

“EMINENT GOOD SENSE?:”  
USING EMINENT DOMAIN TO CURTAIL DEMOLITION BY NEGLECT

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A THESIS

in

Historic Preservation

Presented to the Faculties of the University of Pennsylvania in  
Partial Fulfillment of the Requirements of the Degree of

MASTER OF SCIENCE IN HISTORIC PRESERVATION

2019

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## Acknowledgements

The idea that I wrote this thesis as an independent research project does not fully account for the village of people who supported me throughout this past year. In particular, I am incredibly grateful to my advisor, Anne Nelson, who sparked my interest in preservation law and encouraged me to pursue this topic. She managed to give me both the guidance and reassurance that I sought as well as the room that I needed to make this project my own. I am also grateful to Francesca Russello Ammon, who effectively served as my secondary advisor and pushed me to be thoughtful and rigorous in my research. In addition, this project benefitted from the advice of various faculty at Penn and professionals in the field, as well as my fellow students. Thanks are also due to Reuben McKnight, Cara Macri, and Cynthia Howk who provided valuable insight on the three case studies. Lastly, I would be nowhere without my family and my friends. Thank you to everyone who tolerated my enthusiasm for talking about land use law and who believed in me even when I did not believe in myself.

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## 1. Introduction

In the summer of 1955, 14-year-old Emmett Till walked into Bryant's Grocery & Meat Market in Money, Mississippi to buy candy. After he was accused of whistling at a white woman working at the store, he was brutally murdered by two white men and his body was thrown in the Tallahatchie River. This hate crime became a key moment in the civil rights movement, but how to memorialize it is hotly contested in this small, Delta community. While the courtroom where the men who killed Till were acquitted was restored to the period of the trial, the grocery store at the center of the crime is in a state of ruin. It is currently owned by the family of one of the jurors in the case (all of whom were white), who purchased the building in the 1980s and died in 1998. The current owners have been fickle and guarded, sometimes committing to restore the building and other times refusing to sell the property. As one resident remarked, "I still don't know what they want...I don't know if it's money or they want control of the story that's told."<sup>1</sup>

While this story is unique to the legacy of Emmett Till's murder, the abandonment and subsequent deterioration of a historically-significant building is all too common in places throughout the United States.<sup>2</sup> Every year, preservation advocacy organizations around the country write lists of the most endangered historic buildings in their communities.<sup>3</sup> The threats

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<sup>1</sup> See Audra D.S. Burch, Veda Shastri, and Time Chaffee, "Emmett Till's Murder, and How America Remembers Its Darkest Moments," *The New York Times*, February 20, 2019, accessed April 10, 2019, <https://www.nytimes.com/interactive/2019/02/20/us/emmett-till-murder-legacy.html>.

<sup>2</sup> In a 1993 survey conducted by the National Alliance of Preservation Commissions, local historic preservation commissions responded that "preventing demolition by neglect was the most difficult situation with which they must deal." Rebecca Osborne, "Balancing Act: Preventing Demolition by Neglect," (The Historic Dimension Series, UNCG Department of Interior Architecture, April 2005), accessed April 30, 2019, <http://www.presnc.org/balancing-act/>. There is not a more recent version of this survey, nor are there reliable numbers on the prevalence of demolition by neglect today. See Cory Kegerise, email message to author, April 22, 2019.

<sup>3</sup> Most notably, the National Trust for Historic Preservation has compiled an annual list of America's 11 Most Endangered Historic Places since 1988. The purpose of this list and others like it is to raise awareness and incentivize action. See "11 Most Endangered Historic Places," National Trust for Historic Preservation, accessed May 1, 2019, <https://savingplaces.org/americas-most-endangered-historic-places#.XMmlvuhKhPY>.



*Figure 1.1 What remains of Bryant's Grocery & Meat Market in Money, Mississippi. (Photo by Eames Heard, 2018)*

posed to these buildings vary, but many suffer from intentional or unintentional abandonment for years and even decades. This issue, known as demolition by neglect, is a significant concern in places with historically-, architecturally-, and culturally-significant buildings that no longer meet social needs or have value in the real estate market. This is especially true in cities that have experienced a decline in both their population and their economic base, but it is also present in rural areas as well.

Demolition by neglect is challenging to prevent and even more challenging to stop once it has begun. One reason is because existing regulatory strategies are largely reactive and punitive. This means that they are not always effective enough to incentivize compliance from private property owners, whether they have deep pockets or extremely limited financial means. In addition, these regulations are typically not nimble enough to intervene in dire situations because they are structured to include multiple opportunities for compliance and appeals. This enables

property owners to stall, which effectively allows the deterioration to continue. Another reason why it is difficult to reduce instances of demolition by neglect is because intent is difficult to prove, even though it is often easy to identify. This leaves many communities in limbo, with a clearly abandoned and deteriorating building and no recourse to force the property owner to act.<sup>4</sup>

This paper examines the effectiveness of using eminent domain as a tool to curtail demolition by neglect. Specifically, it studies how local governments can and have condemned vacant and abandoned historic properties to force a change of ownership when the property owner is unwilling or unable to sell. As such, it draws on two bodies of research: one focused on existing strategies to manage demolition by neglect, the other on historical uses of eminent domain to advance preservation objectives. Underlying these discussions is an acknowledgement that the preservation of cultural heritage is a valid public purpose that necessitates government intervention.

The existing literature on demolition by neglect comes from three main types of sources: student research projects, professional guidance, and academic scholarship. Authors in all three categories acknowledge that demolition by neglect is a significant preservation issue that is too complex to be solved with a single tool. Most authors view demolition by neglect as an issue of preservation regulation and therefore propose ways to make existing regulations more effective.<sup>5</sup>

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<sup>4</sup> In her discussion of municipal policies that aim to rehabilitate vacant and abandoned buildings, Elizabeth Tisher notes, “As buildings continue to deteriorate and threaten public health and safety, municipalities often feel that they have little recourse outside of ordering demolition.” She argues that the prohibition against demolition in historic districts actually leads to demolition by neglect because “bad-faith property owners take advantage of the system’s slow process of appeals” to stall action until the building is in such poor condition that they argue rehabilitation would be an economic hardship. Tisher concludes that, although there are existing regulatory tools, they are not enough to discourage demolition, especially in cities that have experienced a significance decrease in both their population and their economic base. Elizabeth M. Tisher, “Re-Stitching the Urban Fabric: Municipal-Driven Rehabilitation of Vacant and Abandoned Buildings in Ohio’s Rust Belt,” *Vermont Journal of Environmental Law* 15, no. 173 (Fall 2013): 187.

<sup>5</sup> See Rachel Ann Hildebrandt, “Demolition-By-Neglect: Where Are We Now?” (master’s thesis, University of Pennsylvania, 2012), accessed April 30, 2019, [https://repository.upenn.edu/hp\\_theses/189/](https://repository.upenn.edu/hp_theses/189/). See also Julia Miller, “Doing Away with Demolition by Neglect” (Washington, D.C.: National Trust for Historic Preservation, 2010), accessed April 30, 2019,

This includes recommending affirmative maintenance provisions, demolition by neglect procedures, and other strategies that stem from a local government’s historic preservation ordinance.<sup>6</sup> These authors also discuss the importance of balancing regulations with incentives, arguing that the “stick” of regulation is more effective when there is a complementary “carrot” of an incentive.

Most of these studies are so focused on examining strategies that exclusively target demolition by neglect that they fail to incorporate a more nuanced understanding of what causes disinvestment in the historic built environment in the first place. However, some authors take a more contextual perspective to understand the factors that lead to demolition by neglect, such as public policy, regional land use patterns, broader economic trends, and a lack of support for historic preservation.<sup>7</sup> These are important arguments to make and represent a step in the right direction of weaving together preservation issues with other issues in the built environment.<sup>8</sup>

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<https://forum.savingplaces.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=d14f259d-2652-bfcb-333f-521361d652db>; Anna Martin, “Demolition by Neglect: Repairing Buildings by Repairing Legislation,” (Georgetown University Law Center, 2007), accessed April 30, 2019, [https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1016&context=hpps\\_papers](https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1016&context=hpps_papers).

<sup>6</sup> Recommendations often include a strong local ordinance that sets minimum maintenance or building condition standards and includes effective monitoring and enforcement protocols. Student researchers also highlight the importance of economic hardship provisions and the use of revolving funds to finance stabilization, repair, and rehabilitation. While it is the oldest study, Goldwyn’s offers the most thoughtful analysis. See Andrea Merrill Goldwyn, “Demolition by Neglect: A Loophole in Preservation Policy,” (master’s thesis, University of Pennsylvania, 1995), accessed April 30, 2019.

[https://repository.upenn.edu/hp\\_theses/357/](https://repository.upenn.edu/hp_theses/357/). See also Meg Corbett Richardson, “Demolition-By-Neglect: An Examination of Charleston’s Ordinance,” (master’s thesis, Clemson University and the College of Charleston, 2008); Sakina B. Thompson, “Saving the District’s Historic Properties from Demolition by Neglect,” (Georgetown University Law Center, 2002), accessed April 30, 2019, [https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1013&context=hpps\\_papers](https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1013&context=hpps_papers); Martin, “Demolition by Neglect;” Hildebrandt, “Demolition-By-Neglect;” Osborne, “Balancing Act.”

<sup>7</sup> For example, in his doctoral dissertation, Galen Newman finds that agricultural preservation in areas adjacent to historic towns correlate to a decrease in the rate of demolition by neglect. Newman argues that this trend is the result of population migration outside of cities coupled with urban economic restructuring and a decline in agricultural production. See Galen D. Newman, “An Exogenous Approach to Circumventing Demolition by Neglect: The Impact of Agricultural Preservation on the Historic Fabric of Colonial Towns,” (dissertation, Clemson University, 2010). See also Galen Newman and Jesse Saginor, “Four Imperatives for Preventing Demolition by Neglect,” *Journal of Urban Design* 19, no. 5 (2014): 622–637; Tisher, “Re-Stitching the Urban Fabric;” Goldwyn, “Demolition by Neglect.”

<sup>8</sup> There is a lack of discussion of equity in code enforcement and the burden that regulations created to curtail demolition by neglect might have on disadvantage and oppressed populations. In doing so, existing



An unlikely, but promising, alternative tool to curtail demolition by neglect is eminent domain. Eminent domain is the government's authority to take private property for public use, provided that the property owner receives just compensation for the taking.<sup>9</sup> While preservationists may equate eminent domain with the destruction of historic built fabric, it can also be used as a tool to promote the preservation of cultural heritage. In fact, there are several examples where governments have condemned privately-owned, neglected, historic properties from noncompliant property owners and transferred them to new property owners who are capable of being better stewards. However, these examples are not widely known by preservation advocates and professionals.

To date, there has been little scholarship on the use of eminent domain to condemn historic properties in order to save them. The research that does exist is bifurcated. Authors with more of a preservation focus mention eminent domain as one of many tools used to prevent and stop demolition by neglect.<sup>10</sup> Authors with a background in law explore the legal foundations of its use, especially in the wake of the landmark United States Supreme Court case *Kelo v. City of New London* in 2005.<sup>11</sup> One author examines specific cases to understand how courts have interpreted local governments' use of eminent domain to lessen demolition by neglect; however,

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research misses an opportunity to align the preservation of historic built fabric with the preservation of social networks and cultural traditions.

<sup>9</sup> *U.S. Constitution*, Amendment V.

<sup>10</sup> A brief white paper published in the Preservation Law Educational Materials series in 2009 offers an introduction to the issue and the strategies used to address it. Unlike most sources, it identifies specific local governments that authorize the use of eminent domain to condemn and acquire properties that are suffering from demolition by neglect. See Preservation Law Educational Materials, "Demolition By Neglect" (Washington, D.C.: National Trust for Historic Preservation, August 2009): 1-7, accessed April 30, 2019,

<https://forum.savingplaces.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=ccd565f7-27f1-fcd7-f3a9-351b5a7b645b&forceDialog=1>. See also Hildebrandt, "Demolition-By-Neglect;" Tisher, "Re-Stitching the Urban Fabric;" Goldwyn, "Demolition by Neglect."

<sup>11</sup> See *Kelo v. New London*, 545 U.S. 469 (2005). See also R. Benjamin Lingle, "Post-Kelo Eminent Domain Reform: A Double-Edged Sword for Historic Preservation," *Florida Law Review* 63, no. 4 (2011): 985-1012; Tisher "Re-Stitching the Urban Fabric."

they only rely on court opinions for their analysis.<sup>12</sup> As a result, this study and others fail to understand both the legal and socio-political factors that limit the awareness and implementation of this tool.

Recent literature on the intersection of eminent domain and historic preservation has largely focused on the public backlash that resulted from the *Kelo* ruling, which called for restricting government's authority to condemn privately-owned properties.<sup>13</sup> Following *Kelo*, at least 42 states passed legislative reforms with the intention of protecting private property owners from a perceived government overreach.<sup>14</sup> Crucial to these reforms was the elimination of the ability to use eminent domain to promote private commercial development, including private-to-private property transfers.<sup>15</sup> According to several authors, the post-*Kelo* reforms represent a "double-edged sword" for historic preservation.<sup>16</sup> The stronger reforms have narrowed definitions of blight, which means that a property cannot be condemned strictly due to its age or poor condition. This protects historic structures, but it also makes it more challenging to use condition as a rationale for condemnation. The weaker reforms left government with enough authority to condemn historic buildings for preservation purposes, including the allowance for private-to-private property transfers. However, these reforms also have not made it any harder to

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<sup>12</sup> See Lingle, "Post-Kelo Eminent Domain Reform."

<sup>13</sup> See Paul Edmondson, "Memorandum: Some Thoughts About the *Kelo* Decision for Members of the Historic Preservation Community" (Washington, D.C.: National Trust for Historic Preservation, August 2005). See also Adrian Scott Fine, "Eminent Domain: A Double-Edged Sword for Historic Preservation," *Forum Journal* 19, no. 3 (2005): 22-26; Lingle, "Post-Kelo Eminent Domain Reform;" Robert Lawton Zurn, "A Blessing or a Curse? The Potential Impact of Post-*Kelo* Legislation on Historic Preservation" (master's thesis, The University of Georgia, 2006), accessed April 30, 2019, [https://getd.libs.uga.edu/pdfs/zurn\\_robert\\_1\\_200605\\_mhp.pdf](https://getd.libs.uga.edu/pdfs/zurn_robert_1_200605_mhp.pdf); Tisher, "Re-Stitching the Urban Fabric;" *Kelo v. New London*.

