

DEMOLITION OF UNSAFE BUILDINGS

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DEMOLITION OF UNSAFE BUILDINGS

The Legislature has created three distinct statutory methods for cities and towns to demolish unsafe buildings. Each statute has its own procedures and standards. See G.L. c. 111, § 127B [board of health]; G.L. c. 139, § 1, et. seq. [city councils]¹; and G.L. c. 143 [building inspectors].

BOARDS OF HEALTH

G.L. c. 111, § 127B, empowers boards of health to demolish buildings. The statute gives the board of health power to repair structures, remove occupants, and "close-up the premises." Before demolition, the board must determine, after a Code inspection, whether a building is:

1. is unfit for human habitation;
2. is or may become a nuisance; or
3. is or may be a cause of sickness or home accident to the occupants or to the public.

If it comes to any one of these conclusions, it can issue a written order to the owner and/or occupant requiring the owner/occupant:

1. to vacate;
2. to put the premises in a clean condition; or
3. to comply with the Code or to comply with the locally adopted board rules and regulations. The initial order must be served in accordance with G.L. c. 111, § 124, with copies sent by "registered mail return receipt requested"² to the owner, mortgagees and lienors of record, and occupants.

¹ For a recent Worcester jury trial decided under this statute, See *Benjamin v. City of Worcester*, WOCV 1994-025969 Fecteau, J.) aff'd 51 Mass. App. Ct. 1114.

²Another statute permits use of certified mail whenever any statute requires registered mail. G.L. c. 4, § 7.

Service of the Original Order

G.L. c. 111, § 124, provides: “[The] order shall be in writing, and may be served:

1. personally on the owner, occupant or his authorized agent by any person authorized to serve civil process; or
2. a copy of the order may be left at the last and usual place of abode of the owner, occupant or agent, if he is known and within or without the commonwealth; or
3. a copy of the order may be sent to the owner, occupant or agent by registered mail, return receipt requested, if he is known and within the commonwealth; or
4. if the order is directed against the owner and if the residence and whereabouts of the owner or his agent are unknown or without the commonwealth, the board may direct the order to be served by posting a copy thereof in a conspicuous place on the premises and by advertising it for at least three out of five consecutive days in one or more newspapers of general circulation within the municipality wherein the building affected is situated.” See 105 CMR Section 410.833 for the DPH regulations for service.

The board may demolish or remove the structure after one year from the date the premises have been closed up. However, if the head of the local health department certifies to the board that "immediate demolition or removal is essential to protect the health and safety of the public," the board may demolish the building within 90 days of its closing. The Department of Public Health has promulgated regulations implementing this statute. 105 CMR 410.831; 410.950. The statute is simple in its requirements. The DPH regulations further describe the procedure for condemnation in more detail.

DPH Regulations for Demolition

THE REQUIRED FINDING

If, after an inspection, the inspector finds conditions which make the premises ‘unfit for human habitation,’ the inspector may begin the process for condemnation and demolition. Initially, the

inspector must make a finding that the building, or portion thereof, is unfit for human habitation.

The phrase "unfit for habitation" is defined in the Code. A **Condition Making a Unit Unfit for Human Habitation** is a condition which justifies "closing down, condemning, or demolishing a dwelling or dwelling unit. It shall mean a violation which **poses such immediate harm or threat of harm to an occupant or to the public that other legal remedies cannot be reasonably expected to bring about removal of the condition with sufficient speed to prevent the serious harm or injury to the occupants or to the public.** 105 CMR 410.020. For board of health condemnations, it is this definition which is critical. This is the starting place for a challenge to a challenge to the demolition of a building. It becomes the legal question fore the court. DOES THIS BUILDING HAVE VIOLATIONS WHICH POSE SUCH AN IMMEDIATE HARM OR THREAT TO AN OCCUPANT OR TO THE PUBLIC THAT OTHER MEANS WON'T SOLVE THE PROBLEM WITH SUFFICIENT SPEED? If the board concludes that the test is met, it may make a written finding to that effect. The finding must include a statement of the material facts and conditions upon which the finding is based.

Before The Finding

PREMISES OCCUPIED

1. Before the inspector may make the required finding,³ the inspector must notify the owner and the occupants containing:
 - a. an identification of the dwelling;
 - b. a copy of the inspection report;
 - c. a statement that the board will consider making a finding that the building, or a specifically identified portion of it, is unfit for human habitation;

³The board can dispense with this notice and the subsequent hearing if the board determines that the danger to life or health is so IMMEDIATE that even this delay is too long. 105 CMR 410.831D). A copy of this determination and the finding that the building is unfit for human habitation must be served on the owner, occupants and any persons with an interest in the property.

