

March 2012

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### Recommended Citation

James Bross, *State Building Codes: Firm Ceilings, Hard Floors, or Shaky Foundations for Local Construction and Rehabilitation Standards*, 1 GA. ST. U. L. REV. (2012).

Available at: <https://readingroom.law.gsu.edu/gsulr/vol1/iss1/7>

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# STATE BUILDING CODES: FIRM CEILINGS, HARD FLOORS, OR SHAKY FOUNDATIONS FOR LOCAL CONSTRUCTION AND REHABILITATION STANDARDS\*

*James L. Bross†*



*"Something should be done about these cheap, nougat-framed houses."\*\**

In law reform, as in life, the foam rubber pillow is often the best metaphor for the unforeseen effects of earnest efforts: just when all energy is directed at the annoying lump on one side, the far side

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springs out vengefully.

During the 1960's, legal scholars<sup>1</sup> and presidential commissions<sup>2</sup> pressed earnestly for statewide building codes<sup>3</sup> to serve as ceilings on local standards which were expensive impediments to mass-produced low-income housing; the legal scholars of the 1980's are eager to preserve historic structures whose rehabilitation is impeded by the inflexible floor of state codes under local standards.<sup>4</sup> This article will evaluate the success of state building codes in achieving anticipated goals of the 1960's and the unanticipated effects of these codes in the 1980's.

### PLANNED AND UNPLANNED PURPOSES OF STATE CODES

State building codes regulating private construction can be designed to achieve a variety of intended purposes:

- A. Where local governments are reluctant to set minimum standards for construction,<sup>5</sup> the state building code may set a floor of minimum standards.<sup>6</sup>

1. Note, *Building Codes: Reducing Diversity and Facilitating the Amending Process*, 5 HARV. J. LEGIS. 587, 600 (1968). The concept is not an innovation of the 1960's. See Thompson, *The Problem of Building Code Improvement*, 12 LAW & CONTEMP. PROBS. 95, 103-04 (1947).

2. NATIONAL COMM'N ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY, H.R. DOC. NO. 34, 91st Cong., 1st Sess. 254-72 (1968) [hereinafter cited as DOUGLAS COMMISSION]; PRESIDENT'S COMM. ON URBAN HOUSING, A DECENT HOME 200 (1969) [hereinafter cited as KAISER COMMITTEE].

3. "Building code" in this article is used as a generic term for those regulations which govern construction and alteration of buildings. Such regulations can be codified under the names "Building Code," "Plumbing Code," "Electric Code," "HVAC (Heating/Ventilating/Air Conditioning) Code," or "One & Two Family Dwelling Code." By contrast, a "housing code" imposes continuing obligations to maintain dwelling units in accord with regulatory standards of habitability.

4. Duerksen, *Local Preservation Law*, in A HANDBOOK ON HISTORIC PRESERVATION LAW 29, 53-54 (Duerksen ed. 1983); Johnston, *Legal Issues of Historic Preservation for Local Government*, 17 WAKE FOREST L. REV. 707, 729-30 (1981). A suburbanite with an exaggerated sense of conspiracy would conclude that 1960's *yuppy* reformers wrote revised building codes to send the poor to the suburbs in mobile homes to make room for 1980's *malpy* (middle-aged laterally mobile professionals) law reformers' gentrification of historic inner city neighborhoods.

5. In Georgia, Bartow County's adoption of a building code for housing was opposed by supporters of the "pioneer spirit." The Atlanta Constitution, March 8, 1984, at 28A, col. 1. Sixty of Georgia's 159 counties and 257 of its 529 cities reported the adoption of building codes by 1984. GEORGIA DEP'T OF COMMUNITY AFFAIRS, GEORGIA BUILDING OFFICIALS & CODES DIRECTORY 1984, at 1.

6. Georgia's own preemptive activities for site-built construction are limited to setting minimum standards in a few specific areas such as water consumption in toilet flush cycles. See O.C.G.A. tit. 8, ch. 2 (1982); O.C.G.A. § 8-2-1 (1982). Georgia's state construction codes are merely advisory models to local government with no more

- B. Where local governments set gratuitously expensive standards for construction,<sup>7</sup> the state building code may set a ceiling of maximum standards.<sup>8</sup>
- C. Where both excessively high and dangerously low standards are a risk,<sup>9</sup> the state building code may set uniform preemptive standards that are both floor and ceiling.<sup>10</sup>

The vagaries of judicial review may result in support for more than one view of a state code's aims. In Oregon, the City of Troutdale required "double wall" construction of all buildings while the state's "Structural Specialty Code"<sup>11</sup> required "single wall" con-

mandatory force than model codes from national and regional private organizations. 1982 Op. Ga. Att'y Gen. 30. California's energy conservation standards for construction of residential buildings, CAL. PUB. RES. CODE § 25402 (Supp. 1984), are minima to which more stringent local standards may be added, 61 Op. Cal. Att'y Gen. 118 (1978), although other state codes in California supersede local codes. *See, e.g., Danville Fire Protection Dist. v. Duffel Financial and Constr. Co.*, 58 Cal. App. 3d 241, 129 Cal. Rptr. 882 (1976).

