

NEIGHBORHOOD STABILIZATION: LEGAL STRATEGIES FOR VACANT AND ABANDONED PROPERTIES

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INTRODUCTION

The housing and economic crises of the past five years have had deep and far-reaching consequences for America's communities. Consequently, municipalities across the country face a growing incidence of vacant and abandoned properties. There is extensive debate on what drives a community's "life-cycle,"¹ from periods of decline and deterioration to their renaissance and rejuvenation.² However, a much greater consensus exists as to the harms vacant and abandoned properties inflict.³ As potential fire hazards and sites for drug trafficking,⁴ vacant and abandoned properties signal to society that a neighborhood is on the decline, undermining the sense of community and discouraging any further investments.⁵ These disinvestments often spread across neighborhoods and affect the overall health of a municipality.

Throughout most of the United States, residential mortgage foreclosures have risen to levels not experienced in 75 years, while some communities simultaneously experienced declines in property values of 25% or more. With an overwhelming concentration of foreclosures in particular neighborhoods, the number of vacant and abandoned properties has reached record levels as well. But perhaps nothing better underscores the real estate market's inability to function efficiently than the governmental restructuring of the two largest guarantors of residential mortgages, Fannie Mae and Freddie Mac, and the largest insurance company, AIG.

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¹ See, e.g., Anthony Downs, *OPENING UP THE SUBURBS: AN URBAN STRATEGY FOR AMERICA* (1973).

² See, e.g., John T. Metzger, *Planned Abandonment: The Neighborhood Life-Cycle Theory and National Urban Policy*, 11 HOUSING POLICY DEBATE 7 (2000); Anthony Downs, *Comment on John T. Metzger's "Planned Abandonment: The Neighborhood Life-Cycle Theory and National Urban Policy,"* 11 HOUSING POLICY DEBATE 41 (2000).

³ John Accordino and Gary T. Johnson, *Addressing the Vacant and Abandoned Property Problem*, 22 J. URBAN AFFAIRS 301 (2000); William Spelman, *Abandoned Buildings: Magnets for Crime?*, 21 J. CRIMINAL JUSTICE 481-6 495 (1993).

⁴ James R. Cohen, *Abandoned Housing: Exploring Lessons from Baltimore*, 12 HOUSING POLICY DEBATE 415, 416 (2001); John A. Jakle and David Wilson, *DERELICT LANDSCAPES: THE WASTING OF AMERICA'S BUILT ENVIRONMENT* 144-6175 (1992).

⁵ James Goldstein et al., *Urban Vacant Land Redevelopment: Challenges and Progress*, Lincoln Institute of Land Policy (*working paper*) (2001); Edward G. Goetz, Kristin Cooper, Bret Thiele, Hin Kin Lam, *Pay Now or Pay More Later: St. Paul's Experience in Rehabilitating Vacant Housing* (1998).

Together, the ongoing national mortgage crisis and the steady economic decline of older, industrial areas have created increasing numbers of vacant and abandoned properties that are placing ever greater stress on communities across the country. The sudden collapse of the mortgage markets and the drastic increase in foreclosure rates may be most intense in Southern and Southwestern regions, while the gradual economic decline and property abandonment may be more characteristic of cities in the Northeastern and Midwestern parts of the country. Despite their differences, the neighborhoods, schools, and local governments of all metropolitan areas must bear the costs induced by these large inventories of foreclosed, vacant, and abandoned properties.

Further complicating recovery, most local governments lack efficient and effective tools for halting and reversing such a serious consequence. First, this article describes the problems associated with vacant, abandoned, and foreclosed properties facing many communities across the country. Second, this article outlines various legal tool strategies and tools that communities can utilize to help return these inventories to productive use. The concepts discussed in this article can help communities turn vacant spaces into vibrant places.

I. UNDERSTANDING THE PROBLEM

Our country's communities face a growing inventory of vacant, abandoned, tax-delinquent, and foreclosed properties. These properties create problems and impose costs on both the municipality and its residents, such as higher annual maintenance costs, reduced property values, and increased property tax delinquencies resulting in declining revenue for local governments.

While both pose significant problems, vacancy and abandonment are not synonymous. Vacancy can be defined as property that is unoccupied. It is more common in commercial areas, and oftentimes a property is vacant simply because a property owner is holding on to it as a long-term investment. Abandonment, on the other hand, is a far stronger concept. An abandoned property suggests that the owner has ceased to invest any resources in the property, is foregoing all routine maintenance, and is making no further payments on related financial obligations such as mortgages or property taxes. Though abandoned by the owner, tenants may still occupy the property, or squatters may live there without permission.

