

2013

A Continuum In Remedies: Reconnecting Vacant Houses to the Market

James J. Kelly Jr.

University of Notre Dame, j.kelly@nd.edu

Follow this and additional works at: http://scholarship.law.nd.edu/law_faculty_scholarship



Part of the [Property Law and Real Estate Commons](#)

Recommended Citation

Kelly, James J. Jr., "A Continuum In Remedies: Reconnecting Vacant Houses to the Market" (2013). *Scholarly Works*. Paper 1081.
http://scholarship.law.nd.edu/law_faculty_scholarship/1081

This Article is brought to you for free and open access by the Faculty Scholarship at NDLScholarship. It has been accepted for inclusion in Scholarly Works by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

A CONTINUUM *IN REMEDIES*: RECONNECTING VACANT HOUSES TO THE MARKET

JAMES J. KELLY, JR.*

INTRODUCTION

For decades, America's older, undercrowded cities have struggled with neighborhoods beset by vacant houses that seemingly have no connection with a functioning real estate market. Working-class communities once teeming with homeowners are now pockmarked by derelict houses and overgrown lots that attract crime and deter investment. Even as inner-city crime rates continue their downward trend and environmentally conscious resistance to metropolitan sprawl mounts, the residential areas closest to America's downtowns appear to be losing the battle against the virulent vacant property contagion.

A nationwide foreclosure crisis has brought attention to the need for inner-city and other metropolitan communities to address vacant house nuisances. In 1995, Cleveland already had tens of thousands of vacant properties.¹ In the ten years that followed, foreclosures in Cleveland doubled, and then doubled again between 2005 and 2007.² Recognizing the far-reaching effects of the foreclosure crisis, Congress created the Neighborhood Stabilization Program (NSP), which has provided approximately \$7 billion in assistance to states and cities hardest hit by the fallout from the foreclosure epidemic.³ The National Vacant Properties Campaign, itself founded in 2004, merged in 2010 with the

* Clinical Professor of Law, Notre Dame Law School.

1. Timothy Williams, *Blighted Cities Prefer Razing to Rebuilding*, N.Y. TIMES, Nov. 12, 2013, <http://www.nytimes.com/2013/11/12/us/blighted-cities-prefer-razing-to-rebuilding.html>.

2. CLAUDIA COULTON & KATHY HEXTER, FED. RESERVE BANK, *FACING THE FORECLOSURE CRISIS IN GREATER CLEVELAND: WHAT HAPPENED AND HOW COMMUNITIES ARE RESPONDING* 4 (2010).

3. Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, 122 Stat. 2654 (2008) (created NSP with \$3.92 billion); American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009); Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (commonly referred to as Dodd-Frank, which appropriated \$2 billion to NSP 2 and \$1 billion to NSP 3, respectively). NSP 3 Funds can be used only for five eligible uses: 1) Use financing mechanisms for purchase and redevelopment; 2) Purchase and rehabilitate for sale, rental, or redevelopment; 3) Establish and operate land banks; 4) Demolish blighted structures; and 5) Redevelop vacant properties for housing. Housing Economic Recovery Act of 2008 § 257.

Genesee Institute, of Flint, Michigan, to form the Center for Community Progress, a nationwide advocacy and technical assistance provider for communities struggling with vacant property problems.⁴

It would seem, at first glance, that insufficient demand for these types of homes in these neighborhoods fully accounts for the spread of house vacancy. Any attempts to fight the market and turn back the clock would then be hopelessly unsustainable. But, such resignation is unwarranted.

Because the elimination of vacant house nuisances, whether by rehabilitation or demolition, involves significant financial investment,⁵ it is crucial that public officials pay attention to the market dynamics of the neighborhood. But they must not take an owner's allowing property to lapse into and remain in a derelict state as an indication that the market has rendered a final (and correct) judgment. Even those who hold up the market as an efficient allocator of resources that should not be hampered recognize that their trust in it is based on certain assumptions necessary to its functioning properly.⁶ Markets work if actors can recognize and take advantage of opportunities to invest.⁷ While government regulation can create barriers to efficient transactions, low-capacity owners, information costs, and property fragmentation can also get in the way of worthwhile investment.⁸ Legal tools can work to reduce these impediments to market functioning.⁹

This paper argues that recent developments in property theory help us understand and complete reforms of legal remedies that target certain types of market dysfunction. By appropriately reducing barriers to sensible investment, in rem code enforcement through tailored tax foreclosure proceedings can reverse decline in struggling neighborhoods. Traditional responses to the problem of blight reflect a binary choice between strong deference to property-owner autonomy and complete liquidation of property interests.¹⁰ In personam code enforcement remedies emanate from a legal understanding of real estate

4. Dan Kildee, *Foreword* to FRANK S. ALEXANDER, *LAND BANKS AND LAND BANKING*, at 8 (2011).

5. CITY OF SOUTH BEND, *VACANT AND ABANDONED PROPERTIES TASK FORCE REPORT 5* (2013), available at http://southbendin.gov/sites/default/files/files/Code_FinalVATF_Report_2_red.pdf.

6. See generally Christine Jolls et. al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998).

7. *Id.* at 1483.

8. See generally Jolls et. al, *supra* note 6.

9. See OFFICE OF POL'Y DEV. & RESEARCH, U.S. DEP'T HOUS. & URBAN DEV., *REVITALIZING FORECLOSED PROPERTIES WITH LANDBANKS* 13 (2009).

10. James J. Kelly, *Refreshing the Heart of the City: Vacant Building Receivership as a Tool for Neighborhood Revitalization and Community Empowerment*, 13 J. AFFORDABLE HOUS. & CMTY. DEV. L. 210, 211 (2004).

ownership as the strongest of property-rule-protected entitlements.¹¹ Local government authorities hold owners directly accountable for any failures to address specific property problems through imposition of fines and threats of contempt.¹² Eminent domain, on the other hand, is invoked to facilitate massive redevelopment. When individualized policing of code norms breaks down, government's only other apparent option is to declare failure and start from scratch.¹³

Traditional code enforcement works fairly well against owners that are amenable to such pressures and that hold properties in functioning neighborhood real estate markets.¹⁴ But, in areas that have many abandoned properties, owners are unable to obtain the resources to complete repairs; and, even in healthier neighborhoods, owners may strategically evade conventional enforcement or be genuinely incapable of fixing up the property or transferring it to someone who can.¹⁵ Eminent domain, on the other hand, can be unnecessarily drastic and is usually driven by a massive new building project, which may be unrealistic for a city that is, on the whole, shrinking.

Inner-city neighborhoods in strong regional markets, as well as those in regions experiencing continuing out-migration, must fill the gap between traditional code enforcement's total deference to the owner's right to exclude, on the one hand, and eminent domain's willy-nilly liquidation of all property rights. A neighborhood market that is strong enough to support full-scale rehabilitation of any structurally sound vacant house may weaken irreversibly if subjected to even spot use of eminent domain authority. Yet, as will be shown below, traditional code enforcement remedies may not be able to bring about even those renovations supported by market logic. Sometimes, the owner is unwilling or unable to carry out a rehabilitation that will be good not only for the neighborhood but for the owner as well. More commonly, the owner

11. *Id.* "A property rule entitlement protection approach assumes that an entitlement will only be transferred, modified, or terminated through a transaction in which the price, if any, is determined by consensual agreement of the parties, i.e., by market forces, however efficient or inefficient, fair or unfair, those forces may be." John A. Lovett, *Meditations on Strathclyde: Controlling Private Land Use Restrictions at the Crossroads of Legal Systems*, 36 SYRACUSE J. INT'L L. & COM. 1, 34 (2008).

12. Kelly, *supra* note 10, at 215.

13. *See id.* at 215–16 ("Traditional code enforcement cannot force all vacant property owners to the realization that if they want to continue to own their houses then they must bring them into compliance with the code. Even if fines and other coercive mechanisms succeed in bringing about the rehabilitation of a great number of properties, those vacant houses that are beyond the code enforcement's reach persist as a threat to an urban neighborhood in transition . . . The economic security of urban-healthy neighborhoods and cities requires an additional approach to vacant building code enforcement.").

14. *Id.* at 215.

15. *Id.* at 214.

would benefit from the additional investment, if only the owner had any equity in the property to begin with. Foreclosure of some kind may be the only way to reconnect this property to the market. Particularly when lenders are more hesitant to take ownership of derelict properties, a government tool for bringing about a change in ownership based upon lack of code compliance is needed.

For weaker neighborhood markets, rehabilitation on a one-by-one basis may be impossible without an unrealistic amount of public subsidy. Just as dysfunction in the ownership of a single parcel may require an alternative approach to code enforcement, fragmented land ownership in a very weak market may require the coordination of investment through land assembly. Some neighborhood markets may support further investment if all the vacant properties in them can be rehabilitated concurrently. While single-property liquidation, or title assembly, is best carried out by code enforcement related foreclosure, property tax foreclosure provides the more effective means for land assembly.¹⁶

Part I provides an overview of the barriers that inner-city neighborhoods must surmount in order to abate vacant house nuisances and regain community vibrancy. Part II shows that any comprehensive vacant house abatement strategy needs to contend with the transaction costs caused by owner inaction and property fragmentation by filling in the remedy gap between in personam code enforcement and eminent domain. Part III reviews existing innovations and lays out the essential features of the remedies needed.

I. BARRIERS TO VACANT HOUSE NUISANCE ABATEMENT

A. *How Vacant Houses Impact Neighborhoods*

All, or almost all, vacant houses start off as recently occupied houses. Both in common usage and official terminology, the difference between “vacant” and “unoccupied” is generally a matter of time, with “vacant” often being defined as unoccupied for more than 90 days.¹⁷ Lack of occupancy, even for an extended period, does not by itself constitute a nuisance.¹⁸ But, long-term

16. See U.S. DEPT. HOUS. & URBAN DEV., REVITALIZING FORECLOSED PROPERTIES WITH LAND BANKS 2–3 (2009), available at <http://www.huduser.org/portal/publications/landbanks.pdf>.

17. U.S. POSTAL SERV., PUBLICATION 32: GLOSSARY OF TERMS 230 (July 2013), available at <http://about.usps.com/publications/pub32.pdf> (stating 90 days unoccupied and not receiving mail is considered an unoccupied delivery point). Addresses that are demolished or so blighted as to be judged not likely receive mail in the near future are considered a no-stat delivery point. *Id.* at 148.

