."[150] The time varies by jurisdiction but is never earlier than some formal event subsequent to the initiation of urban renewal proceedings. Property values may be adversely affected during the interim period between the initiation of housing improvement projects and the actual date of taking. For instance, even though no formal taking has as yet oc-

148. This burden will have to be evaluated in light of the realities of available financing, including federal subsidies which can reduce rent levels and assure a captive market. These subsidies function as a de facto payment of compensation in return for compliance with housing code and rehabilitation standards.

149. Glaves, *Date of Valuation in Eminent Domain: Irreverence for Unconstitutional Practice*, 30 U. CHI. L. REV. 319 (1963).

150. Glaves, *supra* note 149, at 326.

curred in an eminent domain proceeding, initiation of demolition and housing code enforcement powers concurrently with urban renewal activities may be so burdensome to the property owner that a court would find that the property has been taken de facto. There are other circumstances in which a court may find that a property owner has suffered compensable losses *prior* to the taking date.

To understand why property losses may occur before the official date of taking, it will be helpful to consider the practical problems of carrying out urban renewal projects. Difficuties arise because the selection of an urban renewal project area often precedes by several years the commencement of project activities.[151] Yet the designation of such an area may cast an economic pall, discouraging investment and repair and encouraging tenant turnover and outmigration. Indeed, the urban renewal agency has a positive duty to relocate those residents in the project area who are displaced by the renewal project.[152] Once urban renewal activities begin, the pace at which the project is carried out may reinforce the negative impact on property values. For example, successive acquisition and clearance of slum properties will have a cumulative effect on remaining properties; these properties may be abandoned, vandalized, and untenanted by the time the final stages of the project are reached. Nor is it possible to separate the impact of housing code enforcement from urban renewal project activities. In some projects, intensive code enforcement will accompany renewal activities that are aimed selectively at demolition and rehabilitation throughout the project area. In projects in which total clearance is contemplated, the renewal agency may discourage or prohibit any property improvements once the the project is under way.[153] Elsewhere in the city, intensive housing code enforcement may be chosen as an alternative to urban renewal, or may precede urban renewal by several years in housing areas which have a relatively low priority in the urban renewal program. In the face of these realities, conventional eminent domain doctrine will permit a finding at two extremes—either the property owner is entitled to no compensation for losses in value prior to the formal

151. One recent estimate suggests that urban renewal projects take from five to ten years to complete, although the pace of completion has been quickening. The size of the project, difficulties in marketing, and the ability to keep the many private and public groups involved in the project on schedule are important factors affecting the time required for completion. J. KAUFMAN, URBAN RENEWAL, IN PRINCIPLES AND PRACTICE OF URBAN PLANNING 486, 499 (1968).

152. For discussion of the relocation requirement in urban renewal, *see* Berger & Cogen, *Responsive Urban Renewal: The Neighborhood Shapes the Plan*, 1968 URBAN L. ANN. 75, 93-96.

153. *Compare* State *ex rel.* Mumma v. Stansberry, 5 Ohio App. 2d 191, 214 N.E.2d 684 (1964) (holding a prohibition on repairs unconstitutional); *with* Hunter v. Adams, 180 Cal. App. 2d 511, 4 Cal. Rptr. 776 (1960).

taking, or he will always be able to claim that he is entitled to recoupment of intermediate losses.

Public agencies will argue for the first position—that the property owner is entitled to no compensation for intermediate losses. It is well settled that the designation[154] of an urban renewal project area—or even the institution of condemnation proceedings[155] —does not in itself constitute a taking. Under this approach, the property to be acquired will be valued as of the formal taking, which will always be subsequent to the period during which the intermediate depreciation in value occurred. These intermediate losses will then be ignored.

To reach the second result, that the condemnee will always be compensated for intermediate losses, a court need only begin with the well-accepted proposition that an award of compensation can neither be increased nor decreased by activities associated with the project.[156] Or a court may look to the equally well-established principle that neither the condemnor nor any other public agency may deliberately reduce the value of property to be acquired.[157] This principle was given an extreme application in *Housing Author-*