- d. a statement that this finding may result in an order of condemnation requiring the owner to secure the building and the occupants to vacate;
 - e. a statement of the time and place of a hearing of the board at which the board will consider whether to make the finding and whether an order to secure and vacate should be issued. The order must be served as required by G.L.c.111, Section 124 [105 CMR 410.833].The board hearing must be at least 5 days after service of this notice. **NB If an interested party is so situated that this 5 day period is an unrealistic time frame for the person to participate, the 5 days may constitute a due process violation as to that person. [For example - mortgagees]**
2. At the hearing the board must afford the owner and occupants and any other affected person the opportunity to testify and to submit documentary evidence challenging the board's suggested findings. The regulations appear to make this hearing a quasi-judicial hearing. **CAREFUL MINUTES MUST BE KEPT. EVIDENCE RECEIVED AND RECORDED.** This hearing presents another opportunity for a court challenge to a board's decision to demolish. The board must be careful to afford the essential elements of due process. The decision after the hearing must be in writing and must state with some reasonable specificity the reasons for the board's conclusions - the "material facts and the conditions upon which the finding is based." 105 CMR 410.831(A).

The Finding

After the hearing, the board may make the finding that the building, or a specifically identified portion of it, is unfit for human habitation. The board at this time can also order the building condemned, vacated and secured. These orders should be served in accordance with G.L. c. 111, § 124. If after one year the violations are not corrected, the board may demolish the building.

Premises Unoccupied

If the premises are not occupied the board may dispense with the notice and hearing described in paragraphs one and two above. The board may make a finding that the premises, or a specifically identified portion of the premises, are unfit for human habitation and the orders condemning the building, and directing that it be secured. These orders should be served in accordance with G.L. c. 111, § 124.

Demolition

Seven days after the condemnation order has been served on the parties in interest (unless an interested party requests a hearing [410.850] in case of an unoccupied building), or after the notice of hearing was served and the hearing was conducted the board placards the building.

SELECTMEN/CITY COUNCIL

G.L. c. 139, § 1-3B, gives the aldermen or selectmen of any city or town the right to demolish "**burnt, dilapidated or dangerous buildings or other structures.**"⁴ In my opinion, this is the most complicated method since the process involves a hearing before an elected body and is more likely to bring political pressures to bear on a decision which should be clear of any such influences.

After written notice to the owner or his authorized agent and after a hearing, the board can declare the building a nuisance or dangerous. The selectmen or council must "make and record an order adjudging it to be a nuisance to the neighborhood, or dangerous, and prescribing its disposition, alteration or regulation."

The written order must determine whether to demolish, alter, or otherwise regulate the building. A qualified officer (constable or sheriff) must serve the order in the manner described by G.L. c. 111, § 124.

Any aggrieved person may appeal to the Superior Court within three days after service. The petitioner is entitled to trial by jury which can "affirm, annul, or alter such order."

G.L. c. 139, § 3, gives the selectmen/council the same power to abate and remove any nuisance as is given to the board of health under G.L. c. 111, §§ 123-125.

⁴ Or "to the owner of a vacant parcel of land."

BUILDING INSPECTORS

G.L. c. 143, §§ 6-14, giving building inspectors the power to demolish buildings, describes the following process:

G. L. c. 143, Section 6

- When informed about a building by any means, the building inspector must [*“shall”*] inspect it to determine: **either** (1) whether a structure, or anything attached to it, is "*dangerous to life or limb*"; **or** (2) whether any building is "*unused, uninhabited or abandoned,*" and "*open to the weather.*"
- The inspector must [*“shall”*] notify the owner, lessee, or mortgagee in possession: **either** (1) "*to remove it or make it safe*" if it "*appears to him to be dangerous*"; **or** (2) to "*make it secure*" if it is "*unused, uninhabited or abandoned and open to the weather.*"
- If it "*appears [to the inspector] that [the] structure would be especially unsafe*" in the event of fire, the building "*shall be deemed dangerous within the meaning* [of the statute] *hereof.*"

G.L. c. 143, Section 7

- Any person notified by the inspector "*shall be allowed*" until 12:00 p.m. of the day after service "*to begin to remove the structure, make it safe, or make it secure*" and to "*employ sufficient labor speedily*" to do so. If the public safety requires it, and if the aldermen or selectmen order it, the inspector can act immediately to correct the unsafe conditions or take the building down.

G.L. c. 143, Section 8

- If the owner, lessee, or mortgagee in possession fails to comply with the notice, within the time set by the inspector, "*and [the] building is not made safe or taken down,*" as therein ordered, "*or made secure,*" the city engineer (or surveyor in a town), head of the fire department, and one disinterested person appointed by the inspector, as a board, shall make a "*careful survey*" of the

building.

- The survey team must make a written report and a copy must be served upon the owner, lessee, or mortgagee in possession.