<sup>14</sup> See Lingle, "Post-Kelo Eminent Domain Reform," 986.

<sup>15</sup> See Edmondson, "Memorandum," 1.

<sup>16</sup> See Edmondson, "Memorandum;" Fine, "Eminent Domain," Lingle, "Post-Kelo Eminent Domain Reform."

use economic development as a justification for eminent domain, which puts historic buildings at risk of demolition in favor of new construction.<sup>17</sup>

The difficulty of addressing demolition by neglect illustrates the need for additional tools to complement existing ones. However, research on the issue largely focuses on improving existing enforcement strategies, such as affirmative maintenance provisions and demolition by neglect procedures. While a few studies mention the possibility of using eminent domain to manage demolition by neglect, they only do so in passing or as one of many tools.<sup>18</sup> These authors miss an opportunity to more fully analyze the benefits and drawbacks of condemnation as a tool to discourage abandonment and encourage rehabilitation. As a result, there is a need to research more proactive approaches to dealing with privately-owned, vacant and abandoned, historic properties.<sup>19</sup>

This paper aims to close the gap between scholarship and practice by analyzing examples in which local governments condemned historically-significant properties in poor condition to effectuate their transfer to an owner who would rehabilitate and occupy them. It begins by surveying existing tools used by local governments to curtail demolition by neglect to understand where regulatory loopholes still exist. It then analyzes the legal foundations of eminent domain and reviews cases in which it was used to further preservation objectives. It also explains the U.S. Supreme Court's decision in *Kelo* as well as the state-level legislative response to the decision and its outcome for preservation.

This paper then turns to a detailed analysis of three cases in which courts upheld local governments' authority to use eminent domain to condemn historically-significant properties. Each analysis examines the court's opinion to better understand how language in state-enabling

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<sup>17</sup> See Lingle, "Post-Kelo Eminent Domain Reform," 990.

<sup>18</sup> See Preservation Law Educational Materials, "Demolition By Neglect;" Hildebrandt, "Demolition-By-Neglect;" Tisher, "Re-Stitching the Urban Fabric;" Goldwyn, "Demolition by Neglect."

<sup>19</sup> See Preservation Law Educational Materials, "Demolition By Neglect," 1-3.

legislation and local ordinances combined with the particular conditions of the property and other factors led the court to rule in favor of the local government. Included in this analysis is a discussion of the role of politics and advocacy gleaned through personal interviews and media research. Each case study concludes with a coda explaining what happened after the court ruling to reflect on whether or not eminent domain led to a beneficial outcome for the public.

At first glance, eminent domain appears to be a straightforward and effective strategy that is more action-oriented than the regulations that are typically used to encourage the maintenance and use of historic buildings. However, it is a highly contested government power, the use of which draws instant criticism from advocates for both property rights and marginalized communities.<sup>20</sup> Although this does not legally prohibit governments from condemning vacant and abandoned historic buildings for the purposes of rehabilitating them, it is important to keep in mind that both eminent domain and historic preservation are often misunderstood by the public and suffer from a negative public perception. As a result, preservationists must be mindful of how they use this authority to advance preservation objectives.

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<sup>20</sup> Tanvi Misra, “Lawmakers Aim to Protect Private Landowners on U.S.-Mexico Border,” *CityLab*, February 15, 2019, accessed April 30, 2019, <https://www.citylab.com/equity/2019/02/trump-border-wall-private-land-protection-eminent-domain/582868/>.

## 2. Demolition by Neglect

### Definitions

The term “demolition by neglect” is used to describe when a property owner enables the deterioration of a historic building, often beyond the point of rehabilitation.<sup>21</sup> The term is helpful because it combines both an intent and an outcome; however, it only begins to expose the complicated factors that lead to the deterioration of historic properties. Describing a situation as demolition by neglect also obscures the fact that the challenges faced by vacant and abandoned properties are not solely limited to ones that are historic.<sup>22</sup> Despite these considerations, defining demolition by neglect is important because it clarifies the approach taken to remedy it. Clear definitions are also necessary for writing fair and legally-enforceable regulations.

Part of the challenge of defining demolition by neglect is the difficulty in identifying intent. When a situation is labelled as demolition by neglect, malicious intent is often implied.<sup>23</sup> In these cases, a property owner typically seeks to demolish a historic building to facilitate new construction on the property but is prevented from doing so by the local historic preservation commission because the property is designated. Frustrated by not being able to do what they want, the property owner deliberately fails to maintain the building to the point where it becomes a public nuisance and is demolished for safety reasons. In some instances, the property owner

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<sup>21</sup> According to Newman and Saginor, “The term ‘demolition by neglect’ gained popularity in the early to mid-1990s—a phrase coined to raise awareness of the loss of historic structures.” However, the authors note that after an initial wave of interest during this time, research and conversation on the issue diminished until the economic recession in 2008. Research used in this study largely dates to the second wave that Newman and Saginor identify, with a few outliers that predate the late-2000s. Newman and Saginor, “Four Imperatives,” 623.

<sup>22</sup> For example, factors as varied as deferred maintenance, a desire to redevelop the property, absentee property owners, and the loss or relocation of the building’s function all contribute to poor building conditions. *See* Newman and Saginor, “Four Imperatives,” 623.

<sup>23</sup> *See* Preservation Law Educational Materials, “Demolition By Neglect;” Goldwyn, “Demolition by Neglect,” 1-2.



*Figure 2.1 Red Rest Cottage, along with its neighbor Red Roost Cottage, is a rare example of a late-19<sup>th</sup> century bungalow in La Jolla, California, but is currently suffering from demolition by neglect. (Photo by Jeff Scott, 2019)*

argues that the building is in such poor condition that there is no viable use of the property with the building still on it.<sup>24</sup> Either way, the property owner successfully circumvents the application of local preservation laws by exploiting a loophole that eventually allows for demolition.<sup>25</sup>

A more nuanced understanding of demolition by neglect acknowledges that it can also stem from “circumstances beyond the control of the property owner.”<sup>26</sup> This may include unclear or contested property ownership or simply a lack of market demand.<sup>27</sup> In some ways, these cases are more difficult to redress because there is likely an absentee property owner who is

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<sup>24</sup> See Tisher, “Re-Stitching the Urban Fabric,” 187.

<sup>25</sup> See Miller, “Doing Away with Demolition by Neglect,” 2.

<sup>26</sup> *Ibid.*, 6

<sup>27</sup> See Hildebrandt, “Demolition-By-Neglect,” 1-2; Newman and Saginor, “Four Imperatives,” 624.

unresponsive to the local government's attempts to enforce compliance with historic preservation and building code regulations.

Another challenge in defining demolition by neglect is determining the appropriate physical, financial, and legal conditions that necessitate intervention. Most importantly, a claim of demolition by neglect must be supported by a significant level of deterioration. This threshold is typically established by a local ordinance that specifically states what the building conditions must be in order to authorize government intervention.<sup>28</sup> According to many state and local statutes, the pursuit of enforcement against the offending property owner must also occur in a strictly regulated sequence. If the government attempts to intervene too early or too aggressively, then they may face a legal challenge. However, if the government intervenes too late, the building's condition may be so deteriorated that rehabilitation becomes cost-prohibitive and the building loses its material integrity.<sup>29</sup>

Local governments that seek to limit demolition by neglect in their communities require a multifaceted approach.<sup>30</sup> Ideally, this would include regulations, monitoring and enforcement, and incentives, which all work together to spur the rehabilitation and occupancy of vacant and abandoned historic properties in poor condition. It is also important to keep in mind that not all strategies that can be used to deal with demolition by neglect are explicitly labelled as such. There are many tools that are used to manage vacant and abandoned buildings, not just historic ones, that can also be used in combination with or instead of explicit demolition by neglect tools set forth in historic preservation ordinances.

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<sup>28</sup> See Miller, "Doing Away with Demolition by Neglect," 7.

<sup>29</sup> See Osborne, "Balancing Act," 2.

<sup>30</sup> See Miller, "Doing Away with Demolition by Neglect."

## Regulatory Strategies

Regulatory strategies to prevent demolition by neglect are typically included in a local government's historic preservation ordinance. The most common strategy is an affirmative maintenance provision, which sets a standard level of maintenance for locally-designated historic properties. These provisions have been the "traditional approach" to preventing demolition by neglect for over three decades; for just as long, researchers and professionals have recognized that it is an imperfect strategy.<sup>31</sup> However, it is a logical strategy, since, as preservation lawyer Julia Miller writes, "Prevention of demolition-by-neglect begins with the obligation to maintain one's property."<sup>32</sup> The difference between a general building code and an affirmative maintenance standard is that the former reacts to hazards that threaten public safety while the latter attempts to prevent a hazard; affirmative maintenance standards are also triggered much earlier in the building's decline.<sup>33</sup> The most robust of these provisions also require regular, proactive condition monitoring. As a result, affirmative maintenance provisions attempt to nip demolition by neglect in the bud.

Another, though less common, regulatory tool is a demolition-by-neglect procedure in the historic preservation ordinance. These procedures give historic preservation commissions direct authority to regulate poor property conditions, rather than relying solely on code enforcement officials. Ideally, they are flexible enough to allow the historic preservation commission to negotiate a stabilization schedule with the property owner so that punitive enforcement actions are avoided. An adjacent and particularly creative strategy is when the local government places a moratorium on issuing building permits for new construction on the site of a property that has been demolished due to neglect. Some ordinances, such as the Unified Development Code in San

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<sup>31</sup> Goldwyn, "Demolition by Neglect," 2-4.

<sup>32</sup> Miller, "Doing Away with Demolition by Neglect," 2.

<sup>33</sup> See Hildebrandt, "Demolition-By-Neglect," 10.



Antonio, Texas, also prohibit the issuance of permits that allow those properties to be used as surface parking lots.<sup>34</sup>

In addition to regulations that govern the relationship between the historic preservation commission and the property owner, some local preservation ordinances also require building department officials to notify and consult with historic preservation commissions before performing work on or demolishing historic resources.<sup>35</sup> Miller argues that this type of integration between historic preservation regulations and unsafe building procedures prevents property owners from furtively receiving approval for demolition permits after arguing that the building constitutes a public safety hazard.<sup>36</sup> It also ensures coordination between historic preservation commissions and building code enforcement officials.<sup>37</sup>

While affirmative maintenance provisions and demolition-by-neglect procedures specifically protect historic properties, there are additional regulatory tools that are used by communities to deal with all types of vacant and abandoned properties. Some of these tools include vacant building registries, public nuisance ordinances, façade ordinances, and windows and doors ordinances. In addition, there are other tools that are used to relieve development pressure, such as transfer of development rights and zoning.<sup>38</sup> While not explicitly intended to address demolition by neglect, all of these tools have been used to protect historic properties that are in danger of being demolished for redevelopment purposes. In essence, they attempt to balance the need for new development with the need for preservation. However, this means that they are only effective in cases where demolition by neglect is caused by a property owner who

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<sup>34</sup> See Miller, "Doing Away with Demolition by Neglect," 15.

<sup>35</sup> *Ibid.*, 17.

<sup>36</sup> *Ibid.*, 18.

<sup>37</sup> See Osborne, "Balancing Act," 1.

<sup>38</sup> See Newman and Saginor, "Four Imperatives," 626-630.

wants to redevelop the property. As a result, they do not correct for weak markets where demolition by neglect is caused by the lack of demand for the use of the building.<sup>39</sup>

### **Monitoring and Enforcement**

Regulatory strategies are useful tools for addressing demolition by neglect, but they are ineffective if they are not enforced. Miller argues, “The ability to effectively preserve and protect a community's historic resources also requires the commitment to monitor designated resources and enforce violations when they occur.”<sup>40</sup> Monitoring and enforcement should be codified in the historic preservation ordinance and carried out by the historic preservation commission as well as the code enforcement staff. In a case study analysis of three local governments with demolition by neglect provisions in North Carolina, student Rebecca Osborne found that “the difference in approaches between cities lies not in the actual wording of the legislation but in how the city applies the legislation.”<sup>41</sup> This underscores a key finding from other studies, which is that preservationists do not necessarily need a new tool to deal with demolition by neglect, they need to more effectively use the tools that they already have.

The most common form of enforcement is the issuance of citations and penalties, with the hope that they compel owners to repair the property themselves. This typically occurs in the form of fines, with some preservation ordinances imposing civil penalties and others imposing criminal penalties.<sup>42</sup> Preservation ordinances can also be written to enable the local government to ask for injunctive relief from the courts. In these cases, the court can order a property owner to

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<sup>39</sup> Tisher argues that existing regulatory tools are not enough to discourage demolition in cities that have experienced a significant decrease in both their population and their economic base because of the weak real estate markets there. *See* Tisher, "Re-Stitching the Urban Fabric."

<sup>40</sup> Miller, "Doing Away with Demolition by Neglect," 12.

<sup>41</sup> Osborne, "Balancing Act," 5.

<sup>42</sup> For example, South Dakota's state-enabling legislation gives local governments the authority to make historic property neglect a misdemeanor. *See* Newman and Saginor, "Four Imperatives," 631. *See also* Miller, "Doing Away with Demolition by Neglect," 14.

carry out repairs or seek a financial settlement that covers deferred fines.<sup>43</sup> In some cases, local ordinances allow the historic preservation commission to perform stabilization and repair work and then bill the property owner. If the owner fails to pay this bill, then a lien is put on the property. Miller argues that this provision, though rarely used, is important because it “closes the loophole in preservation ordinances.”<sup>44</sup> It is also important to remember that the decision whether or not to enforce a policy (and how) is inherently a political decision.<sup>45</sup>

## Receivership

More and more, local governments are using receivership to rehabilitate neglected properties.<sup>46</sup> Receivership is unique because it focuses on the rehabilitation of the building. This distinguishes it from regulations, which focus on getting the property owner to comply with standards, and from the foreclosure of tax delinquent properties, which focuses on the removal of the property owner.<sup>47</sup> The first vacant property receivership law was enacted by the Ohio Legislature in 1984, based on a model statute drafted by a community development corporation.<sup>48</sup> As of 2016, approximately 19 states had enacted this type of law.<sup>49</sup>

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<sup>43</sup> Miller, “Doing Away with Demolition by Neglect,” 16.

<sup>44</sup> *Ibid.*, 13.

<sup>45</sup> Goldwyn notes both “the political forces that support or impede enforcement” as well as “the interaction of different players, local preservation groups, private organizations, and the buildings department.” Goldwyn, “Demolition by Neglect,” 30.