18. See CMTY. LEGAL RES., VACANT PROPERTY LEGAL MANUAL 17 (2009) (discussing the importance of maintaining vacant properties, then discussing the importance of preventing the

vacancy predictably leads to neglect and decay. Water, sun, and wind constantly batter roofs, windows, siding, and gutters. Lack of occupancy and the attendant lack of income inevitably occasion lack of vigilance and lack of maintenance. Exposure to the elements degrades the exterior of the house first and makes its neglect apparent to even the casual observer.

Signs of vacancy also invite intentional abuse.¹⁹ Vandals can, in a few minutes, casually inflict damage that would take nature years to bring about. Thieves may not find much in the way of valuable personal property left behind, but they can, and do, take the copper piping and wiring right out of the walls for resale as scrap.²⁰ Their ham-fisted demolition can endanger neighbors by creating gas leaks and floods.²¹ In 2010, fifteen families on Cleveland's west side were left homeless by a gas explosion in a vacant house ransacked by a thief stealing copper and appliances.²²

Once man or nature has broken them open, unsecured properties either remain open to casual entry or are boarded up. Both futures are problematic for the immediate community. An unsecured property solicits trespass.²³ A study of unsecured vacant properties found 83% of them showed signs of unauthorized occupancy or criminal activity.²⁴ Squatters may start fires in the property for cooking or heat.²⁵ These and other activities lead to various emergencies that often require police, fire, and emergency medical personnel to enter poorly lit, dangerous spaces.²⁶

home from becoming a nuisance to the community). For a discussion of a legal definition of structures that are per se unsafe, see *infra* notes 42–45 and accompanying text.

19. CMTY. LEGAL RES., *supra* note 18, at 1.

20. Amanda Pinto, 'Scrapper' Faces 57 Charges in West Haven Copper Thefts, NEW HAVEN REG. (June 2, 2011), <http://www.nhregister.com/general-news/20110601/scrapper-faces-57-charges-in-west-haven-copper-thefts>.

21. *Id.*; Nok-Noi Ricker, *Brewer City Council Finds Dilapidated House a Danger*, BANGOR DAILY NEWS (Oct. 8, 2013), <http://bangordailynews.com/2013/10/08/news/bangor/brewer-city-council-finds-dilapidated-house-adanger/>; Mark Puente, *Explosion Destroys 4 Homes, Damages Dozens in Cleveland Blast has Eerie Similarities to One on West Side in January*, CLEVELAND PLAIN DEALER, May 13, 2010, at A1.

22. Pat Galbincea and Gabriel Baird, *Blast at Vacant West Side House Leaves at Least 15 Families Homeless*, CLEVELAND PLAIN DEALER, Jan. 26, 2010, at B3; Stan Donaldson, *Man Sentenced for Thefts from Home that Later Exploded*, CLEVELAND PLAIN DEALER, June 3, 2010, at B3.

23. Kelly, *supra* note 10, at 212–13.

24. William Spelman, *Abandoned Buildings: Magnets for Crime*, 21 J. CRIM. JUST. 481, 481–95 (1993).

25. Jim Cook, Jr., *Squatter With Cooking Equipment May Have Caused Millville Fire*, S. JERSEY TIMES (Nov. 2, 2011), http://www.nj.com/cumberland/index.ssf/2011/11/squatter_with_cooking equipmen.html.

26. *3 Firefighters Hurt in Blaze Damaging 3 Vacant Homes*, INDY STAR (Aug. 27, 2012), <http://www.indystar.com/article/20120827/NEWS/120827001>.

If a rundown vacant building signals neighborhood decline, a boarded-up property blares that message out through a megaphone. James Wilson and George Kelling's classic article about the impact of small, seemingly superficial signs of disorder was entitled *Broken Windows*.²⁷ It demonstrated how subtle signals of decline can accelerate it.²⁸ There is nothing subtle, however, about a house that has all its windows covered by 3' by 5' pieces of plywood. It broadcasts the news that the neighborhood is in bad shape now and is not expected to improve anytime soon. Prospective residents who have choices about where they might live are unlikely to choose a block with a boarded-up house on it.²⁹ Nevertheless, some communities have recognized that boarded properties, which are uninhabitable, and very visibly so, are preferable to houses that are open to casual entry.³⁰ The City of Augusta, Georgia has passed an ordinance establishing a permit process for "mothballing" vacant houses.³¹

Whether boarded or open to casual entry, visibly uninhabitable vacant properties have devastating effects on the surrounding community. Vacant houses inflict tremendous costs on residents of adjacent properties, neighborhoods, and city governments.³² They attract crime, harbor vermin, and pose a danger for community children.³³ They can destroy nearby houses through fire and water damage.³⁴ Adjacent property owners have found it costly, and sometimes impossible, to get casualty and liability insurance because of a vacant house next door.³⁵ It is little wonder that the presence of vacant houses reduces the resale value of compliant houses within a block or two by at least 1.3% per vacant house.³⁶

27. See generally James Q. Wilson & George L. Kelling, *Broken Windows*, ATLANTIC MONTHLY, Mar. 1982, at 29.

28. *Id.*

29. Kelly, *supra* note 10, at 212.

30. See Johnny Edwards, *Mothball Ordinance Creates Complaints*, AUGUSTA CHRON. (Jan. 28, 2008), <http://chronicle.augusta.com/news/metro/2008-01-28/mothball-ordinance-creates-complaints>; Susan McCord, "Mothball" permits aren't solutions for all blighted sites in Augusta, AUGUSTA CHRON. (JULY 12, 2011), <http://chronicle.augusta.com/news/government/2011-07-12/mothball-permits-aren-t-solutions-all-blighted-sites-augusta>.

31. Edwards, *supra* note 30.

32. See ALEXANDER, *supra* note 4, at 10–11.

33. Brian Nordli, *Boy Killed in Fire was Playing with Brother Inside Vacant Home*, LAS VEGAS SUN (May 2, 2013), <http://www.lasvegassun.com/news/2013/may/02/house-fire-claims-life-las-vegas-child/>.

34. See Ricker, *supra* note 21; Puente, *supra* note 21.

35. NAT'L VACANT PROPS. CAMPAIGN, VACANT PROPERTIES: THE TRUE COST TO COMMUNITIES 11 (2005).

36. STEPHEN WHITAKER & THOMAS J. FITZPATRICK, IV, THE IMPACT OF VACANT, TAX-DELINQUENT AND FORECLOSED PROPERTY ON SALES PRICES OF NEIGHBORING HOME 2 (2012)

B. How Local Governments Respond to Vacant House Problems

With so much at stake, state and local governments in many states have made addressing vacant properties a top policy priority. They have moved beyond traditional public nuisance remedies and enacted a range of policy solutions targeted at mitigating or eliminating vacant house problems. Realizing the need for more and better data about the vacant houses in their communities, cities such as Wilmington and Cincinnati have enacted vacant property registration ordinances.³⁷ Often these ordinances provide for the collection not only of information but of money as well.³⁸ By taxing owner inaction, these ordinances point toward the primary response to vacant houses: code enforcement.³⁹

Section 115 of the International Building Code (IBC) provides for the definition of and official response to unsafe structures.⁴⁰ The law provides the local building official with the authority to identify structures as unsafe and ensure that they are “taken down and removed or made safe.”⁴¹ Unsafe buildings include those that are “insanitary, deficient in light and ventilation or adequate exit facilities, constitute a fire hazard or are otherwise dangerous to human life.”⁴² Apart from declaring any vacant structure that is “not secured against entry” to be unsafe,⁴³ the IBC does not explicitly address vacant buildings as unsafe structures. It does not delineate what kinds of structural deficiencies are unsafe when a building has no one living, or even going, inside it regularly.

State and local law authorizing enforcement action against vacant property nuisances have filled this gap. In addition to adopting the IBC statewide, Indiana has also enacted an unsafe building law that it allows local

(“We find that an additional property within 500 feet that is vacant, delinquent, or both reduces the home’s selling price by at least 1.3 percent.”).

37. Joseph Schilling, *Code Enforcement and Community Stabilization: The Forgotten First Responders to Vacant and Foreclosed Homes*, 2 ALB. GOV’T L. REV. 101, 136–42 (2009). See also Yun Sang Lee et al., *New Data on Local Vacant Property Registration Ordinances*, 15 CITYSCAPE: J. OF POL’Y DEV. & RES. 289, 260 (2013).

38. “Registration fees can range from \$70 per year (Chula Vista, California), to \$420 per quarter (San Jose, California), to up to \$5,000 per year (Wilmington, Delaware).” Schilling, *supra* note 37, at 132.

39. *Id.* at 134.

40. The International Building Code has been adopted, either jurisdiction-wide or by local governments, in all 50 states and the District of Columbia. INT’L CODE COUNCIL, INTERNATIONAL CODES-ADOPTION BY STATE (Oct. 2013), available at <http://www.iccsafe.org/gr/Documents/stateadoptions.pdf>.

41. INT’L BLDG. CODE § 116.1 (2012).

42. INT’L BLDG. CODE § 116.1.

43. INT’L BLDG. CODE § 116.1.

jurisdictions to adopt by ordinance.⁴⁴ That statute's definition of an unsafe building tracks, more or less, the IBC definition, but includes a structure that is "vacant and not maintained in a manner that would allow human habitation, occupancy, or use under the requirements of a statute or an ordinance"⁴⁵ This extension of the concept of an unsafe building subjects any vacant property not fit to be lived in to an order to repair immediately or even demolish the structure.⁴⁶ The statute, however, requires that any ordered action "be reasonably related to the condition of the unsafe premises and the nature and use of nearby properties."⁴⁷ Thus, an order to repair must focus on those deficiencies that either make a property a danger or make it unfit for occupancy and cannot extend to preventative maintenance.⁴⁸ Likewise, a demolition order must be justified by the building's severely deteriorated condition and its lack of prospects for prompt renovation.⁴⁹

The IBC authorizes enforcement generally, but does not specify the methods or penalties.⁵⁰ Enforcement mechanisms and standards are left for state and local adopters to provide, usually through modification of the IBC or enactment of separate legislation.⁵¹ Traditional code enforcement involves the issuance of a notice of violation, the imposition of fines for failure to comply and, ultimately, resort to judicial orders to correct the violation.⁵² A court may enforce its order through contempt proceedings as long as compliance is possible.⁵³ As discussed below, repairs that cost more than the resulting value of the property may be impossible to finance through a private mortgage.⁵⁴ In the absence of such a loan, an owner of a vacant property may be able to avoid any proceedings for civil or criminal contempt.⁵⁵ Thus, the coercive approach

44. IND. CODE § 36-7-9-1 (1982).

45. IND. CODE § 36-7-9-4(a)(6) (2005).

46. IND. CODE § 36-7-9-5(a) (2013).

47. *Id.*

48. *Foursquare Tabernacle Church of God in Christ v. Dep't of Metro. Dev. Of Consol. City of Indianapolis*, 630 N.E.2d 1381, 1389–90 (Ind. App. 1994) (City could order repair of items in danger of falling but could not require that chimney be functional).