G.L. c. 143, Section 9

- If the report “*declares that [the] structure is [either] (1) dangerous, or (2) unused, uninhabited or abandoned, and open to the weather, and if the owner, lessee, or mortgagee in possession continues [his] refusal or neglect*” to correct the problem, “*the inspector shall cause it to be made it safe or taken down, or to be made secure.*”

G.L. c. 143, Section 10

- An owner, lessee or mortgagee in possession aggrieved by the order of the building inspector may appeal to the Superior Court under the remedy provided in G.L. c. 139, § 2. G.L. c. 143, but this remedy “*shall not be construed so as to hinder delay or prevent the inspector from acting under Section 9 ...*”

G.L. c. 139, Section 2

- G.L. c. 139, § 2, gives the owner three days within which to appeal to the Superior Court to a jury trial in which the jury has the authority to affirm, annul or alter the inspector’s order.

780 CMR § 121.1-121.6

- The state board of building regulations has promulgated regulations to implement these sections. 780 CMR § 121.1-121.6.

Summary

Section 6 **requires** the building inspector to inspect a building [*“shall inspect the same”*] to determine if a building is (1) “*dangerous to life or limb*” or (2) “*unused, uninhabited or abandoned, and open to the weather.*” If he determines that the building is dangerous to life or limb, he must notify the owner to remove it or make it safe. *Id.* The statute creates a presumption that the building is “dangerous” if it is a fire hazard. If the building “*would be especially unsafe in case of fire,*” it “*shall be deemed dangerous within the meaning*” of the

statute. If the inspector determines the building is unused, uninhabited or abandoned and open to the weather, he must notify the owner to make it secure. *Id.*

Section 7 requires the owner to begin removing the structure or making it safe or secure by [*“shall be allowed until”*] noon of the day following service of the notice. The gravity of the legislative command is reinforced by the specific directive requiring the owner to use enough workers to comply with the order. [*“... and he shall employ sufficient labor speedily to make it safe or remove it or make it secure.”*]

Section 8 requires the city to make a survey [*“shall be made”*] of the building if the owner fails to comply with the inspector’s order. The survey members, the fire chief, the city engineer, and one disinterested person, check the findings of the inspector.

Section 9 **requires** the inspector to make the building safe, take it down, or make it secure and permits him, “if public safety so requires,” to enter the land and building with whatever help he needs to secure or demolish the building. An owner, failing to comply with the original notice “shall ... be punished by a fine of not less than [\$100.00] ...” per day.

COURT DECISIONS

This statute defines the municipal police power to destroy buildings which, meeting the standards of the statute, constitute nuisances. A building in deteriorated condition, posing a threat to public health and safety, constitutes a nuisance. *City of Worcester v. Sigel*, 37 Mass. App. Ct. 764,767 (1994). The Legislature has established the criteria for when buildings must be or may be demolished. The legislature has the authority to declare what property or conduct constitutes a nuisance.⁵ The legislature “may determine when that which is otherwise property shall cease to be such if it be kept against the law (citations omitted) ... Where anything is declared a nuisance, by legislation, it is not competent for a party to show that it is not in fact one ...” *Train v. Boston Disinfecting Co.*, 144 Mass. 523, 11 NE 929,936 (1887).

⁵*Blair v. Forehand*, 100 Mass. 136,139-140 (1868); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029-1031 (1992).

The court has interpreted the statutory demolition power on several occasions. From these cases and general principles of law several points appear. First, the liability of the city depends on whether it has complied with the statute. Compliance is of two kinds -- procedural and substantive. Did the city follow the statutory procedure? And, did the city inspector/survey team make the findings required by the statute? These are the only fact issues before the court and jury.

In *Worcester v. Eisenbeiser*, 7 Mass. App. Ct. 345 (1979), the city demolished a building using Chapter 139, §§ 1-3. That statute provides that the owner shall be ordered to remove the nuisance at his own expense and only upon "failure by the owner or occupant to comply with such order may the city cause the removal of the nuisance." In *Eisenbeiser*, the city issued an order declaring the building to be dilapidated and ordered it to be demolished. It did not inform the owner, **as required by the statute**, that he could remove the nuisance or correct the problem himself. The Court upheld the jury's nullification of the city's order. The Court noted⁶ that the city didn't have to be bound by this procedure. It could have relied on Chapter 143, § 9, but did not do so.

In *Bryant v. Boston*, 11 Mass. App. Ct. 450, 453, the Court noted: "The city's authority, in turn, depended on whether it had complied with the provisions of the statute under which it acted." (Emphasis added.) See also *City of Woburn v. Busa*, 9 Mass. App. Ct. 903 (1980); *Berger v. City of Quincey*, 14 Mass. App. Ct. 964 (1982).

These decisions demonstrate that the Court will require towns to follow the statutory process strictly but that procedures required by one statute will not be read into the others.

ISSUES COMMON TO ALL DEMOLITIONS

⁶*Ibid.* at 349, footnote 1.

