THE SEARCH FOR EFFECTIVE AND COST-EFFICIENT HOUSING STRATEGIES: ENFORCING HOUSING CONDITION STANDARDS THROUGH CODE INSPECTIONS AT TIME OF SALE OR TRANSFER*

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I. BACKGROUND

Federal funding for housing programs in the United States has been cut about seventy-five percent during the 1980s compared to funding

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levels in the 1970s.[1] This reduction in federal support has meant that local governments, which rely heavily on federal housing funds and are relied upon to carry out federal housing policies at the local level, have been forced to look to alternative housing strategies and funding sources.

A. *Code Enforcement Policies Emerged in the 1960s*

The need to maintain and upgrade the existing housing stock, which experienced significant deterioration in older cities, became a major policy concern during the 1950s and 1960s.[2] The Douglas Commission and the Kaiser Committee, which were presidentially appointed in the 1960s to examine housing problems in the United States, gave particular attention and emphasis to the need for code enforcement.[3] Studies that were part of the Douglas Commission's research stimulated two noteworthy publications by Professor Frank Grad: *Legal Remedies For Housing Code Violations*[4] and *Housing Code Enforcement: Sanctions and Remedies.*[5] These analyses stress the need for enforcement, but noted difficulties with traditional code enforcement approaches. Enforcement of housing condition standards (codes) became a major federal policy objective in the 1960s and received considerable priority in federal programs.[6] Code enforcement was looked to as a primary tech-

1. Nenno, *Reagan Housing and Community Development Record: A Negative Rating*, 40 J. HOUSING 135 (1983); Nenno, *The Budget Battle—1985: Housing and Community Development Programs Under Fire*, 42 J. HOUSING 127 (1985); OFFICE OF MANAGEMENT & BUDGET, THE UNITED STATES BUDGET IN BRIEF, 1989 19 (1988). *See also* Simons, *Overview: Housing Options for the 1990's*, 6 YALE L. & POL'Y REV. 259, 260 (1988).

2. D. MANDELKER, C. DAYE, O. HETZEL, J. KUSHNER, H. MCGEE, & R. WASHBURN, HOUSING & COMMUNITY DEVELOPMENT 360 (1981).

3. *See* The Douglas Comission's UNITED STATES NATIONAL COMMISSION ON URBAN PROBLEMS REPORT (1968) and the Kaiser Committee's REPORT OF THE PRESIDENT'S COMMITTEE ON URBAN HOUSING: "A DECENT HOME" (1968).

4. Grad, *Research Report No. 14*, in NATIONAL COMMISSION ON URBAN PROBLEMS (Douglas Commission) (1968).

5. Grad & Gribetz, *Housing Code Enforcement: Sanctions and Remedies*, 66 COLUM. L. REV. 1254 (1966).

6. *See, e.g.*, Housing Act of 1959, Pub. L. No. 86-372, § 417(2), 73 Stat. 654, 677 (1959) (originally codified at 42 U.S.C. 1451 (1959)). Section 101(a) states: [T]he Secretary shall give consideration to the extent to which the appropriate local public bodies have undertaken positive programs (through the adoption, modernization, administration, and enforcement of housing . . . codes and regulations. . .)." Subsection (c) states that no urban renewal contract shall be entered into, and no mortgage insured under certain provisions of the National Housing Act, unless the locality presents a "workable

nique to help maintain the existing supply of dwellings and to motivate improvements in housing units to bring them up to current standards. Federal incentives encouraged most local governments to adopt and enforce housing codes.

B. *Federal Support for Code Enforcement Declined*

While the federal emphasis on code inspections continued into the 1970's, specific funding priority for this objective was withdrawn early in the decade. The first step was deletion of federal Workable Program certification requirements that had required local governments to mount code enforcement activities to qualify for other federal development funds.[7] Next, federal funds for code enforcement were reduced[8] and eventually consolidated into a general Community Development Block Grant.[9] As an eligible but not required activity, code enforcement efforts competed relatively poorly with other critical housing needs. The use of block grants also made it politically easier to carry out subsequent federal cuts in programs for local governments. Because reductions could be made to one consolidated grant, rather than in multiple categorical programs, the depth, scope, and impact of the cuts were masked by percentage reductions. These reductions left local governments largely on their own in meeting their self-imposed (but federally-enticed) responsibilities for assuring compliance with their own codes.

C. *Municipal Responses to Loss of Federal Funds*

1. Code Enforcement Was Often Neglected

Faced with these funding losses, some local governments simply stopped enforcing housing codes. Local officials justified their inaction on grounds that enforcement ultimately accelerated abandonment of deteriorated dwellings by forcing uneconomical repairs. Many munici-

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program," to be certified by the Secretary, which shall include "a minimum standard housing code . . . deemed adequate by the Secretary," who must be satisfied that the locality is carrying out an effective program of code enforcement.

7. Housing and Urban Development Act of 1969, Pub. L. No. 91-152, § 101, 83 Stat. 379 (1969) (originally codified at 12 U.S.C. § 1720 (1969)).

