

**RE-STITCHING THE URBAN FABRIC:  
MUNICIPAL-DRIVEN REHABILITATION OF  
VACANT AND ABANDONED BUILDINGS IN  
OHIO’S RUST BELT**

---

*By Elizabeth M. Tisher\**

Introduction.....	174
Part I: Urban Decline in the United States.....	175
A. History of Urban Decline.....	175
B. Rise in Vacant Buildings.....	177
C. Impact of Vacant and Abandoned Buildings.....	179
D. Impacts of Demolition.....	180
E. Foreclosures and the Subprime Mortgage Crisis.....	182
Part II: Cincinnati’s Efforts to Eradicate Vacant and Abandoned Buildings.....	183
A. Vacated Building Maintenance License.....	183
B. Hazard Abatement Program.....	189
C. Neighborhood Stabilization Program.....	195
D. Land Reutilization Corporation.....	198
Part III: Implementing Aggressive Municipal-Driven Rehabilitation Legislation.....	201
A. Comprehensive Vacant Building Registration Program.....	201
B. Expanding the Public Nuisance Doctrine to Allow for Early Municipal Intervention.....	204
C. Using Eminent Domain to Acquire and Rehabilitate Vacant and Abandoned Buildings.....	211
Conclusion.....	223

*“Root shock, at the level of the local community, be it neighborhood or something else, ruptures bonds, dispersing people to all the directions of the compass. Even if they manage to regroup, they are not sure what to do with one another. People who were near are too far, and people who were*

---

\* Lizzie Tisher is a JD candidate at Vermont Law School.

*far are too near. The elegance of the neighborhood—each person in his social and geographic slot—is destroyed, and even if the neighborhood is rebuilt exactly as it was, it won't work. The restored geography is not enough to repair the many injuries to the maze-way.*"<sup>1</sup>

*"The howl of pain that went up with the first bulldozer has grown and deepened, as people begin to understand . . . what it meant to lose the lower half of our body."*<sup>2</sup>

*"[L]ively, diverse, intense cities contain the seeds of their own regeneration . . . ."*<sup>3</sup>

#### INTRODUCTION

Current demographic trends indicate a renewed interest in urban living, as climate change, high gas prices, and the tedium of suburban sprawl have compelled both young and old alike to seek out more modest living accommodations, walkable neighborhoods, and community connections.<sup>4</sup> Despite this positive shift—a shift that is stimulating the revitalization of economically distressed urban neighborhoods—many former industrial cities continue to struggle with vacant, abandoned, and otherwise blighted properties.<sup>5</sup> These neglected properties threaten the health and safety of the community, hinder economic development, and generate high financial and psychological costs for municipalities. In the worst of circumstances, the aged building stock is left to deteriorate to the point of nuisance and eventual demolition. The vacant lots left in the wake of the demise further plunge the neighborhood into a distressed state. In the best of

---

1. MINDY THOMPSON FULLILOVE, *ROOT SHOCK: HOW TEARING UP CITY NEIGHBORHOODS HURTS AMERICA, AND WHAT WE CAN DO ABOUT IT* 14 (2004).

2. *Id.* at 224.

3. JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* 448 (1961).

4. See Don Lee, *U.S. Population in Cities Growing Faster than in Suburbs*, L.A. TIMES (June 28, 2012), <http://articles.latimes.com/2012/jun/28/nation/la-na-census-cities-20120628> (highlighting recent census data that shows cities grew by 1.1% between 2010 and 2011, while suburbs grew by only 0.9%); Christopher Leinberger, *Cities Versus Suburbs is the Wrong Debate*, THE NEW REPUBLIC (Apr. 20, 2011), <http://www.newrepublic.com/blog/the-avenue/87111/cities-versus-suburbs-the-wrong-debate> (discussing migration toward pedestrian-oriented neighborhoods). *But see* Eric Jaffe, *So Are People Moving Back to the City or Not?*, ATLANTIC CITIES (Nov. 14, 2011), <http://www.theatlanticcities.com/arts-and-lifestyle/2011/11/so-are-people-moving-back-city-or-not/487/> (suggesting cities might not be repopulating at rates previously anticipated and that suburbs are still outgrowing urban areas).

5. *Smaller Is More Beautiful*, ECONOMIST (Oct. 22, 2011), [www.economist.com/node/21533417/print](http://www.economist.com/node/21533417/print) (discussing the decline of old industrial cities over the past half century and the ongoing problems with acres of abandoned property, a dwindling tax base, reduced commercial activity, high unemployment, and high crime).

circumstances, developers push for the removal of blighted structures to pave the way for new construction—a system that results in the loss of significant historic buildings, community identity and character, and, in many cases, affordable housing and small business opportunities (i.e., gentrification).<sup>6</sup>

Municipalities use vacant building registries, hazard abatement programs, public nuisance law, condemnation procedures, land banks, and other local ordinances in their attempts to remedy the vacant and abandoned building problem. However, existing legislation encourages demolition, and the hurdles of implementing and enforcing building codes have weakened their effectiveness. This Note proposes that municipalities have the authority to proactively manage vacant and abandoned historic properties and promote economic development and community stabilization by rehabilitating these properties.

Part I provides a history of urban decline, from deindustrialization and middle-class suburban migration to federally subsidized urban renewal programs; discusses the economic, cultural, and social impacts of urban divestment; and focuses on how urban blight frustrates revitalization efforts and threatens historic buildings. Part II examines how Cincinnati<sup>7</sup>—a historic rust belt city in Southwestern Ohio—is managing its growing vacant and abandoned building stock. This Part addresses both substantive legislation and the procedures implementing and enforcing that legislation and analyzes the effectiveness of the city’s actions. Part III assesses the legal challenges the city may face in adopting more expansive legislation, particularly focusing on the limits of a municipality’s authority under state enabling legislation and the substantive and procedural due process and equal protection guarantees of the United States Constitution. This Part also recommends more extensive legislation that Cincinnati, and other cities, can implement to more proactively and aggressively manage its vacant and abandoned building stock and drive rehabilitation and revitalization efforts.

## PART I: URBAN DECLINE IN THE UNITED STATES

### *A. History of Urban Decline*

---

6. See Peter Marcuse, *Gentrification, Abandonment, and Displacement: Connections, Causes, and Policy Responses in New York City*, 28 WASH. U. J. URB. & CONTEMPORARY L. 195, 198–99 (1985) (defining gentrification and noting that “[t]he definition hinges on economic, social, and population changes that cause physical changes to the neighborhoods”).

7. Cincinnati, Ohio, was selected as a case study because it is a classic rust belt city with a deteriorating historic building stock, maintains the largest urban historic district in the nation, and has an active preservation community that has publicized the city’s revitalization efforts over the past several years.

Vacant and abandoned properties have risen to the forefront of municipal concern in recent years. While the subprime mortgage crisis, which resulted in a dramatic increase in foreclosure rates, exacerbated the problem, vacant and abandoned buildings have long been fixtures on the urban landscape. Urban centers began experiencing population declines as early as the 1950s, as the middle class migrated in a mass exodus to the expanding suburbs and federally funded urban renewal projects displaced over one million inner-city denizens.<sup>8</sup> The dramatic loss of employment opportunities in rust belt cities further exacerbated this population decline, which, in many cities, continued unabated for decades.<sup>9</sup> Between 1999 and 2005 alone, Ohio's major cities lost nearly 300,000 manufacturing jobs.<sup>10</sup> A 2007 study of eight former industrial cities in Ohio—Cleveland, Columbus, Dayton, Ironton, Lima, Springfield, Toledo, and Zanesville—reveals population declines of twenty to thirty percent between 1970 and 2000,<sup>11</sup> and Cincinnati census data for this same period demonstrates a thirty-four percent population loss.<sup>12</sup> And the problem persists. Cincinnati and Cleveland lost between ten and seventeen percent of their populations, respectively, over the last decade,<sup>13</sup> and Columbus' historic core, as defined by its 1950 boundaries, experienced comparable population declines.<sup>14</sup>

The extreme economic decline and population loss in urban centers resulted in concentrated areas of poverty and crime—what government officials derisively called “slums.”<sup>15</sup> The passage of the Housing Act of 1949 spurred the federal urban renewal program, which provided financial assistance to municipalities for wholesale “slum” clearance,<sup>16</sup> a massive

---

8. FULLILOVE, *supra* note 1, at 4.

9. *Smaller Is More Beautiful*, *supra* note 5.