49. *Kopinski v. Health and Hosp. Corp. of Marion Cnty.*, 766 N.E.2d 454, 456 (Ind. App. 2002) (house that required 30% reconstruction two months after fire could not be ordered demolished when funds for reconstruction were imminent).

50. INT'L BLDG. CODE §§ 113.3, 113.4 (2012).

51. *International Code Adoptions*, INT'L CODE COUNCIL (2014), <http://www.iccsafe.org/gr/Pages/adoptions.aspx>. See also *Building Codes*, FED. EMERGENCY MGMT. AGENCY, (Jan. 25, 2013), <http://www.fema.gov/earthquake/building-codes>.

52. Kelly, *supra* note 10, at 214.

53. *Shippen v. Shippen*, 693 S.E.2d 240, 244 (N.C. Ct. App. 2010).

54. See *infra* Part I.C.

55. *Id.*

code enforcement may fall apart in the face of a neighborhood market too weak to support rehabilitation investment.

C. How Neighborhoods Impact Responses to Vacant House Problems

At \$50 per square foot, a conservative, “gut” rehabilitation of a 1,500-square foot vacant house would cost \$75,000. Even houses that can be made ready for occupancy for substantially less nearly always require more than the \$10,000 that the average demolition and removal would cost.⁵⁶ Since elimination of a vacant house nuisance always involves a major capital investment,⁵⁷ no sensible response strategy can ignore the importance of the return on that investment. Even if an owner is willing to make repair expenditures that cannot be recaptured through increased use, income, or resale value, no lender may be willing to provide the necessary funds.⁵⁸ With so much money involved, the financial advisability of rehabilitation often dictates whether or not it goes forward.

No factor will limit the return on rehabilitation investment more than the weakness of the neighborhood real estate market. If the best homes on a block are not selling for more than \$50,000, investing \$75,000 in a full-scale rehabilitation of a vacant property on that block is not financially prudent. For many older, inner-city neighborhoods, houses without major defects can be purchased for less than \$25,000.⁵⁹ But, once these properties have fallen into disrepair, the market will not support their renovation.⁶⁰ Traditional code enforcement does not render such considerations irrelevant. In a marginal case, the inducement of fines and, possibly, imprisonment may well motivate an owner to rehabilitate a property that would otherwise languish.⁶¹ But, in situations where the verdict of the market is unequivocal, renovation is unlikely, even with governmental coercion.⁶²

Under such an analysis, it’s not at all surprising that vacant property problems are so pervasive and intractable. Vacant properties are more a symptom of, than a major contributing factor to, the decline of older, inner-city neighborhoods throughout the United States. The tremendous gap between land values in inner-city and suburban neighborhoods also has little to do with location per se, but a great deal to do with the quality of local public goods

56. Leila Atassi, *Cleveland's Glut of Vacant Housing Could Cost Billions to Eliminate at Current Pace*, CLEVELAND PLAIN DEALER (Sept. 25, 2011), http://www.cleveland.com/metro/index.ssf/2012/09/clevelands_glut_of_vacant_hous.html.

57. *Id.*

58. *Id.*

59. ROBERT L. KEMP, *THE INNER CITY: A HANDBOOK FOR RENEWAL* 310 (2001).

60. Kelly, *supra* note 10, at 214.

61. *Id.* at 215.

62. *Id.*

such as schools, public safety, and shopping and recreational amenities.⁶³ Many inner-city neighborhoods have high concentrations of poverty, a reality that strongly shapes education, crime and commerce in those places.⁶⁴ Suburban development was first made possible by legislative moves to prevent cities from annexing development on their fringes.⁶⁵ The use of racially restrictive covenants by early suburban developers ensured that whites would make up the overwhelming majority of the new residents.⁶⁶ The use of exclusionary zoning set up barriers to socioeconomic integration that survived decades after the judicial rejection of explicit racial discrimination.⁶⁷ Even as the courts moved to integrate schools, suburban districts were exempted from busing remedies unless civil rights plaintiffs could show a history of deliberate racial discrimination in those relatively new areas.⁶⁸ Suburban land was unburdened not only by industrial waste and aging infrastructure, but also by the taint of a racist past. The message throughout the second-half of the twentieth century was clear: A family with the economic ability to choose its neighborhood should move to the land of the fresh start, the suburbs.⁶⁹

In the inner city, the loss of those low-skill, high-wage manufacturing jobs that first induced the Great Migration set the stage for widespread unemployment, civil unrest, and epidemics of violent crime, drug abuse, and chronic disease.⁷⁰ Baltimore's 1950 population of almost 950,000 shrank to a 2010 low just beneath 621,000, a decline of 35%.⁷¹ Even as the metropolitan area as a whole grew, Baltimore's population dropped by double-digit percentages in both the 1970s and 1990s.⁷² A city built for a million residents

63. WILLIAM FISCHER, *THE HOMEVOTER HYPOTHESIS* 45–46 (2001).

64. *See generally* WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED* (1987); DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1993); PAUL A. JARGOWSKY, *POVERTY AND PLACE: GHETTOS, BARRIOS AND THE AMERICAN CITY* (1997).

65. Christopher J. Tyson, *Localism and Involuntary Annexation: Reconsidering Approaches to New Regionalism*, 87 TUL. L. REV. 297, 303–23 (2012).

66. MASSEY & DENTON, *supra* note 64, at 51–55.

67. FISCHER, *supra* note 63, at 65–71.

68. *Milliken v. Bradley*, 418 U.S. 717, 782 (1974).

69. *Id.* at 801.

70. WILSON, *supra* note 64, at 20–92; BERNADETTE HANLON, JOHN RENNIE SHORT & THOMAS J. VICINO, *CITIES AND SUBURBS: NEW METROPOLITAN REALITIES IN THE U.S.* 69–70 (2010).

71. *Maryland: Population of Counties by Decennial Census: 1900 to 1990*, available at <http://www.census.gov/population/cencounts/md190090.txt> (last visited April 22, 2014); *State & County QuickFacts: Baltimore, Maryland*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/24/2404000.html> (last visited Apr. 22, 2014).

72. *Id.*

now has more than 30,000 vacant houses and vacant lots.⁷³ As with many under-crowded urban communities, neither the population loss nor the housing vacancies are equally distributed throughout the city.⁷⁴

The much smaller city of South Bend, Indiana also experienced about a 30% loss in population from 1970—six years after its primary industrial employer, Studebaker, closed for good—to 2010.⁷⁵ A handful of neighborhoods on the west side of town lost more than half their populations during those four decades.⁷⁶ Not surprisingly, the majority of the more than 1,000 vacant and abandoned properties in South Bend are located in these largely African-American and poor neighborhoods.⁷⁷ But, other South Bend neighborhoods also have derelict, vacant houses.⁷⁸ While these neighborhoods are affected by the litany of urban problems that tamp down demand for housing in the inner city, their higher housing values keep vacant house renovation an economic possibility. The presence of protracted vacant house nuisances in these communities requires further inquiry into the reasons why properties remain abandoned.

In addition to the formidable array of social problems that diminishes demand for residences in the central city, inner-city real estate markets face other challenges as well. These problems do not depress demand so much as distort the market in which housing is priced. Small lot sizes mean that city dwellers are more sensitive to the uses, and abuses, that occur on neighboring properties.⁷⁹ This proximity can foster greater social capital and take advantage of positive externalities associated with a vibrant city life.⁸⁰ But, negative externalities, like those associated with a derelict, vacant structure, are also amplified.⁸¹ Small lot sizes are a primary reason why the presence of a vacant house has such powerful effects on the prices of neighboring properties.⁸² Vacant houses are a cause, as well as a symptom of, weak inner-city market

73. Julie Scharper, *Uphill Battle to Rid the City of Vacant Properties*, BALTIMORE SUN (Feb. 9, 2011), http://articles.baltimoresun.com/2011-02-09/news/bs-md-ci-vacants-update-20110209_1_vacant-homes-vacant-properties-housing-officials.story.

74. See SANDRA J. NEWMAN ET AL., *POPULATION DYNAMICS IN BALTIMORE NEIGHBORHOODS: THE GOOD, THE BAD, AND THE NEUTRAL* (2001).

75. CITY OF SOUTH BEND, *supra* note 5, at 7.

76. *Id.* at 8.

77. *Id.* at 10.

78. *Id.*

79. Kelly, *supra* note 10, at 212.

80. Edward Glaeser & Joshua Gottlieb, *Urban Resurgence and the Consumer City*, at 20 (Harv. Inst. Econ. Res., Paper No. 2109, 2006). *But see* Nicole Garnett, *The People Paradox*, 2012 U. ILL. L. REV. 43, 47 (whether because urban dwellers lack time or diversity reduces trust levels, total social capital in cities may be lower than in suburbs).

81. Kelly, *supra* note 10, at 212.

82. *See id.*

neighborhoods because these communities are so dense.⁸³ Interdependence requires effective measures of accountability.⁸⁴

Fragmentation of city land into small lots requires a buyer to be as concerned about his or her neighbors' investments in their properties almost as much as his or her care for his or her own property.⁸⁵ But, fragmentation within the ownership of a property can frustrate appropriate investment as well. Like suburban owners, inner-city homeowners have mortgages on their homes. But, the unsustainable spread of subprime lending, especially in communities of color, led to a wave of foreclosures that has produced many more vacant houses.⁸⁶ The confusing array of lender assignments and loan servicer changes that frustrated borrowers seeking loan modifications also made it very difficult to identify and contact those responsible for recently foreclosed properties.⁸⁷ When the vacant houses became burdens rather than assets for lenders, foreclosures were aborted, leaving even more confusion as to who had the authority and responsibility for maintaining them.⁸⁸ When legal ownership of a property is in limbo, even cost-effective investments and maintenance will fall between the cracks.⁸⁹ To foster sustainability in the urban core, vacant house nuisance remedies should focus on making sure markets work effectively by internalizing costs of vacant houses to those responsible and coordinating investment in the face of property fragmentation.

