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Compulsory Home Repair Laws

*Maynard L. Graft, Jr.**

IN RECENT YEARS legislative bodies at various levels of government have recognized the need for legally requiring the maintenance of housing at certain minimum standards. Such regulation has been deemed necessary because of the deterioration experienced by practically every major city in America. This deterioration causes a downward spiral usually resulting in complete blight in the deteriorating area.[1] The first step toward blight is slight deterioration followed by neglect of repairs by owners and landlords (the latter neglect is an attempt to maintain a high return on investment, the former because of loss of faith in the quality of the neighborhood). In the final analysis purchasers who might have invested in and maintained the neighborhood abandon the area and it is left to rot and die.[2] The impact of poor housing on the community and its members was recognized by Justice Douglas in *Berman v. Parker*:

> Miserable and disreputable housing conditions may do more than spread disease and crime and immorality. They may also suffer the spirit by reducing the people who live there to the status of cattle. They may also be an ugly sore, a blight on the community which robs it of its charm, which makes it a place from which men turn. The misery of housing may despoil a community as an open sewer may ruin a river.[3]

Building Maintenance Housing Codes

In an effort to curb blighting conditions, and in many cases to restore blighted areas, most major cities passed housing codes and have been enforcing them for some time. Some have gone further, and have enacted stern anti-deterioration laws. One such city is Shaker Heights, Ohio, one of the suburbs of Cleveland, and long famous as a wealthy residential area. The purpose of the Shaker Heights Code is to establish minimum standards of health and safety, and to establish standards of maintenance to prevent any dwelling from having a blighting or deteriorating effect on the community.[4] In the June, 1970, issue of *Spectrum*, an informational publication of the City of Shaker Heights, there is emphasis on the fact that good maintenance means high property values.

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[1] Note, Enforcement of Municipal Housing Codes, 78 Harv. L. Rev. 801 (1965).

[2] *Id.*

[3] Berman v. Parker, 348 U.S. 26 (1954).

[4] Housing Code, City of Shaker Heights (Ohio) § 1403.01 (1967).

The Housing Code authorizes inspections by the Commissioner of Buildings and his staff[5] and requires notification to the homeowner of any violation of the Code.[6] Chapter 1411 of the Code details the basic standards for housing which relate to habitable floor area, light and ventilation, heating and electrical requirements and, most pertinent to this discussion, the maintenance requirements.

The *maintenance* requirements relate to building interiors and exteriors and surrounding property. The interior must be kept in good repair, with walls free from cracks, holes, etc.[7] The building exterior must be painted to prevent decay, and any rotted or decayed portions of the dwelling must be replaced with materials that conform to the original design of the building.[8] The requirements for maintenance of the dwelling structure also apply to any appurtenant or secondary structures on the property.[9] The ordinance also requires that all exterior areas of the property must be kept clear of any objects or debris that may cause a health or safety hazard or constitute a blighting or deteriorating influence on the neighborhood.[10]

The Housing Code has enforcement provisions which are set out in Chapter 1409. Section 1409.04 authorizes the Commissioner of Buildings to order an offending building vacated if the owner fails to comply with a notice of violation. The Commissioner may also request the Director of Law to institute legal proceedings to require compliance with the notice of violation. Section 1409.99 also provides for a maximum fine of $500.00 or a maximum jail sentence of six months for failure to comply with a notice of violation, and makes each day of violation a separate offense.

Authority for Enactment

In Ohio, local governing bodies are granted the authority to create and enforce housing regulations by the State Constitution and Ohio statutes. With respect to the Constitution, the "Home Rule" Amendment grants municipalities the right to adopt any local police regulations that are not in conflict with general laws.[11] More specifically, Ohio Revised Code, section 3781.01, provides that municipal corporations may make building regulations that are additional to those provided in Chapter 3781, as long as such additional laws are not in conflict with existing state law.[12]

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[5] *Id.* at § 1409.01.
[6] *Id.* at § 1409.03.
[7] *Id.* at § 1411.22.
[8] Id. at § 1411.21.
[9] *Id.*
[10] *Id.* at § 1411.24.
[11] Ohio Const. Art. XVIII, §§ 3 & 7.
[12] Ohio Rev. Code § 3781.01.

