

The Pennsylvania Abandoned and Blighted Property Conservatorship Act: A Tool for Targeted Neighborhood Revitalization

Melanie Lacey

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I. Introduction

Property abandonment and blight have been long standing problems in this region.[1] For neighbors, they significantly reduce the average value of adjacent lots. [2] For cities, demolition and lost tax revenue add up to millions of dollars in annual costs. [3] Beyond expense, these structures adversely affect public health and safety by attracting criminal activity, posing as fire risks, and exposing children to harm.[4] Many factors contribute. In the forefront is post-industrialization, as well as predatory lending that caused high foreclosure rates in areas that now have low market-demand.[5] Additionally, an absentee-owner may have relocated or be deceased, be a bank, or a real estate speculator.[6]

To address this problem, “vacant property receivership” is an area of law that is gaining momentum. Some jurisdictions assign variant titles; and the state of Pennsylvania calls its statute the “Abandoned and Blighted Property Conservatorship Act.”[7] Conservatorship is a public nuisance proceeding by which a third party may petition the court for the right to gain entry and to oversee the abatement of an abandoned, dilapidated building that meets statutory criteria.[8] While demolition may be a cheaper and faster option, it often creates lots that remain permanently empty, which do not contribute to economic growth.[9] Therefore, communities can use conservatorship to address abandonment and blight before they propagate, or in concert with other development efforts to maximize the impact.[10]

II. General Background on Receiverships

Receivership is a remedy that may arise when assets are subject to litigation.[11] The court appoints a third party to manage and preserve the asset-in-controversy during the course of the lawsuit, until the court directs its final disposition.[12] When the lawsuit ends, the receivership is terminated and the asset may either return to the owner or be sold with the proceeds distributed to creditors according to their priority.[13] In the context of vacant property receivership, the same

logistics apply. The statute creates standing for community members to sue property owners who are unwilling to fix chronic, blighting conditions that constitute nuisances.[14] Therefore, the nuisance is the cause of action, the blighting conditions are the basis for the nuisance, and the property is the asset-in-controversy. [15]

a. *Public Nuisance Exception to the Takings Clause*

Vacant property receivership emerged from a host of historical developments. The concept is superficially reminiscent of condemnation, but it does not conflict with the Takings Clause.[16] In 1788, the United States Supreme Court held that taking private property is not compensable when its purpose is to protect public safety.[17] In *Respublica v. Sparhawk*, the Court did not deem removal of articles during wartime to be a “taking” for the benefit of society, nor as falling under the Fifth Amendment.[18] Instead, the court decided that the protective measure was authorized by the Tenth Amendment police power.[19]

Nearly one hundred years later, the *Sparhawk* “wartime exception” expanded to a “public nuisance exception.”[20] In *Mugler v. Kansas*, a case involving the sale of alcohol during the Prohibition Era, the Supreme Court held that the government has a right to regulate property when illegal use compromises public health and safety.[21] After the gradual development of housing standards, receivership became a tool for protecting the rights of tenants and communities; first by local governments, and then by private citizens by way of statutory right.

b. *How Vacant Property Receivership Evolved from Rental Receiverships*

Vacant property receivership was preceded by “rental receivership,” which only addressed occupied, tenement buildings in substandard condition.[22] Rental receivership first appeared as *in rem* enforcement for housing code ordinances.[23] For example, the New York Multiple Dwelling Law of 1929 allowed cities to initiate proceedings when landlords failed or refused to abate conditions that were unfit for tenants. [24] If court appointed, a city government assumed direct responsibility for making repairs.[25] By directing rental income to responsible use, the city prevented abandonment by tenants that resulted from uninhabitable blight.[26] However, vacant houses and buildings have neither the tenants nor structural requirements needed to trigger those laws. In 1985, after Ohio enacted the first vacant property receivership statute, other states gradually followed suit.[27]