8. Housing and Urban Development Act of 1970, Pub. L. No. 91-609, 84 Stat. 1770 (1970). Appropriations earmarked for code enforcement were reduced for fiscal year 1971.

9. Housing and Community Development Act of 1974, Pub. L. No. 93-383, 88 Stat. 633 (1974) (originally codified at 42 U.S.C. § 5301-17 (Supp. IV 1974)).

palities were in generally dire economic circumstances. With insufficient funding for traditional local government services, local officials had little inclination to fund the improvement of privately owned housing stock. Without federal funding for inspections and with cutbacks in funds for housing rehabilitation, code enforcement was usually neglected.

2. A Point-of-Sale Housing Inspection Strategy Evolved

Other municipalities, however, responded by redesigning their code enforcement programs. One strategy was to require inspections at the time of sale or transfer of owner-occupied units and at the time of change in occupancy of rental units. Code enforcement traditionally occurred in designated "conservation areas" and through area-wide enforcement programs that involved large-scale, costly efforts to repair and improve all units within a specific area of the city.[10] Alternatively, enforcement occurred through inspections that came in response to complaints about a unit's condition by neighbors or tenants.

The new approach changed not only the timing of inspections, but also made the enforcement process essentially self-initiating. By requiring owners themselves to initiate and obtain municipal code inspections of their property prior to sale, transfer, or re-rental, local governments avoid conducting major enforcement programs. Other enforcement efforts can focus on complaints. This strategy allows government to transfer inspection costs to property owners as a type of user fee paid by persons utilizing government services.

3. Legal Challenges to Point-of-Sale Inspections

Landlords and other property owners resisted the point-of-sale inspection strategy. The combination of transferring inspection costs to property owners, the potential threat of criminal sanctions for failure to obtain an inspection report, and the pressure to repair by lenders who refused to provide sales financing without a satisfactory inspection report led to legal challenges to these ordinances.[11]

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10. The ineffectiveness and inefficiency of this approach is discussed in REPORT, UNITED STATES NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 146 (1968).

11. *See, e.g.*, Butcher v. City of Detroit, 131 Mich. App. 698, 347 N.W.2d 702 (1984) (*Butcher I*); Butcher v. City of Detroit, 156 Mich. App. 165, 401 N.W.2d 260 (1986) (*Butcher II*), *consolidated appeal denied*, 428 Mich. 862, 400 N.W.2d 598 (1987), *cert. denied*, 107 S. Ct. 2482 (1987); Louisville Bd. of Realtors v. City of Louisville, 634 S.W.2d 163 (Ky. Ct. App. 1982); Sokolov v. Village of Freeport, 52 N.Y.2d 341, 420

The Detroit, Michigan, ordinance has generated more than 150,000 inspections over the last thirteen years.[12] In June 1987, the ordinance was sustained after six years of litigation when the United States Supreme Court declined to review two Michigan appellate court decisions in *Butcher v. Detroit*.[13] These decisions reversed trial court injunctions preventing enforcement of Detroit's ordinance and upheld the ordinance,[14] which required inspections of one- and two-family dwellings at the time of sale or transfer. Detroit's ordinance is generally representative of those enacted in other municipalities throughout the country.[15]

II. THE POTENTIAL FOR WIDER ADOPTION OF THE POINT-OF-SALE INSPECTION STRATEGY

Judicial validation of code enforcement at point of sale or transfer may spur other local governments to adopt this technique.[16] Based on

N.E.2d 55, 438 N.Y.S.2d 257, (1981); Dome Realty v. Paterson, 83 N.J. 212, 416 A.2d 334, (1980); Wilson v. City of Cincinnati, 46 Ohio St. 2d 138, 346 N.E.2d 666 (1976).

12. Interview with Creighton Lederer, Director of Building & Safety Engineering, City of Detroit (Mar. 1, 1989).

13. *Butcher I*, 131 Mich. App. 698, 347 N.W.2d 702 (1984); *Butcher II*, 156 Mich. App. 165, 401 N.W.2d 260 (1986), *cert. denied*, 107 S. Ct. 2482 (1987).

14. The plaintiff-seller inherited a house in Detroit and then decided to sell it. At the closing, the buyer refused to complete the sale because the seller had not obtained an inspection or report from the city. The seller performed about $1,000 in repairs to obtain a city certificate of approval. The buyer refused to raise the sale price to include the repair costs. After the sale, the seller initiated a class action to have the ordinance held invalid and to obtain a refund of all inspection fees charged to date. The trial court enjoined enforcement of the ordinance and ordered the refund of what ultimately would have been more than $19,000,000 in inspection fees. The Michigan Court of Appeals reversed and remanded to the trial court for consideration of challenges to the ordinance that had not been decided before the initial appeal. On the second appeal, the appellate court upheld the ordinance and reversed the trial court's second attempt to enjoin enforcement of the ordinance. Both appellate decisions were consolidated in an appeal to the Michigan Supreme Court, which denied review.