<sup>46</sup> Receivership is a general legal principle that is applicable beyond abandoned properties. According to *American Jurisprudence*, courts typically appoint a receiver to “protect property, rents, or profits for those ultimately entitled to them.” “Vacant Property Receivership,” Housing and Community Development Network of New Jersey, accessed December 19, 2018, [http://www.hcdnnj.org/index.php?option=com\\_content%26view%3Darticle%26catid%3D19:site-content%26id%3D613:vacant-property-receivership](http://www.hcdnnj.org/index.php?option=com_content&view=article%26catid%3D19:site-content%26id%3D613:vacant-property-receivership).

<sup>47</sup> James J. Kelly Jr., “Refreshing the Heart of the City: Vacant Building Receivership As a Tool for Neighborhood Revitalization and Community Empowerment,” *Journal of Affordable Housing* 13, no. 2 (2004): 211, accessed April 30, 2019, <https://www.jstor.org/stable/25782687>.

<sup>48</sup> Melanie B. Lacey, “A National Perspective on Vacant Property Receivership,” *Journal of Affordable Housing* 25, no. 1 (2016): 144.

<sup>49</sup> *Ibid.*, 145.

In essence, receivership provides a legal vehicle with which a party can petition a court to appoint itself or another party to rehabilitate a property that has outstanding code violations and is considered a public nuisance. According to the Housing and Community Development Network of New Jersey (HCDNNJ):

During the term of the receivership, the receiver effectively exercises all of the powers of the owner in order to restore a building to productive use or remedy the violations that led to the receiver being appointed. While a receiver does not take title to the property, the process may in the end lead to a change in the property's ownership.<sup>50</sup>

As a result, the receiver is typically a third party that does not begin or end as the property owner, though both options are possible in certain states.

State receivership laws differ based on a few key considerations, including the types of properties that are eligible to be targeted, the types of parties that are eligible to intervene, the types of receivers that are eligible to be appointed, and the post-rehabilitation requirements.<sup>51</sup> All receivership laws cover residential properties, but only some include mixed-use, commercial, and/or industrial properties.<sup>52</sup> In addition, most laws require properties to meet a standard for vacancy or abandonment and to be so unsafe that they are considered to be a public nuisance.<sup>53</sup> Some jurisdictions also use tax delinquency as a factor.<sup>54</sup> Most states authorize the local government to petition the court; some also allow a private individual or organization to petition the court as well.<sup>55</sup>

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<sup>50</sup> "Vacant Property Receivership."

<sup>51</sup> In a lesser-used form of receivership the receiver facilitates title clearance and sale, rather than physical rehabilitation of the property. See Lacey, "A National Perspective," 145.

<sup>52</sup> *Ibid.*, 148.

<sup>53</sup> *Ibid.*, 148.

<sup>54</sup> See Lacey, "A National Perspective," 148.

<sup>55</sup> Those that do allow private individuals to petition the court typically require that the individual owns property within a certain distance of the abandoned property and that they are directly experiencing negative effects to their personal health and safety as well as their property value. Lacey argues, "Jurisdictions that offer dual standing to public and private parties are more likely to see private actions." Lacey, "A National Perspective," 145-147.

Most state receivership laws give the property owner the right to intervene, sometimes at multiple points in the process. Although that right is often limited after the receiver is appointed, in some jurisdictions, the owner still has the ability to participate in court decisions. In some jurisdictions, the owner is required to repay the petitioner's legal fees (if they end up taking over the rehabilitation before the receiver is finished) and in others they are required to pay legal fees and construction expenses.<sup>56</sup> However, in all states, the process is designed to ensure that the owner's lack of participation does not slow down or stop the rehabilitation of their property.

Receivership is a powerful legal tool for the rehabilitation and reuse of abandoned properties that improves the current conditions of the building and provides an opportunity for a change in ownership. It is an alternative to both condemnation through eminent domain and public nuisance abatement through the police power because it is administered by the courts, is not focused on punitive measures, and is results-oriented. As a result, receivership is typically perceived by the public to be less controversial, fairer, and more democratic.<sup>57</sup> However, a downside of receivership is that its authority does not stem from sovereign power, which means that it requires specific enabling legislation. Also, since the receiver may not be the future owner-occupant or developer of the property, there is no guarantee that the property will be sold and occupied. Law student Melanie B. Lacey's study illustrates that only approximately a third of all states in the country have this type of legislation, which may indicate a hesitancy to adopt it or simply a lack of knowledge.<sup>58</sup> However, receivership is fairly well-known in the preservation community.<sup>59</sup>

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<sup>56</sup> Lacey, "A National Perspective," 151-152.

<sup>57</sup> "Vacant Property Receivership."

<sup>58</sup> See Lacey, "A National Perspective."

<sup>59</sup> For example, the Cleveland Restoration Society (CRS) in Ohio has partnered with municipalities using receivership for a couple of decades to stabilize and rehabilitate several historic properties. See Mary Rody, email message to author, April 3, 2019. The City of Denver, Colorado recently used receivership to facilitate the rehabilitation of the Bosler House. See Jennifer Cappeto, email message to author, March 27, 2019.

## **Funding, Incentives, and Advocacy**

However effective these strategies may be, they are not always sufficient to both prevent and stop demolition by neglect. Funding, incentives, and advocacy all complement regulations to create a comprehensive approach to ensuring compliance. Some of these tools include providing grants and loans to property owners through a revolving fund, providing tax credits for rehabilitation expenditures, providing tax credits or subsidies for the maintenance of designated historic properties, and partnering with Main Street organizations and other community-based groups that have money to invest.<sup>60</sup> Preservation student Andrea Merrill Goldwyn writes that specific tools are less important than the presence of “a multi-layered strategy, with the dual goals of stopping the intentional neglect of buildings, and creating an atmosphere where such neglect will not be rewarded.”<sup>61</sup>

Formal and informal advocacy also play an important role in preventing demolition by neglect by encouraging local governments to pursue property owners who are failing to maintain historic buildings in good condition.<sup>62</sup> Most historic preservation commissions do not have the capacity to conduct regular surveys of building conditions throughout their jurisdiction, so they rely on “watchdog citizens” to report any issues.<sup>63</sup> As Goldwyn wisely notes, “In order to enforce the ordinance, the enforcers must be aware of the violations.”<sup>64</sup> She argues that it is the responsibility of the entire preservation community to ensure that the enforcers, such as the historic preservation commission or the code official, are made aware of historic property owners who violate building codes.<sup>65</sup>

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<sup>60</sup> Miller, “Doing Away with Demolition by Neglect,” 2; Goldwyn, “Demolition by Neglect,” 54.

<sup>61</sup> Goldwyn, “Demolition by Neglect,” 54.

<sup>62</sup> Osborne, “Balancing Act,” 6.

<sup>63</sup> *Ibid.*, 7

<sup>64</sup> Goldwyn, “Demolition by Neglect,” 56.

<sup>65</sup> *Ibid.*, 75.

## Gaps in Policy and Practice

Currently, local governments rely heavily on regulations to prevent demolition by neglect. The inherent flaw in this strategy is that code enforcement depends on property owners who are willing and able to accept personal liability for their violations.<sup>66</sup> In instances where the property owner is seeking to demolish a historic building in order to redevelop the property, the existing penalty scheme for not complying with affirmative maintenance provisions and building codes is not punitive enough.<sup>67</sup> Many developers consider fines to be part of the cost of doing business, which makes them an ineffective strategy for forcing compliance with building code regulations. Since legal restrictions limit the amount of money that can be levied, local governments are challenged to find the balance between an amount that is high enough to incentivize action, but not so high that it is susceptible to a legal challenge.

A regulation-based strategy also depends on a sophisticated local government with the capacity to routinely monitor property conditions and pay for the administrative costs of issuing fines and court orders.<sup>68</sup> Court-based strategies, such as receivership, are more proactive because they have the ability to remove someone from ownership of a property. However, sometimes a change in ownership (including public ownership) is not enough to overcome a lack of market demand for the use of the property. Similarly, even if incentives are available, they are not always sufficient to lessen financial or psychological barriers to rehabilitation.

While existing strategies could be improved, they will likely never be sufficient enough to address the broader issues and trends that lead to demolition by neglect. Factors such as population growth and decline, regional land use patterns, and public perceptions of the

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<sup>66</sup> Goldwyn, "Demolition by Neglect," 214.

<sup>67</sup> Newman and Saginor write, "Regulatory measures tend to be heavily reactive to structures already succumbing to neglect and usually involve punishment for allowing the process to continue. In some cases, enforcement of maintenance provisions in building codes is all that is needed, but most penalties currently in place are so minor that owners disregard them." Newman and Saginor, "Four Imperatives," 630.

<sup>68</sup> Kelly, "Refreshing the Heart of the City," 214.

importance of historic preservation all influence property owners' decisions to maintain or abandon historic buildings.<sup>69</sup> As a result, local governments seeking to curtail demolition by neglect should use strategies that target individual buildings as well as the enabling environment.<sup>70</sup>

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<sup>69</sup> Goldwyn writes, "There is a larger set of circumstances that influence [demolition by neglect]. This problem does not exist because of an ordinance, no matter how well or poorly written it is." Goldwyn, "Demolition by Neglect," 53.

<sup>70</sup> Goldwyn calls these the "micro level" and "macro level," respectively. Goldwyn, "Demolition by Neglect," 72. Newman and Saginor recommend a four-part approach: local regulations and incentives that are enforced/promoted; reinforcing regulations at different levels of government; financial penalties and incentives; and combining local planning with regional growth management. Newman and Saginor, "Four Imperatives," 634.



### 3. Eminent Domain

#### Legal Foundations

Government's ability to enforce building code regulations stems from two major powers: the police power and eminent domain.<sup>71</sup> The police power is an inherent sovereign power that is used to uphold public health, safety, morals, and welfare. It is generally used by local governments to regulate land use through tools such as zoning ordinances and historic preservation ordinances. It is also used to regulate public nuisances through building code regulations.<sup>72</sup> The police power is restricted by the United States Constitution through the Fifth and Fourteenth Amendments, which prevent the "taking" of private property by government.<sup>73</sup> This means that regulations enacted under the police power may diminish the economic value of a property, but cannot deprive the property owner of a reasonable economic use.<sup>74</sup> Local governments are authorized to use the police power through state-enabling legislation. Since the Constitution does not provide much guidance or restrictions, state legislation typically includes stricter definitions and procedures for how state and local governments may use the police power.

In contrast, eminent domain is government's authority to physically take private property, not just to regulate it. While it shares many similarities with the police power, a fundamental difference is that eminent domain allows government to acquire and take title to property. Like the police power, eminent domain is an inherent sovereign power that is transferred to local governments through state-enabling legislation. The use of eminent domain is also restricted by

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<sup>71</sup> "Use of Zoning Restrictions to Restrain Property Owners from Altering or Destroying Historic Landmarks," *Duke Law Journal* (1975): 1000.

<sup>72</sup> *Ibid.*, 1000.

<sup>73</sup> The Fifth Amendment is applicable to the Federal government, while the Fourteenth Amendment is applicable to the states. "The Police Power, Eminent Domain, and the Preservation of Historic Property," *Columbia Law Review* 63, no. 4 (1963): 710-713.

<sup>74</sup> *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).

the Fifth Amendment, which requires that any private property taken by the government is done to advance a public use. The Fifth Amendment also requires government to provide just compensation to the property owner.<sup>75</sup> This language protects the individual's right to property and prevents its indiscriminate seizure by the government.<sup>76</sup> While there are few constitutional restrictions on government's ability to use eminent domain, state-enabling legislation typically sets stricter parameters for its use.

It is important to understand that eminent domain is not by its nature a destructive tool. In fact, it is strictly intended to be used to advance the public good. However, the primacy that Americans place on property ownership combined with a checkered history of condemnations targeted in oppressed and disadvantaged communities have given eminent domain a negative reputation. As a result, governments typically use it as a last resort, if they use it at all.

### **Case Law on Eminent Domain for Historic Preservation**

There is a long history of case law supporting the use of eminent domain to advance preservation objectives. Case law is the term used to refer to the body of reported court decisions, typically those that have to do with a specific subject.<sup>77</sup> It is different from statutory law, which is legislation that has been adopted by a legislative body. Case law demonstrates how courts have interpreted statutes, which provides guidance to lawmakers on how to craft future legislation. Courts typically refer to previously-recorded opinions within their jurisdiction or

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<sup>75</sup> *U.S. Constitution*, Amendment V.

<sup>76</sup> In a 1963 article, the *Columbia Law Review* calls just compensation a "practical restraint" on public use, meaning that the inability of the government to afford an appropriate sum required to condemn the property hinders its ability to claim that an action serves a public use. "The Police Power, Eminent Domain, and the Preservation of Historic Property," 725.

<sup>77</sup> "What is Case Law?" *The Law Dictionary*, accessed April 30, 2019, <https://thelawdictionary.org/case-law/>.

state, though they sometimes cite cases in other jurisdictions. This means that certain cases may only become precedent for future cases within the same jurisdiction.

In 1896, the U.S. Supreme Court in *United States v. Gettysburg Electric Railway Company* provided a foundation for the argument that historic preservation is a valid public use and therefore can be furthered through eminent domain.<sup>78</sup> *Gettysburg* is one of the earliest cases centered on the validity of the use of eminent domain to condemn historic properties and has been frequently cited in other court opinions.<sup>79</sup> In this case, the United States Congress had condemned land owned by the railway company because it sought to “preserve the lines of battle” of the Battle of Gettysburg.<sup>80</sup> The U.S. Supreme Court determined that the condemnation was necessary and appropriate due to the historical significance of the site, specifically its association with the battle. The ruling states:

Any act of congress which plainly and directly tends to enhance the respect and love of the citizen for the institutions of his country, and to quicken and strengthen his motives to defend them, and which is germane to, and intimately connected with, and appropriate to the exercise of some one or all of the powers granted by congress, must be valid...Such a use seems necessarily not only a public use, but one so closely connected with the welfare of the republic itself as to be within the powers granted congress by the constitution for the purpose of protecting and preserving the whole country.<sup>81</sup>

This statement illustrates the U.S. Supreme Court’s opinion that eminent domain in service of preserving cultural heritage is a valid public use under the Constitution.<sup>82</sup> While the rhetoric is explicitly nationalist, later cases cite *Gettysburg* to support rulings that uphold the use of eminent domain to preserve a variety of historic places.

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<sup>78</sup> *United States v. Gettysburg Electric Railway Company*, 160 U.S. 668 (1896).