10. CMTY. RESEARCH PARTNERS, \$60 MILLION AND COUNTING: THE COST OF VACANT AND ABANDONED PROPERTIES TO EIGHT OHIO CITIES iv (Feb. 2008), [http://communityresearchpartners.org/uploads/publications/FullReport\\_Nonembargoed.pdf](http://communityresearchpartners.org/uploads/publications/FullReport_Nonembargoed.pdf).

11. *Id.* at 2–3.

12. *Data Center*, HAMILTON CNTY., OHIO, [http://www.hamiltoncountyohio.gov/hcrpc/data\\_products/pdf/PopulationChange1970-2010.pdf](http://www.hamiltoncountyohio.gov/hcrpc/data_products/pdf/PopulationChange1970-2010.pdf) (last visited Sept. 8, 2013).

13. Dennis Cauchon, *Population Drastically Declines in Ohio cities*, USA TODAY, March 10, 2011, [http://usatoday30.usatoday.com/news/nation/census/2011-03-09-ohio-census\\_N.htm](http://usatoday30.usatoday.com/news/nation/census/2011-03-09-ohio-census_N.htm).

14. CMTY. RESEARCH PARTNERS, *supra* note 10, at iv. During the 1960s and 1970s, Columbus implemented an aggressive annexation policy that dramatically expanded its urban boundaries. The entire city of Columbus, as presently defined, has benefitted from a ten percent population increase over the last ten years. However, this statistic misrepresents the problems facing Columbus' historic urban core, which has continued to decline on par with other Ohio industrial cities. *Id.* at 2–4.

15. FULLILOVE, *supra* note 1, at 26.

16. See generally Quintin Johnstone, *The Federal Urban Renewal Program*, 25 U. CHI. L. REV. 301, 315–41 (1958) (detailing the federal urban renewal program, its objectives, procedures, and sources of funding).

undertaking that remained in full force for over twenty-five years.<sup>17</sup> The coordinated efforts of the federal and local governments proved to be misguided, as many of the resulting large-scale redevelopment projects eventually failed, draining existing businesses, and further isolating and marginalizing the low-income neighborhoods that initially had been spared the wrecking ball.<sup>18</sup> Those neighborhoods that did not succumb to the massive devastation of the urban renewal program were left to languish slowly.

### *B. Rise in Vacant and Abandoned Buildings*

The former industrial cities that comprise the nation's rust belt suffered severe economic and physical deterioration during the second half of the twentieth century. By 2007, more than 25,000 vacant properties and 15,000 vacant buildings filled Ohio's eight largest industrial cities.<sup>19</sup> The eight-city report, previously discussed at footnote 10, stressed, however, that these numbers may be as much as two to six times higher in cities without adequate vacant building documentation policies.<sup>20</sup> Approximately 2,700 vacant buildings are currently registered in Cincinnati, but because the city only registers uninhabitable buildings—those buildings that are not fit for human occupation—the total number is actually much higher.<sup>21</sup> Historic buildings are more prone to vacancy and abandonment because the inner-city core, which is often the first area to lose businesses and residents, is typically comprised of the oldest structures.<sup>22</sup> Roughly thirty to fifty-percent of Ohio's vacant buildings pre-date 1940, and the large majority of vacant buildings in Ohio's inner-city core neighborhoods pre-date 1940.<sup>23</sup>

---

17. FULLILOVE, *supra* note 1, at 57–59. Despite the devastating impacts on many historic inner-city neighborhoods, the program sparked the modern-day historic preservation movement. *Id.*

18. *See, e.g.*, Roberta Brandes Gratz, *No Town*, PRESERVATION, 38–42 (1999). In 1977, in an effort to revitalize the central business district, Detroit constructed the Renaissance Center—five office buildings, a hotel, retail stores, two garages, and a vast parking lot. The city gambled on the project to pump life back into the city. Instead, the project drained existing businesses, and the “town’s remaining urban vitality vanished.” *Id.* at 42. *See also* ROGER TRANCIK, FINDING LOST SPACE: THEORIES OF URBAN DESIGN 12 (1986) (emphasizing how urban renewal destroyed urban life and stating that “[u]rban-renewal projects rarely corresponded in spatial structure to the evolved community patterns they replaced, nor did they respond to the social relationships that gave meaning to community existence”).

19. CMTY. RESEARCH PARTNERS, *supra* note 10, at iii.

20. *Id.*

21. *Vacant Buildings Neighborhood Database*, CITY OF CINCINNATI CMTY. DEV., <http://cagisperm.hamilton-co.org/cpop/vacantbuildings.aspx> (last visited Sept. 1, 2013).

22. CMTY. RESEARCH PARTNERS, *supra* note 10, at iv.

23. *Id.*

Many of the vacant and abandoned buildings that fill inner-city neighborhoods are located in historic districts, which face delisting if current demolition trends are not reversed.<sup>24</sup> Cincinnati's most notable historic district, Over-the-Rhine ("OTR"), at approximately 362.5 acres, is the nation's largest urban historic district.<sup>25</sup> In 2006, OTR was placed on the National Trust for Historic Preservation's ("NTHP") list of "America's Eleven Most Endangered Historic Places."<sup>26</sup> As stated by the NTHP:

Cincinnati is a very historic city with an extraordinary number of historic places on the National Register. Over-the-Rhine has more such buildings than New Orleans and is larger than Charleston's world-renowned historic district. Unlike these cities, though, Cincinnati has not capitalized on its historic assets. In fact, we have let many of these assets become an albatross: historic buildings throughout Over-the-Rhine sit vacant and derelict, deteriorating over years of neglect. Unfortunately, the approach to this dilemma has been standardized and reactionary: demolition. Over-the-Rhine is still one of America's most historically significant neighborhoods, but it is at a tipping point. We have recently calculated that OTR is only four demolitions away from passing 50% destruction of its historic building stock.<sup>27</sup>

In the five years leading up to OTR's inclusion on the endangered list, fifty-two of its historic buildings succumbed to demolition.<sup>28</sup> As a result, the neighborhood has lost too much urban fabric to be considered a National Historic Landmark, a designation that may have paved the way for preservation grant money.<sup>29</sup> While Cincinnati's vacant building registry

---

24. See National Register Federal Program Regulations, 36 C.F.R. § 60.15 (2013) (discussing grounds for removing properties from the National Register, including "qualities which caused it to be originally listed have been lost or destroyed").

25. *OTR Facts and Figures*, OVER-THE-RHINE FOUND., [http://www.otrfoundation.org/OTR\\_Facts\\_Figures.htm](http://www.otrfoundation.org/OTR_Facts_Figures.htm) (last visited Dec. 2, 2012).

26. *Id.* Every year, the NTHP publishes a list of the eleven most endangered historic places in the nation. Properties on the list are typically of great significance and are under threat of demolition, neglect, alteration, or other negative impact. By publishing this list, the NTHP seeks to garner support for the threatened resources. OTR's placement on the list in 2006 has no doubt helped to spur the preservation efforts that are currently heavily underway in the district. For more information on the endangered list, see *America's Eleven Most Endangered Historic Places*, NAT'L TRUST FOR HIST. PRESERVATION, <http://www.preservationnation.org/issues/11-most-endangered/> (last visited Dec. 5, 2012).

27. NAT'L TRUST FOR HIST. PRESERVATION, [http://www.otrfoundation.org/Historic\\_Preservation.htm](http://www.otrfoundation.org/Historic_Preservation.htm) (last visited Sept. 8, 2013).