7. *See Oster & Quigley, Regulatory Barriers to the Diffusion of Innovation: Some Evidence from Building Codes*, 8 BELL J. ECON. 361 (1977); Flynn, *Impediments to the Increased Use of Manufactured Housing*, 60 U. DET. J. URB. L. 485, 502-03 (1983).

8. Under MINN. STAT. § 16.868 (Supp. 1984), a nonmetropolitan county may exempt itself from all sections of the state building code other than the handicapped access provisions; under MINN. STAT. § 16.869 (Supp. 1984), a city with a population under 2,500 located in an exempt county may similarly opt out. After exemption or opting out, the local government may not legislate on subjects covered by the state building code; an exempt Minnesota county or small town may have either no code or the state code. *See* 15 MINN. LEGAL REG. 2 (Op. Att'y Gen. 1982); 13 MINN. LEGAL REG. 7 (Op. Att'y Gen. 1980); *City of Minnetonka v. Mark Z. Jones Assoc.*, 306 Minn. 217, 236 N.W.2d 163 (1975).

9. "[T]o establish and provide for uniform building and construction standards and uniform enforcement policies and practices throughout the entire State" was the avowed purpose of the New Jersey "State Uniform Construction Code Act." *New Jersey State Plumbing Inspectors Ass'n v. Sheehan*, 163 N.J. Super. 398, 401, 394 A.2d 1244, 1245 (App. Div. 1978). *See also Helfrich v. Hamilton Township*, 182 N.J. Super. 365, 371 n.1, 440 A.2d 1366, 1369 n.1 (App. Div. 1981) (quoting the sponsor's statement for that act).

10. In *City of Eastlake v. Ohio Bd. of Bldg. Standards*, 66 Ohio St. 2d 363, 369, 422 N.E.2d 598, 602 (1981), the court interpreted OHIO REV. CODE ANN. § 3781, which allowed municipal regulations "not in conflict with" state regulations, as a prohibition on local codes for industrialized units more stringent than the state standards. OHIO REV. CODE ANN. § 3781.10(A) provides that rules formulated by the Ohio Board of Building Standards "shall be the lawful minimum requirements specified for . . . industrialized units . . ." The codes promulgated by Indiana's Fire Prevention and Building Safety Commission (and its predecessor, the Administrative Building Council) supersede all local codes. IND. CODE ANN. § 22-11-1-32 (Burns Supp. 1984). *See Suburban Homes Corp. v. City of Hobart*, 411 N.E.2d 169, 172 (Ind. App. 1980); *Town of St. John v. Home Builders Ass'n*, 428 N.E.2d 1299, 1305 (Ind. App. 1981).

11. OR. ADMIN. R. § 814-26-005 (adopted 1974).

struction. Troutdale officials claimed that the city's location at the windy western end of the Columbia Gorge justified the added sheathing of a "double wall." City officials did not apply for a modification to meet local conditions under section 456.785 of the state building code.<sup>12</sup> Such an application would likely have been denied in view of the prevailing professional view that Troutdale's code requirement was both more expensive and less effective than alternative techniques of achieving its avowed aims. Where air infiltration is a concern, insulation with an unbroken vapor barrier is a preferable material to plywood; where structural stability is a concern, the state code's performance standards for structural strength are a truer guarantee than additional sheathing without a measure of strength. Troutdale's code requirement was most effective in raising the price of site-built housing and virtually excluding factory-built housing.<sup>13</sup>

In litigation by the state Department of Commerce to enjoin enforcement of Troutdale's ordinance, the trial judge and two judges of a three-judge panel of the Court of Appeals of Oregon found state preemption of more stringent local standards.<sup>14</sup> The original uniformity provision in section 456.775(1) of the state building code,<sup>15</sup> quoted by Judge Thornton for the appellate majority,<sup>16</sup> prohibited local rules "in conflict" with state codes in language similar to that which the Supreme Court of Ohio interpreted as preemptive in *City of Eastlake v. Ohio Board of Building Standards*.<sup>17</sup> Justice Linde, for the majority of the Oregon Supreme Court, held that Troutdale's regulations were not superseded because the state code was intended to set only basic minimum standards, not maximum standards.<sup>18</sup> The dissenting judge of the Oregon Court of Appeals and three specially concurring judges of the Oregon Supreme Court would not concede the state power to preempt local building codes even if the intent to do so were clear; concurring Justice Tongue claimed that if "the Oregon legislature

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12. OR. REV. STAT. § 456.785 (1983) (original version at 1973 Or. Laws 2567, 2572).

13. Discussions with James Hall, former Planning Director of Clackamas County, Oregon, and Edward Sullivan, former County Counsel, Washington County, Oregon, and former Counsel to the Governor, Oregon (1977).