III. The Conservatorship Act

HB 2188 was passed by unanimous vote in 2008.[28] Seven administrations and four bill sponsors after the original 1987 bill, the level of interest transitioned from barely passing through the Urban Affairs Committee on numerous attempts, to unilateral support at every stage of the legislative process.[29] While blight is not a new problem for Pennsylvania, the recent foreclosure crisis undoubtedly influenced the political climate, allowing for enactment. In addition, the Pennsylvania Legislature amended the Conservatorship Act in 2014, with hopes of making the law more effective and easier to use, while maintaining checks and balances.[30]

a. Conservatorship Property

Most property types are eligible for conservatorship. The Conservatorship Act covers residential, commercial, and industrial structures, as well as vacant lots on which buildings have been demolished.[31] However, it sets forth specific qualification criteria.[32] Properties cannot have been 1) actively marketed for sale over the past six months, 2) subject to foreclosure at the time of petition filing, 3) transferred during the preceding six months, or 4) legally occupied during the preceding twelve months.[33] “Legally occupied” implies that third party squatters have no entitlements; however, adverse possession would not apply here, as property maintenance is lacking.

Conservatorship does not lend itself to frivolous claims. The violations must be severe and unaddressed for a minimum of twelve months, though most are far more delinquent. [34] Furthermore, the petitioner must substantiate with evidence that three of nine blighting conditions coexist. [35] Photographs, code violations, and affidavits from affected neighbors suffice to make this showing.[36] Blighting conditions include vandalism, illicit activity, attractive nuisances, fire hazards, need for substantial rehabilitation (such as roof replacement), the presence of vermin and accumulation of debris.[37] Considering these conditions, the petition must account for a preliminary rehabilitation plan with estimated expenses.[38] The 2014 amendments also allow simultaneous petitioning for adjacent properties that have the same owner.[39] This feature is attractive when speculators leave lots to the whims of time.

b. Conservatorship Petitioner

The Act allows “parties-in-interest” to be petitioners. Parties-in-interest include residential and business neighbors who live in close proximity to the property-in-controversy, as well as local school districts.[40] The 2014 amendments expanded the distance requirement for neighbors from 500 feet to 2,000 feet away.[41] Nonprofit companies located in the same city have standing to petition the court by showing prior involvement in rehabilitation projects situated within a five-mile radius. [42] This distance also increased from a pre-amendment radius of one-mile.[43] Increased distances show an intention to increase the number of participants.

In addition to parties-in-interest, “owners” can be petitioners.[44] The term “owner” applies to mortgagers, mortgagees, and other lienholders. The need to petition for one’s own property would arise when a bank or business partner desires to protect its collateral after an owner-occupant departs. However, lenders would incur greater expense through conservatorship than foreclosure, which may not be worthwhile outside of a strong housing market. Lastly, the term “owner” also accounts for any “heir, assignee, trustee, beneficiary, and lessee, provided that the ownership interest is a matter of public record.”[45] These inclusions are important since absentee-owners are often deceased.

c. Conservatorship Agent

The petitioner does not have to carry out the repairs, which is the exclusive role of the appointed conservator. The Act allows the court to appoint either 1) any individual or entity recommended by the petitioner, with preference for nonprofits and governmental units that have rehabilitation experience;^[46] or 2) the most senior lienholder, to whom first consideration is given.^[47] In practice, local governments in Pennsylvania rarely act as conservators due to financial and time constraints. In addition, past conservators have forged partnership agreements with out-of-state-owners and beneficiaries.^[48]

d. Conservatorship Notification

The Act requires petitioners to notify all owners and political subdivisions by certified or registered mail.^[49] Owners can be discerned through public record searches before investment in a title report. If an owner refuses the first-class mail, then ordinary mail becomes sufficient when unreturned after thirty days.^[50] If an owner cannot be located, then alternative service is the last resort, which involves publication in a local periodical.^[51] When a lienholder is a defunct limited liability partnership, the petitioner would attempt to notify all principals. The Mortgage Electronics Registration Systems, Inc. (MERS), which serves as nominee for many lenders, receives service of process when listed on the note, deed or assignment of mortgage.^[52] Furthermore, all petitioners must file a *lis pendens* with the county land records office. This protects the conservator's interest during the court-approved project if transfer of ownership is attempted.^[53]

e. Respondent's Duties and Powers

If a petition makes a prima facie showing of a public nuisance, then the court enters an Order to Show Cause, requiring the owner to disprove or justify its finding.^[54] The court also sets dates for a status conference, where the owner is given an opportunity to abate within a specific timeframe, and the hearing, where each side may present evidence and testimony. Appointment is only possible when an owner does not comply.^[55] Even with court appointment, owners are encouraged to participate in court decisions that may minimize the conservator's costs.^[56] However, a conservator is not statutorily required to opt for base-level amenities. In addition, some hearings go uncontested because owners fail to attend. If an owner attends, the 2014 amendments require intervening owners to post bonds, and to repay the conservator's legal fees when wasted.^[57] Though disfavored as a business plan, the purpose of the statute is accomplished regardless of who executes the project.