<sup>79</sup> Many of the early preservation cases focused on issues related to the police power and government’s ability to regulate private property for the purposes of promoting cultural heritage. See Stephen N. Dennis, “Annotated List of Major Historic Preservation Cases,” *The Urban Lawyer* 12, no. 1 (1980): 87-101, accessed April 30, 2019, <http://www.jstor.org/stable/27890927>.

<sup>80</sup> *United States v. Gettysburg Electric Railway Company*.

<sup>81</sup> *Ibid.*

<sup>82</sup> Lingle, “Post-Kelo Eminent Domain Reform,” 988.

In 1929, the U.S. Supreme Court again affirmed government's ability to use eminent domain to acquire historically-significant properties in *Roe v. Kansas ex rel. Smith*.<sup>83</sup> In this case, the State of Kansas sought to condemn the Shawnee Mission, a manual training school for young children from various Indian nations that operated from 1839 to 1862, and oversee it as a historic site through the state historical society.<sup>84</sup> The State exercised the authority granted to it from state-enabling legislation passed in 1923, which extended the use of eminent domain "to any tract or parcel of land in the State of Kansas, which possesses unusual historical interest."<sup>85</sup> The State had also passed a joint resolution and appropriation act in 1927 that directed the condemnation of the property. The U.S. Supreme Court held that there was clear legislative intent, that the Shawnee Mission was historically significant, and that the State's use of the site was a valid public use. Citing *Gettysburg*, the U.S. Supreme Court found, "There is no basis for doubting the power of the State to condemn places of unusual historical interest for the use and benefit of the public."<sup>86</sup> As a result, the U.S. Supreme Court upheld the State's authority to condemn historic properties.

Another significant case at the nexus of historic preservation and eminent domain is *Flaccomio v. Baltimore*, which was decided by the Court of Appeals of Maryland in 1950.<sup>87</sup> The case involved the City of Baltimore's attempt to condemn property adjacent to the Star-Spangled Banner Flag House after negotiations to purchase it fell through. As with *Roe*, the City passed an ordinance that authorized itself to use eminent domain to acquire the property for a specific public purpose, in this case the creation of a symbolic park or memorial in connection with the

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<sup>83</sup> *Roe v. Kansas ex rel. Smith*, 278 U.S. 191 (1929).

<sup>84</sup> "Shawnee Indian Mission," Kansas Historical Society, accessed April 30, 2019, <https://www.kshs.org/p/shawnee-indian-mission/19570>.

<sup>85</sup> *Roe v. Kansas ex rel. Smith*.

<sup>86</sup> *Ibid.*

<sup>87</sup> While the case is within the jurisdiction of the state of Maryland, *Flaccomio* is cited frequently enough in later cases to be an important precedent. See *Flaccomio v. Baltimore*, 194 Md. 275 (1950).

museum. In its opinion, the Court also cited *Gettysburg*, asserting that the reasons for condemnation were similar. The Court found:

To make a symbolic memorial of the ground is a fitting way to impress upon the present and future citizens of Baltimore the connection of the city with the flag and its anthem. The title to the land will be taken in the name of the city and whether the property is operated by a private patriotic association or not, does not affect the use, which is public, and can be of great educational value and inspiration. We have no hesitation in holding that the purpose of the condemnation is for a public use.<sup>88</sup>

What is significant about this case is not just that the Court relied upon *Gettysburg* to make its decision, but also that the Court was not disturbed by the fact that the property would not stay in public ownership. In doing so, the Court implied that the broader public benefit of “educational value and inspiration” was enough to satisfy the public use requirement.

While the public use value of the historic properties at the center of *Gettysburg*, *Roe*, and *Flacomio* is tied to the historical or age value of historic places, the rationale for the use of eminent domain to advance preservation objectives has also centered on their aesthetic value. This issue was debated in the 1954 U.S. Supreme Court case *Berman v. Parker*, which is frequently cited by preservationists to assert that the regulation of aesthetics is a valid public use.<sup>89</sup> In this case, the U.S. Supreme Court upheld the use of eminent domain for an urban renewal project in the Southwest quadrant of Washington, D.C. that sought to clear an area that was perceived to be a slum.<sup>90</sup> Specifically, the U.S. Supreme Court found that a community “should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.”<sup>91</sup> The opinion in *Berman* served to dispel “any remaining doubts about whether condemnation solely for aesthetic purposes meets the public use requirement.”<sup>92</sup> Thus,

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<sup>88</sup> *Flacomio v. Baltimore*.

<sup>89</sup> See *Berman v. Parker*, 348 U.S. 26 (1954); Paul Edmondson, “Memorandum,” 3.

<sup>90</sup> See Amy Lavine, “Urban Renewal and the Story of *Berman v. Parker*,” *The Urban Lawyer* 42, no. 2 (2010): 423-75, accessed April 30, 2019, <http://www.jstor.org/stable/27895791>.

<sup>91</sup> *Ibid.*, 3.

<sup>92</sup> “The Police Power, Eminent Domain, and the Preservation of Historic Property,” 726.

after this case, the preservation of places due to their aesthetic value was considered to be a valid public use and a constitutional rationale for eminent domain.

These four cases, *Gettysburg*, *Roe*, *Flaccomio*, and *Berman*, form the foundation of legal analysis regarding the use of eminent domain to advance historic preservation. One other notable case is *Penn Central Transportation Company v. City of New York*, which was decided by the U.S. Supreme Court in 1978.<sup>93</sup> This case centered on whether the New York City Landmarks Law constituted a regulatory taking as applied to the property that includes Grand Central Terminal in Manhattan. While concerned with the police power rather than eminent domain, *Penn Central* definitively ruled that preservation is a valid public use, citing *Berman*. As a result of *Penn Central* and the other cases discussed here, there is no question that the preservation of the historic built environment is a valid public use. Since preservation passes the public use test, government has the authority to use eminent domain for historic preservation purposes.

### **Blight Justifications**

The only restrictions that the Fifth Amendment puts on government's authority to use eminent domain is that the property must be taken for a public use and that the property owner must receive just compensation. One of the ways that governments satisfy the public use clause is by arguing that a property is blighted. The term "blight" is used to describe properties and neighborhoods that are in some way structurally unsafe, pose a health hazard, or lack basic amenities, such as plumbing and ventilation.<sup>94</sup> While this description paints a vivid image of a slum, much like beauty, "blight" is in the eye of the beholder.<sup>95</sup> It is a fundamentally malleable

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<sup>93</sup> *Penn Central Transportation Company v. City of New York*.

<sup>94</sup> Citing Luce, Gold and Sagalyn discuss four themes drawn from twelve categories of blight criteria in state statutes. See Martin E. Gold and Lynne B. Sagalyn, "The Use and Abuse of Blight in Eminent Domain," *Fordham Urban Law Journal* 38 (2010-2011): 1125.

<sup>95</sup> Gold and Sagalyn, "Use and Abuse," 1120.

term that has remained undefined over decades of use and thus has no objective or substantial meaning.<sup>96</sup> However, a blighted property or area is typically assessed as “economically underutilized,” meaning that it is no longer economically competitive due to diminished value caused by building condition, property location, or other factors.<sup>97</sup> While definitions of blight vary, age and perceived obsolescence of building use are often significant factors, which puts historic buildings at risk of being declared blighted and torn down.<sup>98</sup> While the subject property is often the source of the blight, governments have also condemned non-blighted properties in blighted areas.<sup>99</sup>

Although problematic, blight continues to be used as a justification for condemning private property. In fact, lawyer Andrew Tutt argues, “A blight determination is often now all that stands between the ordinary, law-abiding citizen and the full power of the State's exercise of eminent domain.”<sup>100</sup> He argues that since there are so few restrictions on the government’s ability to use eminent domain, the only way to prevent its use is by contesting the declaration that a property is blighted.<sup>101</sup> However, courts have been very deferential to legislatures’ methods for

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<sup>96</sup> Tutt goes so far as to call the term “nearly meaningless, functionally and legally.” See Andrew Tutt, “Blightened Scrutiny,” *UC Davis Law Review* 47 (June 2014): 1807. Legal scholar Wendell E. Pritchett writes, “A vague, amorphous term, blight was a rhetorical device that enabled renewal advocates to reorganize property ownership by declaring certain real estate dangerous to the future of the city.” See Wendell E. Pritchett, “The Public Menace of Blight: Urban Renewal and the Private Uses of Eminent Domain,” *Yale Law and Policy Review* 21 (2003): 3. See also A. Mechele Dickerson, “Revitalizing Urban Cities: Linking the Past to the Present,” *University of Memphis Law Review* 46 (Summer 2016): 976; Gold and Sagalyn, “Use and Abuse,” 1126-1127.

<sup>97</sup> Dickerson also argues that there is “a social dimension to blight,” meaning that perceptions of economic value are in part driven by society’s valuation of the types of people who live in blighted areas. As a result, she asserts that blight is “racially coded.” Dickerson, “Revitalizing Urban Cities,” 977-979.

<sup>98</sup> See Lingle, “Post-Kelo Eminent Domain Reform;” Gold and Sagalyn, “Use and Abuse;” Dickerson, “Revitalizing Urban Cities.”

<sup>99</sup> This was the case in *Berman v. Parker*, where the U.S. Supreme Court found that individual properties within the designated urban renewal area were not required to be “blighted” to be condemned. See Kennedy Smith, “The Supreme Court’s *Kelo* Decision: Good News or Bad News for Downtowns?” *Planning Commissioners Journal*, no. 60 (2005): 2, accessed April 30, 2019, <http://plannersweb.com/wp-content/uploads/2005/10/224.pdf>.

<sup>100</sup> Tutt, “Blightened Scrutiny,” 2.

<sup>101</sup> *Ibid.*

determining blight, which means that this strategy is not often effective.<sup>102</sup> This is problematic given the malleability of the term and its legacy as the justification for the dispossession and displacement of oppressed and marginalized communities.<sup>103</sup> It is also a concern for preservationists since older buildings are more likely to be considered blighted.

### ***Kelo* and Resulting Backlash**

Eminent domain has never been a popular form of government intervention, but the public conversation around eminent domain changed substantially in the wake of the landmark U.S. Supreme Court case *Kelo v. City of New London* in 2005.<sup>104</sup> In this case, the City of New London, Connecticut sought to condemn non-blighted, occupied properties to facilitate the redevelopment of the area. The City did not intend to maintain ownership of the properties and instead planned to transfer them to another private owner as part of a comprehensive economic development project. The central issue of the case was whether the City's action qualified as a "public use" as defined by the Takings Clause of the Fifth Amendment.

The U.S. Supreme Court rejected a narrow definition of public use and instead ruled on the broader concept of "public purpose." It found that the transfer of private land to a private entity through public action is allowed if there are clear (i.e. not incidental) public benefits. In this case, the "primary motivation or effect" of the City's economic development plan was not to benefit a private entity, but to benefit the public by incentivizing business. As a result, the court ruled that the City's action was an appropriate "public use" because it would broadly benefit the

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<sup>102</sup> The pun in Tutt's title comes from his exhortation that courts should apply a heightened standard of scrutiny to takings cases involving blight designations. See Tutt, "Blightened Scrutiny," 1.

<sup>103</sup> Dickerson writes, "Since municipalities have wide discretion in determining whether an area is blighted, 'blight' is often whatever the governing body says it is." Dickerson, "Revitalizing Urban Cities," 979. Pritchett argues, "Blight was a facially neutral term infused with racial and ethnic prejudice. While it purportedly assessed the state of urban infrastructure, blight was often used to describe the negative impact of certain residents on city neighborhoods." Pritchett, "The Public Menace of Blight," 6.

<sup>104</sup> *Kelo v. New London*.



public and was identified through “a carefully considered development plan” that generally serves a public purpose. Therefore, the court reaffirmed existing case law by finding that economic development satisfies the public use clause of the Fifth Amendment and that government can take private property and transfer it to another private party as long as its objective is tied to a public purpose.

Following *Gettysburg* and *Berman*, the decision in *Kelo* was part of a trend towards increasingly broad definitions of public use.<sup>105</sup> However, lawyer R. Benjamin Lingle argues that the case “altered the field of permissible condemnations, validating governments’ constitutional authority to condemn non-blighted neighborhoods for private redevelopment.”<sup>106</sup> As such, it went a step beyond *Berman*, which authorized the condemnation of non-blighted properties within blighted neighborhoods.

The public reaction to the *Kelo* decision was swift. Paul Edmondson, the general counsel for the National Trust for Historic Preservation, writes, “While many Supreme Court decisions are instantly controversial, virtually no other ruling in the land use area, at least in recent memory, has brought such an intense and emotional public response as has *Kelo*.”<sup>107</sup> Due to the outcry from private property owners who worried that government could now more easily take their property, many states reformed their state-enabling legislation. These reforms typically included more stringent blight definitions, a restriction on private-to-private property transfers, and the elimination of the ability to use eminent domain to promote private commercial development.<sup>108</sup>

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<sup>105</sup> Lingle, ““Post-Kelo Eminent Domain Reform,” 986.

<sup>106</sup> *Ibid.*, 985.

<sup>107</sup> Edmondson, “Memorandum,” 1.

<sup>108</sup> According to Lingle, “At least forty-two of the nation’s fifty states had engaged in eminent domain reform by 2009,” whether by an act of legislature or by popular referendum. Lingle, “Post-Kelo Eminent Domain Reform,” 986. *See also* Edmondson, “Memorandum,” 1.

Eminent domain has been described as a double-edged sword for historic preservation because of its ability to both preserve and destroy historic properties.<sup>109</sup> Lingle and others argue that these post-*Kelo* reforms have effectively sharpened the double-edged sword. On the one hand, the stronger reforms have narrowed the definitions of blight and public use to make it harder for government to transfer property from one private owner to another, which protects historic structures from being condemned due to their age and poor condition. The downside is that these reforms also make it harder for government to save neglected historic buildings using eminent domain. On the other hand, the weaker reforms left government with enough authority to condemn historic buildings for preservation purposes. However, they also have not made it any harder to use economic development as a justification for eminent domain, which puts historic buildings at risk of demolition.<sup>110</sup>

While the impact of the legislative reforms are mixed, an important outcome of *Kelo* is that the U.S. Supreme Court affirmed a long-standing precedent in land use law by which courts give “substantial deference” to local governments to make decisions about how to use the police power and eminent domain to best serve their community.<sup>111</sup> Main Street professional Kennedy Smith argues, “Had the Court the authority to rule on the soundness of New London’s economic development plan, rather than on the constitutionality of using eminent domain for economic development purposes, it might have reached a different decision.”<sup>112</sup> Instead, the court deferred to the City’s judgement, giving government broad powers to make decisions about land use within its jurisdiction without answering to the judgement of other parties. While this lack of oversight creates the potential for local governments to make poor land use decisions without

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<sup>109</sup> See Lingle, “Post-Kelo Eminent Domain Reform;” Edmondson, “Memorandum;” Fine, “Eminent Domain.”