14. *State ex rel. Haley v. City of Troutdale*, 28 Or. App. 93, 558 P.2d 1255 (1977).

15. Act of July 22, 1973, ch. 834, § 6, 1973 Or. Laws 2567, 2571 (codified at OR. REV. STAT. § 456.775(1)) (amended 1979).

16. *Haley*, 28 Or. App. at 96, 558 P.2d at 1256-57.

17. 66 Ohio St. 2d 363, 422 N.E.2d 598 (1981); *supra* note 10.

18. *State ex rel. Haley v. City of Troutdale*, 281 Or. 203, 211, 576 P.2d 1238, 1242-43 (1978).

has power to require that all new homes in Oregon must have single wall construction . . . it also follows that the Oregon legislature has power to require all new homes to be painted green . . . .<sup>19</sup>

To make its intentions more explicit, the legislature, in 1979, revised the state building code's uniformity provision to read:

The state building code shall be applicable and uniform throughout this state and in all municipalities, and no municipality shall enact or enforce any ordinance, rule or regulation relating to the same matters encompassed by the state building code but which provides different requirements unless authorized by the director.<sup>20</sup>

Since this legislative clarification of purpose, the Oregon appellate courts have engaged in no further "construction" of the state building code.

#### STATE CEILING AND MANUFACTURED HOUSING

The primary focus of the 1960's critique of local building codes was the constraining effect of diverse and extravagantly high standards on manufactured housing in general and mobile homes in particular. The Douglas Commission and the Kaiser Committee<sup>21</sup> generated volumes of reports on impediments to, and the desirability of, mass production of housing. The Kaiser Committee observed:

External constraints on industrialization of housing production are extremely serious. It is difficult to think of an industry with so many artificial [sic] barriers to technological progress. The main governmental constraints against industrialization are the web of regulations surrounding the building process . . . .<sup>22</sup>

The Kaiser Committee's technical consultants were more circumspect:

Codes *per se* were not found to be the direct reason for the failure of any of the past industrialized systems although they did constrain freedom of choice in technology and have limited the market. . . . [E]ntrepreneurs either learned to "live" with

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19. *Id.* at 212, 576 P.2d at 1243 (Tongue, J., specially concurring).

20. OR. REV. STAT. § 456.775 (1983).

21. DOUGLAS COMMISSION, *supra* note 2; KAISER COMMITTEE, *supra* note 2.

22. KAISER COMMITTEE, *supra* note 2, at 210.

codes as they existed or avoided marketing areas with restrictive codes.<sup>23</sup>

The consequence of critiques in the 1960's was federal legislation in the 1970's. Congress enacted the National Mobile Home Construction and Safety Standards Act of 1974,<sup>24</sup> under which preemptive federal codes for mobile homes were to supplant the more than five thousand state and local building codes.<sup>25</sup>

The federal standards, which were expanded in 1980 to cover all "manufactured homes,"<sup>26</sup> are supplemented by some state preemptive codes covering those mass-produced units beyond the federal definition of "manufactured."<sup>27</sup> Units eligible for inspection under the federal standards are not eligible for inspection under state standards, so the two systems work in concert to regulate most forms of housing which are not "site-built."<sup>28</sup>

23. SPECIAL ADVISORY COMM. ON INDUSTRIALIZED BUILDING AND HOUSING SYSTEMS, *An Historical Evaluation of Industrialized Housing and Building Systems in the United States*, 2 TECHNICAL STUDIES, REPORT OF THE PRESIDENT'S COMMITTEE ON URBAN HOUSING 185 (1968) [hereinafter cited as KAISER COMMITTEE TECHNICAL STUDIES], quoted in D. MANDELKER & R. MONTGOMERY, *HOUSING IN AMERICA* 412 (1973).

24. Pub. L. No. 93-383, §§ 602-626, 88 Stat. 700 (codified at 42 U.S.C. §§ 5401-5425 (1982)).

25. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, *BUILDING CODES: A PROGRAM FOR INTERGOVERNMENTAL REFORM* 1 (1966).

26. "[A] structure, transportable in one or more sections, which, in the traveling mode, is eight body feet or more in width or forty body feet or more in length, or, when erected on site, is three hundred twenty or more square feet, and which is built on a permanent chassis and designed to be used as a dwelling . . . ." 42 U.S.C. § 5402(6) (1982).

27. O.C.G.A. § 8-2-111(3) (Supp. 1984) defines "industrialized building" as "any structure or component thereof which is wholly or in substantial part made, fabricated, formed, or assembled in manufacturing facilities for installation or assembly and installation on a building site and has been manufactured in such a manner that all parts or processes cannot be inspected at the installation site without disassembly, damage to, or destruction thereof." The Georgia Code is preemptive for state-inspected "factory-built" housing. *Clayton County v. Otis Pruitt Homes, Inc.*, 250 Ga. 505, 506, 299 S.E.2d 721, 722 (1983).