The authority granted by the Constitution and statutes, however, presupposes that the enactment will involve a subject matter that is within the power of the local government to regulate. To be within the power of regulation, the enactment must relate to the government's police power and it was decided in the leading case on the subject that police power regulations are constitutional

> whenever they are necessary for the preservation of public health, safety, morals, or general welfare, and not unjustly discriminatory, or arbitrary, or unreasonable, or confiscatory in their application to a particular or specific piece of property.[13]

Clearly then, when the public health, safety, morals or general welfare is not involved, the regulation has no support under the police power.[14] In this regard the Ohio Supreme Court has cautioned that while the police power is broad and inclusive, it may not foster regulations that are arbitrary and/or unreasonable, and that the regulations must be suited to accomplish the lawful goal, must not be discriminatory in operation, must bear a substantial relationship to the purpose of regulation and must not interfere with private property beyond the needs of the situation.[15]

That the subject of housing regulation generally is within the scope of a municipality's police power is clear. In *State of Ohio ex rel Schulman v. City of Cleveland,* the Cuyahoga County Common Pleas Court upheld the right of a municipality under its police power to enact ordinances controlling the use and maintenance of privately owned structures.[16] Further, an Ohio case paraphrasing Article I Section 19 of the Ohio Constitution contained a statement to the effect that all private property is held subservient to the police power and that when conditions so require, such property may be regulated in the best interests of the public safety and welfare.[17]

Validity of Housing Codes

Housing codes are generally valid if they have a proper relation to the public health, safety, morals or general welfare. The relation of an ordinance to public health and safety is usually not too difficult to establish. In a case involving the public safety, the Ohio Supreme Court was called upon to decide whether or not the Dayton, Ohio building code, which prohibited the erection of double acting doors in commercial establishments, was valid.[18] The court upheld the ordinance after placing

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[13] Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

[14] Nectow v. City of Cambridge, 277 U.S. 183 (1928).

[15] Froelich v. The City of Cleveland, 99 Ohio St. 376, 124 N.E. 212 (1919).

[16] 8 Ohio Misc. 1, 37 Ohio Ops. 2d 12, 220 N.E. 2d 386 (1966).

[17] State *ex rel* McElroy v. City of Akron, 173 Ohio St. 189, 181 N.E. 2d 26 (1962).

[18] City of Dayton v. S. S. Kresge Co., 114 Ohio St. 624, 151 N.E. 775 (1926).

considerable weight on the testimony of the city's witness who testified that double acting doors can interrupt free egress in an emergency while doors that open outward only are much more conducive to the public safety.[19] In 1966, a decision was rendered which firmly sustained the validity of the goals of housing codes as they relate to public health and sanitation.[20] In this case the plaintiff was informed by the East Cleveland City Commission that his family was too large for the quarters he was then occupying and that he would have to make use of additional space available in the dwelling or move out entirely (plaintiff was renting the first floor of his double home to another family). Plaintiff claimed that the Housing Code of East Cleveland was not valid in that it deprived him of his property without compensation and was unreasonable, arbitrary and capricious. The court upheld the code as a valid exercise of the police power:

> There is no question that the purposes of the housing code; fire safety, sanitation, health, crime prevention, maintenance of property, neighborhood, and community are matters of public welfare, and are today well within the scope of the police power.[21]

In another case decided in 1966, the court upheld a Cleveland renewal plan which authorized inspection of slum dwellings with the goal of eventual destruction if the deficiencies were not corrected.[22] In this case the plaintiff was the owner of two vacant dwellings on Hough Avenue in Cleveland, Ohio, an area widely known for its deteriorating condition. Each house had been inspected and found to be a public nuisance because of badly deteriorated interiors, exteriors, absence of plumbing, etc. After numerous requests for corrective action were ignored, the houses were scheduled for razing, whereupon plaintiff brought his action. The court viewed the action as one presenting the question whether a city may, through the use of housing codes, inspect buildings in a deteriorating neighborhood, find conditions that endanger the public health and safety, and then notify the owner that the conditions must be corrected or the building will be destroyed. Despite the plaintiff's contention that the action of the city was in violation of his constitutional rights forbidding the taking of property without just compensation or due process, the court decided that the city had the right to enact and enforce its housing code under its inherent police power, and that no person had the right to maintain his property to the detriment of the public.[23]

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[19] *Id.* at 631-2.