The costs an abandoned property imposes on a community are palpable. For example, a detailed study of Chicago in 2005 revealed that a property abandoned prior to foreclosure imposes average costs of almost \$20,000 on the city, and when that property has a building damaged by arson, the costs reach an average of \$34,000.⁶ In Flint, Michigan, an analysis revealed that property within 500 feet of a vacant and abandoned structure lost an average of 2.26 percent of its value.⁷ A study commissioned by Philadelphia in 2010 revealed that vacant and abandoned properties reduced the value of the city's homes by an average of \$8,000, incurred \$20 million in annual maintenance costs, and deprived the city of \$2 million a year in tax revenues.⁸ Further, a study of eight cities in Ohio found that 25,000 vacant and abandoned

⁶ *Id.*; William C. Apgar & Mark Duda, *Collateral Damage: The Municipal Impact of Today's Mortgage Foreclosure Boom* (Minneapolis: Homeownership Preservation Foundation, 2005).

⁷ Patricia E. Norris & Nigel G. Griswold, *Economic Impacts of Residential Property Abandonment* (East Lansing, MI: Michigan State University Land Policy Institute Report #2007-05).

⁸ Catherine Lucey, *Abandoned Properties Have Reduced City Home Values by an Average of \$8,000, Study Finds*, PHILA. DAILY NEWS, Nov. 11, 2010.

properties imposed approximately \$15 million in direct annual costs to the cities and over \$49 million in cumulative lost property tax revenues.⁹

Those properties that are vacant and abandoned are often tax-delinquent as well. In fact, property tax delinquency is the most significant common denominator among vacant and abandoned properties. In addition to negatively affecting the health of a neighborhood, an increase in tax-delinquent properties typically leads to a reduction in a local government's revenue. While some property owners may fail to pay property taxes due to a lack of financial resources, others choose to "milk" the equity from the property and then abandon it. The lengthy periods of time required by antiquated property tax foreclosure systems only encourage a property owner's decision to neglect further investments.¹⁰ In the vast majority of cases, a continuous failure to pay property taxes signals the intent of the owner to abandon the property.

Properties in mortgage foreclosure present yet another challenge to communities, providing an additional reason to leave a property vacant or abandoned. When a property is in foreclosure, the party responsible for maintaining it is often unknown, unaware, or unwilling to expend the time or effort to do so. Frequently, the culprit is not the homeowner, but the lender who becomes the owner through a foreclosure. Consequently, with the drastic rise of foreclosures, the correlation between a community's rate of foreclosure and its inventory of vacant or abandoned properties has increased as well.

Mortgage foreclosures alone, independent of subsequent abandonment, have been found to reduce property values within one-eighth of a mile of the foreclosure by 0.9 percent in value.¹¹ Multiple foreclosures had even greater cumulative adverse effects. The Center for Responsible Lending estimates that foreclosures of subprime home loans originated in 2005 and 2006 decrease the value of nearby properties by an average of \$5,000.¹² In aggregate, foreclosures on subprime loans are expected to cause a \$202 billion decline in home values and the corresponding tax base.

Municipalities often struggle with how to respond to the rise of vacant and abandoned properties, dwindling property tax revenues, and foreclosures forcing families out of their homes. In general, the legal and political cultures in America are not well equipped to deal with vacant, abandoned, and substandard properties. Even with the advent of zoning and building codes during the past 80 years, the regulatory framework has two dominant characteristics. First, it is overwhelmingly prospective and anticipatory in nature. Second, it is largely locally driven with wide divergence among and within the states in both form and in substance.

Thus far, legal and political cultures have been strikingly unwilling to acknowledge, much less address, the impact of vacant, abandoned, and substandard properties. In most jurisdictions, practitioners and politicians alike accept the proposition that advance planning and minimum standards benefit both individuals and the community. However, they have been incredibly reluctant to acknowledge the damages and dangers caused by the functional

⁹ Community Research Partners and ReBuild Ohio, *\$60 Million and Counting: The Cost of Vacant and Abandoned Properties to Eight Ohio Cities* (Columbus: 2008).

¹⁰ See Frank S. Alexander, *Tax Liens, Tax Sales and Due Process*, 75 INDIANA L. J. 747-807 (2000).

¹¹ Dan Immergluck & Geoff Smith, *The External Costs of Foreclosure: The Impact of Single-Family Mortgage Foreclosures on Property Values*, 17 HOUSING POLICY DEBATE 57-80.

¹² CENTER FOR RESPONSIBLE LENDING, *SUBPRIME SPILLOVER: FORECLOSURES COST NEIGHBORS \$202 BILLION; 40.6 MILLION HOMES LOSE \$5,000 ON AVERAGE* 1 (2008).

abandonment of real property. Consequently, communities are left without a mechanism for addressing these problems.