28. 1983 Op. Ga. Att'y Gen. 26. Federal inspections under Department of Housing and Urban Development standards in Georgia are carried out by the State Fire Inspector while inspections under the state standards are by the Technical Assistance Division of the Georgia Department of Community Affairs. The state standards cover factory-built houses with wall construction "closed" during manufacturing so that studs and electrical connections are no longer visible when the wall is delivered to the local site and without the chassis specified under federal law. The state does not inspect kit homes with walls that are not "closed" during manufacturing. In those Georgia localities without local building codes, factory-built houses are the only homes inspected for compliance with some government standards; in those Georgia localities with local building codes, a housing manufacturer may elect to have local inspection of its product if local officials consent to inspect. Telephone interview with Rod Terry, Program

Modular and panelized housing, assembled on site from prefabricated sections of varying sizes and numbers, are common types of factory housing beyond the federal definition.<sup>29</sup> Modular homes consist of large "modules" constructed in the factory and attached to each other on site; panelized homes are assembled on site from complete walls built at the factory.<sup>30</sup> Kit houses and factory-built components of site-built houses, which are "open" to on-site inspection, can fall outside federal and state standards. Among kit houses, log homes alone account for forty thousand units annually. "Open" factory-made roof trusses are used in ninety-five percent of site-built homes.<sup>31</sup>

The penetration of manufactured homes into the housing market has been nothing short of spectacular during the decade since Congress ordered the national standards. Factory-built homes rose from sixteen percent of new single-family units in 1967<sup>32</sup> to thirty-six percent of single-family sales and ninety percent of single-family homes sold for less than \$40,000 in 1981,<sup>33</sup> although the market share of true "mobile homes" declined during the 1970's.<sup>34</sup> The improved image and the improved reality of manufactured housing have been effects of the federal and state codes as important in that dramatic penetration as the removal of the constraints of local building codes.<sup>35</sup>

The battles against local government constraints of manufactured housing have shifted from building codes to zoning codes. Given the historically local nature of zoning, federal and state pre-

Coordinator for Construction Codes and Industrialized Buildings, Georgia Department of Community Affairs (Aug. 29, 1984).

29. Nutt-Powell, *Mobile Homes are Getting Classier*, *PLANNING*, Feb. 1982, at 20; Rawlings, *New-Breed Houses: Factory-Built and Better than Ever*, *NEW SHELTER*, Jan. 1984, at 38, 43.

30. Rawlings, *supra* note 29, at 40-41; Rawlings & Rodale, *Panelized Housing: Factory-Built Precision with a Site-Built Look*, *NEW SHELTER*, Feb. 1984, at 46, 46. Panelized construction and superinsulation have been combined in "stress-skin" or "sandwich panel" construction which laminates interior and exterior sheathing materials to a foam insulation core. Poole, *One-Step Superinsulation*, *NEW SHELTER*, Sept. 1984, at 96.

31. Langdon, *The American House*, *ATLANTIC*, Sept. 1984, at 45, 62, 65.

32. See KAISER COMMITTEE TECHNICAL STUDIES, *supra* note 23, at 182 (mobile homes accounting for 16% of new units), *quoted in* D. MANDELKER & R. MONTGOMERY, *supra* note 23, at 407.

33. Day, *Factory-Built Housing Finds Market*, *USA Today*, Nov. 11, 1982, at 1B.

34. Langdon, *supra* note 31, at 47.

35. *Id.* See generally T. NUTT-POWELL, *MANUFACTURED HOMES* (1982); Rawlings, *supra* note 29; Rawlings, *Mobile Homes: Getting Bigger. Getting Better?*, *NEW SHELTER*, Sept. 1980, at 22.

emptive zoning codes are more problematic than were the building codes.<sup>36</sup> Only daring judicial law-making,<sup>37</sup> limited state legislation,<sup>38</sup> or clumsy local legislative drafting<sup>39</sup> has resulted in removal of land-use based constraints. The thirty-six percent penetration of the housing market and the realities of housing costs may accomplish the reform of local legislative practices more surely than preemptive codes. Although the mobile home dealer who said, "There ain't going to be no stick-built housing in 10 years . . . . Can you buy a car piece by piece?" may overstate the case,<sup>40</sup> trends show a steady two percent per year increase in manufactured housing's share of the single-family market, with a projected fifty percent share of single-family sales by 1990.<sup>41</sup> Law reform and the marketplace have rarely collaborated as successfully in achieving their aims.

#### REHABILITATION: UNIFORM CODES AND UNIQUE HOUSES

The 1960's analyses of housing costs investigated the relationship between building codes and rehabilitation costs less thoroughly than the relationship between codes and constraints on manufactured housing.<sup>42</sup> A study by the *Columbia Journal of Law & Social Problems* concluded that "building codes do not materially and unreasonably increase the costs or otherwise impede the . . . rehabilitation of low and middle income housing."<sup>43</sup> The *Columbia* study interviewed fifty-five professionals involved in rehabilitation of low income housing and surveyed redevelopment

36. See generally Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CAL. L. REV. 839 (1983).

37. See generally Flynn, *supra* note 7; Chernoff, *Behind the Smokescreen: Exclusionary Zoning of Mobile Homes*, 25 WASH. U.J. URB. & CONTEMP. L. 235 (1983); Jaffe, *Mobile Homes in Single-Family Neighborhoods*, LAND USE L. & ZONING DIG., June 1983, at 4.