f. Conservator's Duties and Powers

When appointed, the Conservator has a right to enter the property to assess the damage.^[58] The initial court appointment does not change the property ownership.^[59] Legal title only transfers through resale during the discharge phase.^[60] Following assessment, the conservator submits a final rehabilitation plan for court approval, detailing proposed improvements and requesting permission to complete renovation.^[61] If approved, construction may commence. The conservator is required to maintain and submit expense records to the court in status reports, at the court's discretion.^[62] Furthermore, the Pennsylvania Historical Museum Commission must

participate in projects involving properties designated as “historic.”^[63] This ensures that “sense of place” is maintained, which contributes to community identity and pride.^[64]

During the conservatorship process, the 2014 amendments prevent disruption by foreclosure, sale, or tax sale, which better safeguards the conservator’s investment. ^[65] Before this change took effect, listing a property for sale was a loophole that adversarial owners would exercise, even if they had no actual intention or ability to follow through. Furthermore, the amendments require proof of active marketing for sale, beyond the posting of a sign.^[66] Similarly, filing for bankruptcy has been used as a delay tactic in some cases because the automatic stay freezes the conservatorship action. However, proceedings continue if the bankruptcy case is dismissed. Furthermore, a sophisticated owner who can afford litigation expenses can certainly afford repairs.

g. Conservatorship Financing

Rehabilitation is often financed by a conservator. Sometimes nonprofit organizations collaborate with private development companies. In addition, appointed conservators are required to approach senior lienholders for funding, which would add expenses to the existing lien. ^[67] Currently, Pennsylvania does not have public grants available for these projects, but a conservator may obtain a construction line of credit from a bank. Title companies and banks may express hesitance towards transacting on an asset without guaranteed collateral, as owners have the ability to terminate conservatorship. However, terminated appointment occurs under very limited circumstances.

h. Conservatorship Discharge & Settlement

Conservatorship may be terminated by the conservator when rehabilitation is complete, or by an owner upon showing that the project failed to meet court directions.^[68] When complete, if an owner cannot repay, then the property may be sold with free and clear title to satisfy the conservator’s lien. ^[69] The conservator would petition for permission to sell. If granted, the executed agreement of sale must be court approved, along with a proposed distribution list, pursuant to the Act.^[70] Court costs are covered first, followed by federal, state and local government liens, the conservator’s lien, and lastly, the pre-existing lien order.^[71] Anything left unpaid would be extinguished.^[72] Petitioners may request reductions from government entities when arrears render a project impractical.^[73] Thus far, the city of Philadelphia has reluctantly considered reductions on a case-by-case basis, and minor discounts have been granted.

IV. Further Considerations

Eligibility requirements curtail misuse of this law, such as attempts to monopolize. Yet, many of these properties are located in depressed areas, and therefore less attractive to large investors. Moreover, some properties already exist as Real Estate Owned properties (REO’s), which means that they went through the foreclosure process or the owner surrendered the property to avoid foreclosure. In the case of the former, occupants or squatters have been ejected, and lack of

auction bids caused the banks to repossess legal title.[74] Since REO's are slow selling, banks sometimes forego spending on upkeep and landscaping for extended periods of time.

Similarly, other blighted properties stand in limbo as unclaimed negative assets on which banks have yet to take action.[75] This means that the owner physically left the property, and the mortgage is in arrears, but foreclosure has not yet taken place. During the legislative hearings, banks expressed disinterest towards becoming property managers in light of their overwhelming inventory.[76] While the lienholder's lost investment is certainly a tradeoff, such properties create diminishing returns. Restoring blighted properties to productive use generates tax revenues and contributes to community vitality. The Conservatorship Act may incrementally assist in accomplishing these objectives.