1. Regulatory Taking

Demolition is an application of the police power to curb or abate nuisances. *City of Worcester v. Sigel*, 37 Mass. App. Ct. 764, 767 (1994). See generally, McQuillin, *Municipal Corporations*, § 24.23 (3rd Ed.). While the police power is sufficient to protect public health and safety, public necessity limits its exercise. See, generally McQuillan, *Municipal Corporations*, Section 24.558-562. This limitation raises the issue of regulatory takings. While the police power is an inherent sovereign power of the state, if the exercise of the power "goes too far," it will be recognized as a taking. *Pennsylvania Coal Company v. Mahon*, 260 U.S. 393 (1922). In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), the Court recognized that the government could deprive property of all value if it acts against the "background principles of the state law of property and nuisance." *Id.* at 1029, 1031. The Court cautioned that the government "must do more than proffer [its] declaration that the uses [the owner] desires are inconsistent with the public interest, or the conclusory assertion that they violate a common law [obligation to refrain from using property to create a nuisance.]" The Court's discussion of nuisance law reflects historic concern that **actual** public necessity measures the extent of the city's right to demolish property. The Court's warning that it will not accept "conclusory assertions," shows the basis for a potential challenge to the municipality's findings that a building must be demolished. Chapter 139 specifically incorporates nuisance law. While the demolition provisions of Chapter 143 and Chapter 111 do not reference nuisance law, similar principles apply. Destruction of private property is a drastic remedy and should be a last resort. If the property owner convinces the court that the property was not in fact a nuisance, or did not in fact meet the statutory criteria, the city will face a claim for a taking. See *Armendariz v. Penman*, 31 F.3d 860, 866 (9th Cir., 1994) rehearing *en banc* 75 F.3d 1311 (1996). See *Lopes v. Peabody*, 417 Mass. 299, 306-307 fn. 12 and 13 (nuisance law and regulatory takings).

CAUTION NOTE

The owner of the demolished property may attack the factual bases alleged to support demolition. If the city doesn't have a decent record to support the demolition, the city is open to a takings claim. The findings which support the decision to demolish must be detailed enough and have sufficient persuasive force to convince a judge/jury that public health and safety require

demolition. At the hearing under G.L. c. 139, the council/board of selectmen should take evidence and make specific findings after the hearing required by G.L. c. 139, §§ 1-3B. The statute refers to "adjudging" the building to need demolition. This implies a quasi judicial type of hearing with due process rights.

The building or sanitary code inspectors' reports must have detailed findings. The survey team report, G.L. c. 143, § 8, should also be detailed in describing the dangerous conditions of the building. It should not simply contain conclusory statements tracking the statutory language. It goes without saying that the survey team should have had the opportunity to observe and should have observed all the facts necessary to draw their conclusions. Since G.L. c. 143 references particular concern about fire hazards, the city should always have available a separate affidavit from a fire inspection official explaining how the building creates fire hazards.

The municipality should assume that each person involved will be called upon to testify and justify his/her statements supporting demolition.

In a doubtful case the city can protect itself by seeking judicial relief. A judgment ordering or permitting the demolition of the building should protect the city. Judicial enforcement is available under or all three statutes. See G.L. c. 111, §§ 127B-127C, et seq; G.L. c. 139, § 6-13; G.L. c. 143, § 12.⁷

2. Due Process Limitations

The constitution imposes due process limitations on the exercise of the police power to control or abate nuisances or demolish buildings. A municipality must give the owner, mortgagee, and other interested persons both: (1) adequate notice and a hearing; and (2) enough time make the building safe. See, for example, *Miles v. District of Columbia*, 510 F.2d 188 (D.C.Cir. 1975);

⁷See *Woburn v. Busa*, 9 Mass. App. Ct. 903 (1980 Rescript).

Traylor v. Amarillo, Texas, 492 F.2d 1156 (5th Cir. 1974); see *Sterling v. Environmental Control Board of New York City*, 793 F.2d 52 (2nd Cir. 1986) decision after rehearing 795 F.2d 8, cert. denied 479 U.S. 987 (1986), in which the Court held that service by posting and mailing violated due process. See also *Kornblum v. St. Louis County, Mo.*, 72 F.3d 661 (8th Cir. 1995). In *Kornblum*, the Court held that due process required notice to prospective purchasers of condemned property. In *Armendariz v. Penman, supra*, the Court held that if there is no true emergency reason to demolish, due process requires a pre-deprivation hearing. Due process requires that any person with an interest in the property have notice and an opportunity for a hearing.

The Massachusetts statutes demolition raises due process issues if the city notifies only those persons the statute requires. Each of the statutes require notice to different persons. G.L. c. 111, § 127B, requires notice to owners, mortgagees, and tenants. See 105 CMR § 410.831-950 for content of notice, the right to appeal. G.L. c. 139, § 1, requires notice to the owner only. Both statutes permit service pursuant to G.L. c. 111, § 124. The statute allows service at the last and usual place of abode on the owner, occupant, or agent. G.L. c. 143, § 6, requires notice to owner, lessee or mortgagee in possession. To the extent that a statute omits reference to serving any person with a property interest, it raises a due process issue.