38. Jaffe, *supra* note 37, at 7-8.

39. *Snohomish County v. Thompson*, 19 Wash. App. 768, 577 P.2d 627 (1978), invalidated a local zoning ordinance which attempted to distinguish between mobile homes meeting local building codes and mobile homes which met only the preemptive state codes. The court declined to rule on the legitimacy of local zoning which restricted all mobile homes without regard to building code status, since the opinion implicitly viewed the instant ordinance as a ruse to retain local building code control in violation of preemptive law.

40. Day, *supra* note 33, at 2B.

41. *Id.* Rawlings, *supra* note 29, at 38.

42. *Cf.*, e.g., KAISER COMMITTEE, *supra* note 2, at 22, 103 (discussing relation of HUD requirements and building codes to rehabilitation of existing structures).

43. Note, *Building Codes and Residential Rehabilitation: Tilting at Windmills*, COLUM. J.L. & SOC. PROBS., Aug. 1969, at 88, 97.

agencies of sixteen local governments;<sup>44</sup> no do-it-yourself remodelers and no historic preservationists appear to have been interviewed. It is not surprising that organizations bound by the Davis-Bacon Act<sup>45</sup> to pay “prevailing wages” set by the Secretary of Labor<sup>46</sup> and engaged primarily in gut-and-rebuild forms of rehabilitation<sup>47</sup> would find local building codes a relatively minor factor in their work. More recent commentators with varying perspectives have taken a different view of the role of codes as a constraint on renovation and preservation.<sup>48</sup>

A building code can increase the price of rehabilitation work in two major ways:

- A. A trigger mechanism can require a major reconstruction of a building as a condition of completing a relatively small renovation project.
- B. The code can contain material or technique specifications which are either more expensive than comparable materials and techniques or likely to be beyond the skills of the average do-it-yourself remodeler.

In addition, the building code can contain requirements which conflict with the “limited vocabulary” of a vernacular style.<sup>49</sup> If a sty-

44. *Id.* at 89-90 nn.15-16.

45. 40 U.S.C. §§ 276a to 276a-5 (1982).

46. 40 U.S.C. § 276a (1982); see KAISER COMMITTEE, *supra* note 2, at 103.

47. See M. MAYER, *THE BUILDERS* 423 (1978). In my experience with Community Legal Services of Philadelphia in 1969-71, Federal Housing Administration inspectors took particular pride in requiring removal of period characteristics from Victorian houses; “depressing” dark oak woodwork was a special target for obliteration.

48. See generally NATIONAL INST. OF BLDG. SCIENCES, *GUIDELINE FOR SETTING AND ADOPTING STANDARDS FOR BUILDING REHABILITATION* (HUD Rehabilitation Guideline Series, No. 1, 1980) [hereinafter cited as HUD REHAB GUIDELINES]; Duerksen, *supra* note 4; Bryant & McGee, *Gentrification and the Law: Combatting Urban Displacement*, 25 WASH. U.J. URB. & CONTEMP. L. 43, 93 (1983). The Secretary of the Interior’s Standards for Rehabilitation, 36 C.F.R. § 67.7 (1984), used in evaluating the eligibility of rehabilitation projects for federal tax benefits, recognize the potential for conflicts between historic authenticity and current codes.

49. “Any consistent vernacular architecture . . . is, indeed, limited vocabulary design.” J. WADE, *ARCHITECTURE, PROBLEMS AND DIAGNOSES: ARCHITECTURAL DESIGN AS A BASIC PROBLEM-SOLVING PROCESS* 133 (1977). The words “vocabulary” and “grammar” signify architectural functions analogous to their linguistic functions. For example, in Frank Lloyd Wright’s “Prairie School” of architecture, the “vocabulary” can include strong horizontal lines, abstract geometric shapes with rectilinear forms dominant, hip roofs, rough exterior materials such as stucco and concrete, horizontal bands of casement windows, and decorative elements formed from stylized flowers. The grammatical arrangement of this “vocabulary” can be quite diverse. See generally P. SPRAGUE, *GUIDE TO FRANK LLOYD WRIGHT AND PRAIRIE SCHOOL ARCHITECTURE IN OAK PARK* (1976); G. STEPHEN, *REMODELING OLD HOUSES WITHOUT DESTROYING THEIR CHARACTER* (1977).

listically marred building results from code requirements, the lost value of the building as "damaged goods" is a cost even when the actual construction costs are not increased.