154. United States v. Sponenbarger, 308 U.S. 256 (1939); Danforth v. United States, 308 U.S. 271 (1939); Thompson v. Fayette County, 302 S.W.2d 550 (Ky. 1957); St. Louis Housing Authority v. Barnes, 375 S.W.2d 144 (Mo. 1964); Hamer v. State Highway Commn., 304 S.W.2d 869 (Mo. 1957); Sorbino v. New Brunswick, 43 N.J. Super. 554, 129 A.2d 473 (1957) (determination of blight held not a taking); City of Houston v. Biggers, 380 S.W.2d 700 (Tex. Civ. App. 1964); Glaves, *supra* note 149, at 329, 342; Annot., 64 A.L.R. 546 (1929). *See* City of Chicago v. Zwick Co., 27 Ill. 2d 128, 188 N.E.2d 489 (1963); Grisanti v. City of Cleveland, 18 Ohio Op. 2d 143, 179 N.E.2d 798 (1961); Valley Forge Golf Club v. Upper Merion Township, 422 Pa. 227, 221 A.2d 292 (1966). Typical of these holdings is the decision in State Road Dept. v. Chicone, 158 S.2d 753, 758 (Fla. 1963), in which the court held that depression or depreciation in value due to the "prospect" of condemnation is generally not compensable. For a discussion of interim losses in value as they are affected by limitations on the condemnee's opportunity to challenge the condemnor's right to take, *see* Note, *Challenging the Condemnor's Right To Condemn: Avoidance of Peripheral Damages*, 1967 WASH. U. L.Q. 436.

155. Government of the Virgin Islands v. 50.05 Acres of Land, 185 F. Supp. 495 (D.C.V.I. 1960); Chicago Housing Authority v. Lamar, 21 Ill. 2d 362, 172 N.E.2d 790 (1961); State *ex rel.* City of St. Louis v. Beck, 333 Mo. 1118, 63 S.W.2d 814 (1933) (decrease in rental value and inability to sell property pending proceedings are "personal" damages). *Accord*, J. SACKMAN, *supra* note 102, at § 6.13[3]; *cf.* A. Gettelman Brewing Co. v. Milwaukee, 245 Wis. 9, 13 N.W.2d 541 (1944).

156. United States v. Miller, 317 U.S. 369 (1943); Housing Authority of the City of Atlanta v. Hard, 106 Ga. App. 854, 128 S.E.2d 533 (1962); Chicago v. Lederer, 274 Ill. 584, 113 N.E. 883 (1916); Commonwealth Dept. of Highways v. Wood, 380 S.W.2d 73 (Ky. 1964); State v. Carswell, 384 S.W.2d 407 (Tex. Civ. App. 1964).

157. United States v. Meadow Brook Club, 259 F.2d 41 (2d Cir. 1958). For example, if an illegal use of a building is caused by the project for which the property is taken, no account may be taken of the illegality. Connor v. International & G.N. R.R., 129 S.W. 196 (Tex. Civ. App. 1910). Similar are the cases in which the municipality attempts to depress the compensation payable in eminent domain by making unjustified changes in the zoning which is applicable to the property to be acquired. *See* Mandelker, *Planning the Freeway: Interim Controls in Highway Programs*, 1964 DUKE L.J. 439.

ity of the City of Decatur v. Schroeder.[158] Here, rentals decreased and vandalism increased after it became known that the property was to be taken for a public housing project.[159] The court valued the property as it existed before the depressing effects of the proposed taking were felt. To push this case to its logical conclusion might require that property be valued as of the date a renewal or public housing project is designated—presumably the point at which a negative impact will first be felt.

The problem takes on more complicated dimensions if code enforcement or demolition activity is undertaken concurrently with urban renewal projects. In *Research Associates, Inc. v. New Haven Redevlopment Agency,*[160] the New Haven Board of Health refused to authorize the repair of two tenement houses and then closed them as unfit for habitation. Ordinarily, a building ordered closed may be reopened when satisfactory repairs have been made. Nine months later, when the redevelopment agency moved to acquire the property, the referee in the condemnation proceedings assigned no value to the structures. The court affirmed the referee's findings in an ambiguous paragraph which relied principally on the action of the board of health.[161] When noncompensatory police power action has been initiated after rather than before the filing of eminent domain proceedings, courts have reached contrary results. In one recent case[162] involving a dwelling demolished under municipal order subsequent to the initiation of eminent domain proceedings, the court found that the concurrent exercise of these two powers constituted a taking; accordingly, it valued the property as if it had not been demolished. The court did not attempt an independent analysis of

158. 113 Ga. App. 432, 148 S.E.2d 188 (1966). A court can just as convincingly decide that incidental damages such as those suffered in *Schroeder* are noncompensable, as in Chicago Housing Authority v. Lamar, 21 Ill. 2d 362, 172 N.E.2d 790 (1961), and State v. Vaughan, 319 S.W.2d 349 (Tex. Civ. App. 1958).

159. The court also relied on the fact that the condemnee's property had been posted as government property two months before the actual taking. 113 Ga. App. at 434, 148 S.E.2d at 190.