* *Melanie Lacey is a May 2016 J.D. Candidate at Rutgers Law School and a Staff Editor for the Rutgers Journal of Law & Public Policy. During the 2014–2015 academic year, the author interned with Mt. Airy, USA, a Community Development Corporation located in Northwest Philadelphia, where she worked on conservatorship projects. This post was adapted from a Directed Research paper overseen by Professor Adam F. Scales.*

[1] *Hearing on H.B. 2188 Before the H. Urban Affairs Committee*, p. 5–6 (Pa. 2008) (Statement of Thomas C. Petrone, Chairman, H. Urban Affairs Comm.).

[2] *Id.*

[3] *Id.*

[4] *A Nuisance Law Approach to the Problem of Housing Abandonment*, 85 YALE L.J. 1130, 1132–33 (Jul. 1976) (Problems created by abandonment include: vandalism, criminal activity, fire hazards, and “aesthetic injuries” leading to expectations of neighborhood deterioration that cause depressed real estate values which precipitate further abandonment).

[5] Allan Mallach, *Bringing Buildings Back*, 5, 31–32 (Rutgers University Press eds., 2006).

[6] *Id.*

[7] PA. STAT. ANN. tit. 68, § 1101 *et seq* (West 2008) (hereinafter the “Conservatorship Act”). Other states refer to this process as “stabilization receivership, and derelict building receivership.”

[8] PA. STAT. ANN. tit. 68, § 1105(d). Petitioners must show multiple blighting conditions that are simultaneously present.

[9] Bob Kellet, *The Whos and Whats of Home Demolitions*, SE UPLIFT NEIGHBORHOOD COALITION (July 11, 2014), <http://www.seuplift.org/land-use-transportation/the-whos-and-whats-of-ho....>

(Demolition can cause “loss of affordable housing, impacts on neighborhood character, density changes, potential health and environment impacts, and sustainability”).

[10] H.B. 2188, P.N. 4521, Gen. Assem., 2007–2008 Reg. Sess. (Pa. 2009) (enacted); David Listokin, Elizabeth Allewelt, and James J. Nemeth, *Housing Receivership: Self-Help Neighborhood Revitalization*, 27 Wash. U. J. Urb. & Contemp. L. (1984), 13.

[11] *Hiles v. Watkins*, 117 Ohio St. 165 (1927).

[12] *Black’s Law Dictionary* 1383 (10th ed. 2014).

[13] PA. STAT. ANN. tit. 68, § 1110.

[14] PA. STAT. ANN. tit. 68, § 1103.

[15] PA. STAT. ANN. tit. 68, § 1104(b)(1).

[16] U.S. CONST. amend. V, art. IV, § 3.

[17] *Respublica v. Sparhawk*, 1 U.S. 357 (Pa. 1788) (holding that “congress might lawfully direct the removal of any articles that were necessary to the maintenance of the Continental army, or useful to the enemy, and in danger of falling into their hands...” without compensating for the consequent loss).

[18] *Id.*

[19] U.S. CONST. amend. X.

[20] Scott A. Reznack, Note, *Land Use Regulation and the Concept of Takings in Nineteenth Century America*, 40 U. CHI. L. REV. 854, 854, 859 (1973).

[21] 123 U.S. 623 (1887) (“A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot [sic], in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the state that its use by any one, for certain forbidden purposes, is prejudicial to the public interests”).

[22] W. Dennis Keating, *Judicial Approaches to Urban Housing Problems: Study of the Cleveland Housing Court*, 19 URB. LAW. 345, 358 (1987).

[23] David Listokin, Elizabeth Allewelt & James J. Nemeth, *Housing Receivership: Self-Help Neighborhood Revitalization*, 27 WASH. U. J. URB. & CONTEMP. L. 71 (1984).

[24] 37 N.Y. Sess. Laws 1929, ch. 713, § 309(5).

[25] *Id.*

[26] Richard J. Marco and James P. Mancino, *Housing Code Enforcement—A New Approach*, 18 CLEV.–MARSHALL L. REV. 368, 376 (1969).

[27] Ohio Rev. Code § 3767.41 (2009).

[28] H.B. 2188, P.N. 4521, Gen. Assem., 2007–2008 Reg. Sess. (Pa. 2009)(enacted).