A late-1970's survey of the most used model building codes found that all contained some variation of the "25-50% Rule" as a trigger for increased code compliance work.<sup>50</sup> In its elemental form, the rule mandates that (a) an entire building be brought into compliance with new construction standards if the cost of proposed work exceeds fifty percent of the building's value, (b) the portion of the building being rehabilitated be brought into compliance with new construction standards if the cost of proposed work is between twenty-five and fifty percent of the building's value, or (c) materials of the type used in original construction may be used if the cost of proposed work is less than twenty-five percent of the building's value.<sup>51</sup>

Research has confirmed what common sense analysis would suggest: that the original purpose of the 25-50% Rule was to encourage demolition and discourage rehabilitation. "Balloon frame" wood construction that antedated building code requirement of fire stops in framing was rated a continuing hazard to be removed whenever possible.<sup>52</sup>

The material specifications of older codes most frequently criticized by rehabbers are those involving wiring and plumbing.<sup>53</sup> Romex plastic-sheathed wiring and plastic piping are less expensive than traditional conduit wiring and copper or cast iron piping; Romex and plastic piping are also more accommodating to the skills of do-it-yourselfers.<sup>54</sup> All national and regional model plumbing and building codes accept both Romex and plastic piping, although acceptance of these materials by states and localities is less widespread.<sup>55</sup> Building procedures specified by codes can include precise requirements for stairway widths and slopes and floor joist

50. See HUD REHAB GUIDELINES, *supra* note 48, at 15-24.

51. See *id.* (referring to BASIC BUILDING CODE § 106.0 (1978); STANDARD BUILDING CODE § 101.4 (1979); UNIFORM BUILDING CODE § 104 (1976); NATIONAL BUILDING CODE § 104.3 (1976)).

52. HUD REHAB GUIDELINES, *supra* note 48, at 16.

53. See Markoutsas, *Untangling the Building Code: Will Rehabbers Be Set Free?*, Chicago Tribune, Feb. 27, 1982, § 1, at 13, col. 1; Barry, *Hidden Bommers of Plumbing*, NEW SHELTER, May-June 1983, at 58; Day, *Plumbing Without Tears—Working with Local Codes*, POPULAR SCI., June 1983, at 98.

54. See Markoutsas, *supra* note 53; Barry, *supra* note 53.

55. See Markoutsas, *supra* note 53; Day, *supra* note 53.

spacing requirements.<sup>56</sup> Such requirements are defensible under worst case scenarios popular with building inspectors, but older homes with long-existing deviations from such requirements are not “unsafe” in any ordinary sense of the word.<sup>57</sup>

For those instances where a genuinely hazardous condition exists, provisions in a code actuated only by an owner’s attempt to upgrade a structure are hardly targeted for most effective enforcement. Housing codes<sup>58</sup> and building maintenance codes<sup>59</sup> contain standards which are applicable to all buildings, including those whose owners are uninterested in improving their property. The APHA-PHS Housing Code<sup>60</sup> requires all floors in dwelling units to be “capable of supporting the loads that normal use may cause to be placed thereon”;<sup>61</sup> the BOCA Maintenance Code<sup>62</sup> requires that “[a]ll supporting structural members . . . be . . . capable of safely bearing the dead and live loads imposed upon them.”<sup>63</sup> These continuing code requirements can be satisfied by “performance” of the building; particular means of achieving the performance, such as minimum joist spacing, need not be added if the existing structure performs its function. Although model housing codes and building maintenance codes need examination for standards based more on myth than human needs,<sup>64</sup> such codes are the proper

56. Cf. Duerksen, *supra* note 4, at 53 (discussing rehab projects “delayed or thwarted because of a door that opened inward instead of outward or because of a stairway that was two inches too narrow”).

57. The mythology of building code inspectors is rife with images of “90-year-old arthritic women falling down steep stairways” and “king-size double water beds crashing through floors.” There are no documented instances of water beds crashing through any floors; there are instances of elderly women falling down stairs, although the nexus of such falls with building codes is undocumented. As Duerksen observes, “Building code officials . . . march to the tune of a different drummer.” Duerksen, *supra* note 4, at 54.

58. For example, AMERICAN PUB. HEALTH ASS’N & PUBLIC HEALTH SERV., APHA-PHS RECOMMENDED HOUSING MAINTENANCE AND OCCUPANCY ORDINANCE (Public Health Serv. Pub. No. 1935, 1969) [hereinafter cited as APHA-PHS HOUSING CODE].

59. For example, BUILDING OFFICIALS & CODE ADM’RS INT’L, INC., THE BOCA BASIC PROPERTY MAINTENANCE CODE/1981 (2d ed. 1980) [hereinafter cited as BOCA MAINTENANCE CODE].

60. *Supra* note 58.

61. APHA-PHS HOUSING CODE, *supra* note 58, § 7.06.

62. *Supra* note 59.

63. BOCA MAINTENANCE CODE, *supra* note 59, § PM-302.2 (exterior structure); cf. *id.* § PM-303.2 (interior structure).

64. R. BABCOCK, THE ZONING GAME 16 (1966), documents a model code’s crowding standards as having been “picked . . . out of thin air.” Grigsby, *Economic Aspects of Housing Code Enforcement*, 3 URBAN LAWYER 533 (1971), urges recognition of varied goals of building maintenance standards and the tailoring of codes to policy purposes. Such tailoring would result in local standards which are more like zoning codes than

method of curing hazards in existing structures.