“[It] is undisputed that [the mortgagee] never received notice prior to demolition, [even though] the law does not impose a statutory obligation on the City or any defendant to notify the mortgagee of the intended demolition of the property. However, that does not necessarily establish that the defendants had no duty to notify the mortgagee prior to demolition. This Court is not convinced there is no such legal duty owed to a mortgagee. While the statute does not specifically require such notice be provided to the mortgagee, the lack of such a [statutory] requirement does not automatically entitle the defendant to summary judgment. ...The [defendants] are alleged to have violated the plaintiff's constitutional rights when they failed to notify the plaintiff mortgagee ...The defendants claim they are entitled to qualified immunity because the alleged constitutional violation, failure to provide due process by failing to notify the owner and mortgagee before demolishing the building, was not clearly established by the time of demolition. However ... this Court determines that the right to due process owed to a property owner and mortgagee was sufficiently established to warrant denial of the defendants' motion

concerning federal constitutional violations. See *Teschke v. Keller*, 38 Mass. App. Ct 627, 633 (decided 6/12/95) citing *Christian v. Mooney*, 400 Mass. 753, 761 (1987); appeal dismissed and cert. denied sub. nom. *Christian v. Bewkes*, 484 U.S. 1053 (1988), and *Mennonite Bd. Of Missions v. Adams*, 462 U.S. 791 (1983).” *E.F.Y. Realty Corp. v. City of Lynn, Massachusetts*, 2000 WL 1473141, Mass. L. Rptr. 320 (2000).

In *Morais v. City of Lowell*, 50 Mass. App. Ct. 540 (2000), the Court viewed the city’s failure to give proper notice in terms of negligence.

The Court said: “*The essence of [the plaintiffs’] complaint is that they were entitled to prior notice by the city before it ordered their building vacated. We first determine whether the city had a duty to provide such notice. The authority of a building inspector to determine whether a building is unsafe is subject to "statutory safeguards against its unreasonable exercise, designed to satisfy the requirements of due process."* *DiMaggio v. Mystic Bldg. Wrecking Co.*, 340 Mass. 686, 692, 166 N.E.2d 213 (1960) (examining whether owner was afforded due notice of an order by Boston building commissioner to demolish his building pursuant to a municipal building code then in effect, similar to G.L. c. 143). *General Laws c. 143, §§ 6, prescribes the duties of a local inspector upon being informed that a building is dangerous, and G.L. c. 139, §§ 1 & 3, provide for actions by a city to abate building-related nuisances. Both statutes provide for notice to an owner and an opportunity to make the property safe, or to eliminate the nuisance.*”

The Court concluded that the city had a “special” duty to give notice under the two statutes under which it acted. “*We conclude that the duty created by the notice requirements of c. 139 and c. 143 is a special duty running directly to the plaintiffs in this case, ‘different from that owed to the public at large.’* (citation omitted). ***The failure to perform that duty deprived the plaintiffs of the opportunity--provided by statute--to make the building safe. It is for that reason the special duty of notice is a necessary prerequisite to the performance of the city's duty to the general public ... [The] public demolition statutes in Massachusetts require the local building department to notify the owner before a building is demolished as a public danger.***”

If the city only complies with the statutory notice requirements, it will violate due process protections. In my opinion any person

with an interest in the property should receive notice.⁸

PRACTICE TIP

The best way to avoid notice issues is to run the title to find out the names and addresses of each party having an interest. Be sure to run mortgages for assignments and trusts for names and addresses. The municipality should also record a notice on pending demolition at the registry of deeds IMMEDIATELY after the title search.

3. Strict Procedures

Each statute gives separate and independent power to municipalities and each has different procedures, preconditions and notice requirements. A city ignores the procedural details at its peril.

⁸For statutory notice issues see *Bryant v. Boston*, 11 Mass. App. Ct. 450, 454 (1981).

In *Worcester v. Eisenbeiser*, 7 Mass. App. Ct. 345 (1979), the city demolished a building using Chapter 139, §§ 1-3. That statute provides that the owner shall be ordered to remove the nuisance at his own expense and only upon "failure by the owner or occupant to comply with such order may the city cause the removal of the nuisance." In *Eisenbeiser*, the city issued an order declaring the building to be dilapidated and ordered it to be demolished. It did not inform the owner that he could remove the nuisance or correct the problem himself. The Court upheld the jury's nullification of the city's order. The Court noted⁹ that the city could have relied on Chapter 143, § 9, but did not do so.

In *Bryant v. Boston*, 11 Mass. App. Ct. 450, 453, the Court noted: "The city's authority, in turn, depended on whether it had complied with the provisions of the statute under which it acted." See also *City of Woburn v. Busa*, 9 Mass. App. Ct. 903 (1980). These decisions demonstrate that the Court will require towns to follow the statutory process strictly but that procedures required by one statute will not be read into the others.