28. *Id.*

29. Lucy May, *Building by Building, Over-the-Rhine's History Slipping Away*, BUS. COURIER (June 17, 2009),

currently lists roughly 300 properties,<sup>30</sup> preservationists at the OTR Foundation believe as many as 500 may be sitting vacant or abandoned.<sup>31</sup> At the turn of the twentieth century, OTR's population boomed at 45,000 residents; today it maintains only 4,900.<sup>32</sup> The OTR Foundation speculates that the historic district could accommodate more than 20,000 new individuals without displacing any existing residents.<sup>33</sup>

### C. Impact of Vacant and Abandoned Buildings

The financial impact of vacant and abandoned buildings on municipalities is significant. In 2007, vacant and abandoned properties cost Ohio's industrial cities roughly \$15 million in annual services and \$49 million in cumulative lost property tax revenues to both local governments and school districts.<sup>34</sup> A municipality generally loses \$128 in delinquent real property taxes for every \$1,000 of taxes levied.<sup>35</sup> The financial impact also directly and indirectly extends to the cities' residents. Lost tax revenues shrink the overall city budget and weaken the ability of the city to provide services to its residents,<sup>36</sup> and proximity to vacant or abandoned buildings dramatically decreases property values.<sup>37</sup>

The negative effects of vacant and abandoned buildings reach beyond economics. These properties continue to deteriorate to the point of public nuisance, attract criminal activity, and pose a fire risk.<sup>38</sup> Moreover, the negative impacts can spread both physically and psychologically through the "broken window theory"—a sociological theory positing that one broken window will inevitably lead to other broken windows.<sup>39</sup> Small signs

---

<http://www.bizjournals.com/cincinnati/stories/2009/06/15/story2.html?page=all> (quoting the preservation director at the Cincinnati Preservation Association: "The attrition of historic buildings in Over-the-Rhine has been the slow drip, drip of the loss of one or two building at a time.").

30. CITY OF CINCINNATI CMTY. DEV., *supra* note 21.

31. A Plan for Preservation, Part I, slide 31, OVER-THE-RHINE FOUND. & CINCINNATI PRESERVATION FOUND. (on file with the author).

32. OVER-THE-RHINE FOUND., *supra* note 25.

33. A Plan for Preservation, Part I, *supra* note 31.

34. CMTY. RESEARCH PARTNERS, *supra* note 10, at v.

35. *Id.* at iv.

36. *Id.* at 2–17.

37. *See, e.g., id.* (citing a Philadelphia study that found that properties located within 150 feet of a vacant or abandoned property sold for nearly \$8,000 less than those more than 450 feet from a vacancy).

38. *Id.* at 5–47.

39. *See* George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC (Mar. 1982), <http://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/>. In this seminal article, Kelling and Wilson first posited the theory that strictly policing small infractions will reduce more significant crime and restore order to high-crime neighborhoods. The authors used the broken window as an analogy to this theory, stating that "one broken window becomes many." *Id.* Urban theorists

of blight, such as broken windows, trash, vandalism, and graffiti, send out a message that there are no consequences for bad behavior and no control over the condition of the neighborhood.<sup>40</sup> This perception leads to fear, which, in turn, weakens the housing market.<sup>41</sup> As residents leave, businesses leave, and neighborhoods grow disconnected.<sup>42</sup> Eventually, the small islands of habitation become lost in a sea of abandoned buildings and vacant lots.

#### *D. Impacts of Demolition*

Municipalities typically respond to the problem of vacant and abandoned buildings with aggressive demolition, which has resulted in a significant loss of community stability, neighborhood character, and cultural continuity.<sup>43</sup> The historic preservationist's library is stocked with literature espousing the economic merits of saving historic buildings and districts.<sup>44</sup> In distressed urban neighborhoods like OTR, cultivating a solid historic building stock provides better affordable housing opportunities, incubator spaces for small businesses, and a stable real estate market.<sup>45</sup>

---

quickly latched onto this concept and promoted it as a rationale for blight removal in deteriorated neighborhoods. While many cities claim great success in reducing crime under the broken window theory, the concept has been the subject of debate in recent years. See Bryan M. Seiler, *Moving from "Broken Windows" to Healthy Neighborhood Policy: Reforming Urban Nuisance Law in Public and Private Sectors*, 92 MINN. L. REV. 883, 898 (2008). Seiler finds little empirical support for the broken window theory and argues that it dramatically underestimates the "complexity and particularly flexible nature of human behavior." *Id.*

40. Kelling & Wilson, *supra* note 39.

41. CMTY. RESEARCH PARTNERS, *supra* note 10, at vi.

42. See FULLILOVE, *supra* note 1, at 89 (discussing the contagious nature of housing destruction and how it can destroy miles of urban habitat if left unimpeded).

43. See generally RICHER HERITAGE: HISTORIC PRESERVATION IN THE TWENTY-FIRST CENTURY xiii–xv (Robert E. Stipe, ed., 2003) (outlining several reasons why society chooses to preserve cultural resources). Stipe states: "[W]e seek to preserve our heritage because our historic resources are all that physically link us to our past . . . [and] we strive to save our historic and architectural heritage simply because we have lived with it and it has become part of us. The presence of our physical past creates expectations—expectations that are important to our daily lives." *Id.* at xiii. See also DONOVAN D. RYPKEMA, *THE ECONOMICS OF HISTORIC PRESERVATION: A COMMUNITY LEADER'S GUIDE* 69 (2002) (emphasizing that "historic preservation attaches people to their community, provides a sense of place, connects them to their neighbors, and encourages public participation").

44. See generally RYPKEMA, *supra* note 43 (providing one hundred economic rationales for historic preservation, including job creation, small business development, heritage tourism, and enhanced property values).

45. *Id.* at 69–70. Existing buildings provide more affordable spaces for housing and small businesses because costs of rehabilitation are cheaper than new construction, and the overhead of maintaining a newer building is typically greater than maintaining an older one. Property values of existing buildings are more stable because historic neighborhoods are less vulnerable to fluctuations in the market and speculative real estate practices. *Id.* See also JACOBS, *supra* note 3, at 188 (arguing that "hundreds of ordinary enterprises . . . can make out successfully in old buildings, but are inexorably slain by the high overhead of new construction").



What is impossible to quantify, but is no less present, is the emotional loss suffered by the long-time residents when their community is destroyed and their neighbors, friends, and relatives are uprooted and dispersed. Over time, these residents have formed a culture, their families have taken root, and their communities have flourished, and the upset caused by widespread demolition can render devastating social and psychological impacts.<sup>46</sup> The process of urban renewal that spawned the wholesale clearance of neighborhoods and displacement of residents throughout the 1950s and 1960s has left its mark, and the ongoing disinvestment continues to chip away at the community fabric. Neighborhoods that were redeveloped with new housing and commercial businesses never regained the character, culture, and community that were eradicated.<sup>47</sup>

Even if one believes that new construction, rather than historic preservation, is beneficial to a distressed community, it is important to note that new construction rarely follows demolition.<sup>48</sup> The resulting empty lots only further exacerbate many of the same ills initially brought on by vacant and abandoned buildings. The lots remain undeveloped—further fragmenting the once-contiguous residential and commercial development—and become overgrown, vermin-infested, and trash-laden.<sup>49</sup> The unkempt lots are no surprise. If the buildings that once occupied those lots were untended, it stands to reason that the lots will also remain untended. And the empty lots themselves are contagious, as one bulldozed property often leads to another.<sup>50</sup> Cities rest their hopes on new development that never arrives and then find themselves contending with a different host of problems brought about by overgrown urban prairies.

In her seminal book *The Death and Life of Great American Cities*, urban activist Jane Jacobs preaches the merits of dense, urban neighborhoods filled with sidewalks, small businesses, and human-scale historic buildings.<sup>51</sup> Jacobs concludes that high-density neighborhoods

---

46. See generally FULLILOVE, *supra* note 1 (detailing the social and psychological impacts of urban renewal programs on the displaced African-American residents in several cities and the subsequent break down of the culture that formed around those bulldozed neighborhoods).

47. *Id.*

48. A drive through any distressed urban neighborhood will reveal large swaths of vacant land that has been left to the ravages of nature. And one will not observe much, if any, new construction in these areas. See TRANCIK, *supra* 18, at 2 (explaining how modern cities are filled with “lost spaces,” such as “the vacant blight-clearance sites—remnants of urban-renewal days—that were, for a multitude of reasons, never redeveloped”).

49. See Adrienne Lyles-Chockley, *Building Livable Places: The Importance of Landscape in Urban Land Use, Planning, and Development*, 16 BUFF. ENVTL. L.J. 95, 117 (2009) (discussing cities’ struggles with managing vacant lots, pocket parks, and other open spaces, which are prone to accumulating trash, overgrowth, and drug activity).

50. See FULLILOVE, *supra* note 1, at 89, 93.

51. JACOBS, *supra* note 3, at 187–99.

create vibrant and active cities and that, despite widespread misconceptions, lower-density neighborhoods are more likely to breed overcrowding and “slum” conditions.<sup>52</sup> High concentrations of people produce more services, more amenities, and more social activities, and the large number of eyes on the street serve to deter criminal activity.<sup>53</sup> Vacant lots have no eyes with which to observe street activity or watch out for neighbors; they reduce walkability of neighborhoods, and provide no services or amenities to the remaining residents.