II. THE NEED FOR A COMPREHENSIVE SET OF REMEDIES

The conventional governmental response to urban decline has focused on cost internalization and investment coordination, albeit separately. Traditional code enforcement has sought to make derelict property owners feel the pain they inflict on the members of the community.⁹⁰ When the economics of decline has overwhelmed such case-by-case policing, redevelopment officials have, sometimes and after much delay, invoked the nuclear option of eminent

83. *Id.*

84. *See id.* at 213.

85. *Id.* at 212 (citing WILLIAM H. SIMON, THE COMMUNITY ECONOMIC DEVELOPMENT MOVEMENT 43–45 (2001)).

86. Kermit J. Lind, *The Perfect Storm: An Eyewitness Account from Ground Zero in Cleveland's Neighborhoods*, 17 J. AFFORDABLE HOUS. & CMTY. DEV. L. 237, 239 (2007).

87. *Id.* at 247.

88. Michelle Conlin, *CFPB targets "zombie" foreclosures after Reuters report*, REUTERS, March 13, 2014; David A. Dana, *Why Mortgage "Formalities" Matter*, 24 LOY. CONSUMER L. REV. 505, 506 (2012).

89. *See Kelly, supra* note 10, at 213–16.

90. *Id.*

domain, the ultimate in investment coordination.⁹¹ These two poles of the vacant property nuisance abatement spectrum correspond to the basic division of legal remedies generally. In personam remedies use sanctions to affect internalization of costs, in the vacant property context, to have a landowner bear all the external costs associated with his or her ownership of the land.⁹² In rem responses, on the other hand, focus on the ownership of the property rather than the actions of the landowner.⁹³ Eminent domain coordinates investment by bringing fragmented property into unified ownership, assembling both title interests within parcels and parcels within the contiguous redevelopment area.⁹⁴ Code enforcement preserves the autonomy of the owner but forces him or her to bear the responsibility of it.⁹⁵ Eminent domain liquidates ownership of the property and gives the owner its fair market value in cash.⁹⁶

A classic work of legal scholarship categorized property entitlements by the types of remedies that law and equity offered to protect them.⁹⁷ In *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, Guido Calabresi and A. Douglas Melamed noted that some entitlements enjoy protection by injunction while the holders of other entitlements can expect only money damages as compensation.⁹⁸ Owners in the former category, which the authors call property rule entitlements, can name their price on any sale of their entitlements because, backed by the power of court order, they cannot be made to transfer their entitlements on any other terms.⁹⁹ Liability rule entitlements, however, can be liquidated at some adjudicated price, usually their fair market value.¹⁰⁰ Use of liability rules eliminate holdout problems and reduce other transaction costs.¹⁰¹ Property rule approaches persist in land ownership due to the high degree of personal investment put into it and the need for stability.¹⁰²

91. Lavea Brachman, *Lincoln Inst. of Land Pol'y, Vacant and Abandoned Property: Remedies for Acquisition and Redevelopment*, 17 LAND LINES, no. 4, 2005, at 4, available at http://www.lincolninst.edu/pubs/1057_Vacant-and-Abandoned-Property.

92. *Id.*

93. *Id.*

94. See Kelly, *supra* note 10, at 219–20.

95. *Id.* at 214.

96. See PAUL GOLDSTEIN & BARTON H. THOMPSON, JR., *PROPERTY LAW: OWNERSHIP, USE, AND CONSERVATION* 178–79 (2006).

97. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

98. *Id.* at 1105.

99. *Id.*

100. *Id.* at 1106.

101. *Id.* at 1107.

102. *Id.* at 1108.

Traditional code enforcement pressures owners through fines without interfering directly with their autonomy.¹⁰³ As such, it represents a property rule approach.¹⁰⁴ But, the use of eminent domain in urban redevelopment demonstrates that even land ownership can be rendered a liability rule entitlement.¹⁰⁵ It protects the cash value of the owner's interest even as it liquidates it to achieve land assembly goals.¹⁰⁶ As shown above, traditional code enforcement can succeed in neighborhoods with high land values but is less effective when the owner's net gains from rehabilitation diminish.¹⁰⁷ Eminent domain is a sledgehammer that gains control of nuisance properties but only after destroying, rather than supporting, the confidence of neighboring property owners.¹⁰⁸ The space between these two extremes provides opportunities for innovation.

Abraham Bell and Gideon Parchomovsky have demonstrated that certain legal rules move between both types of remedial protection.¹⁰⁹ Dubbing these pliant remedial structures, which the authors call "pliability rules", Bell and Parchomovsky show how the law can calibrate protection of in-kind entitlements to produce efficient results.¹¹⁰ Foreclosure represents the prominent pliability rule structure associated with land ownership.¹¹¹ When an owner's title has been conditioned on repayment of a debt, foreclosure proceedings determine at what point his or her equity of redemption, his or her right to pay off the debt and preserve the in-kind nature of the land ownership, will be terminated and the property transferred to or on behalf of the

103. Kelly, *supra* note 10, at 215.

104. Calabresi & Melamed, *supra* note 97, at 1092 n.7.

105. The only prior constraint, the "public use" requirement has been interpreted broadly by federal courts and many, though not all, state courts interpreting similar provision in state constitutions. *Kelo v. City of New London*, 545 U.S. 469, 488–89 (2005); *Honolulu v. Sherman*, 129 P.3d 542, 580 (Haw. 2006); *R.I. Econ. Dev. Corp. v. Parking Co.*, 892 A.2d 87, 107–08 (R.I. 2006). *But see* *County of Wayne v. Hathcock*, 684 N.W.2d 765, 788 (Mich. 2004); *Norwood v. Horney*, 853 N.E.2d 1115, 1152 (Ohio 2006).

106. James J. Kelly Jr., *Bringing Clarity to Title Clearing: Tax Foreclosure and Due Process in the Internet Age*, 77 U. CIN. L. REV. 63, 73 (2008).

107. Kelly, *supra* note 10, at 215.

108. G. Davis Mathues, *Shadow of a Bulldozer?: RLUIPA and Eminent Domain after Kelo*, 81 NOTRE DAME L. REV. 1653, 1682 (2006).

109. Abraham Bell & Gideon Parchomovsky, *Pliability Rules*, 101 MICH. L. REV. 1, 7 (2002).

110. *Id.* at 63.

111. Bell and Parchomovsky identify eminent domain as "the most famous instance of pliability rule protection" because the property rule protection gives way to liability protection only "upon [the government] making a decision by a process specified in law." *Id.* at 59. But, the right of redemption at issue in the foreclosure proceeding provides a more meaningful example of a legal gateway between property and liability rule protection. Kelly, *supra* note 106, at 100.

creditor.¹¹² Most foreclosure sales are liability rule approaches in that they do not cause the owner to forfeit the monetary value of remaining equity but preserve it by requiring any surplus net sale proceeds to be paid out to those who were foreclosed upon.¹¹³ Foreclosure proceedings start with the borrower's interest in the collateral as a property rule entitlement moving towards a liability rule entitlement.¹¹⁴ The focus of the procedure is to determine when the owner's time to redeem has finally elapsed.¹¹⁵

To use liability rules in the context of vacant house remediation, we need to develop in rem foreclosure remedies that make noncompliance with public norms a basis for liquidating the existing title interests. To be effective not only against the owner but all stakeholders in the property, the threat of foreclosure must be based on a lien that takes priority over all existing private interests, a so-called super-priority lien.¹¹⁶ Vacant building receivership sales and property tax foreclosure proceedings use such liens.¹¹⁷ Deploying a foreclosure mechanism based upon an owner's failure to pursue a feasible rehabilitation moves code enforcement strategy from a sanction against willful failure to comply to a price-based approach that reveals the property's potential value and the costs of realizing it.¹¹⁸ By putting delinquent owners in competition with other potential rehabilitators, this code-based foreclosure method makes sure those properties that can be fixed up are.¹¹⁹

When even the most effective cost internalization is insufficient to achieve rehabilitation, there is no need to turn immediately to the extreme of eminent domain. Investment coordination can also be achieved through a liability rule's conditional deference to the owner's property rights.¹²⁰ Rather than take all properties in a severely distressed neighborhood, a coordinated use of property tax foreclosure can assemble those properties that owners have walked away from, as evidence by their failure to pay delinquent property taxes.¹²¹ Under this calibrated approach to investment coordination, owners

112. Grant S. Nelson and Dale A. Whitman, *Reforming Foreclosure: The Uniform Nonjudicial Foreclosure Act*, 53 DUKE L.J. 1399, 1438 (2004).

113. See Kelly, *supra* note 106, at 99.

114. See *id.*

115. See *id.* at 99–100.

116. Frank Alexander, *Tax Liens, Tax Sales and Due Process*, 75 IND. L. J. 747, 748 (2000).

117. *Id.* at 770; Kelly, *supra* note 10, at 223; Kelly, *supra* note 106, at 73.

118. See Kelly, *supra* note 10, at 217.

119. *Id.* at 226.

120. *Id.*

121. See Matthew J. Samsa, *Reclaiming Abandoned Properties: Using Public Nuisance Suits and Land Banks to Pursue Economic Redevelopment*, 56 CLEV. ST. L. REV. 189, 201–02 (2008).

fully committed to their properties will not suffer the demoralization costs associated with invocation of eminent domain.¹²²

An in rem approach to code enforcement can force cost internalization in new and effective ways. A land assembly method that allows private property owners a chance to redeem coordinates investment without demoralizing existing property owners.¹²³ Before turning to particularized descriptions of how vacant building receivership sales and vacant property tax foreclosures are best structured, I will walk through how these two foreclosure pliability structures fill the gap between traditional code enforcement and eminent domain.