15. *See* DETROIT, MICH., CODE §§ 26-3-1 to 26-3-11 (1985).

16. At the time of this writing, another challenge to Detroit's ordinance is pending in the Michigan Court of Appeals, Joy Mgmt. v. City of Detroit, No. 85-51187-CH (Wayne County Cir. Ct. 1988) *appeal docketed* No. 110685 (Mich. Ct. App. Aug. 3, 1988). Initially, a circuit judge issued a temporary restraining order blocking a criminal prosecution pending in the 36th District Court against the plaintiffs for ordinance violations. Albeit called an injunction, the order prevented the city's enforcement of the ordinance against the plaintiffs on constitutional grounds. After a second judge failed to lift the order, the city made an emergency appeal. The appellate court ordered the trial judge to hear the city's motion to dismiss the restraining order and it was lifted. After referral to a third judge for trial, and following on cross-motions for summary judgment

Detroit's experience, the strategy has shown real promise in dealing with the problem of maintaining housing condition standards in the existing housing stock.

The strategy has been successful in major urban centers[17] that contain deteriorating dwellings, as well as in more affluent suburbs, such as those around Detroit, where inspection fees and repair costs are less significant given higher overall suburban housing prices. In more prosperous suburbs, assuring that repairs and improvements are undertaken can head off future housing deterioration.

This enforcement strategy demonstrates that local solutions rather than national prescriptions can resolve problems with national impact. It also shows that necessity breeds invention. At one time, local governments only attempted to enforce housing codes when solicited by targeted federal funding support. Despite the withdrawal of these funds, some municipalities have stepped in to carry out enforcement functions. In doing so, they have adopted a strategy that seems to meet

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the trial court upheld the city's ordinance in the face of plaintiffs' scatter-gun attack on its validity. Joy Mgmt. v. City of Detroit, No. 85-51187-CH (Wayne County Cir. Ct. July 20, 1988) (order granting summary judgment).

The plaintiff-appellants have raised several issues on appeal. In addition to a renewed contention that the ordinance violates due process, an issue extensively addressed in the *Butcher* decisions, plaintiffs assert a conflict with state housing law requirements. Plaintiffs contend that the city must provide advance notice of violations before initiating judicial proceedings for enforcement of the ordinance. Their argument analogizes city procedures to procedures under state housing law that provide for notice of discovered defects so that owners can make repairs. Plaintiffs contend that state housing requirements limit municipal power to enact stricter enforcement measures.

Two arguments attack the validity of pending criminal proceedings against the individual plaintiffs, contending they are not covered by the ordinance because they were merely agents, who executed affidavits on behalf of the corporate purchaser certifying that the purchaser would not occupy units until an inspection was performed and repairs were made. In the pending prosecutions, it is alleged that plaintiffs made no repairs to units they obtained from HUD, which was disposing of repossessed, federally insured, abandoned units and nevertheless rented the units to unsuspecting and unsophisticated tenants. They argue that, as agents of the purchasers, they do not come within the "class" of persons (sellers) who may be prosecuted under the ordinance. Another argument made by the plaintiffs is that the ordinance is unconstitutionally vague because another ordinance also requires inspections of tenanted units. The individual plaintiffs contend that potential sanctions of up to $500 and one year in jail for each day the ordinance is violated constitute cruel and unusual punishment.

Briefs have been filed as of February 1989. Oral arguments were not scheduled as of this writing.

17. Various cities, including Paterson, N.J., Detroit, Mich., Louisville, Ky., and Cincinnati, Ohio, have relied on judicial validation of code enforcement at the point of sale or transfer.

two professed objectives — upgrading the housing stock and preventing fraud — while utilizing a generally effective and cost-efficient mechanism.

A point-of-sale ordinance assures prospective homebuyers and renters that they will be better informed about a unit's condition through the inspection report. Also, the timing of the inspection helps ensure that necessary repairs are made. New owners are motivated to carry out repairs at purchase or immediately after taking possession. Tapping these instincts ensures that the existing housing stock is upgraded. Further, by assuring prospective purchasers of full disclosure of a dwelling's condition, sellers will recognize the advantages of maintaining their dwellings while they occupy the unit, not just when it is to be sold or transferred.

A. *Designing a Code Inspection Tactic: Detroit's Experience*

Many American cities, particularly those in the Northeast and Midwest "rustbelts," have lost significant population and have experienced deterioration of housing stock. Population losses were caused by the transfer of city employment from a manufacturing to service-oriented economy, flight of white and affluent families to the suburbs that left increasingly minority and poorer populations in the central cities, and relocation of businesses and jobs to suburban areas. Housing deterioration was caused by the increasing age of the housing stock, poor land use planning and implemention, and the inability of the remaining residents to afford satisfactory housing and maintain existing units due to unemployment and low income in the urban core.