### *E. Foreclosures and the Subprime Mortgage Crisis*

The recent subprime mortgage crisis undoubtedly spurred a significant rise in vacant and abandoned buildings, particularly residential properties, and has been the catalyst for increasing municipal intervention.<sup>54</sup> Ohio alone saw 80,000 foreclosure filings in 2006, up from 16,000 in 1995.<sup>55</sup> A 2010 report on vacant and abandoned properties in seventy-seven cities nationwide reveals a thirty-three percent increase in vacant and abandoned buildings as a result of foreclosure, with some cities reporting between one- and two-hundred-percent increases.<sup>56</sup> However, as is the case with Cincinnati’s OTR, vacant and abandoned buildings have been a persistent problem in inner-city urban neighborhoods for decades. Many of the problems that these foreclosed properties pose are quite different than those presented by the recent foreclosure crisis, but most municipalities have been taking a one-size-fits-all approach.

Foreclosures can occur anywhere and have been widespread over the past few years. Subprime mortgage lending to high-risk borrowers resulted in homeowners struggling to keep up with their debt payments.<sup>57</sup> The bulk of the subprime lending occurred in relatively stable middle-class neighborhoods and sprawling suburbs.<sup>58</sup> Even though mortgage lenders

---

52. *Id.* at 200–21.

53. *Id.*

54. See Creola Johnson, *Fight Blight: Cities Sue to Hold Lenders Responsible for the Rise in Foreclosures and Abandoned Properties*, 2008 UTAH L. REV. 1169, 1174–80 (2008) (analyzing the effects of predatory subprime lending practices on the rise of foreclosures and abandonments and estimating that 2.25 million completely vacant homes are on the market).

55. CMTY. RESEARCH PARTNERS, *supra* note 10, at iv.

56. THE U.S. CONFERENCE OF MAYORS, IMPACT OF THE MORTGAGE FORECLOSURE CRISIS ON VACANT AND ABANDONED PROPERTIES IN CITIES 3 (2010), <http://usmayors.org/publications/2010%20VAP%20Report.pdf>.

57. Johnson, *supra* note 54, at 1174–80.

58. See Christopher B. Leinberger, *The Next Slum?*, ATLANTIC (Mar. 2008), <http://www.theatlantic.com/magazine/archive/2008/03/the-next-slum/306653/> (emphasizing the impact of the foreclosure crisis on “McMansions” and newly-built suburbs); CHRIS MAYER & KAREN PENCE, SUBPRIME MORTGAGES: WHAT, WHERE, AND TO WHOM? 11 (2008) *available at*

were generously doling out money to prospective homebuyers, many distressed inner-city neighborhoods were still considered too high-risk for otherwise creditworthy borrowers.<sup>59</sup> Because the high foreclosure rate was largely a result of predatory lending practices and the failure of otherwise well-meaning homeowners to keep up with their mortgage payments, the subprime mortgage crisis is not endemic to any specific neighborhood. On the contrary, the problem with vacant and abandoned properties in distressed inner-city neighborhoods is rooted in the decades of decline these areas have been experiencing—the problem is linked to the neighborhood itself. As discussed in Part II, these two problems require a specifically tailored set of solutions.

## PART II: CINCINNATI'S EFFORTS TO ERADICATE VACANT AND ABANDONED BUILDINGS

### *A. Vacated Building Maintenance License*

Vacant building registries have garnered attention in recent years, particularly in the wake of the foreclosure crisis.<sup>60</sup> Over 800 municipalities in forty-three states and the District of Columbia have already enacted vacant building registries, and many more ordinances are pending local approval.<sup>61</sup> Municipalities regard these registries as a way to “motivate owners to maintain vacant buildings and return them to productive use, identify the party responsible for the problem properties, monitor vacant properties, and defray costs of providing related municipal services.”<sup>62</sup>

---

<http://www.federalreserve.gov/pubs/feds/2008/200829/200829pap.pdf> (stating that subprime lending practices are prevalent in areas of new construction). See also Jim Rokakis, *The Shadow of Debt*, WASH. POST (Sept. 30, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/09/28/AR2007092801331.html?sid=ST2007093000980>. Slavic Village, a tight-knit residential neighborhood of second-generation Polish and Czech immigrants in Cleveland, has been particularly hard hit by the foreclosure crisis. With roughly eight hundred vacant buildings and completely abandoned streets, the once-stable neighborhood has fallen victim to drugs, looting, and a host of other criminal activities. *Id.*

59. A Plan for Preservation, Part II, slides 14–15, OVER-THE-RHINE FOUND. & CINCINNATI PRESERVATION FOUND. (on file with the author).

60. See Timothy A. Davis, *A Comparative Analysis of State and Local Government Vacant Property Registration Statutes*, 44 URB. LAW. 399, 399–400 (2012) (discussing the impact of the foreclosure crisis on the rise in vacant buildings and the response of municipalities in enacting vacant property registration ordinances).

61. *Vacant Property Registration Ordinances*, SAFEGUARD PROPS., [http://www.safeguardproperties.com/Resources/Vacant\\_Property\\_Registration.aspx](http://www.safeguardproperties.com/Resources/Vacant_Property_Registration.aspx) (last visited Aug. 30, 2013).

62. BLDG. AND PROF'L PEOPLE FOR THE PUB. INTEREST, ET AL., HOW CAN MUNICIPALITIES CONFRONT THE VACANT PROPERTY CHALLENGE?: A TOOLKIT 20 (2010), <http://www.bpichicago.org/documents/toolkitBPI5-6-10-.pdf>.

Although ordinances greatly vary from one jurisdiction to another, they generally define the scope of the targeted property—often providing a definition of “vacant building” or “vacant property”—set a notice period, establish a fee schedule, and specify requirements for compliance.<sup>63</sup>

Cincinnati adopted its Vacated Building Maintenance License (“VBML”) program in 1996.<sup>64</sup> Cincinnati’s ordinance targets structures that the chief building official has deemed “dangerous and unsafe”—i.e., a hazard to health, safety, and welfare; under threat of collapse; or generally “so dilapidated, decayed, or unsafe, or which so substantially fail to provide the basic elements of shelter or safety that they are unfit for human habitation or dangerous to life or property.”<sup>65</sup> Once the building inspector finds dangerous and unsafe conditions, a vacation notice is served upon the owner.<sup>66</sup> The owner has thirty days from the date of the initial vacation order to apply for the license and another sixty days to stabilize the building in conformance with the minimum standards of safety and structural integrity.<sup>67</sup> Additional instructions for obtaining a certificate of appropriateness, a document stating that the rehabilitation work is appropriate for the historic district, are provided for buildings located within designated districts.<sup>68</sup> Property owners must meet thirteen standards set forth in the VBML ordinance that ensure vacated buildings are:

adequately protected from intrusion by trespassers and from deterioration by the weather . . . will not be detrimental to the public health, safety and welfare, will not unreasonably interfere with the reasonable and lawful use and enjoyment of other premises within the neighborhood, and will not pose any extraordinary hazard to police officers or fire fighters entering the premises in times of emergency.<sup>69</sup>

---

63. SAFEGUARD PROPS., *supra* note 61.

64. Lucy May & Dan Monk, *An Ordinance Aimed at Seizing the Potential of Cincinnati’s Thousands of Vacant Buildings is Falling Short*, CINCINNATI BUS. COURIER (Aug. 18, 2008), <http://www.bizjournals.com/cincinnati/stories/2008/08/18/story2.html>. See also SAFEGUARD PROPS., *supra* note 61. Cincinnati’s ordinance is one of the longest running vacant building registries. The majority of these ordinances were adopted after 2009 to address the growing problem of foreclosed homes. The earlier ordinances that pre-date the foreclosure crisis, like Cincinnati’s, were typically adopted to address blight in the historic urban core. *Id.*

65. CINCINNATI, OHIO, BLDG. CODE, § 1101-63 (2011).

66. *Id.* § 1101-67 (2011).

67. *Id.* § 1101-77 (2011).

68. *Id.* § 1101-67 (2011).

69. *Id.* § 1101-79 (2012).