[20] Nolden v. East Cleveland City Commission, 12 Ohio Misc. 205, 41 Ohio Ops. 2d 291, 232 N.E. 2d 421 (1966).

[21] *Id.* at 210.

[22] *Supra,* n. 16 at 12-13.

[23] *Id.* at 22.

Thus, where the relationship of the enactment to the health and safety of the public is easily recognized, both the validity and the virtue is clear. The difficulty arises, however, where that close relationship becomes less easily ascertainable. At that point enter the infirmities.

One of the criteria supporting the use of the police power is the "general welfare." Interpreting what is in the interest of the "general welfare" has caused the courts some difficulty with the result that many courts must consider the evidence and make a subjective judgment as to the relationship to the general welfare. One Ohio court, in refusing to grant permission for the excavation of a road near the site of a newly constructed interstate highway, placed a very broad definition on the general welfare by extending it to include any enactment that would embrace health, peace, safety, morals, economic welfare, convenience and community prosperity.[24] On the other hand, in *State ex rel Stulbarg v. Leighton,* dismay was expressed over the broad and inclusive definition of general welfare expounded by some courts, and it was noted that almost all regulation had been supported by the court as having some relationship to the general welfare. It was felt that many judicial and legislative sins had been committed in the name of "general welfare." [25]

One housing code objective that has been receiving mixed support within the general welfare criterion is the objective of good "neighborhood appearance." In earlier times regulation of neighborhoods merely for aesthetic reasons was strictly forbidden. *Youngstown v. Kahn Bros. Bldg. Co.* spoke out against aesthetic control when invalidating a Youngstown zoning ordinance. The reason for its invalidity was that a police power regulation must be supported by some public necessity and there was no public need available to support aesthetic considerations. The court went on to state that while most authorities could agree on laws necessary to preserve the public health, the conception of what is aesthetically proper is a matter of opinion that varies from person to person.[26] For these reasons the court denounced aesthetic regulation and the decision was specifically referred to and followed in an Ohio case decided four years later[27] in which the City of Athens, Ohio attempted to prohibit the erection of a gas station on the ground that it would detract from the appearance of the neighborhood.

The attitude toward aesthetic regulation may be changing, however. While the courts are cautious in upholding aesthetic concepts because of the inherent subjectivity of the standard of application, they are nevertheless upholding police power enactments where aesthetics is

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[24] *In re* Vacation of Township Road 114, Hancock County, 6 Ohio App. 2d 73, 216 N.E. 2d 768 (1966).

[25] State *ex rel* Stulbarg v. Leighton, 113 Ohio App. 487, 173 N.E. 2d 715 (1959).

[26] City of Youngstown v. Kahn Bros. Building Co., 112 Ohio St. 654, 148 N.E. 842 (1925).

[27] State *ex rel* Srigley v. Woodworth, 33 Ohio App. 406, 169 N.E. 713 (1929).

one, but not the sole, justification for the law.[28] The view is generally supported that aesthetics will be upheld if they are not the overwhelming consideration in the regulation.[29] The United States Supreme Court has stated that "it is within legislative powers that a city should be beautiful as well as healthy."[30] Similarly, a 1968 Ohio case holding that a law requiring that junk yards be located and fenced so as not to be apparent to the public view, was valid even though it was based primarily on aesthetic considerations.[31]

Section 1411.21 (replacements must conform to original design) and Section 1411.24 (exterior property must not have a blighting influence on the neighborhood) of the Shaker Heights Code both deal with aesthetic values, and these aesthetic values are energetically enforced by the inspectors in their daily routine of inspecting properties. In the past these objectives of beauty would have rendered the code provisions void. Considering recent decisions, it is difficult to determine whether or not the provisions would be upheld today, but they would definitely be held invalid if the evidence showed that they were administered in an arbitrary or unreasonable manner.