160. 152 Conn. 137, 204 A.2d 833 (1964). *Accord,* Director of Highways v. Olrich, 5 Ohio St. 2d 70, 213 N.E.2d 823 (1966).

161. No rent had been collected on the property since the date of the closing order. *Cf.* Winepol v. State Roads Commn., 220 Md. 227, 151 A.2d 723 (1959). Here the building's tenants moved out when they learned of the prospective taking, so the property was vacant at the time of taking. In using the rent-capitalization approach, the owner was allowed to show potential rental at the time of taking by going back to the last years in which rentals were paid.

162. City of Cleveland v. Kacmarik, 17 Ohio Op. 2d 135, 177 N.E.2d 811 (1961). *Cf.* Shaffer v. City of Atlanta, 223 Ga. 249, 154 S.E.2d 241 (1967). The court found a taking in a case in which the city ordered the demolition of a dwelling and then prohibited repair of the dwelling pending a final determination of questions pertaining to the demolition order. In *In re* Public Place, 54 Misc. 2d 69, 281 N.Y.S.2d 414 (Sup. Ct. 1967), the court found a de facto taking in an improper failure to issue a building permit which was followed by a cancellation of condemnee's lease.

the demolition order to determine whether it was justifiable on its own merits—an approach which makes more sense than a mechanical before-and-after test.

What of the case in which a property owner voluntarily demolishes his building because of progressive deterioration in an urban renewal area or as an alternative to compliance with a repair order? In an analogous situation, some courts have recognized that when protracted acquisition activity in urban renewal areas leads to progressive neighborhood deterioration, vandalism, and property abandonment, the resulting losses must be compensated and the property valued as if the damage and abandonment had not occurred.[163] In one of these cases there was evidence of deliberate acts by the condemning authority which contributed to the property loss.[164] But the offending action—notification to public assistance recipients in project areas of the need to find dwellings elsewhere—is difficult to characterize as other than normal urban renewal project activity. The deliberate-act rationale has also been applied to find a taking on the basis of normal housing code enforcement activities. In *City of Detroit v. Cassese*,[165] public authorities filed an eminent domain action for the acquisition of property in an urban renewal project area in 1950. The action was left pending for ten years without further action before it was finally dropped. In the interim, one of the dwellings to be acquired was vandalized, and the owner finally tore it down in response to a city building division order to repair or demolish. The eminent domain action was then refiled.[166] Reversing the case for a new trial under the deliberate-act rationale, the appellate court indicated that intense building inspection and code enforcement could have constituted a de facto taking prior to the refiling of the eminent domain proceeding. The case is per-

163. City of Buffalo v. Strozzi, 54 Misc. 2d 1031, 283 N.Y.S.2d 919 (Sup. Ct. 1967); City of Cleveland v. Carcione, 190 Ohio App. 525, 190 N.E.2d 52 (1963); City of Cincinnati v. Mandel, 9 Ohio Misc. 235, 224 N.E.2d 179 (C.P. 1966). The courts do not always indicate whether they base their decisions on a constructive taking or on the recognition of additional compensable elements of damage. *See* Becos v. Mosheter, 15 Ohio St. 2d 15, 238 N.E.2d 548 (1968).

164. City of Cleveland v. Carcione, 190 Ohio App. 525, 190 N.E.2d 52 (1963).

165. 376 Mich. 311, 136 N.W.2d 896 (1965). In a similar case arising out of the same project, a federal court reached the same result. Foster v. City of Detroit, 254 F. Supp. 655 (E.D. Mich. 1966). In this case the city also demanded from the owner a waiver of any claim of damages for the increased value of his property due to improvements which the city had allowed. *Cassese* was also followed in Sayre v. United States, 282 F. Supp. 175 (N.D. Ohio 1967). In *Sayre*, the court noted that no taking would have occurred if a depreciation in property values in the project area had taken place, even though there had been no delay in the urban renewal eminent domain proceedings.

166. Note that abandonment and refiling of the compensation proceeding will not entitle the property owner to compensation for intermediate damage if he cannot establish the bad faith of the condemnor. City of Houston v. Biggers, 380 S.W.2d 700 (Tex. Civ. App. 1964).

haps explainable by its unusual facts: formal eminent domain proceedings were filed and left pending for a ten-year interim period during which code enforcement activity was carried on.[167] In another case, a trial court in Ohio found that systematic building demolition activities carried out pursuant to a federal grant were not a substitute for a taking and payment of compensation in eminent domain.[168] In this case, the buildings to be demolished were in an area which was scheduled for later urban renewal treatment.