Buildings are typically inspected every thirty days to verify compliance.<sup>70</sup> A property owner's failure to apply for or receive a license may result in criminal charges,<sup>71</sup> and the offending buildings may be placed in the city's hazard abatement program and eventually may be demolished.<sup>72</sup> Roughly 2,769 buildings are currently licensed under the VBML program.<sup>73</sup> Nearly 300 are located in OTR, and several hundred more are scattered within the city's other twenty-eight historic districts.<sup>74</sup> Of the licensed buildings, 1,320 are condemned, 297 have been deemed a hazard, and almost 1,000 properties are the subject of civil or criminal proceedings.<sup>75</sup>

Key to Cincinnati's VBML is the annual fee that the city assesses to offset the cost of maintaining the program. Cincinnati boasts one of the more aggressive fee schedules compared with other vacant building registries.<sup>76</sup> The ordinance provides a graduated rate system with an initial application fee of \$900 for properties that have been vacant for less than one year and an annual increase up to \$3,500 for properties vacant five or more years.<sup>77</sup> An additional \$1,000 late fee will be charged for the owner's failure to obtain or renew a license within the specified time period.<sup>78</sup> The current rate system was adopted in 2006 when the VBML program was overhauled, and in the first two years of the revised rate system, the city collected roughly \$628,000 from 544 property owners.<sup>79</sup> Ideally, the increased fee gives the city more resources to manage the growing problem and also incentivizes property owners to quickly put their buildings back into productive use.<sup>80</sup>

Cincinnati's VBML was largely upheld as a facially valid exercise of the city's police power in *Etzler v. City of Cincinnati*.<sup>81</sup> In 2009, Cincinnati property owners sought a declaratory judgment that the VBML violated

70. *Id.*

71. *Id.* § 1101-71 (2011).

72. *Vacant & Hazardous Buildings*, CITY OF CINCINNATI CMTY. DEV., <http://www.cincinnati-oh.gov/community-development/property-maintenance/vacant-hazardous-buildings/> (last visited Sept. 20, 2013).

73. *Vacant Buildings Neighborhood Database*, CITY OF CINCINNATI CMTY. DEV., <http://cagisperm.hamilton-co.org/cpop/vacantbuildings.aspx> (last visited Sept. 20, 2013).

74. *Id.*

75. *Id.*

76. See SAFEGUARD PROPS., *supra* note 61. While fee schedules vary, most fall within the \$50 to \$250 range. Most rates are fixed, and many are assessed only once at the time of application. Only a few municipalities charge a higher rate than Cincinnati. *Id.*

77. CINCINNATI, OHIO, BLDG. CODE, § 1101-129 (2011).

78. *Id.*

79. May & Monk, *supra* note 64.

80. *Id.* (discussing city council's motivation to "beef up" ordinance in 2006).

81. *Etzler v. City of Cincinnati*, No. 1:07-CV-1035, 2009 WL 3210337, at \*7 (S.D. Ohio 2009).

substantive due process and equal protection rights; was void for vagueness; and violated the Ohio Constitution's mandate that taxes against real property be uniform according to value; and that the fines were unconstitutionally excessive.<sup>82</sup> First, the court dismissed the plaintiffs' due process and state constitutional claims, relying on the Sixth Circuit's "entitlement test" to determine whether the plaintiffs' alleged property rights are protected under the Fourteenth Amendment.<sup>83</sup> The Sixth Circuit explained that a plaintiff "lacks a legitimate claim of entitlement or justifiable expectation if a municipality has discretion under its zoning code to deny the plaintiff's land-use application."<sup>84</sup> Applying this test to the VBML, the court found that because an inspector has the discretion to order a building to be vacated, the plaintiffs have no claim of entitlement to that property interest.<sup>85</sup> The court also held that the fee is not a tax but rather an assessment for services provided to the individual property owners and is valid under the state constitution.<sup>86</sup> However, the court found the plaintiffs had a valid equal protection claim as applied to their property due to the city's alleged uneven and arbitrary enforcement.<sup>87</sup> Additionally, because the ordinance involved criminal penalties and did not define "code violation" and "noncompliance" and because the excessive fines appeared disproportionate to the gravity of the offense, the court found that the plaintiffs stated valid void-for-vagueness and excessive fines claims.<sup>88</sup> Although documentation on any further proceedings is unavailable, the VBML has undergone little change since this 2009 case—with the exception that the terms "code violation" and "noncompliance" are now specifically defined in the ordinance.<sup>89</sup>

Critics of Cincinnati's VBML argue that the program has been fraught with inefficient and inconsistent enforcement since its inception.<sup>90</sup> Good-faith property owners who are paying annual fees and actively rehabilitating their buildings point to neighboring properties that are unsecured and rapidly deteriorating, and many residents claim the city is intentionally overlooking its own nuisance properties in violation of its own laws.<sup>91</sup> The

---

82. *Id.* at \*1.

83. *Id.* at \*3, \*7.

84. *Id.* at \*7.

85. *Id.* at \*4.

86. *Id.* at \*6.

87. *Id.* at \*4.

88. *Id.* at \*6–7.

89. CINCINNATI, OHIO, BLDG. CODE, § 1101-65 (2010).

90. *See* May & Monk, *supra* note 64 (highlighting shortcomings of VBML program).

91. *Id.* *See also* Dan Monk & Lucy May, *City Files Charges Against Cincinnati Public Schools*, CINCINNATI BUS. COURIER (Sept. 20, 2010), <http://www.bizjournals.com/cincinnati/stories/2010/09/20/story2.html?page=all>. In 2008, a local

city has countered these accusations by citing how the inadequate inspection staff and growing backlog of properties have forced the city to prioritize buildings that pose immediate public safety hazards.<sup>92</sup>

Absentee property owners present an even bigger challenge under the VBML program.<sup>93</sup> According to city officials, absentee owners are the worst offenders when it comes to complying with building codes, responding to vacation orders, and paying licensing fees, and the city's attempts at attaching liens to such properties are futile when the owners are already tax delinquent.<sup>94</sup> Furthermore, many of these absentee owners have little interest in placing their buildings back into productive use, at least in the near future. Rather, they speculatively hold onto numerous properties across the state and await a rise in property values.<sup>95</sup>

Notwithstanding the VBML's short-term enforcement hurdles, the program's long-term effectiveness at actually saving and rehabilitating the city's aging building stock is questionable. The program's biggest flaw is that it targets buildings that are already violating building codes; vacant buildings that are not already "dangerous and unsafe" need not apply for a VBML.<sup>96</sup> By the time the city intervenes, the forces are already working against saving the building and putting it back into productive use. Consequently, the expense of bringing a building into compliance will be much higher, deterring delinquent property owners from taking action and inhibiting many well-intentioned property owners who cannot afford both to pay the licensing fee and pursue rehabilitation. As buildings continue to deteriorate and threaten public health and safety, municipalities often feel

---

architect was renovating his future home on Walnut Street in Over-the-Rhine and paying \$3,500 in annual VBML fees. Two vacant buildings on nearby East McMicken Street—both owned by Cincinnati Public Schools—sat unsecured and unmaintained, and CPS had not paid any of its VBML fees. CPS was eventually prosecuted in 2010 on a first-degree misdemeanor charge for failing to comply with inspection orders. *Id.*

92. See Lucy May & Dan Monk, *Vacant-Buildings Issue Full of Concerns*, CINCINNATI BUS. COURIER (Aug. 25, 2008), <http://www.bizjournals.com/cincinnati/stories/2008/08/25/story1.html> (discussing city's lack of manpower to keep pace with growing vacant building problem).