Recent editions of model building codes contain revisions designed to reverse the pro-demolition bias of the 25-50% Rule and to remove the need to comply with material and design mandates of new construction standards. Section 104(b) of the Uniform Building Code contains the following language added in 1979:

Alterations or repairs to an existing building or structure which are nonstructural and do not adversely affect any structural member or any part of the building or structure having required fire resistance may be made with the same materials of which the building or structure is constructed.<sup>65</sup>

Section 104(f) of the Uniform Building Code and section 316.1 of the Basic Building Code contain exemptions from code compliance for legally designated historic structures, although no accommodation is made for nondesignated structures in a designated historic district or for buildings which are merely old.<sup>66</sup>

Revisions of model codes are useful as concepts but slow to change practice. Local governments may not update their own codes annually to reflect changes in their preferred model,<sup>67</sup> often add local amendments that vary the national model,<sup>68</sup> and may find local reforms preempted by uniform state codes.<sup>69</sup> Evidence exists that ad hoc informal adjustments are common in applications of strict code provisions;<sup>70</sup> but such informal deviations can be applied unevenly, unsafely, and corruptly.<sup>71</sup>

The same preemptive state codes that cut through constraints on factory housing and that obstruct local initiatives for rehabilitation can be the tools for statewide reforms to facilitate rehabilita-

traditional housing codes in neighborhood-oriented specifics. See S. PARRATT, HOUSING CODE ADMINISTRATION AND ENFORCEMENT 154-56 (Environmental Health Serv. Series on Housing and Hygiene No. 2, 1970).

65. UNIFORM BUILDING CODE § 104(b), *quoted in* HUD REHAB GUIDELINES, *supra* note 48, at 21.

66. See HUD REHAB GUIDELINES, *supra* note 48, at 27-28.

67. See Note, *supra* note 1, at 594.

68. Los Angeles, California, and Phoenix, Arizona, have more restrictive 10-50% Rules in place of the 25-50% Rule. HUD REHAB GUIDELINES, *supra* note 48, at 18-19.

69. See *supra* notes 9-10. My own draft of a Housing Rehabilitation Code for the City of Hammond, Indiana, was dropped by a city reluctant to seek administrative relief from the uniform rules of the Indiana Administrative Building Council which then administered the code.

70. Interviews with contractors and do-it-yourself rehabbers working in the Candler Park neighborhood of Atlanta, Georgia. See also Bender, *I've Looked at Codes from Both Sides Now*, NEW SHELTER, Jan. 1983, at 56, 61-66.

71. See J. GARDINER & T. LYMAN, DECISIONS FOR SALE 26-27, 100-25 (1978).

tion. Several states accommodate designated landmarks in their state building regulations<sup>72</sup> or in enabling legislation for local codes.<sup>73</sup> Going beyond either model codes or other state codes, Massachusetts, in 1979, replaced the 25-50% Rule in its state code with comprehensive rules governing repair and alteration of existing buildings.<sup>74</sup> Applying to "existing buildings which have been legally occupied and/or used for a period of at least five (5) years,"<sup>75</sup> the Massachusetts rules permit alteration of existing buildings without further compliance with the state building code as long as the alterations do not reduce the existing building's overall compliance with the code<sup>76</sup> and as long as specified hazardous conditions are not present.<sup>77</sup>

An official responsible for enforcement of the Massachusetts rules describes them as a "terrific success because [the rules] have removed tensions between inspectors and builders, established clear standards and pathways for designers, and allowed architects to know in advance what trade-offs would have to be made."<sup>78</sup>

The Massachusetts rules and the sample Housing Rehabilitation Code in the Appendix to this article share a common change in paradigm for building codes. Under older codes, existing structures which do not comply with the most recent building code are pre-

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72. See CAL. HEALTH & SAFETY CODE §§ 18950-18961, 18951 (exempting structures "designated as historic buildings" from the state building code); N.C. STATE BLDG. CODE §§ 1009.1(a), 1010(a) (1982); Johnston, *supra* note 4, at 730. Recent regulations in Indiana exempt historic buildings from state codes if the State Division of Historic Preservation and Archaeology confirms the conflict between historically significant elements and the state code, if the local building official determines that the restoration will not increase hazards to life and limb, and if a warning sign is posted within 10 feet of public entrances. The sign must state:

**NOTICE - HISTORIC BUILDING**

Because historic accuracy is a prime consideration in its preservation and use, this building may not comply with contemporary construction and fire safety requirements.

660 IND. ADMIN. CODE 6-3-1 (1984).

73. IDAHO CODE § 67-4618 (1980) and S.D. CODIFIED LAWS § 1-19B-54 (1980) provide that a local governing body may exempt a historic property from the application of standards contained in county or city codes upon recommendation of the local historic preservation commission.