<sup>110</sup> Lingle, “Post-Kelo Eminent Domain Reform,” 990.

<sup>111</sup> Edmondson, “Memorandum,” 4.

<sup>112</sup> Smith, ““The Supreme Court’s *Kelo* Decision,” 2.

significant repercussions, it also creates the opportunity for local governments to use eminent domain to benefit their communities. This provides a window for historic preservation uses of eminent domain.

## 4. Case Studies

### Preface

This section analyzes three cases in which courts ruled in favor of local governments that sought to use eminent domain to acquire privately-owned, neglected, historic properties: the Old Elks Temple in Tacoma, Washington (court opinion issued in 2004); the Hoyt-Potter House in Rochester, New York (court opinion issued in 1988); and St. Joseph's Church in Albany, New York (court opinion issued in 2004).<sup>113</sup> Since eminent domain is not often used for this purpose, there were not many examples to choose from. These three cases were selected because they each have a recorded court opinion, which provides detailed facts about the case and presents an opportunity to closely analyze the court's legal analysis. They were also selected because of the availability of additional information drawn from personal interviews and media sources.

These three cases illustrate not only how local governments arrive at the point of using eminent domain to address neglected, historic properties, but also how courts have interpreted this action. As a result, they demonstrate both the legal and political considerations of condemnation in this situation. However, there are many more examples of eminent domain being used to curtail demolition by neglect in local governments throughout the United States. In some cases, the local government did not ultimately use eminent domain, but the threat of condemnation was enough to compel a property owner to finally sell the property. The appendix includes a citation and brief description of several of these cases.

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<sup>113</sup> No cases were found in which courts ruled against local governments being able to use eminent domain in this way. All three cases pre-date *Kelo*, which means that they do not reflect post-*Kelo* legislative reforms. While it would have been instructive to have analyzed a case that was decided post-*Kelo*, it is still possible to extrapolate an interpretation of how post-*Kelo* legislative reforms would impact a local government's ability to use eminent domain to curtail demolition by neglect from these cases.

### **Old Elks Temple – Tacoma, WA (2004)**

The Old Elks Temple is a Second Renaissance Revival building located at 565 Broadway in Tacoma, Washington, a small city south of Seattle.<sup>114</sup> The building was designed by architect É. Frère Champney, a graduate of the École des Beaux Arts school of architecture in France, and constructed in 1915.<sup>115</sup> It is a contributing property to the Old City Hall Historic District, which is listed in the Tacoma Register of Historic Places as well as the National Register of Historic Places.<sup>116</sup> The building served as the lodge for the Tacoma Chapter of the Benevolent and Protective Order of the Elks until the 1960s-1970s, at which point it became vacant.



*Figure 4.1 The Old Elks Temple is an iconic building in Tacoma, Washington. (Photo by Visitor7, 2011)*

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<sup>114</sup> “Old City Hall Historic District,” (National Register of Historic Places Nomination Form, National Park Service, 1977), accessed May 3, 2019, [https://npgallery.nps.gov/NRHP/GetAsset/NRHP/77001352\\_text](https://npgallery.nps.gov/NRHP/GetAsset/NRHP/77001352_text).

<sup>115</sup> Ibid.

<sup>116</sup> Ibid.; Reuben McKnight (Historic Preservation Officer, City of Tacoma) in discussion with the author, April 2019.

Around the turn of the century, Ronald Zimmerman, a wealthy businessman based in Oakland, California, purchased the building along with several other buildings in Tacoma.<sup>117</sup> Shortly after becoming the owner of the Old Elks Temple, he applied for a demolition permit for the building from the Landmarks Preservation Commission. In October 2001, the Commission denied Zimmerman's application after residents expressed their support for doing so at a public meeting.<sup>118</sup>

By this time, Zimmerman had demonstrated that he did not intend to rehabilitate the Old Elks Temple, which had already been vacant for over 30 years. In response to the building's poor condition and Zimmerman's unwillingness to cooperate, the City began to enforce the Tacoma Municipal Code ("Code"). In March 2001, the City inspected the building and subsequently sent a letter to Zimmerman requesting that he and his wife (the co-owner) submit a repair plan to remediate poor building conditions. The Zimmermans failed to respond, so the City began issuing civil citations as permitted under the Code.<sup>119</sup> By September 2001, the Zimmermans had not paid fines or remedied the building's condition, so the City filed a Certificate of Complaint with the Pierce County Auditor's office. The Certificate of Complaint gave the City the authority to acquire the property using eminent domain as directed by the Code. In the same month, the City Council passed an ordinance authorizing the City to acquire the property under the state's blighted property statute and the city's blighted property ordinance. The City also petitioned the

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<sup>117</sup> According to the current Historic Preservation Officer in Tacoma, Zimmerman was a bullish personality who frequently acted to spite the City. *See* McKnight discussion.

<sup>118</sup> Zimmerman appealed the Commission's decision, which was overturned by the hearings examiner. The Commission normally would have appealed that decision to the local governing body, but too many City Councilmembers were biased against Zimmerman and had made comments indicating as much in the press. Instead, the case went directly to the Superior Court of Pierce County. *Ibid.*

<sup>119</sup> These citations eventually included five citations and over \$1,000 in unpaid fines. *City of Tacoma v. Zimmerman*, 119 Wn. App. 738 (2004).

Superior Court of Pierce County for an order determining that it was necessary for the city to acquire the property to alleviate blight.<sup>120</sup>

The Superior Court of Pierce County ruled in favor of the City, declaring that there was an intended public use for the property. The Zimmermans appealed the ruling to the state Court of Appeals, which decided the case in January 2004 in *City of Tacoma v. Zimmerman*.<sup>121</sup> At issue was whether the ordinance condemning the property was unenforceable because the building was not of “sufficient value to be repairable.”<sup>122</sup> According to the Code, the City is authorized to use eminent domain either to rehabilitate or demolish a building, depending on which option is “more economical.”<sup>123</sup> The Zimmermans argued that rehabilitation was cost-prohibitive and was therefore not a valid reason for condemning the property. The Court disagreed, with the majority ruling that the City of Tacoma had the right to use its eminent domain power to condemn the Old Elks Temple.<sup>124</sup>

Due to the nature of the suit and the statutory language, the Court’s decision centered on a determination of value. The Court found that “sufficient value,” as defined by the Code, exclusively refers to economic value. Although the City argued that heritage values should be considered as part of an analysis of the building’s overall value, the Court found that the language in the statute restricted their decision to the building’s economic value. While the Court refused to consider the building’s historic and aesthetic values independently, it did note that “the

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<sup>120</sup> *City of Tacoma v. Zimmerman*. According to the current Historic Preservation Officer, the City Attorney led the effort to condemn the property, with support from the City Manager and City Council. The City condemned a total of three properties in the same proceeding, all of which were considered a chronic nuisance. The other two properties, a house and a small commercial building, were not designated at the time, though the latter was eventually designated. See McKnight discussion.

<sup>121</sup> This ruling was then appealed by the Zimmermans to the Supreme Court of Washington, which denied a Petition for Review en banc in November 2004.

<sup>122</sup> *City of Tacoma v. Zimmerman*.

<sup>123</sup> Ibid. This frequently results in the demolition of historic buildings because the cost of repair is typically higher than the cost of demolition. See McKnight discussion.

<sup>124</sup> In a dissent, one judge further argued that there was not enough evidence that the building had sufficient value to be repairable. See *City of Tacoma v. Zimmerman*.

building's stature in the [Old City Hall Historic District] increases the economic value of repairing the building by maintaining the continuity of the community, drawing tourists and other people to the area, and generally enhancing the City."<sup>125</sup> As a result, it agreed with the trial court that the building had sufficient value to be repairable.<sup>126</sup>

The Court also deferred to the City on the validity of its legislative actions, deciding that they were reasonable as long as they were not arbitrary or capricious. This presumption of legitimacy puts the burden on the property owner to prove otherwise. Furthermore, the Court found that "a landowner who allows his property to fall into disrepair endangering the community thus transfers decision-making authority over the property to the elected representatives of that community."<sup>127</sup> This acknowledges that a property owner's rights are limited and that once their actions (or lack of action) cause harm to the public, those rights are effectively suspended.

While the Court did not rule on this issue, it is worth mentioning that the City followed state and local regulations governing building code enforcement and the use of eminent domain. For example, the City followed Section 2.01.050 Administration and Process of the Tacoma Municipal Code, which outlines specific (and increasingly punitive) steps that the City is authorized to take to encourage or force property owners to comply with the building code. In the Code, eminent domain is considered to be a last resort to correct building code violations and put the building back into productive use.<sup>128</sup> The state statute was also a factor in the City's timing

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<sup>125</sup> Interestingly, the court found that the City's assessment of the value of the building based on it being part of a district was "necessary and proper," in contrast with an individual property owner who would only consider the economic value of the building itself. *City of Tacoma v. Zimmerman*.

<sup>126</sup> As a result, the Court effectively acknowledged the existence of the building's heritage values. It is unclear whether the Court was trying to find a way to more liberally interpret the City's blighted property ordinance or if it truly believed that this was the appropriate rationale.

<sup>127</sup> *City of Tacoma v. Zimmerman*.

<sup>128</sup> The first step is assessing penalties to get the property owner to comply with submitting a repair plan and schedule. The second step is when the City itself corrects building code violations, which can be done directly or carried out through receivership. The third step is when the City can condemn the property pursuant to the RCW 35.80A, initiate Unfit Building Proceedings, and/or register the building as derelict. See "Tacoma Municipal Code," City of Tacoma, Section 2.11 and Section 2.12, accessed May 5, 2019, <http://www.cityoftacoma.org/cms/one.aspx?portalId=169&pageId=2255>.



and use of eminent domain because it limited the City’s ability to acquire the property until it was in a blighted state.<sup>129</sup> As a result, this case also illustrates the importance of state and local statutes that enable the use of eminent domain to condemn neglected, historic properties for preservation purposes.<sup>130</sup>

Another factor that benefitted the City is the fact that the Old Elks Temple is listed in the Tacoma Register of Historic Places and the National Register of Historic Places. While the building was not required to be a designated historic structure, the Court implied that the Old Elks Temple’s status as a “pivotal structure” in the Old City Hall Historic District represents an exceptional value to the public. If the building had not been designated as a historic structure, the Court may not have considered it to have enough value to justify the use of eminent domain to save it.

While the City prevailed in *City of Tacoma v. Zimmerman*, it ultimately never condemned the Old Elks Temple. Shortly after the court ruling, Ronald Zimmerman died and his son inherited the property. Unlike his father, Steve Zimmerman did not hold a grudge against the City and was willing to negotiate a settlement. Since the City was not interested in owning the property and had planned to use eminent domain to effectuate a sale to a private owner anyway, it allowed Steve Zimmerman to sell the property on the private market and avoid condemnation.<sup>131</sup> Around 2006, he sold the Old Elks Temple to Portland-based developers Williams & Dame

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<sup>129</sup> See *City of Tacoma v. Zimmerman*.

<sup>130</sup> The Code also includes provisions for respecting historic resources throughout this process and prioritizes alternatives to demolition. For example, the Code specifically notes, “Abatement undertaken on properties regulated under Tacoma Municipal Code 13.07 shall be reviewed and approved by the Tacoma Landmarks Preservation Commission in accordance with the provisions of Tacoma Municipal Code 13.07 prior to abatement.” With the exception of true emergencies, this means that work on designated historic properties would be consistent with preservation regulations. In addition, the emergency cases section states, “If an alternative to demolition is identified, then it may be pursued as the preferred action.” “Tacoma Municipal Code,” Section 2.11 and Section 2.16.

<sup>131</sup> While the City required that the building be brought up to code, it did not impose further restrictions on the sale, such as a façade easement. This may be due to a lack of an easement culture in Washington. See McKnight discussion.

Development who then sold it to McMenamins, a hospitality company based in the Pacific Northwest, in 2009. McMenamins received approval for rehabilitation work from the Landmarks Preservation Commission in 2012, but work did not begin until 2017 due to revisions mandated by the National Park Service as part of the Federal Rehabilitation Tax Credit application process. The building was adapted into a hotel with bars, a live music venue, a brewery, and restaurants and opened in April 2019.<sup>132</sup>

This case offers a few important takeaways for using eminent domain to deal with demolition by neglect. First, it demonstrates that building condition and historic designation are both critical factors in determining the public use value of intervention. These factors helped convince the public and elected officials that there was both a need and a benefit to using eminent domain. The Old Elks Temple case also demonstrates the importance of not only having permissive statutory authority, but also appropriately following that authority. Lastly, this case shows how critical it is to cultivate public and political support for condemnation. Even though the City had the statutory authority to condemn the Old Elks Temple, it would not have done so if there was no political leadership and if the community was opposed. As a result, the outcome of the case was strongly influenced by individual personalities and relationships, including a strong working relationship between the Historic Preservation Office and elected officials.<sup>133</sup>

While in many respects the Old Elks Temple is a success story, the City was fortunate that the Court generously interpreted the “sufficient value” clause of the Code to accommodate the building’s heritage values. The City would have had a stronger argument if the Code explicitly stated that “value” was a holistic term that included, but was not limited to, economic value. It is also important to note that it took nearly two decades from the initial enforcement

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<sup>132</sup> See McKnight discussion.

<sup>133</sup> McKnight contends that Zimmerman acted irrationally and appealed the eminent domain action solely because he did not want the City to prevail in their pursuit of enforcement. *Ibid.*

action for the building to be rehabilitated and occupied. All told, the building was vacant for nearly 50 years. This demonstrates that eminent domain is not always a quick and efficient strategy for encouraging the reuse of a vacant and abandoned historic building.

### **Hoyt-Potter House – Rochester, NY (1988)**

The Hoyt-Potter House is a c. 1840 Greek Revival building located at 133 South Fitzhugh Street in the Corn Hill neighborhood of Rochester, New York. The building was constructed for bookseller and stationer David Hoyt, who sold it to businessman Henry S. Potter in 1850. The Potters lived in the house until 1907, after which the history of the occupancy of the building is unclear.<sup>134</sup> At some point in the 1960s, it was purchased by Jack Lubelle, who also owned two vacant lots on South Fitzhugh Street that were used as surface parking lots.<sup>135</sup> Lubelle was an absentee owner who wanted to demolish the building to make way for new construction. He allowed the house to fall into such poor condition that, by 1969, he had accrued 89 building code violations on the property.<sup>136</sup> Neighboring residents were so concerned that Lubelle would orchestrate an “accidental” demolition that they painted the street address on the exterior walls of the building.<sup>137</sup>

Beginning in 1970, Lubelle actively sought a demolition permit from the Rochester Preservation Board, which had oversight over the property since it was individually designated as a local landmark.<sup>138</sup> When the Board denied Lubelle’s application, he sued, declaring that the

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<sup>134</sup> According to Cynthia Howk, the building was in good condition before Lubelle purchased it. *See* Cynthia Howk, (Architectural Research Coordinator, Landmark Society of Western New York) in discussion with the author, April 2019.