While some argue that this is consistent with a general aversion to collective control over property usage, a more pernicious premise of the human condition seems to drive much of this attitude. American culture, at least thus far, views real property as a disposable asset ó a consumable item. It is only valued as long as it is ðuseful,ð and then it is disposed of. The catch, of course, is that land is not a disposable item. It is not something to be consumed and then discarded. Land, by definition, is a fixed commodity, permanently existing in a community and possessing an inherent relationship with its surroundings. Vacant, abandoned, and substandard properties impose costs on neighbors, on communities, on local governments, and on society.

A reformation of the cultural false premise that land is a disposable item cannot be accomplished by the legal system alone. However, reforms in the legal and regulatory systems can add legal significance to the meaning of being a responsible property owner by eliminating the incentives that encourage abandonment and creating disincentives for abandoning property. The next section describes the legal tools that a municipality can utilize in its strategy addressing vacant, abandoned, tax-delinquent, and foreclosed properties.

II. LEGAL STRATEGIES AND TOOLS

In any community where there is a significant amount of vacant and abandoned inventory, the initial task is to evaluate the properties to identify the dominant characteristics of that inventory. In some jurisdictions, the dominant characteristic of abandoned property is the prevalence of multiple years of tax delinquency. In others, it is the absence of housing and building codes or general nuisance abatement ordinances, and in those communities with adequate ordinances, it may be the lack of any strong enforcement mechanism. In yet other communities the dominant characteristic may be the nature of the mortgage foreclosure process with incentives for inaction rather than property preservation.

General economic decline within a community ó with accompanying joblessness, population loss, and disinvestment ó may well explain a rise in vacant and abandoned property inventories. It rarely, however, serves as an adequate justification for legal systems that encourage abandonment, and it never justifies having high rates of abandonment in concentrated neighborhoods in an otherwise stable community.

Regardless of differences between inventories, all legal strategies dealing with vacant, abandoned and substandard properties have three key features. The first is the ability to identify at all times the legal owner(s) of the property. The second is to impose legal liability for the financial costs of abandonment. The third is to be able to force a transfer of ownership and control if the problems are not resolved. With these common features in mind, the following subsections highlight multiple areas for legal reform. These areas include: property tax foreclosure; code enforcement; receivership actions; vacant property registration; mortgage foreclosure; and land banks and land banking.

A. Property Tax Foreclosure Reform

As stated previously, properties that are vacant and abandoned are often tax delinquent as well. Unfortunately, antiquated property tax systems prevent the real estate market from reaching these properties. At present, there are over 150 different systems in the United States

for collecting the property tax. Most states have at least two entirely different approaches for enforcing payment of the property tax. Other states leave the enforcement of the property tax to local governments, with little consistency in procedures across jurisdictions.

Complexity, rather than clarity and simplicity, characterizes property tax collection procedures in most jurisdictions. Many jurisdictions currently utilize procedures involving two, three, or four distinct steps to enforce a property tax lien. Some states conduct two sales ó an initial sale of the property or the lien, followed by a statutory period of time before a final sale. Others conduct a sale of the property, following by a statutory redemption period. One of the few generalizations that can be made about property tax enforcement proceedings in the United States is that they are largely inefficient and ineffective. It can take anywhere from two to seven years to complete a property tax foreclosure, and even then the purported new owner of the property lacks insurable and marketable title. Throughout this time frame the underlying properties decay and become greater liabilities to the community.

Reforming state and local property tax enforcement procedures is not for the faint of heart, but it can be done, and done in a manner that creates an efficient and effective system consistent with all contemporary constitutional due process requirements. In 1995 Georgia enacted an optional judicial in rem foreclosure statute. In 1999 Michigan completely revamped its property tax foreclosure system. Reform of property tax foreclosure laws can contemplate many systemic changes. These changes include: a shift to in rem foreclosures; the creation of judicial tax foreclosure proceedings; providing for constitutionally adequate notice; a reduction in time between initial delinquency and the completion of foreclosure; the possibility for large-volume bulk foreclosures; the permission of sales without requiring a minimum bid; and allowing for expedited quiet title proceedings.

1. Shifting to Judicial In Rem Foreclosures

One of the initial steps in reforming property tax foreclosure procedures is to shift the focus of foreclosure from seeking a judgment of personal liability against the property owner to seeking to enforce a lien against the property. Proceedings against properties ó commonly referred to as in rem foreclosures ó have considerably different constitutional requirements to meet than proceedings against property owners personally. In contrast to a suit for personal liability, an in rem foreclosure action requires adequate notice to all owners of interests in the property, but does not require that the court obtain complete jurisdiction over the owners themselves.