Poorly designed and administered federal housing finance programs have also contributed to poor urban housing conditions. These programs were intended to improve urban areas that experienced housing deterioration and abandonment, but the programs actually accelerated, rather than ameliorated, the problems.[18] These programs mistakenly permitted opportunities for homeownership by providing low downpayments to relatively poor families. Because they had little equity invested in the property, these families had little stake in maintaining the unit.

Federal loans were available even though necessary repairs and im-

18. *See* HOUSE COMM. ON GOVERNMENT ACTIVITIES, DEFAULTS ON FHA INSURED HOME MORTGAGES — DETROIT, MICHIGAN, HOUSE COMM. ON GOVERNMENT ACTIVITES, H.R. REP. NO. 1152, 92d Cong., 2d Sess. (1972) [hereinafter DEFAULTS].

provements to the dwelling, including its plumbing, heating, and electrical systems, had not been performed. The unsuspecting lower income buyers were later unable to pay these repair and improvement costs. In other instances, federal inspections, on which the government relied in making its loans, failed to identify needed work.[19] These failures were occasionally the result of fraud that occurred when a large number of units were repossessed and resold.[20] Thus, when problems that should have been anticipated arose with the dwelling's condition, or when problems were finally discovered, families were likely to abandon the unit rather than undertake costly repairs. The inattention frequently increased the cost of needed repairs. Lower income families who could barely meet their monthly mortgage payments could not afford repairs and had little chance to obtain financing. Neither the federal government nor these families anticipated the need for setting aside money to maintain the unit. Federal rehabilitation grants and loans had been severely cut, and private sector assistance was generally unavailable.

1. Detroit's Ordinance Responded to a Crisis of Abandonments Exacerbated by Federal Government Incompetence

Detroit was among the cities suffering most from these problems. In fact, its inspection ordinance evolved directly from the city's attempt to deal with federal incompetence. By 1972, the federal Department of Housing and Urban Development (HUD) had become the city's largest landowner, holding title to thousands of repossessed properties throughout Detroit. Alarmed by this situation, HUD officials disposed of these units by sale on an "as is" basis. HUD did not ensure that the units it repossessed and resold met local code standards. Sales were made either to unsophisticated buyers for their own residence or to speculators who made cosmetic repairs and resold the units to unwary owner-occupants. In either event, the result was the transfer of dwellings that violated city code standards to unsophisticated persons with insufficient funds to remedy defects that could have been disclosed by an inspection.

Abandonment was exacerbated by the sheer number of HUD-financed units abandoned and then repossessed by HUD: more than

19. Comment, *Property Abandonment in Detroit*, 20 WAYNE L. REV. 845, 861 (1974).

20. *Id.*

8,000 units were in HUD's Detroit inventory in 1974.[21] In fact, this volume created a service industry of boarding up abandoned units. The turnaround time for HUD's resale of repossessed units could be as long as two years. During that time, the sight of other abandoned units, boarded up and unrepaired, reinforced the owner's tendency to abandon rather than pour more money into an investment that probably would not hold its value after repairs. In short, abandoned units tended to infect surrounding houses and whole neighborhoods.[22]

Detroit officials recognized that without municipal intervention the sale of "as is" HUD-repossessed units would intensify the deterioration of its housing stock. Abandoned and dilapidated units were having an adverse impact on the remainder of the city's housing supply. The blight of abandoned houses was spreading.[23] Detroit needed a mechanism to maintain its existing stock and to respond to what was essentially a fraud on unsophisticated purchasers carried out unwittingly or otherwise through HUD's policies.[24]

The city had little money available for handling its immense housing problems. Declining local property and income taxes hurt city finances at a time when the federal government continued to require cities to

21. *Id.* at 858.

22. DEFAULTS, *supra* note 18, at 5.

23. *Id.*

24. The preamble of Detroit's ordinance tells the story:

WHEREAS, A substantial number of substandard dwellings have been sold in the City of Detroit, often by fraudulent means, by private real estate investors and speculators; many of these dwellings have been first purchased from or insured by the Federal Government and do not meet even minimum standards of habitability and liveability, and

WHEREAS, the danger to the health and safety of the people of the City of Detroit will assume crisis proportions because of the actions of the U.S. Department of Housing and Urban Development . . . which instructs the Detroit HUD Area Office to use as its 'primary technique' sale on an 'as is' basis 'without warranty' for disposal of its present inventory of at least 8,000 existing dwellings, which number is being augmented by at least one additional dwelling unit every two hours of the day; and

WHEREAS, This will increase the number of sales of these dwellings which have been previously abandoned by their owners and will also have the effect of increasing the sale of other dwellings in the City caused by the blighting influence of such HUD homes and the failure of HUD to repair such HUD acquired properties; and

WHEREAS, The citizens of Detroit urgently need protection from sales and resales of such property without full disclosure of such deficiencies in habitability and without assurance that the dwelling will be repaired so as to meet minimum standards of health, safety and habitability. . . ."

DETROIT, MICH., CODE § 12-7-1 (1974).

provide expensive services (especially to welfare households) without commensurate federal financial assistance. The result was a reduction in many local services, including massive layoffs of police officers and firefighters, as the city struggled to remain solvent. What was needed was an approach to maintaining existing housing that would not require massive city funding, that would identify a unit's condition, and that would encourage owner improvements.