<sup>135</sup> *See* “Hoyt-Potter House,” Landmark Society of Western New York, accessed May 3, 2019, <http://landmarksociety.org/programs/historic-sites/hoyt-potter-house/>. *See also* *Lubelle v. City of Rochester*, 145 A.D.2d 954 (1988).

<sup>136</sup> The building was damaged due to fire, weather, and vandalism, all of which occurred during Lubelle’s ownership. *See* *Lubelle v. Rochester Preservation Board*, 158 A.D.2d 975 (1990). *See also* “Hoyt-Potter House.”

<sup>137</sup> *See* Howk discussion.

<sup>138</sup> At that point, Lubelle had evicted the tenants from the building. *Ibid.*



*Figure 4.2 The Hoyt-Potter House before it was rehabilitated. (Photo by Bero Architecture, 1989)*



*Figure 4.3 The Hoyt-Potter House after it was rehabilitated. (Photo by Bero Architecture, 2015)*

landmark designation was a taking.<sup>139</sup> Around 1974, the Landmark Society of Western New York submitted an offer to Lubelle to purchase the Hoyt-Potter House, which they planned to use for their administrative offices. Lubelle rejected their \$40,000 offer, claiming that he wanted \$500,000 for the derelict property.<sup>140</sup>

Caught in much the same place as the City of Tacoma was with the Old Elks Temple, the City of Rochester eventually moved to use eminent domain to acquire the property. While the City's motivations for doing so are not explicitly mentioned in court documents, it is clear that the building was suffering from demolition by neglect and that the City wanted to preserve it. Lubelle sued the City, arguing that the condemnation constituted an excessive taking that was unconstitutional because it would not serve a public use.<sup>141</sup> After the Supreme Court of Rochester County ruled in favor of the City, Lubelle appealed the decision to the Supreme Court of New York, which, in 1988, upheld the trial court's ruling.

In a brief opinion, the Court ruled that the City's use of eminent domain was not excessive because it served a public purpose, namely the preservation of a historic building. The Court plainly stated, "There is no dispute that historic preservation serves a public purpose."<sup>142</sup> In doing so, it affirmed the rulings in prior cases and set a precedent in New York State for connecting the public use value of preservation to the public use requirement of eminent domain.

The Court also found that its scope of review was narrow based on New York's state-enabling legislation, the Eminent Domain Procedure Law (EDPL).<sup>143</sup> Section 207 (C) of the law

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<sup>139</sup> The trial court ruled in favor of the Board and the ruling was upheld by the Supreme Court of New York in *Lubelle v. Rochester Preservation Board*.

<sup>140</sup> Howk provided this as an example of how Lubelle put "roadblocks" in front of legitimate sales offers. See Howk discussion.

<sup>141</sup> *Lubelle v. City of Rochester*.

<sup>142</sup> The court cited the case *Matter of Trustees of Sailors' Snug Harbor v Platt*, 29 A.D.2d 376. Ibid.

<sup>143</sup> Ibid.

states that the Court is limited to determining if the action conforms with federal and state constitutions; if it is within the statutory jurisdiction or authority of the condemnor; if the condemnor's determination and findings followed statutory procedures; and if "a public use, benefit or purpose will be served by the proposed acquisition."<sup>144</sup> This gives the condemnor fairly broad discretion as long as it follows the appropriate procedures and as long as the acquisition serves a valid public use, benefit, or purpose.<sup>145</sup> In reviewing this statute, the Court found, "Where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the due process requirements of the Constitution are satisfied."<sup>146</sup> Since the Court determined that the condemnation served a public purpose, it was unwilling to further question its constitutionality.

Due to its limited scope of review, the Court did not take up the question of whether the benefit of rehabilitating the Hoyt-Potter House was sufficient to justify the cost. Unlike the court in the Old Elks Temple case, the Court here held that the City Council has the authority to determine if the cost of rehabilitation is a sufficient deterrent to condemnation.<sup>147</sup> While this ruling may be due to a difference of judicial opinion, it likely also reflects a difference in the language of the statutes upon which the courts relied to make their opinion. Another difference

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<sup>144</sup> "New York Consolidated Laws, Eminent Domain Procedure Law," §207 Judicial review, accessed May 3, 2019, <https://codes.findlaw.com/ny/eminent-domain-procedure-law/>.

<sup>145</sup> The short list of requirements for the condemnor's determination and findings supports this reading of broad discretion. According to the EDPL, the condemnor is required to specify "(1) the public use, benefit or purpose to be served by the proposed public project; (2) the approximate location for the proposed public project and the reasons for the selection of that location; (3) the general effect of the proposed project on the environment and residents of the locality; (4) such other factors as it considers relevant." The EDPL does not explicitly restrict the ultimate transfer of property to another private owner. "New York Consolidated Laws." As an FAQ page on the New York Attorney General's website states, "The supreme court's determination is limited to whether or not the hearing complied with all provisions of law, and whether or not a public use, benefit or purpose will be served by the proposed acquisition." "FAQs About the NYS Eminent Domain Procedure Law," New York State Office of the Attorney General, accessed May 3, 2019, <https://ag.ny.gov/real-property/faqs-about-nys-eminent-domain-procedure-law>.

<sup>146</sup> *Lubelle v. City of Rochester*.

<sup>147</sup> Hinting at the line of arguments that Lubelle may have used to make his case, the Court declared, "Petitioner will receive just compensation and he cannot be heard to complain that achieving preservation of a historic building will be difficult or expensive." *Ibid.*

with the Old Elks Temple case is that the Hoyt-Potter House case exclusively focused on the authority granted under state-enabling legislation, since the City of Rochester did not invoke a municipal ordinance to condemn the property.

After the City condemned the Hoyt-Potter House, it issued a request for proposals and eventually sold the property to a local redeveloper who specialized in renovating challenging historic properties.<sup>148</sup> In 1991, the property was sold to the Landmark Society of Western New York, which used the building as its headquarters as well as the home for its library and archives.<sup>149</sup> In April 2019, the Landmark Society sold the property to a private owner, who intends to use the Hoyt-Potter House as an office for their business.<sup>150</sup>

The Hoyt-Potter House case amplifies some of the takeaways from the Old Elks Temple case and adds a few of its own. As with the Old Elks Temple, politics and personality defined the outcome of this case. Lubelle was clearly an absentee property owner with malicious intent, but the City may never have moved to condemn the Hoyt-Potter House without public advocacy and political leadership. Another similarity between the two cases is that both courts gave the local governments broad discretion to make decisions about land use. Both cases also demonstrate that courts are confident declaring that preservation is a valid public use.

Another important takeaway from the Hoyt-Potter House case is that the Court was not concerned that the City did not expressly authorize the use of eminent domain in its own statutes. In fact, the case may demonstrate that it is helpful for a local government to use authority granted by a state statute if that statute allows for a fairly liberal interpretation of public use and places few restrictions on condemnation in general. In this case, the New York State Eminent Domain

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<sup>148</sup> See Howk discussion.

<sup>149</sup> Ibid.; “Hoyt-Potter House.”

<sup>150</sup> See Howk discussion.

Procedure Law gave the Court the ability to defer to the City in its determination that the acquisition of the Hoyt-Potter House served a public use.

### **St. Joseph's Church – Albany, NY (2004)**

The former St. Joseph's Church is located at 38 Ten Broeck Street in the Ten Broeck Triangle neighborhood of Albany just north of the city center. The building is both iconic and monumental, with over 17,000 square feet over three stories. It is locally listed as part of the Arbor Hill/Ten Broeck Triangle Historic District, but is not individually landmarked. The church closed in the 1980s but continued to be used sporadically as a religious building until the 1990s. At that time, Elda C. Abate, a local restaurateur, purchased the building from the diocese with the intention of converting it into a nightclub. The neighborhood was vehemently opposed to this proposed adaptive reuse and were wary of Abate, who had a negative reputation.<sup>151</sup>

Meanwhile, the church was suffering from a lack of maintenance, including structural issues with the roof and issues with moisture infiltration.<sup>152</sup> In September 2001, the Albany Department of Fire, Emergency, and Building Services notified Abate and her daughter (the co-owner) that the building was structurally unsound and ordered them to remediate the issues within 30 days.<sup>153</sup> After they failed to comply with the order, in December 2001, the City of Albany declared the property to be “an unfit and unsafe building which threatened the public safety and

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<sup>151</sup> According to Cara Macri, Abate did not have any financing secured for the project, which contributed to the public's distrust of her proposal. *See* Cara Macri (Director of Preservation Services, Historic Albany Foundation) in discussion with the author, April 2019.

<sup>152</sup> *See* Macri discussion.

<sup>153</sup> *In re Acquisition of Real Property by the City of Albany*, 9 A.D.3d 551 (N.Y. App. Div. 2004).





*Figure 4.4 St. Joseph's Church is a towering landmark in the Ten Broeck Triangle neighborhood of Albany, New York.  
(Kenneth C. Zirkel, 2018)*

welfare of the community” according to section 133-55 of the City’s code.<sup>154</sup> Around the same time, the City identified and later performed emergency stabilization work “to prevent further structural deterioration and catastrophic failure.”<sup>155</sup> After 10 months of monitoring following the completion of this work, the City engineer reported that the building created a “hazardous situation” that required “the immediate necessity for additional structural repairs due to the impending dynamic failure of several structural components of the subject property.”<sup>156</sup>

Following overwhelming community support, the City moved to condemn the property from the Abates.<sup>157</sup> In 2002, the City Council passed a resolution in support of condemnation, which states, “The City of Albany, by and through its Corporation Counsel, is hereby authorized to take any and all actions necessary to acquire the subject property for the public purpose of historic preservation and emergency stabilization.”<sup>158</sup> In the same document, the City Council further elaborated on its motives, stating, “The City of Albany possesses an interest in preserving structures with historical significance and seeks to promote historic preservation as a tool to revitalize our neighborhoods and communities.”<sup>159</sup> This illustrates that the City was motivated to condemn the property to advance historic preservation objectives.

After a series of decisions and appeals, the New York Supreme Court ruled in favor of the City and granted its request to use eminent domain.<sup>160</sup> Due to the nature of the original suit, the Court focused on the procedural requirements of the law, not on the merits of the property

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<sup>154</sup> “Minutes of a Regular Meeting,” Albany Common Council, Monday, December 16, 2002.

<sup>155</sup> *Ibid.*

<sup>156</sup> *In re Acquisition of Real Property by the City of Albany*. See also “Minutes of a Regular Meeting.”

<sup>157</sup> See Macri discussion.

<sup>158</sup> “Minutes of a Regular Meeting.”

<sup>159</sup> *Ibid.*

<sup>160</sup> The City of Albany requested that the Supreme Court of Albany County grant them an exemption to the public hearing requirement that is typically associated the use of eminent domain. The court granted the City’s request and thus authorized it to condemn the property. The property owners appealed the decision to the New York Supreme Court, which was charged with determining whether the city satisfied procedural requirements by requesting an order of condemnation without a public hearing. The appellate court affirmed the trial court’s order granting the City of Albany’s condemnation of the property. See *In re Acquisition of Real Property by the City of Albany*.

acquisition. As a result, it was not concerned with determining if the condemnation of St. Joseph's Church was a valid public use for purposes of historic preservation. However, the case is still illustrative of how courts interpret eminent domain statutes.

The Court found that the City complied with the procedural requirements of the New York State Eminent Domain Procedure Law (EDPL), the same state-enabling legislation used in the Hoyt-Potter House case 16 years earlier.<sup>161</sup> Similar to the City of Rochester, since the City of Albany did not have an explicit provision in its code authorizing the condemnation of properties due to their deteriorated condition, it relied on the authority granted by the EDPL.<sup>162</sup> While the Court did not challenge the City's lack of a statute explicitly granting this authority, the City would have had a stronger case if it was supported by explicit language in a local ordinance that named eminent domain as an appropriate legal tool in this situation.

The Court appears to have been concerned with condemnation being used as a first step to remedy a minor issue. For example, the Court implied that the engineer's final declaration of a "hazardous situation" was different from the initial finding of an unsafe property. It argued that the former condition met the "magnitude of the order of condemnation," implying that the latter did not.<sup>163</sup> As a result, the Court was satisfied that the City intended to use eminent domain as a last resort to address a major issue that had not been ameliorated by lesser forms of intervention.

The Court also affirmed the City's authority to be the primary decision-maker about when using eminent domain is appropriate. The Court argued that "the condemnor [is] [vested with] broad discretion in deciding what land is necessary to fulfill [the public] purpose," citing a prior opinion to support its position.<sup>164</sup> This is consistent with the Old Elks Temple and Hoyt-Potter House cases, as well as case law on general matters of land use regulation.

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<sup>161</sup> *In re Acquisition of Real Property by the City of Albany.*

<sup>162</sup> *See Ibid. See also* "Minutes of a Regular Meeting."

<sup>163</sup> *In re Acquisition of Real Property by the City of Albany.*

<sup>164</sup> The case cited was *Matter of Rafferty v Town of Colonie.* *Ibid.*

While the Court did not evaluate whether the condemnation was a valid public use, the fact that the property was designated as part of a local historic district likely supported the City's case in seeking to use eminent domain. In fact, it may even be because the property was designated that the Abates chose not to contest the condemnation, knowing that they would lose an argument about the validity of using eminent domain for historic preservation. Even if the designation did not implicitly factor into the Court's opinion, it motivated the City to act.