74. MASS. ADMIN. CODE tit. 780, art. 22 & app. T (1980).

75. *Id.* § 2200.3.1.

76. See *id.* § 2203.2.

77. Cf. *id.* § 2204.0-2204.9, Table 2204 (requirements where new use of existing building is deemed more hazardous).

78. Telephone interview with Paul Fredette of the Building Code Office, Public Safety Department, Commonwealth of Massachusetts (Aug. 22, 1984).

sumed potential threats.<sup>79</sup> Under the Massachusetts and sample codes, existing structures are presumed to have proved themselves safe by a test of time; the burden of proof is placed upon code officials to demonstrate that the existing structure is genuinely hazardous in particular respects. Both codes assume that an existing structure restored to its condition at the time of original construction is safer than an existing structure which is unrestored because the 25-50% Rule makes restoration prohibitively expensive. As with factory-built housing, law reform and the marketplace can collaborate to achieve public goals and serve private interest.

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79. See Duerksen, *supra* note 4, at 54.

## APPENDIX

The sample Housing Rehabilitation Code below was drafted in collaboration with Professor Dennis Korchek, architect and planner on the faculty of Purdue University-Calumet. Only the introductory framework of the code is included.

## TITLE AND SCOPE

*Title*

Sec. 101. This ordinance shall be known and may be cited as the "Housing Rehabilitation Code" of the City/State of \_\_\_\_\_.

*Purpose and Intent*

Sec. 102. The purpose of this ordinance is to facilitate provision of liveable, cost-efficient housing in the City/State of \_\_\_\_\_, through restoration and adaptation of existing dwelling units.

It is the intent of this ordinance to encourage, by permitting the employment of such techniques of rehabilitation as will increase liveability of existing residences without unduly increasing their costs, the restoration and adaptation of structures which have demonstrated their usefulness by actual occupancy over time. This ordinance shall be construed liberally and justly to implement this intent as fully as possible, consistent with the health and safety of the occupants.

*Scope*

Sec. 103. This ordinance shall apply to existing residential buildings or portions thereof that qualify under section 104, provided, however, that the provisions of this ordinance shall not prohibit alteration or additions that meet the requirements of existing building and zoning codes for new construction.

*Qualification of Buildings*

Sec. 104. An existing building used as a dwelling may be declared rehabilitable based upon a written inspection report by [designated building official] if the report finds that the building is capable of "restora-

tion” and/or “adaptation” as defined herein.

A. Restoration requires elimination of hazards and compliance with the Housing Maintenance Code<sup>80</sup> of the City/State of \_\_\_\_\_ and permits improvement of cosmetic amenities if:

i. such elimination of hazards, compliance with the Housing Maintenance Code, and cosmetic improvements can be carried out without replacement of structural, electrical, plumbing, heating, or mechanical elements of the building; or

ii. such elimination of hazards, compliance with the Housing Maintenance Code, and cosmetic improvements can be carried out by installation of replacements for deteriorated structural, electrical, plumbing, heating or mechanical elements with sound and essentially identical equivalents which return the building to its condition at the time of original construction. Requirements for return of the building to its condition at the time of original construction may be established by building codes in effect at the time of construction; by documentation found in engineering drawings, building department records or similar archival sources; or by field survey and report of the structure.

If the designated building official finds that hazardous conditions may still exist because of changed patterns of housing occupancy since the time of original construction, he may still allow restoration if he can specify methods of mitigation which ameliorate such hazards.

In no case shall restoration require standards more stringent than those established hereafter by this code.

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80. As part of a program of reviewing city codes relating to building and rehabilitation, the Housing Maintenance Code should be examined for provisions which set unjustifiable standards. For example, large minimum window area requirements for sleeping rooms can present difficulties in some older existing houses and new earth-sheltered houses.

B. Adaptation allows redesign and reconstruction of interior and exterior elements of existing residences to best fit those residences for use in contemporary housing markets. Adaptation includes such construction as rearrangement of rooms by relocation of partitions or walls, installation of new bathrooms or kitchens, and changes to structural elements as part of a general refurbishing of all or part of the building's exterior and interior.

All work for adaptation shall comply with the provisions of this Housing Rehabilitation Code.

Those portions of the residential structure not adapted in compliance with this Housing Rehabilitation Code shall be free from hazardous conditions and in compliance with the Housing Maintenance Code of the City/State of \_\_\_\_\_.

[For "adaptation" work, the code then collects those provisions of the existing building codes which are both necessary for safe construction and consistent with the aim of facilitating rehabilitation. The code contains some provisions which are mandatory under all circumstances and other provisions which can be waived. For each provision which can be waived, the following standard language is used:

Except for certain buildings exempted in writing by [designated building official], the following code provisions shall govern . . . . Waiver shall be based upon a finding that compliance in a building built prior to [date] would result in undue costs in comparison with alternate techniques which would not unduly threaten the safety of occupants.

The date in the waiver provision is based upon local code and construction history.]