Evaluation of these recent precedents is difficult. On the one hand, they suggest a cautious approach to any use of building demolition or code enforcement activity in conjunction with urban renewal programs that require payment of compensation. On the other hand they reflect, to some extent, the current practice of permitting the use of noncompensatory housing code enforcement and building demolition activity to depress the level of compensation that is constitutionally payable in an eminent domain proceeding. Under the compensation method proposed in this Article, housing maintenance standards are explicitly applied to determine constitutionally acceptable compensation levels. Only a timing problem remains. Public agencies must be careful to consider the negative impact of urban renewal and related activities on the property subject to valuation during the interim between announcement of the project and the actual taking. One way in which to accomplish this is to make blanket valuations of property in urban renewal areas as soon as the projects are designated.[169]

C. *The Personal Hardship Problem*

The proposal made in this Article to base compensation for

167. *Cf.* A. Gettelman Brewing Co. v. City of Milwaukee, 245 Wis. 9, 13 N.W.2d 541 (1944), in which the court held that damages were not payable for delay in starting condemnation proceedings that had been kept under consideration for some time. Even mere delay in continuing eminent domain proceedings may result in compensation being payable for depreciation in property values when the delay is unreasonable. *See* Lord Calvert Theatre v. Mayor & City Council, 208 Md. 606, 119 A.2d 415 (1956).

168. State *ex rel.* Shulman v. City of Cleveland, 8 Ohio Misc. 1, 220 N.E.2d 386 (C.P. 1966). In West Chicago Park Commrs. v. Boal, 232 Ill. 238, 83 N.E. 824 (1908), the court affirmed an award based on the rent-capitalization method of valuation when witnesses for the condemnor based their estimate in part on the expectation that condemnation of the building for insanitary conditions would depress rents.

169. Discounting the impact of local housing improvement programs over time may still present difficult problems, however. For one thing, the impact of these programs is cumulative, so that earlier projects may have an influence on areas of the city which are scheduled for later redevelopment. In addition, even the mere announcement of proposed housing improvement activities may have an effect on maintenance and investment. But this is difficult to take into account until some official act occurs which can be used as a point in time for the beginning of the project. A line must be drawn somewhere. The answer may be that the property owner will have to assume the collateral effects of housing improvement activities in other parts of the city on the ground that their effect on property values in later projects is too remote.

slum properties on compliance with the standards of housing maintenance codes is intended as a method of rationalizing public powers over slum housing rather than as a punitive measure against investors in slum properties. For one thing, some of these investors may be poor Negroes or Caucasians[170] rather than the slumlords who are the targets of social reformers. Nevertheless, we can expect that using housing code standards to determine the amount of compensation will in many cases reduce below present levels the compensation that is payable. While we might agree that these losses should be forced on slum investors as a matter of social policy, more difficult problems are presented by the owner-occupant who must seek new housing elsewhere in the community if his home is taken for an urban renewal project. Considerable evidence already exists that owner-occupants displaced by urban renewal activities do not receive sufficient compensation to purchase adequate replacement housing.[171] In these cases, the law of compensation conflicts with equally demanding policies calling for the proper relocation of residents displaced by public action. The problem is complicated by the fact that the market for land-financing in slum areas inflates property security on slum housing in order to enhance the attractiveness of the lending risk. Even an award of compensation under conventional rules of valuation may leave the owner-occupant with an amount which is insufficient to retire existing indebtedness, much less compensate him for his equity investment.[172] Various solutions to this problem have been suggested. Under one, a wholesale-retail approach to market value,[173] the property owner would receive the fair credit value of his property rather than the fair cash value. The award would apparently be sufficient to retire any existing indebtedness, but not enough to compensate the owner for his investment or for improvements. Another solution would authorize the condemning agency to acquire the notes or other evidence of indebtedness as well as the property itself, again at market value.[174] Existing indebtedness would be acquired at its fair

170. *See* G. STERNLIEB, THE TENEMENT LANDLORD 121-51 (1966).

171. *See* the discussion in Downs, *Uncompensated Non-Construction Costs Which Urban Highways and Urban Renewal Impose Upon Residential Households*, in *Hearings on Urban Highway Planning, Location, and Design Before the Subcomm. on Roads of the Senate Comm. on Public Works*, 90th Cong., 2d Sess., pt. 2, at 313, 323-27 (1968).

172. The problem was dramatically illustrated by the Mayme Riley litigation. Riley v. District of Columbia Redevelopment Land Agency, 246 F.2d 641 (D.C. Cir. 1957). For comment *see* HOUSE COMM. ON PUBLIC WORKS, 88th Cong., 2d Sess., STUDY OF COMPENSATION AND ASSISTANCE FOR PERSONS AFFECTED BY REAL PROPERTY ACQUISITION IN FEDERALLY ASSISTED PROGRAMS 86-88 (1965); Dunham, *Do "Hard Cases" Make Bad Economics?*, 4 How. L.J. 50 (1958).