As discussed above, urban real estate markets face a significant challenge in small lot sizes.¹²⁴ Urban property owners must be almost as concerned with their neighbor's investment and upkeep choices as they are with their own.¹²⁵ The lapse of an unoccupied house into a derelict condition imposes an external cost upon the neighbors.¹²⁶ By sanctioning serious and visible code violations, local governments try to make responsible owners feel their neighbors' pain.¹²⁷

Private rights of action can give those neighbors a more direct way to shift their costs to liable owners.¹²⁸ Tort approaches have their own costs.¹²⁹ Rarely can those costs be easily shared when many neighbors are affected.¹³⁰ In the end, the ultimate effectiveness of the private remedy will depend on the feasibility of collecting money judgments.¹³¹

While in personam remedies also focus on money, they are not quite so limited as a civil suit for damages. Many jurisdictions allow fines to be

122. See generally Frank Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1214 (1967) (asserting "'Demoralization costs' are defined as the total of (1) the dollar value necessary to offset disutilities which accrue to losers and their sympathizers specifically from the realization that no compensation is offered, and (2) the present capitalized dollar value of lost future production (reflecting either impaired incentives or social unrest) caused by demoralization of uncompensated losers, their sympathizers, and other observers disturbed by the thought that they themselves may be subjected to similar treatment on some other occasion").

123. Kelly, *supra* note 10, at 224. See also Kelly, *supra* note 106, at 100.

124. Kelly, *supra* note 10, at 212.

125. *Id.*

126. *Id.*

127. *Id.* at 213.

128. HEATHER K. WAY ET AL., CMTY. DEV. CLINIC, BUILDING HOPE: TOOLS FOR TRANSFORMING ABANDONED AND BLIGHTED PROPERTIES INTO COMMUNITY ASSETS 12 (2007).

129. *Id.*

130. See *id.*

131. See Kermit J. Lind, *Can Public Nuisance Law Protect Your Neighborhood from Big Banks?*, 44 SUFFOLK U. L. REV. 89, 104 (2011).

imposed relatively quickly, sometimes through an administrative process.¹³² The amount of these fines does not depend on the monetary loss suffered by neighbors or the public at large.¹³³ Moreover, in many cities, these fines immediately become liens on the property, often taking first priority over preexisting private mortgages and liens.¹³⁴ But traditional code enforcement sanctions are not limited to the pocketbook.¹³⁵

When courts are involved, injunctions can be issued and backed up through findings of contempt.¹³⁶ While theoretically enforceable through imprisonment, willful failure to comply with an order to repair generally yields still larger fines.¹³⁷ A finding of willfulness requires the court to look into the costs of compliance and the ability of the owner to afford them.¹³⁸ As the costs of rehabilitation can involve tens of thousands of dollars,¹³⁹ relatively few owners will have sufficient cash on hand to bring the property into full code compliance.

Whether administrative or judicial in nature, proceedings to enforce building code violations require notice to responsible parties.¹⁴⁰ Enhanced enforcement mechanisms involve still greater due process requirements.¹⁴¹ Criminal contempt proceedings, for example, cannot move forward unless the accused is present in the courtroom.¹⁴² When the subject matter is a house that the owner of record abandoned years ago, tracking down and personally serving that owner can be a major undertaking.¹⁴³ Even if the owner lives in the area, the address provided in official records for him or her may be the vacant property itself.¹⁴⁴ When the owner is an investor in another state or

132. WAY ET AL., *supra* note 128, at 10, 13.

133. Robert Cooter, *Prices and Sanctions*, 84 COLUM. L. REV. 1523, 1532–33 (1984) (stating that the sanctions approach has an information costs advantage over adjudication of private lawsuits by stipulating an amount for a penalty rather than investigating the monetary value of the damages. As long as lawmakers are confident in their definitions of permitted and prohibited behavior, it is not essential that they set the penalty at some optimal level based on the social cost imposed by the sanctioned activity).

134. Kelly, *supra* note 10, at 216.

135. *Id.* at 215.

136. 17 C.J.S. *Contempt* §23 (2013).

137. Kelly, *supra* note 10, at 214.

138. Shippen, 693 S.E.2d at 243–44.

139. *See Samsa, supra* note 121, at 204–05.

140. 17 C.J.S. *Contempt* § 121 (2013).

141. *See Kelly, supra* note 10, at 217–18.

142. *Adams v. Epperly*, 499 N.E.2d 374, 376 (Ohio Ct. App. 1985).

143. *See Ferris v. State ex rel. Maass*, 249 N.W.2d 789, 791 (Wis. 1977); James R. Cohen, *Abandoned Housing: Exploring Lessons From Baltimore*, 12 HOUS. POL'Y DEBATE 415, 435 (2001).

144. Cohen, *supra* note 143.

another country, the problems of hailing him or her into court increase significantly.¹⁴⁵ Experienced building code violators are rarely motivated to make notification easier, especially once they learn the benefits of evading notices.¹⁴⁶

Proceedings that focus on ownership of property rather than adjudicate personal obligation are in rem, not in personam.¹⁴⁷ These proceedings also require that affected parties receive constitutionally adequate notice.¹⁴⁸ But rules and statutes specifying adequate notice are often less exacting for foreclosure and other in rem processes than for their in personam counterparts.¹⁴⁹ A plaintiff in a lawsuit for damages against the owner of a vacant house may be able to proceed without actual, personal service only after demonstrating that his or her attempts to serve the defendant have been unsuccessful because of the defendant's deliberate attempts to evade service.¹⁵⁰ The evidence of evasion may prove to be more elusive than the defendant.¹⁵¹ For in rem proceedings, however, a court will only be satisfied once all reasonable attempts to notify the defendant at all reasonably ascertainable addresses have been made.¹⁵²

In personam remedies can light a fire under those who have been slow to commence a feasible rehabilitation. When the neighborhood market supports the legally required investment, the threat of fines will frequently succeed in helping responsible owners appreciate their neighbors' predicament and remedy the situation.¹⁵³ Even when the rehabilitation investment is not assured to be fully reflected in the resale value of the home, the prospect of significant fines can make an owner put his or her doubts aside.¹⁵⁴ To a lesser extent, a stubborn or contrary owner can sometimes be coerced to make an investment in a vacant property that will benefit him or her in the long-term even if he refuses to see it.¹⁵⁵

145. *Id.*

146. *See Kelly, supra* note 10, at 214.

147. *Shaffer v. Heitner*, 433 U.S. 186, 199–200 (1977).

148. *Id.* at 204–06.

149. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 311–13 (1950). *See also Kelly, supra* note 10, at 218.

150. *Slenzka v. Landstar Ranger, Inc.*, 204 F.R.D. 322 (E.D. Mich. 2001). *See also Kelly, supra* note 10, at 218; FED. R. CIV. P. 4.

151. *See Randy G. Gerchick, No Easy Way Out: Making the Summary Eviction Process a Fairer and More Efficient Alternative to Landlord Self-Help*, 41 UCLA L. REV. 759, 784 (1994).

152. Michael H. Rubin & E. Keith Carter, *Notice of Seizure in Mortgage Foreclosures and Tax Sale Proceedings: The Ramifications of Mennonite*, 48 LA. L. REV. 535, 539 (1988).

153. Creola Johnson, *Fight Blight: Cities Sue to Hold Lenders Responsible for the Rise in Foreclosures and Abandoned Properties*, 2008 UTAH L. REV. 1169, 1197 (2008).

154. *See id.* at 1196–97.

155. *Id.*

But, many times, a financially feasible renovation of a vacant house is so stymied by an owner's lack of willingness and/or ability to rehabilitate the property that neither threats of sanctions nor the sanctions themselves will produce the needed rehabilitation.¹⁵⁶ The coercion approach to cost internalization as a mode of achieving better pricing and market efficiency presupposes the capability and rationality of the owner.¹⁵⁷ Even if the owner is able both to recognize and pursue a worthwhile rehabilitation of the property, he or she may not be able to benefit from the investment due to outstanding mortgages and liens and may refuse to send good money after bad.¹⁵⁸

An owner's inability to carry out a financially feasible rehabilitation may stem from a total lack of executive functioning. Working with contractors is challenging and some owners will be overmatched by the complexity of their role.¹⁵⁹ In some cases, the lack of capacity is much clearer. A mentally incompetent or deceased owner will not be made to comply with an order to repair, no matter how sensible the investment is.¹⁶⁰ Proper notice of threat of foreclosure, including special forms of notice to protect owners that lack legal capacity, may motivate curative action or a voluntary transfer.¹⁶¹ Otherwise, an owner incapable of meeting basic code obligations must be replaced, making transfer of title essential to any privately funded abatement of such a vacant house nuisance.¹⁶²

An owner unwilling to act prudently makes unlikely not only compliance by rehabilitation but also limits hope that a voluntary transfer to a rational, capable owner will happen. An owner who refuses not only to fix the property but also turns down reasonable purchase offers may have a completely unrealistic view of its worth.¹⁶³ Alternatively, the owner may have a strong personal attachment to the property even though it is no longer habitable.¹⁶⁴ In such cases, an involuntary transfer by means of foreclosing a super-priority lien presents an attractive alternative to court-ordered coercion. By forcing

156. *See id.* at 1194.

157. *Id.* at 1234.

158. *Id.* at 1236.

159. *See* Julia Patterson Forrester, *Constructing a New Theoretical Framework for Home Improvement Financing*, 75 OR. L. REV. 1095 (1996).

160. Robin Powers Kinning, *Selective Housing Code Enforcement and Low-Income Housing Policy: Minneapolis Case Study*, 21 FORDHAM URB. L.J. 159, 181 (1993).

161. C. Tyler Mulligan, *Toward a Comprehensive Program for Regulating Vacant or Abandoned Dwellings in North Carolina: The General Police Power, Minimum Housing Standards, and Vacant Property Registration*, 32 CAMPBELL L. REV. 1, 32 (2009).

162. Kinning, *supra* note 160, at 181.

163. *See* James J. Kelly, Jr., "We Shall Not be Moved:" *Urban Communities, Eminent Domain, And The Socioeconomics Of Just Compensation*, 80 ST. JOHN'S L. REV. 923, 968 (2006).

164. *Id.* at 952.

such owners to realize that ignoring their responsibilities will cost them their ownership of the property, a foreclosure based on failure to comply with code takes a new approach to cost internalization, one in which the cost imposed on the responsible party is liquidation of their ownership interest.¹⁶⁵

If the owner's interest is underwater, then even a willing seller may not be able to unload the property. Anyone buying the property will want to acquire it only once it is free and clear of any liens and encumbrances. If the owner is in default, the mortgagee may have the legal right to foreclose but elect not to pursue foreclosure because of doubts about the property condition and the strength of the neighborhood real estate market.¹⁶⁶ Without the foreclosure, the owner has legal title but no financial stake, while the lender has a financial interest but lacks legal title.¹⁶⁷ When a bargain-and-sale transfer is unavailable, a title-clearing mechanism such as a super-priority lien foreclosure may be the only feasible response.