Buyers remained at risk whether they purchased units from HUD directly, from commercial speculators, or simply from owner-occupants. This remained true regardless of whether purchasers were financed by HUD-insured loans, by financing from private lenders (which was rare), or through land contracts with selling owner-occupants. In all circumstances, late discovery of unanticipated repair expenses along with the generally depressed condition of housing in many neighborhoods made it likely that the cycle of abandonment would continue. Low downpayment provisions of HUD financing were the preeminent source of loans then available in the urban core. Rather than attempt to pay for the costs of significant repairs, buyers walked away when unexpected problems surfaced. This resistance to increasing housing expenditures had a clear economic basis. Major expenditures for repairs and improvements are not justified in deteriorating areas unless there is some expectation that nearby units will also undergo rehabilitation.

Because the concepts behind the strategy were far broader than simply dealing with the problems created by HUD sales, the ordinance encompasses all sales of these types of units. Whether the housing unit is sold by HUD or someone else, few potential buyers in inner-city areas have the requisite knowledge properly to assess its condition. Thus, the wider application of the concept was clearly merited.

2. The Operation of the Ordinance

Detroit enacted the ordinance in 1972, and several housekeeping amendments followed it over the next five years.[25] The city borrowed and adapted an approach introduced in 1967 in University City, Missouri, a St. Louis suburb that was undergoing racial transition.[26] University City's ordinance applied to both renter and owner-occupied

25. DETROIT, MICH., CODE § 12-7-1 (1974). The ordinance was recodified as DETROIT, MICH., CODE § 26-3-1 (1985).

26. Downs, Saunders & Collins, *Occupancy Permits Provide An Older Suburb With An Anti-Blight Tool*, 32 J. HOUSING 506 (1975).

dwelling units and, like Detroit's ordinance, focused on the point when a change in occupancy occurred.

Detroit's ordinance requires the seller to provide the buyer with an inspection report obtained through a city inspection prior to transfer or sale of the property.[27] Owners of one- and two-family dwellings are expected to call the city for an appointment for an inspection. A fee, currently about $140, is charged for conducting the inspection and preparing the owner's report. After repairs are completed and a reinspection shows compliance, the city issues a Certificate of Approval that is analogous to a post-construction occupancy permit.

Unless purchasers knowingly waive their right to a Certificate, repairs must be made prior to sale.[28] This allows the purchaser to bargain with the seller over price in terms of who will pay for bringing the unit up to code standards. Presumably, buyers would waive the Certificate if they could make repairs themselves for less than any negotiated price reduction stimulated by the inspection report.

To facilitate enforcement of the ordinance, the buyer may proceed against the seller for the costs of making repairs required by the code. Failure to provide the purchaser with the report creates an "implied warranty" that the property meets the applicable code standards, and the purchaser may sue to enforce the warranty.[29] The owner's failure to provide the purchaser with an inspection report is a misdemeanor. The sanction applies either to the failure to obtain an inspection report or to provide it to the buyer before sale.[30] No restriction directly prevents the sale.

Transfers without consideration, such as gifts or testamentary dispositions, are excepted from the ordinance because the availability of funding for repairs is less likely in such circumstances. Also excepted are sales occurring after the purchaser has occupied the unit for one year under a lease, since the buyer is presumed to have sufficient knowledge of the premises. Furthermore, the condition of the unit has been largely within the tenant's responsibility during his lease. This exception is particularly appropriate where the unit was inspected as a rental unit prior to its lease, as now required under a new Detroit

27. DETROIT, MICH., CODE § 26-3-2 (1985).

28. DETROIT, MICH., CODE § 26-3-7 (1985).

29. DETROIT, MICH., CODE § 26-3-10 (1985).

30. DETROIT, MICH., CODE § 26-3-2(2) (1985). A 10-day waiting period is specified to ensure that the buyer has enough time to receive assistance in determining the cost of repairs. *Id.*

ordinance.[31]

B. *The Ordinances Have Withstood a Variety of Legal Attacks*

A number of cities have adopted point-of-sale housing inspection ordinances. Their existence is noticeable primarily because of litigation generated by real estate interests, property owners, and landlords. Cities in Missouri, New Jersey, Ohio, California, Kentucky, and New York, as well as a number of other Michigan cities, have enacted similar inspection provisions. In some cases, the provisions apply only to tenanted properties with the inspection occurring upon a change in tenants. Many jurisdictions, however, have required inspections at the time of sale or other transfer of residential property as well as at the time of re-rental.

The legal challenges to these ordinances cover a wide spectrum. Most courts, particularly those recently reviewing such ordinances, have rejected the challenges. The authority of local governments to enact point-of-sale ordinances has been consistently upheld. While one court noted that private contractors also perform similar inspections for a fee, that court implicitly held that the availability of private inspection services did not prevent government from carrying out that function.[32] The Michigan Supreme Court, in reviewing that decision, held that under the doctrine of sovereign immunity, the government could not be sued even when the inspection may have been deficient.[33] The buyer's only redress is against the seller.