[29] S.B. 888, P.N. 1091, Gen. Assem., 1987–1998 Reg. Sess (Pa. 1987); H.B. 2523, P.N. 3862, Gen Assem., 1997–1998 Reg. Sess (Pa. 1997); H.B. 1996, P.N. 3015, Gen Assem., 1999–2000 Reg. Sess. (Pa. 1999); H.B. 14, P.N. 24, 2003–2004 Reg. Sess. (Pa. 2003); H.B. 691, P.N. 784, 2005–2006 Reg. Sess. (Pa. 2005); H.B. 843, P.N. 1003, 2007–2008 Reg. Sess. (Pa. 2007); H.B. 2188, P.N. 4521 (Act 135), 2007–2008 Reg. Sess. (Pa. 2009)(enacted); H.B. 1363, P.N. 4241 (Act 157), 2013–2014 Reg. Sess. (Pa. 2014)(enacted)(Conservatorship Act amendments).

[30] H.B. 1363, P.N. 4241 (Act 157), 2013–2014 Reg. Sess. (Pa. 2014)(enacted).

[31] PA. STAT. ANN. tit. 68, § 1104(a).

[32] PA. STAT. ANN. tit. 68, § 1105(d).

[33] PA. STAT. ANN. tit. 68, § 1105(d)(1–4).

[34] PA. STAT. ANN. tit. 68, § 1105(d)(5)(2).

[35] PA. STAT. ANN. tit. 68, § 1105(d)(5)(i–ix).

[36] *Conservatorship Handbook*, HOUSING ALLIANCE OF PENNSYLVANIA, 13 (2013).

[37] § 1105(d)(5)(i–ix).

[38] PA. STAT. ANN. tit. 68, § 1104(b)(3).

[39] PA. STAT. ANN. tit. 68, § 1104(e).

[40] PA. STAT. ANN. tit. 68, § 1103.

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] PA. STAT. ANN. tit. 68, §§ 1003(3),1105(e)(3)(ii).

[47] PA. STAT. ANN. tit. 68, § 1105(e)(2).

[48] Telephone Interview with Richard L. Vanderslice, Founder, Richard L. Vanerslice, P.C. (April 9, 2015).

[49] PA. STAT. ANN. tit. 68, § 1104(d)(1).

[50] PA. STAT. ANN. tit. 68, § 1104(d)(2).

[51] PA. STAT. ANN. tit. 68, § 1104(d)(3). Pa. R.C.P. No. 430.

[52] FAQ, MERS, <https://www.mersinc.org/about-us/faq> (last visited August 5, 2015).

[53] PA. STAT. ANN. tit. 68, § 1104(c).

[54] PA. STAT. ANN. tit. 68, § 1105(e).

[55] Kermit Lind, *Public Nuisance Abatement and Receivership: A Guide to Ohio Revised Code §3767.41*, Cleveland–Marshall College of Law (2010).

[56] Joseph Schilling, *Nuisance Abatement of Vacant Properties: Innovative Uses of Civil Receivership*, Policy Brief, 2 (February 2006).

[57] PA. STAT. ANN. tit. 68, § 1005(f)(3).

[58] PA. STAT. ANN. tit. 68, § 1106.

[59] PA. STAT. ANN. tit. 68, § 1110.

[60] *Id.*

[61] PA. STAT. ANN. tit. 68, § 1106(b)(3).

[62] PA. STAT. ANN. tit. 68, § 1106(b)(5).

[63] PA. STAT. ANN. tit. 68, § 1104.

[64] PA. STAT. ANN. tit. 68, § 1006(a)(11).

[65] PA. STAT. ANN. tit. 68, § 1105(d).

[66] PA. STAT. ANN. tit. 68, § 1105(d)(2).

[67] PA. STAT. ANN. tit. 68, § 1108(b)–(c).

[68] PA. STAT. ANN. tit. 68, §§ 1109(b)(2), 1110(2).

[69] § 1110(2).

[70] PA. STAT. ANN. tit. 68, § 1109(c).

[71] PA. STAT. ANN. tit. 68, § 1109(d).

[72] *Id.*

[73] *Conservatorship Handbook*, *supra* note 49 at 7.

[74] Diana Olick, *What is an REO?*, AOL REAL ESTATE (Mar. 15, 2013), <http://realestate.aol.com/blog/2013/03/15/reo-bank-owned-home/>.

[75] *Hearing*, *supra* note 1.

[76] *Id.*