Although the City of Albany won in court, the fate of St. Joseph's Church was not secured. After condemning the property, the City quickly sold it to the Historic Albany Foundation (HAF) for \$1.<sup>165</sup> HAF had been an integral partner in the eminent domain proceedings and had worked out a deal with the City in which the City would use eminent domain to acquire the property and immediately transfer it to HAF. HAF then planned to use grant funding to stabilize the property before selling it to a private developer.<sup>166</sup>

This is largely what happened, with HAF spearheading emergency work within its first year of ownership, followed by several more years of lesser stabilization work and repairs. As the building became safer and more accessible, HAF started holding events to bring people to the site and generate interest from potential developers. Around 2010-2011, a brewer approached HAF with a proposal to reuse St. Joseph's Church as a brewery.<sup>167</sup> However, due to overwhelming opposition from neighbors, the project quickly died.<sup>168</sup> Faced with harassment

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<sup>165</sup> The City did not require a preservation easement as part of the sale; however, a grant from New York State required the placement of a 24-year preservation easement on the building, which is held by the State Historic Preservation Office. *See* Macri discussion.

<sup>166</sup> Macri suggests that HAF may have even given the city the initial idea to use eminent domain. *Ibid.*

<sup>167</sup> *Ibid.*

<sup>168</sup> According to Macri, neighbors only wanted the building to be used as a two-family residence, which is consistent with the zoning in the area. They were even able to pass a local resolution to disallow specific uses in the building, especially ones that would allow liquor and/or generate a demand for parking. As HAF was seeking zoning board approval for the brewery, the neighborhood association started a suit against HAF and threatened to sue the zoning board as well. In the face of this opposition, the developer pulled out. *See* *Ibid.* *See also* Jordan Carleo-Evangelist, "Church pub called a foul brew," *Times Union*, December 13, 2012, accessed January 26, 2019, <https://www.timesunion.com/local/article/Church-pub-called-a-foul-brew-4113761.php>.

from the neighborhood association and political leadership that was no longer interested in supporting HAF's work to find a viable use for St. Joseph's Church, HAF decided to invoke a clause in the initial purchase agreement that allowed ownership to revert back to the City. Since 2013, the building has been owned by the City, which does not have any specific plans for its use.<sup>169</sup>

Similar to the Old Elks Temple and Hoyt-Potter House cases, the case of St. Joseph's Church demonstrates the importance of cultivating public and political support, both for the initial use of eminent domain and for the rehabilitation and reuse of the building. It also demonstrates the importance of partnerships. In this case, a neighborhood association and a well-resourced, non-profit preservation advocacy organization worked together to generate the public support that motivated political support for condemnation. The non-profit and the City also worked together to ensure that the building would not linger in public ownership and would be immediately stabilized. Together, these three stakeholder groups effectively saved St. Joseph's Church from demolition by neglect. However, once HAF assumed ownership of the property, the neighborhood association became an active adversary and the City became a bystander at best.<sup>170</sup> As a result, the partnerships unraveled and the building remains vacant.

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<sup>169</sup> See Macri discussion. See also Kristen V. Brown, "St. Joseph's reverts to city ownership," May 16, 2013, accessed January 26, 2019, <https://www.timesunion.com/local/article/St-Joseph-s-reverts-to-city-ownership-4522372.php>.

<sup>170</sup> According to Macri, the City repeatedly cited and fined HAF for small violations. They also refused to negotiate a water bill that HAF owed for the property, even though it had never used water from the municipal water utility. See Macri discussion.

## Key Takeaways

Based on an analysis of nearly a dozen cases, including the three detailed in this paper as well as the additional cases cited in the appendix, six key takeaways for practice emerge:

### *Takeaway 1*

Historic preservation is a legitimate public use of eminent domain.<sup>171</sup> This has been long-established in case law, but it is important to reiterate that courts will not challenge takings for preservation purposes solely on the question of public use. In fact, the public use value of historic preservation may convince people who are wary of using eminent domain to transfer a privately-owned property to a different private owner that there is a broader public benefit of the transaction.

### *Takeaway 2*

Courts are consistently deferential to local governments' decision-making when it comes to eminent domain.<sup>172</sup> They explicitly acknowledge local authority to condemn private property and are hesitant to reverse a legislative decision. As one judge argued, the court "should not interfere with a condemning authority's exercise of discretion absent bad faith."<sup>173</sup> This means that as long as the local government follows the guidelines for using this authority and does not violate the property owner's right to due process, the court will look favorably upon their decision.

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<sup>171</sup> This is demonstrated in the Old Elks Temple, Hoyt-Potter House, Wray-Nicholson House, and Manorville Farm cases.

<sup>172</sup> This is demonstrated in the Old Elks Temple, Hoyt-Potter House, St. Joseph's Church, and Wray-Nicholson House cases.

<sup>173</sup> "Georgia Court Upholds County's Use of Condemnation Authority for Historic Preservation Purposes." *Preservation Law Reporter*, 14 PLR: 1233. 1995.

### *Takeaway 3*

Eminent domain can be used to facilitate what is effectively a private-to-private transfer without violating the public use clause of the Fifth Amendment.<sup>174</sup> As one court opinion argues, as long as there is a “dominant” public purpose, any “incidental benefits to private individuals does not invalidate the condemnor’s [action].”<sup>175</sup> In some of the cases cited here, the local government had even worked out a deal with a private buyer in advance of the condemnation, which reduced the risk the government was taking. It is important to note that governments’ ability to transfer condemned properties to private owners, while upheld in *Kelo*, may be restricted by state-enabling legislation. However, in states where the legislation is adequately permissive, local governments still have the authority to condemn privately-owned properties for purposes of historic preservation, even if they do not intend to keep them in public ownership.

### *Takeaway 4*

Eminent domain can also be used to motivate property owners to sell on the private real estate market.<sup>176</sup> In these examples, condemnation unintentionally became a powerful bargaining tool that enabled local governments to compel owners to act after long periods of neglect. Since it is difficult to predict a property owner’s response to a condemnation action, the local government should be prepared to follow through and should not assume that an eminent domain action will motivate a property owner to sell.

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<sup>174</sup> This is demonstrated in the Hoyt-Potter House, St. Joseph’s Church, Wray-Nicholson House, and Colorado Business Bank cases. It was the intention with the Colonial Inn and Old Main Post Office cases, though those cases did not go to court.

<sup>175</sup> Aspen Creek Estates, Ltd. V. Town of Brookhaven, et al., 47 A.D.3d 267 (2007).

<sup>176</sup> This is demonstrated in the Colonial Inn and Old Main Post Office cases. It is also somewhat applicable in the Old Elks Temple case.

### *Takeaway 5*

Local governments have mostly used eminent domain to save buildings that could be characterized as iconic, civic, or institutional.<sup>177</sup> This includes buildings that were purpose-built as a fraternal organization lodge, a university building, a church, a bank, a post office, and an inn. Only one building studied here was used as a residence and it was more of a grand mansion than a humble house.<sup>178</sup> This demonstrates that local governments are not using eminent domain to condemn lower-style buildings or buildings that are primarily residential. Local governments also typically use eminent domain to condemn individual buildings, rather than a whole area.<sup>179</sup>

### *Takeaway 6*

Perhaps unsurprisingly to practicing professionals, these cases demonstrate that politics and personalities matter tremendously.<sup>180</sup> As one historic preservation official put it, the successful use of eminent domain to stop demolition by neglect is “less of a legal thing than a personality thing.”<sup>181</sup> Different combinations of notorious property owners, inspired government leaders, neighborhood groups, and preservation advocacy organizations all significantly influenced outcomes. In addition, when local governments have preservation staff, it is critical that those professionals foster strong working relationships with elected officials to both encourage condemnation and support the proceeding.

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<sup>177</sup> This is demonstrated in the Old Elks Temple, St. Joseph’s Church, Wray-Nicholson House, Colorado Business Bank, Old Main Post Office, and Colonial Inn cases.

<sup>178</sup> This is demonstrated in the Hoyt-Potter House case.

<sup>179</sup> This is demonstrated in all cases, exception for the Old Elks Temple, which was condemned along with two other properties.

<sup>180</sup> This is demonstrated in the Old Elks Temple, Hoyt-Potter House, St. Joseph’s Church, and Old Main Post Office cases, though is likely representative of all cases.

<sup>181</sup> McKnight discussion.



## 5. Conclusion

At first glance, eminent domain appears to be an unlikely solution to the vexing issue of demolition by neglect. To most people, it is synonymous with the unnecessary destruction of houses and communities to facilitate large-scale redevelopment and major infrastructure projects. However, this restrictive and negative perception of eminent domain belies its power for good. Indeed, eminent domain is fundamentally a tool to advance the public good.

Preservationists have an opportunity to reclaim eminent domain by using it to effectuate the rehabilitation and reuse of vacant and abandoned historic buildings. What makes eminent domain so effective is that it is not dependent on the cause of demolition by neglect, unlike other regulations and incentives that may be more successful targeting intentional or unintentional neglect, or hot or cool real estate markets. Whether a property owner is waiting to redevelop a property or simply does not have the means with which to maintain it, government can still condemn that property without depending on compliance from the property owner. As a result, eminent domain is a valuable strategy that local governments can use to close the regulatory loopholes that allow demolition by neglect.

Although condemnation is a legal and effective strategy to curtail demolition by neglect, it is not a silver bullet. Instead, it is one of many tools that local governments should consider using to proactively combat demolition by neglect along with affirmative maintenance provisions, permit restrictions, and receivership. One of the downsides of using eminent domain is that it is not guaranteed to lead to rehabilitation faster than traditional forms of regulation. As with these regulations, the slow process of condemnation exacerbates the poor condition of the building, which is already likely to be acute at the time the proceeding begins.

It is also important for local government officials and preservation advocates to recognize that the use of eminent domain to manage the demolition by neglect of specific historic properties gives primacy to their value over the value of other historic properties in the same jurisdiction. In many communities, there is more than one historic building that suffers from vacancy and abandonment. If a local government chooses to condemn one of these properties over another, it must have a strong rationale for doing so, otherwise it risks a legal challenge due to discrimination.<sup>182</sup> Given eminent domain's legacy of disproportionately harming oppressed and marginalized communities, this is especially important if the local government favors historic properties in more advantaged neighborhoods.

With all of this in mind, how would preservation advocates determine whether eminent domain was an appropriate strategy to save Bryant's Grocery & Meat Market in Money, Mississippi so the building could memorialize Emmett Till's murder? First, they should review applicable statutes to see if they restrict the use of eminent domain for certain undertakings or by specific government agencies. This would include analyzing the state-enabling legislation as well as local ordinances that may limit the use of eminent domain to understand provisions regarding blight, economic development, and private-to-private property ownership transfers. If the legislation does not explicitly allow for eminent domain to be used for preservation purposes, preservation advocates should lobby for this provision to be included.

Second, they should start building a case as soon as possible. This includes monitoring and enforcing affirmative maintenance provisions in the preservation ordinance as well as citing

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<sup>182</sup> A recent example comes from Dallas, Texas where residents of the Tenth Street Historic District are suing the City, claiming that it violated fair housing laws by demolishing more than 70 structures in the District. They argue that the City has not extended the same protections afforded by historic designation to the District as it has to other historic districts in predominantly white neighborhoods. See Hanaa' Tameez, "Residents group sues Dallas for demolitions in city's historic black neighborhood," *Fort Worth Star-Telegram*, January 25, 2019, accessed May 3, 2019, <https://www.star-telegram.com/news/local/community/dallas/article225080485.html>.

any violations to the building code. This not only gives the property owner a chance to comply, but it could also be used to show the court that the government pursued lesser forms of intervention before choosing to use eminent domain. In addition to documenting the condition of the property, preservation advocates should document the historic significance of the property to make it easier for courts (and the public) to acknowledge that there will be a public benefit to saving it.<sup>183</sup> Ideally, this would involve listing the property in a register of historic places to show that an independent body of professionals recognizes its heritage values. However, since courts have not required designation as long as the historic significance of the property is not questioned, designation may not be required.<sup>184</sup> By carefully demonstrating both the historic significance of Bryant's Grocery & Meat Market and the property owner's negligence in adequately maintaining the building, preservation advocates will be able to raise awareness about the need to intervene and start building both public and political support for condemnation.

Once preservation advocates have convinced the local government to condemn the property, the legislative body should pass a resolution that supports the use of eminent domain and states the objectives of the action. This gives the property owner and the public an opportunity to comment on the action and also provides additional evidence that could be used in court to support the local government's position. The resolution should state what authority the local government is using to condemn the property as well as the steps that it has already taken to remedy the issue. In addition, the resolution should identify the historical significance of the

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<sup>183</sup> See the Wray-Nicholson House case and the Court's requirement that the property's significance be "carefully documented." "Georgia Court Upholds County's Use of Condemnation Authority."

<sup>184</sup> In a related case where eminent domain was used for farmland preservation, the local government demonstrated a track record of public support, including formal policies incentivizing preservation and the passage of a bond act to finance this work. *See Aspen Creek Estates, Ltd. v. Town of Brookhaven, et al.* Since the U.S. Supreme Court was persuaded in *Kelo* by the City of New London's comprehensive economic development plan, it is useful for local governments to have some sort of established plan in place to show that the condemnation is part of a comprehensive strategy and therefore not arbitrary. While none of the courts in the case studies analyzed here based their decisions on the existence or absence of such plans, they may have treated historic property designations as an appropriate equivalent.

property and include any examples of the local government's support of historic preservation more generally.

If the local government successfully condemns Bryant's Grocery & Meat Market and decides to sell the property to a private individual or entity, it should ensure that the sale is fair, transparent, and maximizes the public benefit. This could include issuing a request for proposals or selling the property through a public auction. The local government should also consider placing a preservation easement on the building, requiring that the buyer owns and/or occupies the property for a minimum number of years, and even requiring that the buyer use the property for a specified use.<sup>185</sup>

With all of this in mind, it is important to remember that eminent domain can only be used to benefit the public. While case law supports the argument that preservation provides a public benefit, that does not mean that each individual preservation project does so as well. One author warns that preservation cannot become "an end in itself."<sup>186</sup> If the designation of historic properties becomes a key consideration in the ability for a government to use eminent domain, the process of designation must be fair and deliberate and the arguments for designation must be well-supported. This will prevent an abuse of the public trust and ultimately achieve successful preservation outcomes.

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<sup>185</sup> Though it is outside the scope of this research, there is a large existing body of policies on the disposal of public property. For example, see the New Jersey Register of Historic Places Act. "New Jersey Register of Historic Places Act," New Jersey Administrative Code 7:4, effective July 2, 2015, accessed May 3, 2019, [https://www.nj.gov/dep/hpo/1identify/nj\\_register\\_hist\\_plac\\_rules\\_07\\_02\\_2015.pdf](https://www.nj.gov/dep/hpo/1identify/nj_register_hist_plac_rules_07_02_2015.pdf).

<sup>186</sup> "The Police Power, Eminent Domain, and the Preservation of Historic Property," 732.