Courts have held that point-of-sale inspections are within the scope of local government police powers to protect residents' health, safety, and welfare.[34] Local government may require inspections and repairs

31. DETROIT, MICH., CODE § 26-3-3(2) (1985).

32. Brand v. Hartman, 122 Mich. App. 326, 330-31, 333, 332 N.W.2d 479, 481-82 (1983), *rev'd on other grounds*, 422 Mich. 884 (1985). The Michigan Supreme Court, in a redefinition of the scope of sovereign immunity, reversed the Court of Appeals 2-1. The high court held that inspections were not an essential function entitling government immunity against liability for negligent inspections.

33. 422 Mich. 884, 368 N.W.2d 231 (1985). The court summarily reversed, following its seminal decision in Ross v. Consumers Power Co., 420 Mich. 567, 363 N.W.2d 641 (1985).

34. A traditional description of that power, on which the *Butcher* court relied, is found in Cady v. Detroit, 289 Mich. 499, 514, 286 N.W. 805, 810-11 (1939):

> Ordinances having for their purpose regulated municipal development, the security of home life, the preservation of a favorable environment in which to rear children, the protection of morals and health, the safeguarding of the economic structure upon which the public good depends, the stabilization of the use and value of prop-

even as to owner-occupants after it determines all units must meet certain habitability standards.

Other legal challenges have urged that state inspection laws preempt local ordinances.[35] While such questions depend on state, not federal, law, no court has denied a municipality power to set its own housing standards in this context.

Constitutional attacks have been made on three grounds. One has been based on prohibitions against government "takings" of private property without just compensation. Courts have rejected this argument, pointing out that transfer of the property is not prevented; sanctions are imposed only for failing to obtain an inspection.[36] Of course, the buyer may sue the seller for breach of warranty and, in turn, the city may require the buyer himself to bring the property up to code standards. Imposing the costs of inspection and repairs, even though the costs must be paid as a result of the ordinance, does not constitute a taking.[37] Nor do these ordinances exceed a city's inherent authority to inspect an owner's property to ensure that applicable codes are met where it reasonably believes an inspection is justified. This authority exists independently of a point-of-sale ordinance. The government decision that a sufficient basis exists for inspecting at the time of sale or transfer is entitled to judicial deference.[38] That local decision is particularly appropriate in light of the experience of many cities with major housing problems that involve deterioration, abandonment, and frauds on purchasers.

Challenges based on equal protection have failed to overturn ordinances that apply only to certain types of units, or to specific types of tenure, or which exempt certain transactions. Courts have found a rational basis for the distinctions made.[39]

The third constitutional challenge, which had some early success, argued that point-of-sale inspections violate state and federal constitu-

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erty, the attraction of a desirable citizenship and fostering its permanency are within the proper ambit of the police power. Changes in such regulations must be sought through the ballot or the legislative branch.

Id.

35. *Butcher I*, 131 Mich. App. at 704-06, 347 N.W.2d at 706.

36. *Id.* at 707, 347 N.W.2d at 707.

37. *Id.* at 708, 347 N.W.2d at 707.

38. *Butcher II*, 156 Mich. App. at 172, 401 N.W.2d at 264. *See also* Dome Realty v. Paterson, 83 N.J. 212, 226, 416 A.2d 334, 342 (1980).

39. *Id.*

tional provisions against warrantless searches and seizures of private property.[40] The fourth amendment proscription against inspections (searches) without judicial review of the grounds for a search warrant has existed for twenty years.[41] Recently, however, courts have found warrants to be superfluous in the context of point-of-sale inspections.[42] The appellate review of Detroit's ordinance reached the same conclusion.[43]

C. *An Analysis of Legal Arguments in Detroit's Litigation*

A number of these constitutional challenges were raised in two related state appellate court decisions addressing Detroit's ordinance. In the first appeal in *Butcher v. Detroit*,[44] the Michigan Court of Appeals stayed a lower court injunction and upheld the ordinance. The appellate court determined that the city had authority as a Home Rule City under the state constitution and under its own police powers to require an inspection[45] and to collect an inspection fee.[46] The court stated: "Such an inspection deters fraud and helps enforce the city's building code. Both the means and goals are validly within defendant's police power."[47] The court continued:

> The particular inspection method challenged here is aimed at the specific practice of fraudulent conveyance of homes with serious structural and other deficiencies. . . . Such fraudulent transactions pose an obvious threat to the health and welfare of defendant's citizens, and an ordinance directed against them is within the authority of the City of Detroit.[48]

In respect to the takings argument, the court responded:

> [T]he ordinance neither destroys nor reduces the property's value. In fact, if anything, by requiring post-inspection repairs, it enhances value. . . . The inhibition is not on the transfer of prop-

40. *See, e.g.*, Sokolov v. Village of Freeport, 52 N.Y.2d 341, 420 N.E.2d 55, 438 N.Y.S.2d 257 (1981); Hometown Co-Operative Apartments v. City of Hometown, 495 F. Supp. 55 (N.D. Ill. 1980).