2. Creating Judicial Tax Foreclosure Proceedings

A second step in property tax foreclosure reform is to change from reliance on nonjudicial, or administrative, tax sales to judicial proceedings. A judicially supervised and approved tax foreclosure has the substantial advantage of a final judicial decision on the adequacy of notice to all parties. A judicial decision provides a strong likelihood that the property will have an insurable title ó a fundamental prerequisite for future development. A tax foreclosure process that provides both constitutionally adequate notice to all parties and a judicial decree on the validity of the foreclosure provides a unique opportunity to resolve all outstanding title defects. Because a lien for property taxes is the senior lien on the property, regardless of the date it arose, a valid foreclosure of this senior lien terminates the interests and claims of all other parties to the property. A properly conducted judicial tax foreclosure thus has the possibility of conveying clear and marketable title as a result of the foreclosure. If a

jurisdiction grants senior priority status to nuisance abatement liens, and similar judicial foreclosure proceedings apply, enforcement of the nuisance abatement lien also can provide clear and marketable title.

Some jurisdictions, faced with numerous properties that are both tax delinquent and constitute a public nuisance, have adopted streamlined procedures to allow quick acquisition or transfer of the property. Such an expedited or emergency foreclosure proceeding requires a finding of both tax delinquency and code violations. An expedited judicial foreclosure process with constitutionally adequate notice is one of the most powerful tools for local governments to transfer of vacant, abandoned, and tax-delinquent property to new responsible ownership.

3. Providing Constitutionally Adequate Notice

The lack of constitutionally adequate notice in foreclosure proceedings is the primary reason why tax-foreclosed properties are considered to have title defects and serious limitations on marketability. Notice of property tax foreclosure proceedings must be given to all parties holding legally protected property interests whose identities are reasonably ascertainable. This decision seriously undercut the adequacy of state laws that relied upon providing notice of a tax sale simply by publishing a notice in a local newspaper. States have been slow to revise their property tax foreclosure laws to accommodate the new constitutional standard.

4. Reducing the Time Frame Between Delinquency and Foreclosure

Many tax foreclosure laws also require multiple steps over very extended periods of time, with the result that a foreclosure may require four to six years to be completed. Such a lengthy process creates yet another incentive for property owners to pay little attention to tax bills. A drawn out process severely limits a community's ability to take action against the clearly abandoned properties that are tax delinquent. For those jurisdictions with particularly lengthy tax enforcement procedures, any contemplated reform should reduce the time period completing foreclosures.

5. Contemplating Large-Volume Bulk Transfers

A common misperception is that judicial proceedings must be lengthy and that separate proceedings are required for each tax enforcement action. Although procedures can require many months to complete, a properly conducted judicial in rem foreclosure provides marketable and insurable title to the property upon completion. One method for increasing efficiency in a jurisdiction that utilizes judicial in rem tax foreclosure is to permit bulk petitions. A bulk petition can be constructed to permit a local government to process hundreds or even thousands of parcels in one short hearing. When a jurisdiction is contemplating reforming its tax foreclosure procedures, providing for bulk petitions will increase effectiveness and efficiency of the tax enforcement system.

6. Permitting Sales Without Requiring a Minimum Bid

Historically, most states' laws have provided that the minimum bid for a parcel of property at a tax sale is the total amount of all delinquent taxes, penalties, and interest. With vacant and abandoned properties, however, the amount of tax delinquency grows each year. It is not uncommon for the total amount of the delinquency to exceed the property's fair market value. Unfortunately, in this situation there is no offer for the minimum bid, and the property is left unsold. The simple and direct solution is amending the applicable state or local laws to

provide either that the minimum bid can be reduced to a lower amount by the tax collector, or that the property is automatically sold to a public agency such as a land bank.

7. Allowing Expedited Quiet Title Proceedings

Unfortunately, property tax foreclosure laws are not directly designed to address title problems that may exist in the inventory of properties acquired by local governments under preexisting enforcement procedures. In these instances state and local governments find themselves with a substantial inventory of properties, title to which is clouded, defective, and not marketable. Because no taxes are due on publicly owned property, even revised tax foreclosure laws cannot provide a mechanism to gain clear title on this preexisting inventory. Providing for an expedited procedure applicable solely to publicly held inventories of previously tax-foreclosed properties is an effective way to address this issue.

The essential structure of such a procedure is based on a quiet title action. A quiet title action is a legal proceeding which seeks a judicial ruling on the claims of all parties. In a specially designed proceeding, constitutionally adequate notice is given to all interested parties of the opportunity to redeem the property from the tax lien. Failure of such redemption then vests clear title in the local government.

Proceedings for properties held by local governments or land banks as a result of previous foreclosure actions should be structured so they can be completed quickly. As the prior owners have already lacked legal title to the properties for an extended period of time, there is little justification for the length of proceedings to extend beyond what is necessary to give adequate notice.