93. *Id.*

94. *Id.*

95. See Lucy May, *Firm Snapping Up Vacant Buildings Called Speculator*, CINCINNATI BUS. COURIER (Dec. 8, 2008), <http://www.bizjournals.com/cincinnati/stories/2008/12/08/story2.html?page=all>; Lucy May, *Bought on the Cheap, Many Cincinnati JD4 Homes Sit in Decay*, CINCINNATI BUS. COURIER (Jul. 6, 2009), <http://www.bizjournals.com/cincinnati/stories/2009/07/06/story9.html?page=all>. In 2008, a Utah-based investment company purchased nearly 150 properties across Ohio with the goal of eventually owning one thousand. Roughly thirty or forty of those properties are located in Cincinnati. The company purchased the properties through foreclosure and is hoping to flip them within a few years when the market improves. However, several properties in Cincinnati have already been condemned and many more are being left to deteriorate. The city sees this company, and similar speculative investors, as one of the biggest threats to revitalization efforts. *Id.*

96. CINCINNATI, OHIO, BLDG. CODE, § 1101-79 (2012).

that they have little recourse outside of ordering demolition.<sup>97</sup> Furthermore, in the city's local historic districts—where demolition is illegal without approval from the historic conservation board<sup>98</sup>—bad-faith property owners take advantage of the system's slow process of appeals to achieve “demolition by neglect.”<sup>99</sup> They allow their buildings to fall into extreme disrepair and then, by raising takings claims, argue that requiring rehabilitation is an undue hardship and not economically viable.<sup>100</sup> Fifty of fifty-six buildings lost in OTR between 2001 and 2006 were a result of emergency demolition spurred by years of neglect.<sup>101</sup>

The city's failure to facilitate rehabilitation efforts compounds the problem of late registration. While the city grants a two-year fee waiver to property owners with a rehabilitation plan in place, it does not provide any direct financial assistance to aid otherwise well-meaning property owners who lack the resources to bring their buildings back into productive use.<sup>102</sup> Moreover, once the two-year fee suspension expires, the rate increase becomes even more cumbersome.<sup>103</sup> Even property owners slowly but actively in the process of rehabilitating their buildings have been faced with seemingly unwarranted demolition orders for minor VBML infractions.<sup>104</sup> In many respects the program serves as a one-way street to demolition.

---

97. See CT. TRUST FOR HISTORIC PRES., DEMOLITION BY NEGLECT, <http://www.cttrust.org/index.cgi/1050> (explaining how both municipalities and courts feel bound to allow demolition of buildings that have become a public health and safety hazard, particularly when rehabilitation costs are large).

98. See CINCINNATI, OHIO, ZONING CODE, § 1435-09 (2012) (stipulating that “no one shall make an alteration or undertake a demolition, or receive any permit to do so, without first obtaining a Certificate of Appropriateness”).

99. See Dan Monk, *Over-the-Rhine Property Owner Elicits Accusations of Neglect*, CINCINNATI BUS. COURIER (Aug. 11, 2009), <http://www.bizjournals.com/cincinnati/stories/2009/08/10/story1.html>. In 2003, a local family foundation purchased thirteen buildings in the OTR Historic District for redevelopment. The foundation sought permits to demolish twelve buildings. Although the historic conservation board denied the permits, five of the buildings were razed as of 2009. While the foundation pursued several lengthy appeals, the buildings continued to deteriorate, possibly making demolition the only option. *Id.*

100. See Kevin LeMaster, *Zoning Board of Appeals Rules Demolition of 309 W. Fifth Street Okay*, BLDG. CINCINNATI (Apr. 19, 2012, 2:38 PM), <http://building-cincinnati.com>. In April 2012, the zoning board of appeals (“ZBA”) reversed the historic conservation board's decision to deny a demolition request to the owner of 309 W. Fifth Street near the city's central business district. When the owner purchased the property in 2010, the city had already declared the building a public nuisance. The owner left the property unsecured against the weather and allowed it to further deteriorate before seeking a demolition permit. He claimed that rehabilitating the building would result in a financial loss and claimed that denial of his permit amounted to an illegal taking. The ZBA agreed. *Id.*

101. A Plan for Preservation, Part II, *supra* note 59, at slide 4.

102. CINCINNATI, OHIO, BLDG. CODE, § 1101-83 (2011).

103. See Randy A. Simes, SOAPBOX CINCINNATI, (Aug. 10, 2010), <http://www.soapboxmedia.com/devnews/0810vbmlreform.aspx> (outlining amended VBML rate structure and fee suspension provision).

104. See *Wheeler v. City of Cincinnati*, No. C-060393, slip op. at 2–3 (Ohio Ct. App. May 30, 2007) (remanding to the trial court to determine if, in light of the appellant's substantial renovation



*B. Hazard Abatement Program*

Most municipalities have adopted public nuisance ordinances, which allow municipalities to take action against properties that interfere with the public health, safety, and welfare.<sup>105</sup> Public nuisance claims may be brought under the common law or specifically defined by statute.<sup>106</sup> While private nuisance is a civil tort action, public nuisance offenders may face criminal charges.<sup>107</sup> Ohio's enabling legislation directly authorizes municipalities to regulate the erection, inspection, removal, repair, and alteration of buildings.<sup>108</sup> Expressly included under that grant of power is the authority to remove or repair "insecure, unsafe, or structurally defective buildings."<sup>109</sup> The state also grants municipalities broad power to abate nuisances, prevent injury, and prosecute any individual who "creates, contributes to, or suffers such nuisance to exist."<sup>110</sup> Ohio's statute defines a nuisance building as one that is:

structurally unsafe, unsanitary, or not provided with adequate safe egress; that constitutes a fire hazard, is otherwise dangerous to human life, or is otherwise no longer fit and habitable; or that, in relation to its existing use, constitutes a hazard to the public health, welfare, or safety by reason of inadequate maintenance, dilapidation, obsolescence, or abandonment.<sup>111</sup>

A municipality may adopt word-for-word this definition of "nuisance" or draft a more restrictive definition, but a municipality may not provide a broader definition of nuisance than that authorized under state statute. However, the state definition is sufficiently broad to afford municipalities the discretion to apply their own interpretation to the statute's terms, such as "dilapidation," as long as that definition does not contravene any stated legislative purpose. Other pertinent sections of the Ohio statute define parameters within which a municipality must act when abating a

---

efforts, the broken window and gaps in siding are sufficient VBML violations to warrant a demolition order).

105. Restatement (Second) of Torts § 821B (1979). See generally Robert Abrams & Val Washington, *The Misunderstood Law of Public Nuisance: A Comparison with Private Nuisance Twenty Years After Boomer*, 54 ALB. L. REV. 359 (1990) (comparing public and private nuisance actions).

106. Restatement (Second) of Torts § 821B.

107. *Id.* at cmt. d.

108. OHIO REV. CODE ANN., § 715.26 (2009).

109. *Id.*

110. *Id.* § 715.44.

111. *Id.* § 715.263.

nuisance—e.g., limitations on acquiring property,<sup>112</sup> abatement liens,<sup>113</sup> and notice procedures.<sup>114</sup>

Cincinnati considers any “dangerous or unsafe” premises to be a public nuisance, and its ordinance enumerates five defects that constitute dangerous and unsafe conditions.<sup>115</sup> Despite this enumerated list, the criteria leave a wide berth for interpretive discretion. For example, as stated above, a building may be deemed dangerous and unsafe if it is a “hazard to the safety, health, or general welfare of the occupants or the public.”<sup>116</sup> When a building is found to be a public nuisance, the city issues a written notice that orders the owner to bring the property into compliance with the building code or remove the offending structure within thirty days.<sup>117</sup> The notice must be sent at least ten days before a public hearing at which interested parties may appear in opposition to the nuisance orders.<sup>118</sup> In an emergency situation—under threat of collapse or any other immediate danger—the city is authorized to take any steps necessary to abate the hazard, with or without notice, in the interest of public safety.<sup>119</sup> Under Cincinnati’s public nuisance ordinance, the administrative procedures for dealing with dangerous and unsafe premises specify that repair shall be undertaken in lieu of demolition only upon authorization by the city council.<sup>120</sup> Here, the property owner has the burden of presenting to the council a viable rehabilitation plan early in the process.

Because Cincinnati receives federal funds from the U.S. Department of Housing and Urban Development (“HUD”) for demolishing blighted buildings, the city must comply with Section 106 of the National Historic

---

112. OHIO REV. CODE ANN., § 719.012 (2011).

113. *Id.* § 715.261 (2011).

114. *Id.* § 715.26 (2011).

115. CINCINNATI, OHIO, BLDG. CODE § 1101-63. The ordinance states: “All buildings having defects as set forth herein shall be deemed dangerous or unsafe buildings as follows: (1) Those whose walls, floors, foundations, or other members are so out of plumb, level, original position, deteriorated, or overloaded as to be unlikely to perform their intended structural function, or are in such condition or of such size as to cause stresses in any structural members likely to result in failure or collapse; or (2) Those which are, or have become, so dilapidated, decayed, or unsafe, or which so substantially fail to provide the basic elements of shelter or safety that they are unfit for human habitation or dangerous to life or property; or (3) Those which in the opinion of the chief building official or his designee and a responsible officer or the fire division constitute a serious fire hazard because of their use, construction, unprotected exposure, or lack of maintenance; (4) Those which are a hazard to the safety, health, or general welfare of the occupants or the public; or (5) Those which the chief building official or his designee has ordered vacated or kept vacant and which in the time provided by order have not been brought into compliance with the CBC or into compliance with the terms and conditions of a current vacant building maintenance license.” *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. CINCINNATI, OHIO, BLDG. CODE, § 1101-57 (2012).