41. Camara v. Municipal Court, 387 U.S. 523 (1967); See v. City of Seattle, 387 U.S. 541 (1967).

42. *See* Dome Realty Co. v. City of Paterson, 83 N.J. 212, 416 A.2d 334 (1980).

43. *Butcher II*, 156 Mich. App. at 173, 401 N.W.2d at 264.

44. *Butcher I*, 131 Mich. App. at 698, 347 N.W.2d at 702.

45. *Id.* at 704-06, 347 N.W.2d at 706.

46. *Id.* at 706, 347 N.W.2d at 706.

47. *Id.* at 704, 347 N.W.2d at 705-06.

48. *Id.* at 705, 347 N.W.2d at 706.

> erty but upon the failure to have the home inspected. On the other hand, the ordinance ensures that one- and two-family dwellings meet certain minimum requirements. The ordinance is defendant's way of ensuring that a buyer has more recourse on buying a house less valuable than anticipated than merely stoically accepting the saw "caveat emptor." Moreover, the ordinance helps combat housing deterioration.[49]

On remand, the trial court again struck down the ordinance, this time as violative of equal protection and search and seizure requirements. The Court of Appeals again reversed, holding that, as to equal protection, the ordinance's exemptions were rationally related to the legitimate governmental purposes of the ordinance — "protecting buyers from latent housing defects and from fraud on the part of the seller."[50]

On the search and seizure issue, the Court of Appeals examined the twenty-year-old search warrant requirement set forth in the United States Supreme Court's decisions in *Camara v. Municipal Court*[51] and *See v. City of Seattle*.[52] These cases held that search warrants were required in the context of residential and commercial building inspections. Several courts, including the highest courts of New York[53] and Ohio,[54] have held that housing inspections occurring with point-of-sale ordinances require a warrant if the owner requests one. On the other hand, the New Jersey Supreme Court in 1980,[55] and the Kentucky Court of Appeals in 1982,[56] held that recourse to a warrant procedure was unnecessary in these circumstances.

In *Camara*, the Court stated:

> Under the present system, when the inspector demands entry, the occupant has no way of knowing whether enforcement of the municipal code involved requires inspection of his premises, no way of knowing the lawful limits of the inspector's power to search, and no way of knowing whether the inspector himself is acting

49. *Id.* at 707, 347 N.W.2d at 707.

50. *Butcher II*, 156 Mich. App. at 170, 401 N.W.2d at 263.

51. Camara v. Municipal Court, 387 U.S. 523 (1967).

52. See v. City of Seattle, 387 U.S. 541 (1967).

53. Sokolov v. Village of Freeport, 52 N.Y.2d 341, 420 N.E.2d 55, 438 N.Y.S.2d 257 (1981).

54. Wilson v. City of Cincinnati, 46 Ohio St. 2d 138, 346 N.E.2d 666 (1976).

55. Dome Realty v. Paterson, 83 N.J. 212, 416 A.2d 334 (1980).

56. Louisville Bd. of Realtors v. City of Louisville, 634 S.W.2d 163, 166 (Ky. Ct. App. 1982).

under proper authorization. These are questions that may be reviewed by a neutral magistrate. . . .[57]

The Court, however, stopped short of requiring the inspector to show "probable cause" prior to obtaining a warrant. It pointed out that "the need for the inspection must be weighed in terms of the reasonable goals of code enforcement."[58]

In the context of a point-of-sale or change-in-occupancy ordinance, the legislative judgment has determined that the need exists for an inspection at that specified time. By doing so, this decision subsumes the warrant issue in that legislative determination.

In contrast to the area-wide inspection scheme at issue in *Camara*, Detroit's point-of-sale ordinance contains a warrant authorization process, applicable when the owner requests that one be obtained.[59] The Michigan Court of Appeals, however, pointed out that use of a warrant is superfluous to an inspection at point of sale. Referring to the reasoning in the 1980 New Jersey *Dome Realty v. Paterson*[60] case, the court found that Detroit's ordinance "contains all the necessary protection against unreasonable searches and is not subject to the constitutional warrant requirement." The court reasoned:

> [M]any inspections will occur just prior to sale when the structures are vacant and the owner's expectations of privacy are relatively low. In addition, the housing inspector has no discretion regarding which structures are to be searched. An inspection under the ordinance only occurs when the owner-seller requests one. The inspection is restricted to the published guidelines required by the ordinance. Thus, both the scope and the timing of the inspection are known by the owner in advance. Furthermore, the inspection has no connection with a criminal investigation. The presence of violations has no punitive consequences for the landlord. In such a situation, we conclude that the inspection process itself effectively provides the assurances and safeguards of a warrant and renders the procurement of a search warrant unnecessary.[61]

The New York and Ohio decisions that struck down point-of-sale inspections on fourth amendment grounds both involved ordinances with no provision for obtaining a warrant. The court decisions failed

57. *Camara*, 387 U.S. at 532.