The single most important aspect of dealing with the defective title that characterizes so many problem properties is the availability of title insurance. Because of the numerous procedural obstacles and evolving constitutional requirements, title insurance companies historically have been reluctant to insure marketable title on properties acquired through tax foreclosures. To ensure that the title insurance industry is comfortable with the adequacy of new foreclosure procedures, industry representatives should participate in revising foreclosure laws for delinquent taxes and nuisance abatement liens.

B. Code Enforcement

The underlying substance of housing and building codes, and generalized nuisance abatement ordinances, have been revised in recent decades to reflect contemporary construction techniques and knowledge of public health, safety, and welfare. The problem is not so much the creation of a code, but the failure of many local governments to modernize their codes.

The adoption of modern codes and nuisance abatement ordinances is simply the first step. It is critical that liability for a violation exist as a lien on the property. However desirable it may be to impose personal liability on the part of the property owner, our corporate structures of ownership make it relatively easy to create shells that cannot be penetrated. The key is the imposition of a lien on the property for every code violation and for each expenditure of public assets to remedy a violation. The lien must be legally recognized as having "super-priority" status, thus making it a first lien on the property ahead of all mortgages and other encumbrances.

A super-priority code enforcement lien should then be capable of easy and quick enforcement through foreclosure resulting in insurable title to the property. Tying the code

enforcement lien to an efficient and effective property tax foreclosure system is one of the optimum approaches.

Since the middle of the twentieth century, the standard approach to enforcement of housing and building codes has been an administrative or judicial enforcement proceeding against the property owner seeking to force the owner to remedy the violations. The logic of this approach is its goal to place responsibility on the party who is failing to meet public duties. The difficulty, however, is that the owner may be hard to locate, have insufficient assets, or simply drag out the proceedings for years. An alternative approach used in recent years is to authorize the local government to undertake repairs or demolition directly if the owner fails to do so within a specific period of time. The advantage of this approach is that the local government can act far more quickly in demolishing dangerous and harmful structures, but the distinct disadvantage is that the local government funds are required.

The willingness of public officials to invest public resources to correct code violations on private property relates both to the magnitude of the harm caused to the community by the violations and to the possibility of recovering part or all of the financial investment. All jurisdictions permit the local governments to file a lien against the property in the amount of the public expenditures. Unfortunately, if the lien has only chronological priority it is likely to be subordinate to mortgages, judgments, and other encumbrances, rendering it of little functional value. However, the outcome is dramatically different if the nuisance abatement lien is by law made a first priority lien superior to all other claims against the property. Such a policy has two significant benefits. First, it is far more likely that the local government will recapture part or all of its financial investment in repairs or demolition. Second, the existence of a nuisance abatement lien with senior priority permits the local government to enforce it and proceed with foreclosure even if there are no delinquent property taxes that could be the basis for such an action.

C. Receivership Actions

A variation on direct action by local governments is to strengthen the legal procedures for the appointment of a receiver to control and manage the property.¹³ The central task of a court appointed receiver is to step into the shoes of the owner of disputed or distressed property, to protect that property from waste or deterioration, to manage and return it to occupancy where possible, and to preserve it until the court makes a final determination as to its ultimate disposition.¹⁴

Statutory receivership programs that expressly provide for the appointment of a receiver over properties that are vacant, abandoned or substandard, that expand standing to bring receivership actions to parties other than government officials, owners or lien-holders, that

¹³ See generally James J. Kelly, Jr., *Refreshing the Heart of the City: Vacant Building Receivership As a Tool for Neighborhood Revitalization and Community Empowerment*, 13 J. AFFORDABLE HOUSING 210 (2004); DAVID LISTOKIN, *HOUSING RECEIVERSHIP AND SELF-HELP NEIGHBORHOOD REVITALIZATION* (1985); Judah Gribetz & Frank P. Grad, *Housing Code Enforcement: Sanctions and Remedies*, 66 COLUM. L. REV. 1254 (1966).