Preservation Act (“NHPA”).<sup>121</sup> Under this review process, the city must assess the historic significance of any property that has been condemned and is being considered for demolition.<sup>122</sup> The city has entered into a programmatic agreement with the Ohio Historic Preservation Office (“OHPO”), under which Cincinnati’s urban conservator will oversee the process of seeking public comment and assessing the significance of properties over fifty years of age.<sup>123</sup> Unless an emergency exists, any building deemed historically significant must be repaired rather than demolished.<sup>124</sup> Recent data, as of November 2012, indicate that roughly fifty historic buildings have been listed in the public hearing schedule each month for the past six months.<sup>125</sup> Due to the large number of historic buildings arising within the hazard abatement program, and the need to hold public hearings to consider each and every structure, bad-faith property owners can again take advantage of this process to achieve demolition by neglect.

Public nuisance is a well-ingrained common law and statutory doctrine that has been deemed a necessary component to a municipality’s police power, and, thus, the courts have broadly upheld public nuisance claims and granted wide deference to local governments to determine what constitutes a nuisance.<sup>126</sup> While the substance of Cincinnati’s public nuisance law has been held valid,<sup>127</sup> the application of the ordinance has been struck down when the city has failed to comply with the appropriate

---

121. See HISTORIC BLDG. LOSS TASK FORCE, CONCLUSIONS AND RECOMMENDATIONS 44–45 (2010) (outlining the NHPA Section 106 process, which is triggered by the distribution of federal HUD funds and requires that the city review the significance of historic properties before demolition). Cincinnati has entered into a programmatic agreement with the OHPO to administer the Section 106 process, and the city’s Urban Conservator has been tasked with overseeing the process. The Urban Conservator came under fire in recent years for failing to properly assess historic structures. When the Conservator was confronted by significant historic properties, he claimed that the city was not using HUD money but rather local funds for their demolition—a clear abuse of the system. The Historic Building Loss Task Force shed light on this abuse and has since made strides to rectify the situation. *Id.*

122. *Id.*

123. *Id.*

124. CINCINNATI, OHIO, BLDG. CODE, § 1101-57 (2012).

125. See, generally, Kevin LeMaster, BLDG. CINCINNATI, <http://www.building-cincinnati.com>. LeMaster provides monthly lists of historic buildings up for public hearing by the Urban Conservator. Current agendas can be found at CITY OF CINCINNATI CMTY. DEV., *Condemned Buildings for Historic Review & Comment*, <http://www.cincinnati-oh.gov/community-development/property-maintenance/condemned-buildings-for-historic-review/>.

126. See *Maxedon v. Rendigs*, 9 Ohio App. 60, 61 (Ohio Ct. App. 1917) (upholding Cincinnati’s authority to “regulate the sanitary condition [of buildings] and provide for their inspection, and for the repair and destruction, if necessary of insecure, unsafe dangerous buildings”).

127. See *Rhodes v. City of Cincinnati*, No. C-890384, 1990 WL 88745, at \*1 (Ohio Ct. App. 1990) (upholding Cincinnati’s public nuisance ordinance and finding that city’s action was not “unconstitutional, illegal, arbitrary, capricious, [or] unreasonable”).

notice procedures.<sup>128</sup> The court typically sets a higher due process bar for properties slated to be razed—if the demolition process is expedited, the city must show that peril to the public is imminent.<sup>129</sup>

Cincinnati preservationists decry the city's seemingly aggressive demolition policies for nuisance properties, particularly where historic buildings are involved, and warn that the public nuisance designation is overused.<sup>130</sup> They claim that buildings that could be rehabilitated are being razed with little recourse for the owners.<sup>131</sup> In response, city officials urge that they only view demolition as a last resort, particularly because demolition is expensive, but concede that condemnation has become more common as the vacant and abandoned building numbers continue to swell year after year.<sup>132</sup> Critics also deride the city's lax prosecution of building code violations.<sup>133</sup> Prosecution is a slow and costly process, particularly when the city is already backlogged on inspection and code enforcement, and many property owners are resistant to complying with abatement orders and would prefer to face jail time.<sup>134</sup> As a result, bad faith owners know that non-compliance is an acceptable level of risk.<sup>135</sup> Along this same line of reasoning, property owners in the protected historic districts work the loopholes in the system to obtain emergency demolition approval for their nuisance properties.<sup>136</sup> Finally, preservationists argue that the system will continue to fail without a receivership program, which would allow the court to appoint a receiver to enter the nuisance property and make repairs

---

128. See *Cincinnati v. York Rite Bldg. Ass'n*, 843 N.E.2d 250, 253–54 (Ohio Ct. App. 2005) (holding that Cincinnati did not serve property owner with actual notice of public nuisance hearing when city continued to send notice to building that was known to be vacant).

129. *Maxedon v. Rendigs*, 9 Ohio App. at 61–62.

130. See Lucy May, *Preservationists, Officials Try for Cincinnati Demolition Options*, CINCINNATI BUS. COURIER, (Oct. 19, 2009), <http://www.bizjournals.com/cincinnati/stories/2009/10/19/story8.html?page=all> (criticizing the city's move to demolish an historic building that has been deemed a fire hazard and a public nuisance).

131. *Id.*

132. *Id.*

133. See OVER-THE-RHINE FOUND., *supra* note 25 (illustrating how the system for dealing with vacant and abandoned properties in Cincinnati is supposed to operate compared to how it actually operates); Lucy May, *Inspectors Lead City Through Raze-Rebuild Cycle*, (Nov. 23, 2009), <http://www.bizjournals.com/cincinnati/stories/2009/11/23/story18.html?page=all> (discussing some of the administrative hurdles that impede prosecution of building code violations).

134. A Plan for Preservation, Part II, *supra* note 59, at slides 29–32 (discussing how several owners of historic buildings in OTR have continued to purchase properties while claiming the financial inability to maintain the ones they already own and that one such property owner was sentenced to ninety days in jail rather than comply with abatement orders).

135. *Id.*

136. See LeMaster, *supra* note 100.

to bring the building up to code, but funding for such a program has been lacking.<sup>137</sup>

In addition to the enforcement hurdles faced by building inspectors and other city officials, Cincinnati's public nuisance ordinance clearly favors demolition. The language at the outset of the building code states that it shall be "liberally construed in order to promote public safety, health and welfare."<sup>138</sup> While this is customary language that ensures a valid exercise of the city's police power, it also operates as a rationale for the city to undertake aggressive demolition practices. Moreover, the ordinance explicitly creates a presumption of demolition unless the property owner obtains authorization from the city.<sup>139</sup> In effect, the burden falls on the property owner to convince the city that rehabilitation is feasible by developing a workable plan and making reasonable strides to implement it within the narrow confines of the abatement period, typically thirty, sixty, or ninety days with limited opportunity for renewal. Any error in judgment on the part of the property owner in budgeting time for repairs or obtaining the necessary financing results in aggressive action from the municipality in ordering demolition of the property, even when the property owner otherwise has made good-faith efforts to rehabilitate the structure.<sup>140</sup> A mere error in properly boarding a nuisance building against trespassers can result in a municipality ordering demolition.<sup>141</sup>

In essence, the city's actions are punitive toward the property owner at the expense of both the historic building and the greater community. The city is undoubtedly trying to protect the health, safety, and welfare of the public by abating what it sees as hazardous conditions, but little justification exists for overlooking other options that may save the building. The courts generally look at the quantity and severity of the property's defects in determining whether an emergency situation exists and do not consider the actual imminence of public harm.<sup>142</sup> In many cases, the extra

---

137. See Lucy May, *Gap in Funding Stalls Over-the-Rhine Receivership Movement*, CINCINNATI BUS. COURIER, (Apr. 26, 2010), <http://www.bizjournals.com/cincinnati/stories/2010/04/26/story10.html?page=all> (discussing the city's lack of matching funds for implementing a receivership program).

138. CINCINNATI, OHIO, BLDG. CODE § 1101-07 (2002).

139. *Id.* § 1101-57 (2012).

140. See *Hotel Innovations, Inc. v. City of Dayton*, No. 19595 2003 WL 1596303, at \*3 (Ohio Ct. App. 2003) (holding that development company's failure to adhere to the deadlines of their rehabilitation plan was their own inexcusable neglect and that city could intervene and demolish nuisance property).