58. *Id.* at 535.

59. DETROIT, MICH., CODE § 26-3-4(c) (1985).

60. Dome Realty v. Paterson, 83 N.J. 212, 416 A.2d 334 (1980).

61. *Butcher II*, 156 Mich. App. at 173-74, 401 N.W.2d at 264.

to analyze the rationale for use of a warrant and the legislative judgment respecting the need for an inspection at a particular time. Unless the legislative determination of the need to have inspections at the point of sale or re-rental is flawed, however, there is little left for judiciary inquiry; thus, there is no need for the process that is undertaken when warrants are deemed necessary. Moreover, if the inspection is conducted in response to an appointment made by the owner, it seems somewhat convoluted to require a warrant to validate the governmental inspection, especially because the necessity of the inspection at such times was determined with the enactment of the ordinance.

The New York and Ohio courts were concerned that property owners would be forced to accede to a warrantless inspection in order to sell or rent their property. The legislature's determination that inspections are then necessary should be dispositive of that concern, however. A substantial governmental interest in such inspections has been established. The importance of the Michigan, New Jersey, and Kentucky courts' analysis is that they have examined the rationale of *Camara* and found it inapplicable under these circumstances. Thus, housing inspections at the time of sale and transfer avoid a possible constitutional confrontation that can occur with traditional code enforcement strategies.

Ideally, the decisions upholding point-of-sale inspections will inform other jurisdiction of the availability of this strategy for code enforcement. Much can be said in its support.

Because point-of-sale inspections are triggered by a commercial transaction that occurs when the unit is less likely to be occupied, they are far less of an imposition on the owner's privacy than an area-wide inspection process. Inspections are less disruptive when the unit is vacant. The inspection is arranged by appointment and is initiated by the seller, not the government. The inspection system gives lenders confidence in the property and encourages them to lend in locations where they might otherwise refuse credit. Finally, the inspection occurs when funding for repairs is more likely to be available.

III. Analyzing the Impact of Inspection Fees and Repair Costs

Significantly, this inspection strategy is not dependent on governmental funding for code enforcement. By imposing inspection costs on the property owner through inspection fees, this strategy transfers inspection costs from governments reluctant to fund or give priority to

inspection activities because of more pressing demands for other housing and city services. While these "user fees" are imposed on the property owners, the costs are incurred when funds are most likely to be available to them.

In many cases, the seller will cover the costs of inspection and repairs from the proceeds of the sale. If repair costs are seen as delayed maintenance expenses, these are properly an obligation of the seller. As in any sales transaction, however, the costs can be transferred to the purchaser by lowering the purchase price. If the purchaser believes he can make the repairs himself at a lower cost, he can negotiate a lower price and spread repayments over the term of the loan.

Federal, state, local, and private rehabilitation loans and grants are more likely to be available at the time of sale. The new owner is motivated to take advantage of these sources and to ensure the unit is in good condition before occupying or renting it. Finally, the inspection fee is a relatively minor part of the closing costs of property whose value has increased. These inspections also educate more purchasers, so that price better relates to value.

Generally, inspections of rental units, whether at time of change in occupancy or not, impose inspection fees upon the landlord. While these fees and repair costs may be transferred to the tenants through rent increases, as often occurs with property tax increases, these costs are frequently treated as operating expenses and are not necessarily covered immediately by rent increases. Where rent controls apply, some ordinances allow inspection and repair costs to be amortized by future rent increases.

Whether the inspection comes at the time of sale or re-rental, the owner is more likely to carry out repairs when funding is available to cover them. In this regard, the focus on time of sale or transfer or change in tenancy provides a significant opportunity to ensure owner participation in repair and improvement activities. Without the availability of loan financing, the proceeds from a sale, or an occasion to set or modify rents, owners are less likely voluntarily to make needed repairs and improvements.

If financial resources are available when inspections occur and repairs and improvements are identified, voluntary action is facilitated. This is a better means to ensure repairs than a threat of criminal sanctions, which has been a traditional but ineffective method of code enforcement. Courts are reluctant to impose sanctions for failure to

make repairs, particularly uneconomical ones, unless the conditions are egregious.

IV. CONCLUSION

Inspections at point of sale or change in occupancy make a good deal of sense. The concept may ensure that over time (six years is the current national average between moves for families) a city's existing housing stock can be brought into code compliance. Detroit, which has approximately 420,000 dwellings, conducted more than 150,000 inspections during the last ten years.[62] While the problem of adequate code enforcement is not solved immediately, the pace is steady. The point-of-sale inspection, moreover, does not replace other inspection alternatives, such as those that respond to complaints or where conservation treatment justifies area-wide enforcement. It simply assures substantially more progress in maintaining the housing stock than in its absence.

62. Interview with Creighton Lederer, Director of Building & Safety Engineering, City of Detroit (Mar. 1, 1989).