An owner who is forced to choose between eliminating the nuisance or having his property sold to those who are willing to fix it faces the true market judgment regarding the decision to invest in rehabilitation.¹⁶⁸ If the property is not worth fixing up right away, there will be no foreclosure because there will be no buyers willing to take on the responsibility of rehabilitating the property.¹⁶⁹ If, however, the property is located in a neighborhood strong enough to support investment in it, then the stakeholders are put to the question as to whether they will preserve their interests and carry out the renovation or step aside and take the cash value of their stakes in the property in its current condition.¹⁷⁰

Foreclosure produces better cost internalization than traditional code enforcement in certain cases for two reasons. First, the in rem approach to procedural due process is not as burdensome as for civil and criminal contempt proceedings and does not lead to a battle of wills with intransigent defendants.¹⁷¹ Second, the cost being shifted onto the noncompliant owner in foreclosure is no longer a fine of questionable collectability but the imminent loss of his or her ownership in the property.¹⁷²

165. Mulligan, *supra* note 161, at 32.

166. Johnson, *supra* note 153, at 1234.

167. *Id.* at 1186.

168. Kelly, *supra* note 10, at 211.

169. Johnson, *supra* note 153, at 1183–84.

170. *See* Mulligan, *supra* note 161, at 20.

171. *See* Kelly, *supra* note 10, at 217–18.

172. Johnson, *supra* note 153, at 1194.

A. *When Stand-Alone Renovations Do Not Pencil Out—The Need for Investment Coordination*

Fragmentation of urban land into small lots intensifies the externality problem and the importance of vacant house remediation.¹⁷³ Effective methods for cost internalization, for forcing owners to face the true economic decision before them or replace them with those who will, are essential for those neighborhoods that still have the strength to justify the investment required for complete rehabilitation of a vacant property.¹⁷⁴ But, what if a neighborhood is already beset by a dozen or more vacant properties? Fixing up one alone will not only fail to bring adequate return for that rehabilitator, but it will also not make an appreciable difference in the neighborhood.¹⁷⁵ Here, the fragmentation associated with city neighborhoods requires remedies to go beyond cost internalization to more proactive investment coordination.¹⁷⁶

The above discussion of vacant, derelict houses in otherwise healthy neighborhoods examined several cases in which sensible renovations were frustrated by ownership circumstances. The assumption that the prolonged presence of a vacant house signals the decline of the neighborhood can be a self-fulfilling prophecy.¹⁷⁷ But, cost internalization remedies that effectively use the threat of foreclosure can sort out which properties can be brought back to productive use right away.¹⁷⁸ Even in those neighborhoods where renovation is not supported by the local real estate market, revitalization should not necessarily be judged unsustainable. Instead of bringing one property back to productive use, it may be necessary to bring the neighborhood as a whole back.¹⁷⁹

The coordination of real estate investment has been used to justify massive urban redevelopment projects using eminent domain.¹⁸⁰ But, using tax foreclosure to acquire vacant properties in neighborhoods beset by them offers a more promising alternative. First, tax foreclosure sidesteps the troubled history of urban renewal's use of eminent domain and the more recent populist backlash that arose from the U.S. Supreme Court's decision in *Kelo v. City of New London*.¹⁸¹ Second, the top-down, large scale investment necessary to justify the use of eminent domain can give way to alternative approaches to

173. Kelly, *supra* note 106, at 67.

174. See Johnson, *supra* note 153, at 1194.

175. *Id.* at 1198.

176. Mulligan, *supra* note 161, at 3–4.

177. Johnson, *supra* note 153, at 1181–82.

178. See Kelly, *supra* note 10, at 217.

179. Mulligan, *supra* note 161, at 2–3.

180. See Kelly, *supra* note 163, at 957.

181. Ilya Somin, *What if Kelo v. City of New London Had Gone the Other Way?*, 45 IND. L. REV. 21, 21 (2011).

neighborhood revitalization, ones that engage the community about what is best right now and what steps can be made toward a brighter future.¹⁸² Third, tax foreclosure is not burdened by the statutory limitations associated with eminent domain proceedings.¹⁸³

The innate power of the sovereign to compel the sale of privately owned land for public necessity has been unquestioned by the law but has greatly troubled everyday citizens, particularly homeowners.¹⁸⁴ When the U.S. Supreme Court held that the City of New London had a right to take owner-occupied residential property as part of a redevelopment project that would induce investment from the Pfizer Corporation, a tidal wave of anti-redevelopment sentiment spread across the nation.¹⁸⁵ Although Hurricane Katrina shattered New Orleans later that same year, voters in Louisiana subsequently voted to curtail the use of eminent domain authority for redevelopment purposes.¹⁸⁶ The reality that a property owner could be forced to sell his or her land without fault or ability to prevent the sale profoundly disturbs many Americans' sense of what it means to be a homeowner.¹⁸⁷

Although tax foreclosure can accomplish many of the same land assembly goals used to justify eminent domain, it offers both a rationale for liquidation and an opportunity to avoid it. The payment of property taxes is a fundamental and universally applicable obligation of property ownership.¹⁸⁸ Because a person who does not pay property taxes does not expect to be able to escape the consequences of delinquency, the prospect of tax foreclosure does not threaten the security of tenure of property owners generally.¹⁸⁹ The foreclosure process itself is designed to allow a reasonable period of time for the debtor to cure the default and preserve his or her ownership of the property.¹⁹⁰ By reconnecting the equity of redemption to land assembly and title clearing, tax

182. Kelly, *supra* note 163, at 928–29.

183. Alexander, *supra* note 116, at 756, n.108.

184. United States v. Carmack, 329 U.S. 230, 237–38 (1946) (“The power of eminent domain is essential to a sovereign government.”).

185. John M. Broder, *States Curbing Right to Seize Private Homes*, N.Y. TIMES, Feb. 21, 2006, at A1.

186. Act of July 25, 2006, No. 851, § 1, 2006 La. Acts 2957 (This act authorized a ballot initiative to amend Constitution to include, *inter alia*, the following: “Except as specifically authorized by Article VI, Section 21 of this Constitution property shall not be taken or damaged by the state or its political subdivisions: (a) for predominant use by any private person or entity; or (b) for transfer of ownership to any private person or entity.” Art. VI, § 21 authorizes condemnation of industrial property for transfer to new industrial investors.).

187. Kelly, *supra* note 163, at 930–31.

188. Alexander, *supra* note 116, at 765.

189. Kelly, *supra* note 106, at 67 n.9.

190. *Id.* at 72–73.

foreclosure reclaims truly derelict properties in a way that builds upon a sense of fair play.¹⁹¹

Land banking is nothing more than the acquisition of vacant properties for subsequent return to productive use.¹⁹² Scaled-up tax foreclosure of delinquent houses and lots allows for land assembly and a bundled disposition process.¹⁹³ As with the controversial redevelopment plan challenged in *Kelo*, the transfer from the public entity to the private recipient in an eminent domain redevelopment is already arranged before the properties are taken, often without meaningful community input.¹⁹⁴ Because the tax foreclosure mechanism is a creditor's device, which does not need to require a public use pretext, tax-delinquent vacant properties can be assembled as communities engage with the publicly accountable land banking entity as to their disposition.¹⁹⁵ Land banking strategies can work in tandem with demolition of vacant houses to create usable open space in severely undercrowded neighborhoods.¹⁹⁶ Newly created vacant lots can be made available to homeowners as sideyards and to community greening groups as vegetable gardens and pocket parks. By gaining control and taking responsibility for vacant properties right now, land banks can set the stage for a grounded move forward for communities contending with decades of demographic decline.

Finally, tax foreclosure, in addition to being free of the historical baggage associated with eminent domain redevelopment, is not subject to the same legal constraints that follow the delegation of eminent domain to local governments. As an inherent power of the sovereign, the power of eminent domain condemnation is vested originally in state legislatures.¹⁹⁷ Those state legislatures have the power to delegate that authority to other bodies but often subject the invocation of that power to planning restrictions and further legislative action at the local level.¹⁹⁸ The actual condemnation award is adjudicated through a jury trial process, incentivizing public agencies to pay premiums to streamline acquisition.¹⁹⁹ For the kind of land assembly needed by severely distressed communities, a tax foreclosure approach is less costly and more efficient.²⁰⁰

191. *Id.* at 73.

192. U.S. DEP'T. HOUS. & URBAN DEV., *supra* note 16, at 1.

193. *Id.* at 2–3.

194. Nicole S. Garnett, *Planning as Public Use?*, 34 *ECOLOGY L.Q.* 443, 446–47 (2007).

195. *Id.* at 453.

196. U.S. DEPT. OF HOUS. & URBAN DEV., *supra* note 16, at 3.

197. Kelly, *supra* note 163, at 933.

198. *See, e.g.*, N.J. CONST. art. VIII, § 3 (restricting condemnation of blighted areas); COLO. REV. STAT. § 31-25-102 (2013) (regulating urban renewal condemnation).

199. *See, e.g.*, *Utility Center Inc. v. City of Fort Wayne*, 985 N.E.2d 731, 733 (Ind. 2013).

200. Kelly, *supra* note 106, at 117–18.

III. FILLING IN THE GAPS

In this final part, I move beyond the case for foreclosure-based responses to vacant houses and look at the actual tools being used to reconnect derelict structures to a sustainable urban market. The vacant property problem has been a top agenda item for many struggling cities well before the mortgage foreclosure crisis made it a national emergency.²⁰¹ The need for powerful tools to repair faltering neighborhood real estate markets has already spurred innovations along the lines advocated for above. An examination of the essential features of these best practices provides guideposts for broader-based reform.