The superior court followed this principle in the case of *E.F.Y. Realty Corp. v. City of Lynn, Massachusetts*, 2000 WL 1473141 (Mass. Super. 2000). The issue in the case was whether the demolition ordered by the City complied with the statutory procedural requirements for the demolition of dilapidated and dangerous buildings.

The court said: "Considering the disputed facts in the light most favorable to the City, this Court accepts the City's contentions that: (1) the plaintiff knew in June 1995 of the scheduled meeting in March 1995 concerning demolition; (2) the City mailed various notices to the plaintiff concerning this building; and (3) Counselor Ellis informed the plaintiff in December 1995 of both the demolition order and that he should immediately make the building safe. Even accepting these contentions as facts for purposes of considering the plaintiff's motion, the defects in the City's compliance with the statutory notice requirements in G.L. c. 139, §§ 3 and 3A, and Chapter 111, §§ 123-25, fail to be corrected. **The City agrees it failed to comply with the strict statutory requirement to notify the owner both to remove the building and of a specific time period during which the owner can or should perform such removal at its expense.** The

⁹*Ibid.* at 349, footnote 1.

instruction to the plaintiff that he "should immediately make the building safe" fails to satisfy the statutory requirement. In any event, the statutory notice provisions of G.L. c. 13, §§ 3 and 3A, and G.L. c. 111, §§ 123-25 are not merely notice provisions which may be waived if the plaintiff had actual notice. "It is only upon a failure by the owner or occupant to comply *with such order that the city may cause the removal of the nuisance.* 'Worcester v. Eisenbeiser, 7 Mass. App. Ct. 345, 348 (1979) citing G.L. c. 111, § 125. Based on the City's noncompliance with the statutes' clear notice requirements, the City was, as a matter of law, without authority to demolish the building owned by [the] plaintiff. *Id.*

PRACTICE TIP

Read that applicable statute and regulations carefully. Prepare forms and instruct the city officials on the requirements of the statute/regulations.

4. Liens for Demolition Costs

Each statute gives the city a lien on the real estate to recover the costs of demolition. Chapter 111, § 127B, and Chapter 143, § 9, incorporate the lien remedy found at Chapter 139, § 3A. The costs of demolition or correcting the unsafe condition constitute a debt to the city when the work is completed upon rendering an account to the owner. This debt is recoverable from the owner in a contract action. The debt constitutes a lien on the land if a statement of the amount claimed, signed by the mayor or selectmen, is recorded in the Registry within after 90 days after the debt becomes due. The lien continues for two years from the first day of October following the date of the filing. If the debt remains unpaid when the assessors are preparing the real estate tax list and warrant under G.L. c. 59, § 53, the mayor, the selectmen or the collector of taxes must certify the debt to the assessors. The assessors must add it to the tax and commit it to the collector even if the property is tax exempt. The collector has the same powers over these debts as he does to collect taxes. For example, he can record an instrument of taking and foreclose the right to redeem.

G.L. c. 139, § 3B, creates another lien. The statute regulates insurers paying any claims: (1) for loss or damage or destruction to a building exceeding \$1,000.00; or (2) for any loss, damage or

destruction which causes the building to be dangerous to life or limb, unused, uninhabited, abandoned and open to the weather as described in G.L. c. 143, § 6. Before making any payment the insurance company must give ten days written notice to the building inspector, the fire department, or arson squad and to the board of health or board of selectmen of the municipality. If the city notifies the insurer before payment, by certified mail, that it intends to perfect the lien described in Section 3A, the insurer cannot make any payment while the "proceedings" are pending provided that the "proceedings" are initiated within 30 days. The lien described in Section 3A extends to, and can be enforced against, any casualty insurance policy or policies covering the loss, damage or destruction.

PRACTICE TIP

Effective communication among municipal departments is the most effective way to implement these statutes. Regular procedures after a fire should assure that each department has information about the insurance company, adjusters and owners. See G.L. c. 186, § 21, requiring owners to disclose the names of insurers.

5. Demolition of Occupied Premises

A municipality has additional problems if the premises are occupied.

1. G.L. c. 111, § 127B, regulates removing occupant from residential premises or even issuing an order to vacate residential premises. The board of health must notify the occupants and provide for a public hearing. After the hearing it must find in writing that the premises are unfit for human habitation. The finding must include the facts upon which it is based. The hearing cannot be held until five days after the occupant receives the notice unless the board determines that the danger is immediate and delay would endanger life and health. If the building is not unfit for human habitation but the board believes that the owner cannot correct conditions unless the occupants vacate, the board can begin a summary process action under G.L. c. 239, § 1.