173. HOUSE COMM. ON PUBLIC WORKS, *supra* note 172, at 86.

174. *Id.* at 87.

market value rather than its face value, and any difference between the value of the property and the fair market value of the indebtedness would be payable to the owner. A final alternative, which has been adopted in England, would authorize judicial write-off or alteration of the terms and period of an outstanding indebtedness in cases in which the property is not acquired at a value sufficient to retire existing debt.[175] Although attractive, a statute drafted along this line might run into constitutional difficulties in the United States.

While none of these proposals has been implemented, some relief has been made available to the displaced owner-occupant by recent federal and state legislation which provides him a compensatory bonus to obtain replacement housing which meets minimum standards.[176] These innovations are helpful, but they leave untouched the plight of the low-income investor in rental housing who does not happen to reside in the housing he owns. Unless we wish to make socially significant policy distinctions between the owner-occupant and the owner-investor, the personal hardship problem must receive continuing attention.

IV. Conclusion

No attempt has ever been made to rationalize the exercise of compensatory and noncompensatory public powers over slum property. Disparities in the incidence of compliance burdens on slum property owners, difficulties in finding appropriate levels of compensation, and corresponding rigidities in the exercise of public powers of housing improvement suggest that a way of rationalizing the exercise of these powers must be found.[177] These problems will intensify with increasing opportunity for the overlapping exercise

175. Housing Act of 1957, 5 & 6 Eliz. 2, c. 56, sched. 2, pt. 2, par. 5, as extended by the Housing (Slum Clearance Compensation) Act 1965, c. 81, § 2.

176. A $5,000 bonus is provided in the Housing and Urban Development Act of 1968, 82 Stat. 476, § 516, and in the Federal-Aid Highway Act of 1968, 82 Stat. 815, § 30. For a similar provision in a state law *see* Md. Ann. Code art. 33A, § 6A (Supp. 1968). As the federal legislation is written, the bonus is payable regardless of the physical condition of the property that is acquired.

177. This Article has concentrated on slum housing and on housing improvement programs, but there is no reason why the proposals made here cannot be applied to takings of slum housing for nonhousing purposes, such as highway programs. Moreover, as standards of maintenance for nonresidential property are more widely adopted, these proposals can also be implemented for nonresidential property. A question may be raised whether valuation on the basis of maintenance codes might not supplant the market-value standard in all cases. One answer is that the market test should continue to be applied whenever the market is operating under normal conditions. Whether the market-value or the maintenance-code test of value should be applied will probably be a question for judicial or administrative determination. In addition, further analysis may indicate a gradual erosion of the market-value standard outside slum areas.

of public powers based alternatively on the payment of compensation in full, or the payment of no compensation at all.

This Article has attempted to construct a new basis for compensation which will apply regardless of the housing treatment that is selected. Approaches to this problem which start with the market-value basis of just compensation make the assumption that the market-value standard can be made to work in slum areas. Our analysis began, instead, with the law of building demolition. The assumption was that the principles governing the demolition of substandard housing without compensation might provide a clue to a constitutional definition of value in slum housing. This analysis, however, led to a consideration of standards of repair. The courts have tended to judge an order for the demolition of a building on the basis of a comparison of required repairs with building value. But the use of "building value" as a basis for judging the repair burden assumes the question in issue.

As an alternative, we examined the housing maintenance code as the public expression of minimum housing standards and proposed a method of deriving the value of a substandard building from that code. This analysis began with a consideration of constitutionally acceptable standards of housing maintenance. From these we developed an index of building value based on the extent to which the building complies with the maintenance requirements. Compensation would be predicated on the extent of compliance, with two exceptions. A tipping point would be selected beyond which the existing building would be assumed to contribute no value to the reconstructed building. In these cases, the owner would not be constitutionally entitled to compensation. Furthermore, the burden of housing repair orders would be judged constitutionally on the basis of the owner's opportunity to recoup his repair costs from future rentals.

The proposal does not necessarily provide a satisfactory resolution of all the problems discussed. Constitutional difficulties may arise from the use of housing maintenance standards to fix levels of compensation, and hardship may result whenever compensation is inadequate to retire existing indebtedness or to secure adequate replacement housing. Solutions to these problems are possible. If they can be found, the proposal put forward here can make a significant contribution rationalizing the exercise of legal powers over slum housing.