In 1990, Baltimore enacted an amendment to its Building Code, an adoption of the precursor to the IBC.²⁰² The ordinance empowered the city, or its community nonprofit designee, to file a judicial petition for appointment of a receiver for any property that has an outstanding vacant building violation notice.²⁰³ In order to avoid the appointment of the receiver, an owner, a mortgagee, or any other party with a preexisting interest in that property has to show a willingness and ability to rehabilitate the property.²⁰⁴ Once appointed, the receiver's expenses, administrative as well as remedial, form the basis for a super-priority lien on the vacant property.²⁰⁵

Many other code enforcement receivership statutes require long waiting periods prior to a receiver's foreclosure on his or her special lien.²⁰⁶ Designed for income-producing, occupied apartment buildings, these receivership procedures provide for foreclosure only as a last-resort means of recouping the costs of maintaining a truly abandoned building.²⁰⁷ Baltimore's ordinance, however, authorizes the court to have the receiver foreclose on this lien before rehabilitation work has even begun and auction the property off to any bidder

201. See Press Release, Smart Growth Am., Second Reclaiming Vacant Properties Conference Begins Today (June 1, 2009), available at http://www.smartgrowthamerica.org/documents/sga-release_06-01-09.pdf.

202. BLDG., FIRE, AND RELATED CODES OF BALT. CITY, INT'L BLDG. CODE § 121 (2013).

203. BLDG., FIRE, AND RELATED CODES OF BALT. CITY, INT'L BLDG. CODE § 121.2 (2013).

204. BLDG., FIRE, AND RELATED CODES OF BALT. CITY, INT'L BLDG. CODE § 121.7 (2013).

205. BLDG., FIRE, AND RELATED CODES OF BALT. CITY, INT'L BLDG. CODE § 121.13 (2013).

206. Ohio and Rhode Island both require that the receiver certify the abatement of the nuisance prior to selling the property. OHIO REV. CODE ANN. § 3767.41(I)(1) (West 2013); R.I. GEN. LAWS § 34-44-12 (2013). Missouri permits sale after two years of inaction by parties in interest. MO. REV. STAT. § 441.641 (2013) (prior to a 1998 amendment, the law required a ten-year waiting period). For a complete summary of state receivership statutes, see ALAN MALLACH, BRINGING BUILDINGS BACK: FROM ABANDONED PROPERTIES TO COMMUNITY ASSETS 49-59 (2d ed. 2010).

207. None of the three different kinds of receivership statutes that Connecticut has created allows for sale of the property by the receiver. MALLACH, *supra* note 206, at 52-53. Texas requires three years of receivership control before sale is an option. *Id.* at 56-57.

who has demonstrated the ability to rehabilitate the property immediately.²⁰⁸ Rather than require the receiver to try to obtain financing on a property that he or she does not own, vacant building receivership offers nuisance abatement using private capital.²⁰⁹

At its core, this remedy imposes a super-priority lien for failure to eliminate a vacant building nuisance. The fact that the receiver's lien takes priority over all preexisting private mortgages and liens allows the threat of foreclosure to be effective against lenders as well as owners. If these parties do not step forward to fix the property, then the receiver is able to offer a clean title to those who will.²¹⁰

Creating new super-priority liens and foreclosure proceedings would be beyond the scope of most local governments' home rule authority.²¹¹ Baltimore was able to create such a proceeding because of a relatively unique provision in Maryland's home rule provisions that allows the city "[t]o enact local laws ... for the protection and promotion of public safety, health, morals, comfort and welfare, relating to ... the erection, construction, repair and use of buildings and other structures; and to enact local laws providing appropriate administrative and judicial proceedings, remedies, and sanctions for the administration and enforcement of such ordinances and amendments."²¹² On the other hand, jurisdictions, such as Cleveland, Ohio, have been forced to go to their state legislatures to enact such a remedy.²¹³ The resulting receivership law in Ohio creates a lien that takes priority over preexisting judgment liens but not mortgages.²¹⁴

Nearly as important as the super-priority nature of the lien is the timing of the actual foreclosure sale. In order to make the threatened liquidation of the property a true inducement to the delinquent owner to fix or transfer the property, the foreclosure on the receiver's lien cannot be a mere eventuality a year or two down the road.²¹⁵ Even if the foreclosure of the lien can be postponed by the owner's payment in full of the receiver's costs, the owner must be made to understand that he or she will pay for bringing property into code compliance or the property will be sold.²¹⁶

208. BLDG., FIRE, AND RELATED CODES OF BALT. CITY, INT'L BLDG. CODE § 121.10 (2013).

209. BLDG., FIRE, AND RELATED CODES OF BALT. CITY, INT'L BLDG. CODE § 121.9 (2013).

210. *Id.* at § 121.9.

211. *See e.g.*, 53 PA. CONS. STAT. ANN. § 2962 (West 2013).

212. MD. CODE ANN., Local Gov't § 10-317 (West 2013) (emphasis added).

213. OHIO REV. CODE ANN. § 5721.14 (2000).

214. *See id.*

215. Kelly, *supra* note 10, at 223–24.

216. *Id.* at 219.

Baltimore's approach is somewhat unique in that it authorizes the court to order the sale of the property before the code violations have been corrected.²¹⁷ The transfer itself to a qualified bidder is part of the remedial strategy.²¹⁸ By allowing a pre-screened buyer to purchase the property in its dilapidated state, this approach allows the party that is going to ready the property for productive use to handle the entire rehabilitation process.²¹⁹ Other receivership statutes require the receiver to eliminate the outstanding code violations as a prerequisite to any foreclosure on the unpaid lien.²²⁰ Indiana's unsafe building law is not clear on this point.²²¹ A promising middle ground would be to require that the receiver carry out any urgently needed repairs on the vacant structure before putting it up for sale.

If the property is to be sold in anything less than pristine condition, it is of great importance that bidders at the auction be pre-qualified as developers willing and able to rehabilitate the property. Transferring the property from one delinquent owner to another does nothing to remedy a vacant house nuisance. Many cities have broad authority to conduct urgently needed repairs to the exteriors of vacant houses and impose super-priority liens without judicial appointment of a receiver.²²² When foreclosed these liens enter into the general tax sale process in which an array of speculators and debt collectors bid alongside experienced developers.²²³ For a receivership sale remedy to be an effective and legitimate means of achieving code compliance, bidders at any such sale must be screened and must be held accountable on their commitment to prompt rehabilitation of the property.²²⁴

The process of screening bidders for a receivership sale also helps ensure that the properties are amenable to renovation using private capital.²²⁵ If a vacant house is located in a market that is too weak to support the investment needed to bring the property into compliance, a foreclosure based on failure to adhere to code standards is not an appropriate response.²²⁶ Neighborhoods with

217. BLDG., FIRE, AND RELATED CODES OF BALT. CITY, INT'L BLDG. CODE § 121.10 (1990).

218. Kelly, *supra* note 10, at 219.

219. *Id.*

220. OHIO REV. CODE ANN. § 3767.41(I)(1) (West 2013); R.I. GEN. LAWS § 34-44-12 (West 2013).

221. *See* IND. CODE § 36-7-9-20(a)(5) (2012).

222. MALLACH, *supra* note 206, at 47.

223. *Id.*

224. The Indiana Unsafe Building law, for instance, requires that "[t]he transferee in either a public or private sale must first demonstrate the necessary ability and experience to rehabilitate the premises within a reasonable time to the satisfaction of the receiver. IND. CODE ANN. § 36-7-9-20(a)(5) (2013).

225. Kelly, *supra* note 10, at 220.

226. *Id.* at 226.

multiple vacant properties require the kind of investment coordination that property tax foreclosure provides. The weakness of the real estate markets in these neighborhoods facilitates tax foreclosure by discouraging owners from paying property taxes on the vacant houses and lots they own.²²⁷

Every state provides some statutory scheme for collecting unpaid property taxes by foreclosure.²²⁸ The vast majority of states use a combined sale and foreclosure process to ensure both that the taxes due are paid in full and that any leftover value in the property is made available to the stakeholders whose interests have been liquidated.²²⁹ Most mortgage foreclosure proceedings

227. *Id.* at 211.

228. Judicial: ALA. CODE § 40-10-12 (Westlaw through 2013 Reg. Sess.); ALASKA STAT. § 29.45.370 (2012); ARIZ. REV. STAT. ANN. § 42-18201 (Supp. 2013); CONN. GEN. STAT. § 12-157 (2013); DEL. CODE ANN. tit. 9, § 8742 (2011); FLA. STAT. § 197.502 (2013); IDAHO CODE ANN. § 63-1003 (2007); 35 ILL. COMP. STAT. 200 / 21-75 (2012); IND. CODE § 6-1.1-24-4.7 (2013); KAN. STAT. ANN. § 79-2801 (Supp. 2012); KY. REV. STAT. ANN. § 134.420 (West Supp. 2009); LA. REV. STAT. ANN. § 13:5031 (Westlaw through 2013 Reg. Sess.); ME. REV. STAT. tit. 36, § 552 (Westlaw through 2013 Reg. Sess. & First Special Sess. of 126th Legis.); MD. CODE ANN., TAX-PROP. ANN. § 14-834 (LexisNexis 2007); MASS. GEN. LAWS ch. 60, § 65 (Westlaw through the 2013 1st Ann. Sess. and Ch. 1 of the 2014 2nd Ann. Sess.); MINN. STAT. § 279.01 (Supp. 2009); MISS. CODE ANN. § 27-41-11 (LEXIS through the 2013 Reg. Sess. and 1st and 2nd Extraordinary Sess.); MO. REV. STAT. § 140.190 (2008); MONT. CODE ANN. § 15-16-403 (2013); NEB. REV. STAT. § 77-1902 (Supp. 2012); NEV. REV. STAT. § 361.5648 (2007); N.J. STAT. ANN. § 54:5-6 (West 2002); N.M. STAT. ANN. § 7-38-48 (2013); N.Y. REAL PROP. TAX LAW § 1123 (McKinney 2013); N.C. GEN. STAT. § 105-355 (LEXIS through the 2013 Reg. Sess. Annotations through Sept. 6, 2013); N.D. CENT. CODE § 57-02-40 (2011); OHIO REV. CODE ANN. § 5721.10 (West Supp. 2012); OR. REV. STAT. § 312.010 (2011); 72 PA. CONS. STAT. ANN. § 5860.301 (West, Westlaw through Reg. Sess. Act 2013-88, 91, 93 to 97, 99 to 103, except 20 PA. CONS. STAT. ANN. § 7101 to end current through 2013-104); R.I. GEN. LAWS § 44-9-25 (2010); S.C. CODE ANN. § 12-51-40 (2003); S.D. CODIFIED LAWS § 10-22-21 (Westlaw through 2013 Reg. Sess. and Sup. Ct. R. 13-12); TEX. TAX CODE ANN. § 33.91 (West 2008); VT. STAT. ANN. tit. 32 § 5191 (2008); VA. CODE ANN. § 58.1-3340 (2009); WASH. REV. CODE § 84.56.020 (2013). Nonjudicial: ARK. CODE ANN. § 26-37-101 (2012); CAL. REV. & TAX. CODE § 3691 (West Supp. 2013); COLO. REV. STAT. § 39-11-101 (LEXIS through all laws passed at the First Reg. Sess. of the Sixty-Ninth G.A. of the State of Colo. (2013)); GA. CODE ANN. § 48-3-3 (Supp. 2009); HAW. REV. STAT. § 246-56 (2013); IOWA CODE § 446.15 (2009); MICH. COMP. LAWS § 211.60 (through 2013 P.A. 267 & includes 269-77); N.H. REV. STAT. ANN. § 80:59 (2012); OKLA. STAT. tit. 68, § 3105 (Westlaw through Ch. 23 (end) of the First Extraordinary Sess. of the 54th Legis. (2013)); TENN. CODE ANN. § 67-5-2003 (LEXIS through 2013 Reg. Sess.); UTAH CODE ANN. § 59-2-1303 (LexisNexis 2008); W. VA. CODE § 11A-2-1 (2013); WIS. STAT. § 75.12 (through 2013 Wisc. Act 117 and all Sup. Ct. Orders entered before Jan. 17, 2014); WYO. STAT. ANN. § 39-13-108 (2007).