¹⁴ See generally I-IV RALPH EWING CLARK, *A TREATISE ON THE LAW AND PRACTICE OF RECEIVERS* (3d ed. 1959 & Supp. 1968-69); I HENRY G. TARDY, *A TREATISE ON THE LAW AND PROCEDURE OF RECEIVERS: SECOND EDITION OF SMITH ON RECEIVERS* (1920); JAMES L. HIGH, *A TREATISE ON THE LAW OF RECEIVERS* (Shirley T. High ed., 4th ed. 1910).

ensure a broad range of receiver powers, and that provide for super-priority status for receiver liens can increase the speed and efficacy of the receivership tool.¹⁵

The most common objective statutory criteria for a property to be placed into a court appointed receivership are the existence of citations for housing or building codes that are unremediated for a stated period of time. For example, pursuant to Pennsylvania's Abandoned and Blighted Property Conservatorship Act, a receiver (or conservator) may be appointed over a building that (i) has been unoccupied for at least twelve months, (ii) has not been marketed in the sixty days before the receivership petition, (iii) has not been acquired by the owner in the previous six months, (iv) is not already in foreclosure proceedings, and (v) has at least three violations contained on the state's list of nuisances and code violations.¹⁶ Similarly, according to Baltimore, Maryland's vacant building receivership ordinance, receivers may be appointed over vacant structures for which the owner has failed to comply with a notice or order to rehabilitate.¹⁷ Vacant structures that implicate the Baltimore ordinance are unoccupied structures that are unsafe for human habitation, and a determination of vacancy may be based on the fact that a structure is open to casual entry, has boarded up windows and doors, or lacks intact window sashes, walls, or roof surfaces to repel weather entry.¹⁸

In many jurisdictions local governments do not have the resources or capacity to adequately abate housing or building code violations, let alone to petition the court for receivers over troubled properties. Receivership statutes that provide non-profit housing corporations, community associations, tenants, or neighbors with standing to petition the court for a receiver over a troubled property may alleviate some of the burden on local governments.¹⁹ In addition, receivership statutes that expand the universe of those with standing to seek receivership over property provide a means by which individuals or organizations most adversely affected by a particular property are empowered to directly participate in the rehabilitation of that property and the neighborhood stabilization that follows.²⁰

Upon appointment, a receiver's powers should be broad and essentially mirror those of the owner ó including the power to rehabilitate or demolish, and the power to sell the property at any time. Receivers should be appointed, in judicial discretion, based on their experience, ability, and resources to achieve remedial actions with respect to the objective criteria that form the basis for the receivership petition. A judicially appointed receiver has the advantages of being able to take control of any cash flow (such as rents) from the property and provide immunity from liability for such matters as environmental contamination²¹ and negligent decisions²² ó two factors that frequently make public officials reluctant to take control of properties.

¹⁵ See, e.g., OHIO REV. CODE ANN. § 3767.41; 68 PA. STAT. ANN. § 1101 *et seq.*; BALT., MD. CODE § 121.1. *et seq.*

¹⁶ 68 PA. STAT. ANN. § 1105.

¹⁷ BALT., MD. CODE § 121.1.

¹⁸ See *id.*, §§ 116.4.1-2.

¹⁹ See e.g., OHIO REV. CODE ANN. § 3767.41(B); 68 PA. STAT. ANN. § 1104(a).

²⁰ See generally, LISTOKIN, *supra* at 18-19.

²¹ See, e.g., 68 PA. STAT. ANN. § 1107(c)(1).

²² See generally, CLARK, *supra* note 44, § 391; *Davis v. West*, 317 S.W.3d 301, 307 (Tex. Ct. App. 2009) (õ[A] court-appointed receiver acts as an arm of the court and is immune from liability for actions grounded in his conduct as receiver.õ).

An effective receivership statute will provide for adequate receiver compensation and the super priority status of receiver liens. If a receiver's lien is not granted such priority there are two specific adverse results. First, the receiver will not be in a position to borrow against the value of the property in order to accomplish the maintenance and rehabilitation. Second, the lien will not permit a judicially authorized receiver's sale of the property to provide clear title. In contrast, a senior priority receiver's lien can be foreclosed and provide marketable and insurable title to the foreclosure sale purchaser.²³

D. Vacant Property Registration

One of the newest approaches to address the problems posed by vacant and abandoned properties is the requirement that such properties be registered with the local government. According to one estimate, over 240 local governments have moved ahead with some form of vacant property registration ordinance in the last decade. There is a wide range of approaches within this category of vacant property registration. Some jurisdictions have the registration requirement triggered by vacancies of particular lengths of time; others trigger the requirement upon a specific event such as the initiation of a foreclosure action. Foreclosure related registration typically triggers a mandatory inspection of the property, and establishes the possibility of fines and penalties for unremediated violations. One of the most innovative features of this new wave of vacant property ordinances is the imposition of financial liability on the mortgagee on the theory that the mortgagee has the contractual, if not statutory, right to manage and control the property once there has been a default.

A vacant property registration ordinance triggered by a declaration of mortgage default provides:

Any [beneficiary under deed of trust covering a property OR beneficiary/trustee who holds a deed of trust on a property OR mortgagee who holds a mortgage on real property] located within the [City Name] shall cause an inspection to be performed of the property that is the security for the deed of trust [within fifteen (15) days of issuing a notice of default to the trustor OR upon default by the trustor, prior to recording a Notice of Default]. If the property is found to be vacant or shows evidence of vacancy, it is, by this article, deemed abandoned and the beneficiary/trustee shall, within ten (10) days of the inspection, register the property with the [code enforcement officer] or his/her designee on forms provided by the City.