An infirmity in some housing codes, including the Shaker Heights Code, is the lack of standards established for functionaries to follow necessitating arbitrary administration by those entrusted with code enforcement. For example, a portion of the above mentioned Section 1411.24 of the Shaker Code reads as follows: "Lawns, landscaping and driveways shall also be maintained so as not to constitute a blighting or deteriorating effect in the neighborhood." Neither "blight" nor "deterioration" is included in the definitions section of the Housing Code. How then, one might ask, can one be sure that he is or is not maintaining his lawn, landscaping or driveway in a blighting or deteriorating manner? Simple, says the city! Our inspectors will tell you! Herein lies the infirmity. The Housing Code authorizes the Commissioner of Buildings to adopt any rules and regulations that he deems fit to aid in the interpretation and enforcement of the code.[32]

On August 5, 1970, the Assistant Commissioner of Buildings for the City of Shaker Heights stated, in an interview, that no rules and regulations had been prepared for use by inspectors, nor were they necessary. It was his feeling that all of the city inspectors had years of building trades experience and were therefore qualified to pass judgment on housing deficiencies. With respect to structural and mechanical deficiencies and obvious health and safety hazards, he may be correct,

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28 Newsom, Zoning for Beauty, 5 N. Eng. L. Rev. 1 (1969).

29 Annot., 21 A.L.R. 3d, 1225 (1968).

30 *Supra*, n. 3 at 33.

31 State v. Buckley, 16 Ohio St. 2d 128, 45 Ohio Ops. 2d 469, 243 N.E. 2d 66 (1968).

32 Housing Code, City of Shaker Heights (Ohio) § 1409.08, *supra*, n. 4.

but trades experience does not qualify one to be a proper judge capable of perceiving the point at which a lawn or driveway graduates into the position of causing a "blight" or "deterioration" in the neighborhood. Without further specific interpretation, an inspector is not equipped to determine for himself that a lawn liberally populated with weeds or an untrimmed bush or a cracked driveway (not causing a safety hazard) constitutes a blighting and deteriorating effect on the community.

In 1955, a zoning ordinance which forbade the erection of a filling station on plaintiff's property, was struck down by the Ohio Supreme Court because it failed to provide proper guides to administrative officials relative to enforcing its provisions.[33] The court stated that sufficient standards and criteria must be established and that failure to provide these standards to officials allows the exercise of discretionary powers with respect to another's property. The court felt that if the ordinance made the absolute enjoyment of one's property subject to the arbitrary will of the city officials, then it could not be upheld because it failed to provide a uniform rule of action and was therefore unconstitutional.[34] In another case not related to housing but emphasizing the necessary clarity of statutes, the defendant was arrested for preaching on a public street corner. The arrest was held to be in violation of the defendant's constitutional rights because the statute under which he was arrested made it unlawful to congregate on street corners in such vague terms that one would not know if he were in violation. The court held that whenever an ordinance is so vague that "reasonable men would have to guess as to its meaning and differ as to its application" it is violative of due process and, in this instance, did not provide any standards to guide the police in its enforcement.[35] In regard to providing standards, the above-cited portion of Section 1411.24 of the Shaker Heights Code, standing alone, is unenforceable as it currently stands.

Another potential problem in the area of housing code enforcement presents itself in the 1967 United States Supreme Court decision in *Camara v. San Francisco,* limiting a city's right to authorize housing inspections.[36] Prior to this decision, housing inspections were being conducted in Ohio cities with the blessings of the Ohio Supreme Court. Housing inspections, it was said in the *Eaton* case, were not violative of Fourth Amendment freedom from unreasonable search and seizure, because the results of the inspection were not later used as the basis of a criminal prosecution.[37] The *Camara* case, however, held that a housing

[33] State *ex rel* Selected Properties Inc., v. Gottfried, 163 Ohio St. 469, 127 N.E. 2d 371 (1955).

[34] *Id.*

[35] City of Cleveland v. Baker, 83 Ohio L. Abs. 502, 504, 167 N.E. 2d 119 (1960).

[36] 387 U.S. 523 (1967).