229. Michigan provides for a public sale but applies the age-old remedy of strict foreclosure. Thus, failure to redeem the property by payment of the taxes due results in a total forfeiture of the property with any surplus going to the governmental creditor. MICH. COMP. LAWS § 211.60(4) (through 2013 P.A. 267 & includes 269-77).

auction the property only after the borrower's time to redeem has elapsed.²³⁰ In property tax collections, however, most proceedings to foreclose the equity of redemption occurs only after the property tax lien has been sold to a private bidder.²³¹

Some states grant tailored periods of redemption for different types of property interests.²³² Although Kansas is patient with homestead owners, giving them three years to pay, owners of vacant buildings receive only one year after the sale to prevent foreclosure.²³³ Kansas has decided that the community should not have to be particularly patient with owners of unoccupied properties when "there has been a failure to perform reasonable maintenance."²³⁴

Crucial to the success of tax sale foreclosure as both a collection remedy and a means of clearing title to abandoned properties is the super-priority nature of the property tax lien, which allows it to take precedence over not only ownership interest but also mortgage and judgment lien interests that predate the tax delinquency.²³⁵ Because claims for unpaid property taxes take priority over pre-existing private liens, all parties with substantial interests in the property are entitled to notice of their opportunity to redeem.²³⁶ Constructive notice, such as publication of an advertisement in a newspaper of general circulation, can constitute constitutionally adequate notice, but only after diligent attempts at direct notification have been made.²³⁷

230. See FED. HOUS. FIN. AGENCY OFF. OF INSPECTOR GEN., AN OVERVIEW OF THE HOME FORECLOSURE PROCESS 15, available at http://fhfa.ig.gov/Content/Files/SAR%20Home%20Foreclosure%20Process_0.pdf (last visited Apr. 22, 2014).

231. 26 U.S.C. § 6323 (2013).

232. For instance, Kansas provides for a two-year post-sale redemption period during which counties must postpone foreclosure to allow owners to save their property interests by paying off any delinquencies. KAN. STAT. ANN. § 79-2401a(a)(1) (West, Westlaw through 2013 Reg. and Special Sess.). For homestead properties, owners have three years to redeem. § 79-2401a(b)(1).

233. KAN. STAT. ANN. §§ 79-2401a(a)(1), 79-2401a(b)(1), 79-2401(a)(2). Maryland provides two types of accelerated post-sale foreclosure processes. MD. CODE ANN., TAX-PROP. § 14-833 (West 2008). Persons that purchase properties as part of a special tax sale of abandoned properties may commence foreclosure proceedings the day after the sale. § 14-833(f). Even a property sold at a conventional sale can be foreclosed upon six months after the sale, half the normal time period, if a building on the property has been certified as needing substantial repair. § 14-833(e).

234. KAN. STAT. ANN. § 79-2401a(a)(2) (West, Westlaw through 2013 Reg. and Special Sess.).

235. Alexander, *supra* note 116, at 760.

236. Because mortgagees and judgment creditors have no actual ownership rights, their right to redeem allows them to preserve their remedies for collecting money owed to them by the property owners. GRANT S. NELSON & DALE A. WHITMAN, REAL ESTATE FINANCE LAW 558, 689-94 (4th ed. 2001).

237. *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 798 (1983). The constitutional right to notice and opportunity to be heard does not allow legislators and judges the same flexibility in

Effective reform of tax foreclosure laws impacting vacant properties requires attention to the procedures for the sale of liens as well as to the time for redemption afforded the owners and other stakeholders. A sensible approach to the sale of tax liens on vacant and abandoned houses and the lots resulting from their demolition allows local jurisdictions to facilitate investment coordination without fear of severely underpricing important receivables. A similarly tailored approach to the waiting period between the sale of a tax certificate on a vacant and abandoned property and the issuance of a deed for that property recognizes the urgency of getting such a property back into productive use without undercutting the rights of other owners, especially homeowners, to raise the money needed to prevent loss of their land to foreclosure.

Unoccupied, derelict properties located in neighborhoods with insufficient market strength to support their rehabilitation require special tax sale procedures to facilitate their return to productive use. A great many of these properties could not be sold, after a complete renovation, on the open market for just the costs of the needed repairs. That is, even if one such vacant house could be transferred in its dilapidated condition to a new, capable owner for \$1, the needed renovations would still not be economically feasible. As discussed above, allowing a developer or team of developers to invest in all the vacant houses in a neighborhood offers a way to reset the market paradigm that constrains the influx of desperately needed capital.²³⁸ The prevalence of significant tax delinquency makes tax foreclosure an ideal way to allow coordinated title-clearing efforts. Unfortunately, the great size of tax arrearages, when combined with legislated tax sale rules that require a minimum bid no less than the amount of the tax delinquency, prevents these properties from even taking the first step toward reconnection with the market.²³⁹

While minimum bid provisions may make sense for tax sales generally, they significantly harm efforts to return tax-delinquent vacant properties to productive use. Many, if not all, states require that any bid at a conventional tax lien auction to purchase a tax-delinquent property be sufficient to pay the relevant state and local government taxes and related charges due on the property.²⁴⁰ Generally, the potential for corruption and abuse in a mass auction

adjusting notification methods and standards to facilitate the more efficient foreclosure of vacant and abandoned properties. I have argued elsewhere, however, that the nature of a stakeholder's relationship to a vacant and abandoned property can be a relevant consideration in determining the process due him, her or it in a tax foreclosure proceeding. *See generally* Kelly, *supra* note 106.

238. *See supra* note 193 and accompanying text.

239. ALEXANDER, *supra* note 4, at 30.

240. *Id.*

of public receivables justifies the legislature's insistence on receiving the full value of what the public is owed. Vacant and abandoned properties with large tax arrearages invariably remain unsold at the end of tax sales with such minimum bid requirements.²⁴¹

Land banking efforts, however, are demonstrating that vacant and abandoned properties can be transferred to developers capable of returning them to productive use as long as an auction mechanism is not relied upon either to identify those buyers or to set the price of the sale. To accomplish the appropriate bundling and pricing of vacant properties in need on investment coordination, land banks must be empowered to purchase and foreclose on vacant property tax certificates without being required to pay the full lien value. As publicly accountable entities, they need to be able to work with potential developers to identify coordinated investment opportunities and sell the properties at prices that reflect the market realities and the public benefit of having the properties returned to productive use. Auctions do not allow for the verification of capacity and financing required for large-scale redevelopment projects nor do they allow for the negotiations needed to produce thoughtful pricing of the real property assets. To facilitate an ultimately more efficient mode of vacant property disposition, minimum bid requirements must be abandoned to allow transfers of qualifying tax certificates to land banks. States, such as Kansas, have recognized the need to set post-tax-sale redemption periods at different lengths to protect different kinds of property ownership.²⁴² Those states facing significant concentrations of vacant properties in their urban neighborhoods must shorten the minimum time for completion of the foreclosure. For instance, Maryland requires most tax-sale purchasers to wait six months before commencing judicial foreclosure proceedings, but properties that have been certified as in need of substantial repair can be foreclosed upon after 60 days.²⁴³ The waiting period is eliminated altogether for tax sale certificates sold at special bulk sales designed to facilitate land banking efforts.²⁴⁴ Likewise, Indiana requires a delinquent owner to redeem a property within one year of a conventional tax sale;²⁴⁵ but, it shortens that redemption period to 120 days for properties sold at a special sale without the standard minimum bid requirement.²⁴⁶ These clear and reasonable differences in redemption periods follow from the fact that foreclosure of vacant properties, by definition, do not result in the displacement of legal occupants. Moreover,

241. *Id.*

242. *See supra* notes 232–34 and accompanying text.

243. MD. CODE. ANN. §14-833(a), (e) (West 2013).

244. MD. CODE. ANN. §14-833(f) (West 2013).

245. IND. CODE. §6-1.1-25-4(a)(1) (LexisNexis Supp. 2010).

246. IND. CODE. §6-1.1-25-4(c) (LexisNexis Supp. 2010).

the community need for investment in these properties requires a quicker transition than that allowed to tax-foreclosed properties generally.

The major gap between conventional code enforcement and eminent domain is filled by the remedies of vacant building receivership and tax sale foreclosure. Both use an owner's failure to meet basic public obligations as a basis for liquidating all the title interests in the derelict property should the stakeholders not step forward and bring the property into compliance. The receivership remedy, which combines code enforcement and title-clearing mechanisms, is only now being enacted in various jurisdictions.²⁴⁷ The tax foreclosure proceeding, while widely available, requires major reform in many jurisdictions if it is to be effective in accomplishing the investment coordination goals for which it is uniquely suited.²⁴⁸ Together, these remedies can complete a nearly seamless array of vacant property responses that can allow local communities to reconnect any vacant property to a real estate market that can return it to vitality.

247. See BLAKE ET AL., CONSERVATORSHIP HANDBOOK (2013), available at http://www.housingalliancepa.org/sites/default/files/resources/ConservatorshipManual_Phila-final.pdf (last visited Apr. 22, 2014).

248. ALEXANDER, *supra* note 4, at 28–30.