E. Mortgage Foreclosure Interventions

The mortgage foreclosure crisis of the past two years has resulted in a sharp increase in the number of properties that are vacant and abandoned. What this crisis reveals ó at least from the perspective of this issue ó are the systemic inadequacies of existing legal and regulatory structures in our mortgage foreclosure laws.

One challenge is presented simply by the uncertainty of the identity of the lender seeking to pursue a foreclosure, or the identity of the purchaser at a foreclosure sale. This uncertainty is magnified by the existence of the Mortgage Electronic Registration system (MERS), which was

²³ See e.g., OHIO REV. CODE ANN. § 3767.41(H); 68 PA. STAT. ANN. § 1105(g) & 1108(b); BALT., MD. CODE §§ 121.9(4) & 121.13-14.

created a decade ago to facilitate the transfer of mortgages in the secondary mortgage market. With MERS, mortgages are ðregisteredð in an electronic database which refers to the securitization trust (or portfolio lender) that is the legal holder (at least in theory) of mortgages. The legal difficulty is that MERS, as a corporation, disclaims ownership interests in the mortgages, acting solely as ðnomineeð. This structure and system is largely inconsistent with all existing state real property laws and mortgage foreclosure laws. Jurisdictions have begun to address this hurdle by requiring that the identity of the foreclosing lender be filed in local real property records at the commencement of a foreclosure, or prior to the foreclosure sale.

The MERS database can serve as a potential resource to local governments seeking to identify the servicer or agent on behalf of the mortgagee having authority or responsibility for the property during the foreclosure process, or following the completion of the foreclosure. The mere existence of such a database, however, does not serve to create legal responsibility on the part of MERS or the servicer identified in its records.

The imposition of a requirement for vacant property registration upon the mortgagee ó as a corollary to declaration of default ó is one example of seeking to impose responsibility and liability for vacant and substandard properties upon the entity with the largest interest in the property. Such an approach, however, may not be viable if the mortgagee makes a determination that it will not seek a foreclosure sale for the property. When a mortgagee elects to ðwalk-awayð from the property after commencement of a judicial foreclosure action, the consequent legal uncertainties only serve to lock-in for an indefinite period the on-going harms being caused by the property to the neighborhood. Legislation is under consideration in Ohio that would require mortgagees to bear some degree of legal and financial liability for these consequences.

Another approach to modifying the legal system to internalize the external costs of foreclosure is the establishment of an assessment to be paid upon the filing of a foreclosure deed (or deed in lieu of foreclosure). Such an assessment would not correspond to a tax, but would be an assessment or fee reflective of the costs imposed on the local governments as a result of increased fire, police, and building inspection activities that accompany foreclosed residential properties. The assessment would be payable, much as document recording are done, as a condition for the recordation of the instrument. The payment of the assessment would also trigger an inspection of the property by the local government.

The prevalence of vacant, abandoned, and substandard properties in many of the older industrial cities of the Great Lakes, in concentrated neighborhoods of our stable cities, and across the country where foreclosure rates have escalated to record levels is the invitation and the opportunity to re-examine or legal and regulatory systems. The time is long past for revision of our systems so that real property is no longer simply a disposable consumer item, but rather an integral part of our communities for which there is an on-going stewardship obligation.

F. Land Banks and Land Banking

As entities intended to help a local government achieve legal, institutional, and systemic changes facilitating the reuse of a community's problem properties, land banks have taken many forms. First proposed as a form of urban planning in the 1960s, the concept has taken root in several metropolitan communities in the last 25 years. The Housing and Economic Recovery Act of 2008, with its Neighborhood Stabilization Program, is the first federal recognition of the severe costs borne by neighborhoods and local governments when properties are vacant or

abandoned. For the first time, Congress has appropriated funds for the acquisition, management, and disposition of such properties and has recognized the role of a tool called land banking.

The idea of land banking is not to replace or supplant either the open market or land-use planning but to step in when there is a failure of market demand, acquiring abandoned inventory, and making it available for other land-use planning. As with other new approaches to land use and planning, some efforts have been more successful than others. But all land banking initiatives share the ability to address inefficiencies in real estate markets and the potential to bring together federal, state, and local policies to build stronger communities.

A land bank is not the same as a land trust, in which property may be held in perpetuity for a community purpose such as conservation or affordable housing. It is more like a bank into which one deposits valuables until such time as they are needed. Today, as more communities deal with a wave of foreclosures, more and more are likely to make use of land banking. Land banking is a useful tool because markets for land rarely, if ever, operate with market efficiency.