2. G.L. c. 143, § 9, incorporates by reference G.L. c. 239, the summary process statute. G.L. c. 139 has no provision for removal of occupants except in narrow circumstances. See G. L. c. 139, § 9, § 19. In this regard, see G.L. c. 184, § 18, which governs right of entry into premises generally. Some kind of judicial process or summary process is necessary to remove tenants.
3. G.L. c. 79A also limits a town's demolition authority if the premises are occupied: "No ... demolition which shall involve the displacement of occupants of dwelling units or business units shall be made unless and until the bureau [of relocation] has qualified a relocation, advisory agency to give relocation assistance to the occupants to be displaced." Section 3 requires the city to provide relocation assistance and payments to persons displaced by demolition. See 760 CMR, § 27.00, et seq.

6. Collateral Estoppel

The owner or other interested party has a right to judicial review of demolition orders under G.L. c. 143, § 10, and G.L. c. 139, § 2, and to administrative review under G.L. c. 111, § 127B.¹⁰ The judicial remedy provides for a jury trial. If the owner fails to appeal, but later sues the municipality for damages or injunctive relief, his failure should bar an attack on the findings supporting the demolition. The order of the building inspector "not being appealed from ... was binding on both the plaintiff and defendant." *Burofsky v. Turner*, 274 Mass. 574, 582 (1931); also *Boston v. Diston*, 4 Mass. App. Ct. 323, 337 (1976). In *Ditson*, Chief Judge Hale held the:

"trial judge noted that the respondent had a right to appeal the order of the building commissioner to a

¹⁰See the State Sanitary Code, 105 CMR § 410.730-410-734.

statutory board of appeal ... and a right to judicial review of any decision by the board under ... the same chapter, but that she did not avail herself of these remedies. He [the trial judge] also pointed out that she failed to seek timely judicial review of the lien arising from this charge as was her right ... The judge ruled that the appellant's failure to pursue those statutory remedies precluded her collateral attack on this charge in the present foreclosure proceeding ... The ruling was correct ..." *Id.*

In *Lezberg v. Rogers*, 27 Mass. App. Ct. 1158 (1989) was an appeal of a small claims matter brought by a landlord. The plaintiff had failed to appeal an earlier health inspector's order and finding. "For purpose of this appeal, it is enough to say that the plaintiff is bound by the unchallenged and unappealed decision of the board of health ... The plaintiff may not collaterally attack that decision in this proceeding ... (citations omitted)." *Id.* at 1159.

Plaintiff therefore is bound by the findings of the building commissioner and public health director that the building constituted a public nuisance and a threat to the public health and safety.

7. Civil Rights Challenges

A recent federal case in California suggests other possible challenges to code enforcement. *Armendariz v. Penman*, 31 F.3d 860 (9th Cir. 1994) after rehearing *en banc* 75 F.3d 1311 (1996).

Owners of rental housing sued the city solicitor, the mayor and planner under 42 U.S.C. § 1983. Plaintiffs alleged substantive and procedural due process violations, equal protection violations and regulatory takings. The city defendants claimed qualified immunity. The plaintiffs asserted that the defendants intentionally closed buildings in a particular section of San Bernadino to disperse tenants in a high crime area and to raze the buildings in preparation for a shopping center.

Defendants moved for summary judgment on qualified immunity grounds. The court held:

1. Plaintiffs stated a claim for violations of procedural due process. The claim turned on whether a real

emergency existed eliminating the constitutional right to a pre-depravation hearing.

2. Plaintiffs did not state a substantive due process claim. However, the Court's basis for his holding creates other constitutional problems for cities. Where a particular constitutional amendment provides an explicit textual source of constitutional protection, that amendment, and not substantive due process provides protection. If plaintiffs' allegations were true, the Fourth and Fifth Amendments protect them from the city. The court cited *Alexander v. San Francisco*, 29 F.3d 1355, 1361 (9th Cir. 1994). "[A]n administrative search [to] determine compliance with the health and building codes may not be converted into an instrument which serves the very different needs of law enforcement officials." *Armendariz, supra* at 75 F.3d 1320. The Fifth Amendment protects plaintiffs from government acts taking their property for a private use. Since the claims arise under the Fourth and Fifth Amendments, plaintiffs had no claim under substantive due process.
3. The plaintiffs stated an equal protection claim. They alleged that the city created two classes of people for code enforcement purposes -- property owners whose property the city wanted and all others. The Court concluded that this distinction, if true, was irrational. Therefore, the equal protection claim survived the motion.

Code enforcement programs, and demolition in particular, are often part of long term planning strategy. The *Armendariz* case suggests that a town must have the facts essential to support demolition. The planning motives of city officials should not be the basis for demolition without objectively grounded facts to support code enforcement and demolition.

8. Penury and the Nominee Trust

The case of *City of Worcester v. Sigel*, 37 Mass. App. Ct. 764 (1994) establishes two important code enforcement tools.

The city filed a code enforcement action against building owners, Manual and Jerome Sigel, trustees of the S&G Nominee Trust. The

city sought an order requiring them to install/restore a sprinkler system in a vacant building. The trust defended on the grounds that it was insolvent.