[37] State *ex rel* Eaton v. Price, 168 Ohio St. 123, 5 Ohio Ops. 2d 377, 157 N.E. 2d 523 (1958).

inspection conducted over the objection of the homeowner and without a warrant did violate the Fourth Amendment of the U. S. Constitution. In so deciding the Supreme Court reversed its earlier decision in *Frank v. Maryland,*[38] which had been specifically followed by the Ohio Supreme Court in the *Eaton* case, cited above. The Court apparently did not forbid the use of area, external inspections with subsequent notice of violation but did list the three conditions under which an interior inspection may lawfully be made:

1. When given consent by the owner;
2. After issuance of a warrant supported by reasonable cause; or
3. Under emergency conditions.

Officials of the City of Shaker Heights have interpreted the case so as not to forbid internal inspection of homes occupied by persons other than the owner and, curiously enough, not to forbid internal inspections of two-family dwellings whether occupied by the *owner* or otherwise.[39] Perhaps the interpretation is not so unusual when viewed with knowledge of the fact that the areas in which two-family homes are located are older, becoming increasingly integrated and are inspected more regularly than homes in other areas. The city, it appears, has selected those areas requiring most attention and has interpreted the case so as not to conflict with established objectives.

It seems clear that the court intended in *Camara* to limit the municipality's right to enter upon a homeowner's property and cite for code violations without a warrant or other sufficient provocation, and it seems equally clear that the above-mentioned interpretation is erroneous. Any homeowner or occupier would be legally justified in refusing admittance to an inspector not in possession of a warrant when emergency conditions do not exist.

Validity of Housing Codes in Other Jurisdictions

The laws of other states seem to be clearly in support of housing codes that deal primarily with matters of public health and safety[40] but not so clearly in support of code regulation based on aesthetics and maintenance of property to protect property values.

In 1959, the Supreme Court of Wisconsin upheld the housing code of the City of Milwaukee to the extent of declaring that the main-

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[38] 359 U.S. 360 (1959).

[39] Interview with Mr. James F. Vales, Assistant Commissioner of Buildings for the City of Shaker Heights, Ohio, in Shaker Heights (August 5, 1970).

[40] Abbate Bros. v. City of Chicago, 11 Ill. 2d 337, 142 N.E. 2d 691 (1957); City of Louisville v. Thompson, 339 S.W. 2d 869 (Ky. Ct. App. 1960); Adamec v. Post, 273 N.Y.S. 250, 7 N.E. 2d 120 (1937); Paquette v. City of Fall River, 338 Mass. 368, 155 N.E. 2d 775 (1959); Richards v. City of Columbia, 227 S.C. 538, 88 S.E. 2d 683 (1955).

tenance of adjoining property values was a subject matter within the jurisdiction of the police power.[41] In this case the plaintiff sought to enjoin the City of Milwaukee from enforcing its housing code against his property. Along with claiming that his property was being taken from him without due process of law, plaintiff alleged that a portion of the ordinance which required that all exterior surfaces be painted was void as it related primarily to aesthetics and was not a valid exercise of the police power. The court in reply to plaintiff's argument pronounced that even though the paint requirement did not have a direct relationship to health or safety, the house if not painted would soon become an eyesore and depreciate adjoining property values. In the estimation of the court, the police power extended to preserving the good order of the city and to prohibiting actions that lower property values.[42] On the other hand, in 1967, the Supreme Court of Georgia held void the requirement that interior and exterior surfaces be painted.[43]

The courts of the State of Pennsylvania struck down ordinances in 1926[44] and again in 1954[45] because in both cases the major objectives of the enactments were to conserve property values an to promote aesthetic considerations. In the 1926 case, the court said that the legislature cannot arbitrarily interfere with the private ownership of property simply by labeling a law as in the interest of the public welfare.[46] In the 1954 case, the court was in sympathy with the desire of the community to maintain its value and beauty but felt that the interference with individual property rights was not in keeping with the U. S. Constitution.[47]

While the courts of Pennsylvania have expressed considerable reluctance to allow legislatures to govern in the field of community appearance, Pennsylvania's eastern neighbor, New Jersey, has plowed into the field with vigor and upheld a zoning ordinance having community appearance as its major objective.[48] Along with confirming that a municipality may regulate the erection, construction, alteration, repair, or use of buildings, the court stated that protection of the "character" of a community and conservation of property values were prime considerations in zoning regulation.[49] The New Jersey Supreme Court, using perhaps the most direct judicial words to date on the subject, supported community aesthetics in the following statement:

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[41] Boden v. City of Milwaukee, 8 Wis. 2d 318, 99 N.W. 2d 156 (1959).