Land banks engage in asset banking by acquiring inventories of real property, primarily from five sources: (1) tax delinquencies and tax foreclosures; (2) excess residential real estate foreclosures; (3) foreclosure of government liens arising from housing and building code violations; (4) direct market purchases; and (5) third parties' deposits of properties to be held pending redevelopment. A deposit-based program can permit a governmental or not-for-profit entity to transfer ownership of property to the land bank, reserving the right to withdraw the property at any time after paying the land bank for holding costs.

Land banks help stabilize the real estate market by creating the functional equivalent of a publicly controlled secondary market. Its ability to acquire inventory when land has no readily available private market lets it address the contraction and expansion of property liquidity relative to demand. The regulation of private development is not affected, nor is traditional zoning and land-use plans.

As part of a public agency, or as a separate public authority, a land bank is, and should be, required to exercise its authority consistent with the common good. All real property transactions must fall within clearly stated purposes and priorities on land use. These purposes and priorities are established by state legislatures, by intergovernmental contracts, or by the local governments that create the programs.

The ultimate objective of a land bank is to provide a multi-jurisdictional response to inefficient land markets and to reallocate land for inclusionary, sustainable purposes. Forty years ago, advocates urged its adoption as part of federal housing and urban development policy. The need is greater than ever, and the opportunity is here.

CONCLUSION

Together, the ongoing national mortgage crisis and the steady economic decline of older, industrial areas have created increasing numbers of vacant and abandoned properties that are placing ever greater stress on communities across the country. Communities must bear the costs induced by these large inventories of foreclosed, vacant, and abandoned properties. The tools described in this article can help local governments halt and reverse the negative impact of vacant, abandoned, and foreclosed properties.

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Additional Resources – Local Ordinances and Statutes

Registration Triggered by Vacancy:

Fresno, Cal., Municipal Code and Charter of Fresno, California, Article 6, Sec. 10-617 (2008).

City of Beaumont, California, Registration Form for Abandoned Residential Property.

Smyrna, Del., Ordinance § 18-1557 (2007).

Wilmington, Del., Code for the City of Wilmington, Delaware, ch. 4 §27, 125.00 (2003)

Springfield, Mass., Title 8, ch. 7.50 (2009), Regulating the Maintenance of Vacant and/or Foreclosing Residential Properties, *available at* www.safeguardproperties.com/vpr/docs/Springfield_MA_ordinance.doc.

Registration Triggered by Initiation of Foreclosure Process:

Belton, Mo., Ordinance No. 2009-3547 (2009).

Chula Vista, Cal., Ordinance No. 3080 (2007).

Deerfield Beach, Fla., Ordinance No. 2008/020, *available at* integratedservicesinternational.com/Documents/Ordinance-Deerfield_Beach,_FL.pdf (requiring VPR after a trustor defaults).

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Lyndhurst, Ohio, Code of Ordinances Part 13, Title 5, ch. 1393 (2007).

Requirement of Registration upon Foreclosure Sale:

See An Act Concerning Neighborhood Protection, Connecticut Public Act No. 09-144 (Oct. 1, 2009), *available at* www.cga.ct.gov/2009/ACT/PA/2009PA-00144-R00SB-00951-PA.htm (requiring all properties obtained after October 1, 2009 due to foreclosure to be registered with the town clerk in the local municipality where the property is registered or, alternatively, with MERS)

Requirement of Insurance on Vacant Properties:

Chicago, Ill., Municipal Code § 13-12-125 (2008).

Bellwood, Ill., Code of Ordinances Title XV, §153.31(C) (2002).

An Act relating to municipal registration of vacant buildings; providing a penalty, Texas Local Government Code §1, ch. 214 (2009), *available at* www.legis.state.tx.us/tlodocs/81R/billtext/pdf/HB03065I.pdf (last visited Dec. 10, 2009) (expressly allowing local municipalities to enact VPR ordinances, including insurance requirements, and makes it a misdemeanor to violate a local VPR ordinance)

Special Assessments Depending on Structure Characteristics or Length of Vacancy:

Altoona, Pa., Ordinance 5564, § 1003.3 (2008), *available at* www.altoonapa.gov/altoona/lib/altoona/vacant_property.pdf

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Holyoke, Mass., Eighth Amendment to Chapter 18 of the Revised Code of Ordinances of the City of Holyoke, Massachusetts (1997), *available at* www.safeguardproperties.com/vpr/docs/Hoyyoke_MA_ordinance_form_fees.pdf

Miami, Fla., Code of Ordinances Ch. 10, Art. IV (2008), *available at* www.municode.com/resources/gateway.asp?pid=10933&sid=9