Justice Kass held that penury is not a defense to an action seeking compliance with a public safety statute.

A more intriguing possibility is raised by the decision in the last paragraph. "The trust is a nominee trust, i.e., one as to which the beneficiaries exercise controlling powers, and the action which the trustees may take on their own very limited. (Citations omitted.) When questions of liability arise as to nominee trusts, the court may impose liability on the beneficiaries of the trust. (Citations omitted.) The sole beneficiary of the defendant, S&G Realty Nominee Trust, is a partnership, S&G Realty Partnership. It is far from proven that the partnership lacks the means to make the sprinkler system in the premises serviceable once again."

FEDERAL CASES

The constitution imposes due process limitations on the exercise of the police power to control or abate nuisances or demolish buildings. A municipality must give the owner, mortgagee, and other interested persons both: (1) adequate notice and a hearing; and (2) enough time make the building safe.

In *Kornblum v. St. Louis County, Mo.*, 72 F.3d 661 (8th Cir. 1995) cert. denied 516 U.S. 1189 (1996), , the Court held that **due process required notice to prospective purchasers of condemned property**. In *Armendariz v. Penman, supra*, the Court held that if there is no true emergency reason to demolish, due process requires a pre-deprivation hearing.

Armendariz v. Penman, 31 F.3d 860 (9th Cir. 1994) after rehearing *en banc* 75 F.3d 1311 (1996) presents a serious issue for municipalities.

Owners of rental housing sued the city solicitor, the mayor and planner under 42 U.S.C. § 1983. Plaintiffs alleged substantive and procedural due process violations, equal protection violations and regulatory takings. The city defendants claimed qualified immunity. The plaintiffs asserted that the defendants intentionally closed buildings in a particular section of San Bernadino to disperse tenants in a high crime area and to raze the buildings in preparation for a shopping center.

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1. Plaintiffs stated a claim for violations of procedural due process. The claim turned on whether a real emergency existed eliminating the constitutional right to a **pre**-deprivation hearing.
2. Plaintiffs did not state a substantive due process claim. However, the Court's basis for his holding creates other constitutional problems for cities. Since a particular constitutional amendment provided an explicit textual source of constitutional protection, that amendment, and not substantive due process protected the plaintiffs. If plaintiffs' allegations were true, the Fourth and Fifth Amendments protect them from the city. The court cited *Alexander v. San Francisco*, 29 F.3d 1355, 1361 (9th Cir. 1994). "[A]n administrative search [to] determine compliance with the health and building codes may not be converted into an instrument which serves the very different needs of law enforcement officials." *Armendariz, supra* at 75 F.3d 1320. The Fifth Amendment protects plaintiffs from government acts taking their property for a private use. Since the claims arise under the Fourth and Fifth Amendments, plaintiffs had no claim under substantive due process.
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Code enforcement programs, and demolition in particular, are often part of long term planning strategy. The *Armendariz* case suggests that a town must have the facts essential to support demolition. The planning motives of city officials should not be the basis for demolition without objectively grounded facts to support code enforcement and demolition.

Recent federal cases have addressed a wide number of procedural due process issues in the demolition context.

1. *McKenzie v. City of Chicago*, 973 F.Supp. 815 (N.D. Ill. 1997), overruled 118 F.3d 552 (7th Cir. 1997), also *McKenzie v. City of Chicago*, 964 F.Supp.1183;
2. *Kruse v. Village of Chagrin Falls, Ohio*, 74 F. 3d 694 (6th Cir. 1996);
3. *Hroch v. City of Omaha*, (8th Cir. 1993);
4. *Catanzaro v. Weiden*, 188 F.3d 56 (2nd Cir. 1999);
5. *Pierce v. City of Divernon, Ill.*, 17 F.3d 1074 (7th Cir.1994);
6. *Freeman v. City of Dallas*, 186 F.3d 601 (5th Cir. 1999);
7. *Swann v. City of Dallas*, 922 F.Supp. 1184 (N.D. Tex. 1996), aff'd. without opinion, 131 F.3d 140 (5th Cir. 1997); and
8. *Fruman v. City of Detroit*, 1 F.Supp. 665 (E.D. Mich. 1998);
9. *Aubuchon v. City of Fitchburg*, 933 F. Supp. 90 (1996).

In these cases the courts carefully scrutinize the city's conduct - the alleged factual bases for the demolition, the actual motive(s), the quality of and necessity of pre-termination procedures, whether there was in fact an emergency and the quality of the city's notice to interested parties. However municipalities have generally withstood the due process challenges to their actions.

This article is only a summary about one aspect of the law. The summary presents information about the law through the date of its publication. Legislatures amend statutes. Courts interpret the law and statutes and by doing so affect legal rights and duties. This article is not intended as, and cannot be substituted for, legal advice which always must be tailored to each unique circumstance. Therefore, you should always consult a lawyer before simple relying on opinions or statements in this

summary.