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## Appendix

While not an exhaustive list, this appendix illustrates some of the cases identified through the course of research conducted for this thesis.<sup>187</sup>

### **Hoyt-Potter House – Rochester, NY**

Lubelle v. City of Rochester, 145, A.D.2d 954 (1988) and Lubelle v. Rochester Preservation Bd., 158 A.D.2d 975 (1990)

See description and analysis in Case Studies section.

### **Wray-Nicholson House – Athens-Clarke County, GA**

Unified Government of Athens-Clarke County v. 1.8308 Acres of Land, Civ. Act. No. SU-95-CV-1250-S (Ga. Sup. Ct. Oct. 17, 1995)<sup>188</sup>

One of the earliest examples of eminent domain being used to force a change of ownership of a neglected, historic property is the 1995 case of the Wray-Nicholson House in Athens, Georgia. The circa 1805 house was built for the University of Georgia and used as a student dining hall before becoming the private residence of the Wray family in 1840. In 1964, then-owner Lucy Nicholson sold the house to the Christian College of Georgia, which let the property fall into disrepair. In 1991, the College planned to demolish the house, but a group of advocates spearheaded by Nicholson's niece persuaded the Athens-Clarke County government to intervene. The County purchased the property for \$1.5 million and spent \$4.4 million

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<sup>187</sup> N.B. The phrase quoted in the title of this paper comes from an article by legal scholar Joseph L. Sax on takings in which he discusses eminent domain. Sax notes U.S. Supreme Court Chief Justice John Marshall's "eminent good sense" in an opinion on the limits of the state's ability to seize private land without just compensation. Joseph L. Sax, "Takings and the Police Power," *The Yale Law Journal* 74, no. 1 (November 1964): 59, accessed November 20, 2018, <https://www.jstor.org/stable/794805>.

<sup>188</sup> The author was unable to find the opinion for this case.

rehabilitating the house and auxiliary structures. The plan was to use the building as a visitor's center for the 1996 Olympics and then for government offices, but the project did not finish in time. The house now serves as the headquarters of the University of Georgia National Alumni Association.<sup>189</sup>

While an opinion for the case has not been found, the Preservation Law Reporter reported that the Court ruled that the County had the authority to use eminent domain to acquire the Wray-Nicholson House for preservation purposes. It noted, "Concluding that historic preservation has long been recognized as a legitimate public purpose, Judge Stephens ruled that the County had properly exercised its condemnation powers in this case." To make his case, Stephens held that actions taken by the U.S. Congress and U.S. Supreme Court supported his interpretation. Namely, he cited the National Historic Preservation Act, which declares the importance of preserving "the historical and cultural foundation of the Nation," and *United States v. Gettysburg Historic Railway Company*, which upheld the use of eminent domain to acquire a historic battlefield.<sup>190</sup> Stephens ultimately found that the condemnation served a public purpose.

In addition to referencing national laws and court cases, Stephens also cited Georgia law on the valid use of eminent domain. Foreshadowing later cases, Stephens held that the Court "should not interfere with a condemning authority's exercise of discretion absent bad faith."<sup>191</sup> As with other cases regarding land use regulation by local governments, the Court found that it did not have a role to decide whether the local government's use of eminent domain was a good or a bad one as long as the government has a legitimate reason.

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<sup>189</sup> Interestingly, this article does not mention the use of eminent domain to save this building. While the author may have deemed that piece of information unnecessary for their story, it could also reflect an impulse to hide the fact that the building was condemned, due to perceptions of public backlash. See "Pre-Civil War mansion reopens, renovated house being returned to UGA," *Florida Times Union*, p. B-10, May 13 1999, accessed 10 Jan. 2019, [http://link.galegroup.com/apps/doc/A55475882/STND?u=upenn\\_main&sid=STND&xid=e4c82371](http://link.galegroup.com/apps/doc/A55475882/STND?u=upenn_main&sid=STND&xid=e4c82371).

<sup>190</sup> "Georgia Court Upholds County's Use of Condemnation Authority," 1233.

<sup>191</sup> *Ibid.*, 1233

In conclusion, the *Preservation Law Reporter* noted:

The Georgia court's decision in this case underscores the generally recognized principle that historic preservation serves the public good. Accordingly, communities with relatively broad condemnation powers should be able to exercise those powers to protect historic property whenever the need presents itself. Evidence of a property's historical significance, however, should be carefully documented.<sup>192</sup>

This guidance is still valid after the post-*Kelo* legislative reforms, but it does mean that states and local governments need to have carefully-written enabling legislation that still gives those “relatively broad condemnation powers” to instances of historic preservation.

### **Colorado Business Bank – Denver, CO**

*[No court case]*

A more recent example is the former Colorado Business Bank in Denver, Colorado. When construction on the building finished in 1908, it was “the first multistory office building west of the Mississippi River to be built of reinforced concrete,” which was fitting since it was built by the owners of the Colorado Portland Cement Co.<sup>193</sup> The building was remodeled in 1927, but was in poor condition by the end of the 20<sup>th</sup> century. A redeveloper was able to acquire part of the property, but two owners refused to sell their shares.<sup>194</sup> When negotiations fell through, the Denver Urban Renewal Authority condemned the remaining property for the redeveloper to use.<sup>195</sup> In 2001, the redeveloper restored the building, which is now a vital component of the city’s 17<sup>th</sup> Street commercial corridor.<sup>196</sup>

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<sup>192</sup> “Georgia Court Upholds County’s Use of Condemnation Authority,” 1234.

<sup>193</sup> Jill Jamieson-Nichols, “Buyer to unlock potential in historic 17th St. bank building,” *Colorado Real Estate Journal*, October 18-31, 2017, accessed May 3, 2019, <https://crej.com/news/buyer-unlock-potential-historic-17th-st-bank-building/>.

<sup>194</sup> The acquisition of the property was complicated by the presence of a ground lease, which meant that the ownership of the building was distinct from the ownership of the land. While a redeveloper owned the building, they were only able to negotiate a settlement to buy the underlying land with owners who represented 67% of the site. See “Eminent Domain Examples,” *National League of Cities*, 2005.

<sup>195</sup> *Ibid.*

<sup>196</sup> See Jamieson-Nichols, “Buyer to unlock potential.”

### **Old Elks Temple – Tacoma, WA**

City of Tacoma v. Zimmerman, 119 Wn. App. 738 (2004), review denied, No. 751412 (Wash. Oct. 5, 2004)

See description and analysis in Case Studies section.

### **St. Joseph’s Church – Albany, NY**

In re Acquisition of Real Property by the City of Albany, 9 A.D.3d 551 (N.Y. App. Div. 2004)

See description and analysis in Case Studies section.

### **Manorville Farm – Brookhaven, NY**

Aspen Creek Estates, Ltd. v. Town of Brookhaven, et al., 47 A.D.3d 267 (2007)

Not all cases involving the condemnation of historic properties are directly related to curtailing demolition by neglect or advancing the preservation of cultural resources. One example is the case of Manorville Farm in Brookhaven, New York. In this case, the Town of Brookhaven used eminent domain to acquire a 39-acre parcel of farmland from a residential housing developer to preserve its agricultural use by allowing a farmer to lease or buy the land from the Town.<sup>197</sup>

The case focused on a few questions, one being whether the condemnation “serves a legitimate public purpose, or is instead a pretext to improperly confer benefits upon private persons.” The Court broadly interpreted “public purpose,” arguing that “it is generally accepted that the condemnor has broad discretion in deciding what land is necessary to fulfill [the public] purpose.” In this specific case, the Town had enough of a track record (including formal policies

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<sup>197</sup> The property included a pre-1858 farmhouse that was recommended for landmark designation by the Town Historic District Advisory Committee. See *Aspen Creek Estates, Ltd. v. Town of Brookhaven, et al.*

and the passing of a bond act) with farmland preservation that the court was convinced that there was public support for the condemnation.

Another important holding from the Manorville Farm case is the way the Court weighed public and private benefits. This is especially important given that the case was decided after *Kelo*. The Court held, “The mere fact that condemnation will provide incidental benefits to private individuals does not invalidate the condemnor’s determination as long as the public purpose is dominant.”<sup>198</sup> As opposed to setting a strict requirement for a complete public purpose and/or the negation of a private purpose, the Court set a lower threshold for a “dominant” public purpose. In this case, that meant that the overall benefit to the public of having actively farmed farmland in a historically agricultural area was so great that any private benefit from the sale or lease of the land to a farmer was secondary. As a result, the appellate court affirmed the trial court’s ruling in favor of the Town, allowing the acquisition of the property by eminent domain.<sup>199</sup>

### **Colonial Inn – Hillsborough, NC**

*[No court case]*

In some cases, local governments began eminent domain proceedings, but the threat of condemnation motivated the property owner to sell their property on the private market. One of the best-known examples is the Colonial Inn in Hillsborough, North Carolina, an 1838 building that is listed in the National Register of Historic Places and is classified as contributing to the local historic district. In October 2015, the Hillsborough Town Board unanimously voted to begin eminent domain proceedings against property owner Francis Henry, who had bought the building in 2002 and almost immediately stopped maintaining it. An eminent domain proceeding

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<sup>198</sup> *Aspen Creek Estates, Ltd. v. Town of Brookhaven, et al.*

<sup>199</sup> *Ibid.*

was filed in July 2016, but in May 2017, the Town and Henry reached a settlement. As a result, the Town voluntarily dismissed the action.<sup>200</sup> While the Town ultimately decided to stop eminent domain proceedings, it reserved the right to resume them if the building was not sold within 11 months.<sup>201</sup>

Henry sold the property to Allied DevCorp LLC in January 2018 for \$800,000.<sup>202</sup> The sale had been under contract since November 2017, approximately five months after the town and the previous property owner settled the eminent domain proceeding, which was well within the 11-month timeframe for the sale.<sup>203</sup> The new owners plan to restore the inn back to its original use by having a restaurant on the ground floor and a boutique hotel on the second floor, along with the addition of a bar, conference room, and event center.<sup>204</sup>

### **Old Main Post Office – Chicago, IL**

*[No court case]*

A similar chain of events occurred in Chicago around the same time as the Colonial Inn case. The Old Main Post Office is a nine-story building located on the west side of the South Branch of the Chicago River, just south of Union Station at 433 West Van Buren Street. It was constructed in 1921 as a federal facility and expanded in 1934 to also accommodate the city's

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<sup>200</sup> See “Eminent Domain Action Over Historic Inn Settled,” Town of Hillsborough, May 10, 2017, accessed April 18, 2018, <https://www.hillsboroughnc.gov/news-releases/2017/5/10/10187/eminent-domain-action-over-historic-inn-settled/>.

<sup>201</sup> See Charlie Pogacar, “After all: Eminent Domain suit dropped, Colonial Inn to be up for sale,” *The News of Orange County*, May 12, 2017, accessed April 18, 2018, [http://www.newsfororange.com/news/article\\_bde8fdca-372a-11e7-80bd-83ea9452e3e3.html](http://www.newsfororange.com/news/article_bde8fdca-372a-11e7-80bd-83ea9452e3e3.html).

<sup>202</sup> See Matt Goad, “Once rotting from neglect, Colonial Inn in Hillsborough could be back in business soon,” *The Herald-Sun*, September 11, 2018, accessed May 3, 2019, <https://www.heraldsun.com/news/local/counties/orange-county/article218188550.html>.

<sup>203</sup> See “FAQ: Former Colonial Inn,” Town of Hillsborough, accessed May 3, 2019, <https://www.hillsboroughnc.gov/government/frequently-asked-questions/faq-former-colonial-inn/>.

<sup>204</sup> See Goad, “Once rotting from neglect.”



main post office.<sup>205</sup> By 1997, the building was declared functionally obsolete and a new facility was constructed, leaving the building vacant. In 2009, English real estate developer Bill Davies purchased the building at auction for \$24 million.<sup>206</sup> Despite years of redevelopment proposals, Davies never moved forward with plans to rehabilitate and reoccupy the building, despite multiple building code violations and even a fire.<sup>207</sup> Davies also owed more than \$600,000 in back taxes on the property.<sup>208</sup>

In 2016, the City of Chicago decided to condemn the property with the intention of selling it to another developer, using the money from the sale to pay Davies his just compensation.<sup>209</sup> Despite telling the press that he would fight the action, in April 2016, Davies reached a tentative deal with the City that established a timeline both for the sale of the building and the creation of a redevelopment plan. In May, the property was purchased by 601W Companies, which has since rehabilitated the building as retail and office spaces that are set to open later in 2019.<sup>210</sup>

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<sup>205</sup> See “Old Chicago Main Post Office Building Landmark Designation Report,” City of Chicago Department of Planning and Development, December 7, 2017, accessed May 3, 2019, [https://www.chicago.gov/content/dam/city/depts/zlup/Historic\\_Preservation/Publications/Old\\_Chicago\\_Main\\_Post\\_Office\\_Bldg.pdf](https://www.chicago.gov/content/dam/city/depts/zlup/Historic_Preservation/Publications/Old_Chicago_Main_Post_Office_Bldg.pdf).

<sup>206</sup> See Mitch Dudek, “Emanuel scraps eminent domain, announces deal for Old Post Office,” *Chicago Sun-Times*, April 12, 2016, NewsBank, accessed October 9, 2018.

<sup>207</sup> See *Chicago Tribune* Editorial Board, “Finally develop the old Chicago post office? Letter rip,” *Chicago Tribune*, February 23, 2016, accessed May 3, 2019, <https://www.chicagotribune.com/news/opinion/editorials/ct-old-chicago-post-office-eminent-domain-edit-0224-20160223-story.html>. See also Jay Koziarz, “The Sad Saga of Chicago's Old Post Office Redevelopment,” *Curbed Chicago*, February 23, 2016, accessed May 3, 2019, <https://chicago.curbed.com/2016/2/23/11099924/the-sad-saga-of-chicagos-old-post-office-redevelopment>.

<sup>208</sup> See Jay Koziarz, “City of Chicago Moves Forward with Eminent Domain Claim on Old Post Office Site,” *Curbed Chicago*, March 9, 2016, accessed May 3, 2019, <https://chicago.curbed.com/2016/3/9/11185730/chicago-eminent-domain-old-post-office>.

<sup>209</sup> *Chicago Tribune* Editorial Board, “Finally develop.”

<sup>210</sup> See Micah Maidenber, “As Work Space, Old Post Offices Have a Timeless Allure,” *The New York Times*, February 13, 2018, <https://www.nytimes.com/2018/02/13/business/post-office-redevelopment.html>. See also “The Old Post Office,” accessed May 3, 2019, <http://www.post433.com/>.

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