[42] *Id.*

[43] City of Columbus v. Stubbs, 223 Ga. 765, 158 S.E 2d 392 (1967).

[44] Appeal of White, 287 Pa. 259, 134 A. 409 (1926).

[45] Appeal of Medinger, 377 Pa. 217, 104 A. 2d 118 (1954).

[46] *Supra,* n. 44 at 412.

[47] *Supra,* n. 45 at 122.

[48] Lionshead Lake, Inc. v. Wayne Township, 10 N.J. 165, 89 A. 2d 693 (1952).

[49] *Id.* at 696.

> It is in the public interest that our communities, so far as feasible, should be made pleasant and inviting and that primary considerations of attractiveness and beauty might well be frankly acknowledged as appropriate under certain circumstances, in the promotion of the general welfare of our people.[50]

It is apparent that housing regulation as it relates to aesthetics and other values less directly related to public health, safety and welfare is accepted with differing degrees of enthusiasm depending upon the jurisdiction examined.

Conclusion

The Shaker Heights Housing Code, viewed as a whole, is a sound piece of municipal legislation, promoting the desirable and lawful objective of community maintenance. There are, however, objectionable portions of the code, and the legality of its enforcement in certain respects is highly questionable. The aesthetic requirements, for example, even if found to be valid, are not supported with sufficient criteria to guide inspectors in deciding whether or not a violation exists. For this reason, the aesthetically based code provisions would probably fail a court test.

It seems unlikely, though, that a court test will materialize even though City officials become quite concerned when inquiries are made regarding the code.[51] This unlikelihood stems from the fact that the City of Shaker Heights has for years been regarded as aesthetically beautiful and has maintained stable property values. Generally, the residents of the city understandably support measures designed to retain these characteristics even though the measures taken somewhat reduce freedoms previously enjoyed. Because of this acceptance of the goals of the code, residents usually comply with, rather than challenge, notices of violation.

In this regard it is worthwhile to note that deterioration can be prevented most effectively by enforcement of higher standards of maintenance in good neighborhoods.[52] In support of early, anticipatory enactment of home maintenance regulations, one court has stated "it requires as much official watchfulness to anticipate and prevent suburban blight as it does to eradicate city slums." [53]

Even though it is unlikely, should a court test of the questionable provisions be undertaken, it is hazardous to predict that they will be ruled invalid. As with all legislation, the code is protected by the place-

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[50] Borough of Point Pleasant Beach v. Point Pleasant Pavilion Inc., 3 N.J. Super. 222, 66 A. 2d 40, 41 (1949).

[51] Note, Enforcement of Municipal Housing Codes, *supra,* n. 1.

[52] *Supra,* n. 48 at 697.

[53] City of Cleveland v. Antonio, 100 Ohio App. 334, 124 N.E. 2d 846 (1955).

ment of the burden of proving unconstitutionality on the shoulders of the homeowners[54] who may not have the time nor the inclination to accept the burden. It is further protected by the judiciary's historic position that it will not interfere with legislation because the determination of the need for municipal regulation and the reasonableness of the enactment is a matter of legislative not judicial concern.[55] Consequently, legislation will not be overthrown unless *clearly* arbitrary, unreasonable or unrelated to public health, safety, morals or welfare.[56]

It is worthy of mention that the United States Supreme Court has stated emphatically that regulations must change with the times and that some regulations that are sustained today would have been held to be unreasonable and arbitrary in the past.[57] Changing conditions dictate changes in regulation in all areas, including housing, and the courts might well decide, after viewing the rapid death of America's inner cities, that strict measures, heretofore deemed unreasonable, must be taken and enforced in order to preserve this most important aspect of our daily existence.

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[54] *Supra,* n. 3; Benjamin v. City of Columbus, 167 Ohio St. 103, 146 N.E. 2d 854 (1957).

[55] Stary v. City of Brooklyn, 162 Ohio St. 120, 121 N.E. 2d 11 (1954).

[56] *Supra,* n. 13 at 383.

[57] *Supra,* n. 3.

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