141. See *Burroughs v. City of Cleveland*, No. 60036, 1992 WL 41910, at \*2 (Ohio Ct. App. 1992) (upholding city's demolition order, because property owner had not sufficiently boarded all windows on his building).

142. See *McMaster v. Hous. Appeals Bd. of Akron*, No. 18226, 1997 WL 775674, at \*4 (Ohio Ct. App. 1997) (upholding city's demolition order against property owner's claims that nuisance

time a municipality may have been able to grant a property owner to rehabilitate the structure would not have necessarily endangered the public.

Even under the best of circumstances, motivated property owners encounter obstacles in rehabilitating their properties. Money may be scarce, particularly in neighborhoods that are an economic risk, and unforeseen circumstances can slow down or stall rehabilitation efforts. The window for abatement seems so prohibitively narrow that it appears the city has no real intention of encouraging rehabilitation but merely expediting the inevitable end—demolition. And municipalities generally do not offer financial assistance to cash-strapped property owners. Furthermore, once a building has been declared a nuisance or encumbered with a lien, the owner encounters more hurdles in securing loans or other financing on the property, and the clouds on the title may render it unmarketable and prevent the property's resale.<sup>143</sup>

Because demolition, as compared to other municipal regulations that may limit property rights, is so onerous to the property owner, the courts generally ascribe to a relatively high procedural due process bar. It requires ample notice, opportunities for appeal, and all the benefits of public hearings at which a property owner and other interested parties can give testimony and submit evidence in dispute of the city's determination.<sup>144</sup> On their face, these procedural safeguards allow the property owner to buy time in developing and implementing a rehabilitation plan or, in the very least, comply with the city's minimum demands for securing the building against trespassers. In their application, however, the procedures can draw out the process so long that the building inevitably suffers further deterioration. Property owners already struggling financially to comply with the

---

could have been abated without demolition). In *McMaster*, the court found that the city had presented a substantial amount of evidence that a nuisance existed but failed to weigh the necessity of demolition against the possibility of rehabilitation. While the court found the property owner's rehabilitation efforts insufficient for abating the nuisance, it failed to consider the *actual feasibility* of rehabilitation. *Id.* See also *Roberts v. City of Jackson*, No. 484, 1984 WL 3484, at \*4 (Ohio Ct. App. 1984) (rejecting property owners' claim that demolition was not reasonably necessary to abate the nuisance and that city should have rehabilitated rather than demolished the structure). In *Roberts*, the contractor hired to demolish the property stated in his affidavit: "I figured that it would take more than \$15,000.00 to fix it up. At a minimum, the building would have to have an all new back end, an all new front porch, an all new roof, all new drywall, all new windows, all new electrical wiring, and all new plumbing fixtures." *Id.* at \*2. The court focuses its inquiry more on the estimated cost of these repairs rather than the feasibility of rehabilitation or the immediacy of the emergency conditions. *Id.* at \*3-4.

143. See Diana A. Silva, *Land Banking as a Tool for the Economic Development of Older Industrial Cities*, 3 DREXEL L. REV. 607, 616 (2011) (emphasizing unmarketability of vacant properties and noting that local tax and code enforcement liens encumber vacant properties, decreasing their value, and that back taxes may exceed property's fair market value).

144. See *City of Cleveland v. Bedol*, No. 93061, 2010 WL 1795351, at \*3 (Ohio Ct. App. 2010) (holding that "where a city has failed to provide a property owner with an opportunity for hearing or appeal prior to the razing of property, the city has denied the owner due process of law").

minimum requirements likely will not be addressing significant maintenance issues with their buildings during the extended appeal process. Property owners who have no interest in rehabilitating their buildings, but are more interested in appealing the associated costs of nuisance abatement, will allow their building to further deteriorate during the process. The more a building continues to deteriorate, the more of a nuisance it becomes and the more expensive the rehabilitation or minimum code compliance requirements will become. Too frequently, by the time the aggrieved property owner has reached the court, the city has already demolished the building, and the owner can obtain only compensation for the demolition costs.<sup>145</sup>

### *C. Neighborhood Stabilization Program*

While municipalities, like Cincinnati, often lack the financial resources to effectively address urban blight, federal programs have stepped in to help fund revitalization efforts. The Neighborhood Stabilization Program (“NSP”), administered by HUD, was authorized under the Housing and Economic Recovery Act of 2008 “for the purpose of stabilizing communities that have suffered from foreclosures and abandonment.”<sup>146</sup> Under the NSP, local governments are free to develop their own programs and funding priorities, but they must use at least twenty-five percent of the funds for the redevelopment of abandoned or foreclosed residential properties for families whose incomes do not exceed fifty percent of the area median.<sup>147</sup> A local government may not simply undertake broad community development activities or “prevent or eliminate slums and blight.”<sup>148</sup> Eligible uses for NSP funds include redevelopment of residential properties, rehabilitation of foreclosed or abandoned homes, establishment of land banks for foreclosed homes, demolition of blighted structures, and the redevelopment of demolished properties.<sup>149</sup> A survey of cities that received first-round NSP funds reveals that all the cities are using the funds to acquire vacant and abandoned properties, ninety-two percent of

---

145. See *Roberts v. City of Jackson*, No. 484, 1984 WL 3483, at \*4 (Ohio Ct. App. 1984) (denying property owners compensatory and punitive damages for the demolition of their building).

146. *Neighborhood Stabilization Program Grants*, U.S. DEPT. OF HOUSING AND URBAN DEV., [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/comm\\_planning/communitydevelopment/programs/neighborhoodspg](http://portal.hud.gov/hudportal/HUD?src=/program_offices/comm_planning/communitydevelopment/programs/neighborhoodspg) (last visited Dec. 3, 2012).

147. *Id.*

148. *Id.*

149. *Id.*

the cities are rehabilitating structures, and sixty-eight percent are demolishing structures.<sup>150</sup>

Cincinnati was awarded more than \$8.3 million in first-round NSP funds and has been strategically targeting ten residential neighborhoods with three primary goals: (1) housing purchase and redevelopment; (2) affordable housing; and (3) hazard abatement.<sup>151</sup> The city acquired a second round of NSP funds to target seven neighborhoods in which stagnant population growth, high unemployment rates, and weak housing markets have led to high foreclosure and vacancy rates.<sup>152</sup> Finally, a third round of \$3.16 million was allocated to aid four “high need” neighborhoods.<sup>153</sup> At the outset of the program, the city identified 738 vacant buildings in the target neighborhoods and 639 bank-owned buildings.<sup>154</sup> At the close of the first quarter of 2012, the last date of available data, the city had used NSP funds to demolish 182 structures.<sup>155</sup> This number exceeded the city’s projection of 166 units by the close of the March 2013 deadline.<sup>156</sup> The city’s hazard abatement—i.e., demolition—budget significantly outpaced the acquisition and rehabilitation budget.<sup>157</sup> Again, while the city urges that these buildings were a hazard, there is no evidence that the NSP funds could not have been used to abate those hazards at little to no extra cost.<sup>158</sup> Since the NSP allows the municipality to implement its own plan, within the parameters of the program’s guidelines, there is no oversight to determine whether or not the city’s actions legitimately further the revitalization goals.

One of the major shortcomings of the NSP is that it targets foreclosures, which, as stated in Part I, do not always require the same solutions as other distressed properties. The remedies must be tailored to the individual circumstances. Municipalities have been relying heavily on demolishing

---

150. THE U.S. CONFERENCE OF MAYORS, *supra* note 56, at 7.

151. *Cincinnati NSP*, CITY OF CINCINNATI CMTY. DEV., <http://www.cincinnati-oh.gov/community-development/neighborhood-development/neighborhood-stabilization-program/neighborhood-stabilization-program-round-1/> (last visited Dec. 3, 2012).

152. *Id.*

153. *Id.*

154. CITY OF CINCINNATI, JANUARY 1, 2012 THRU MARCH 31, 2012 PERFORMANCE REPORT 2 (2012).

155. *Id.* at 45.

156. *Id.*

157. *Id.*

158. Demolition is often perceived as a less costly option than rehabilitation, but often the numbers tell a different story. Municipalities often fail to research actual costs or rely heavily on one biased cost estimate. See PENN DESIGN, MAINTENANCE AND RESOURCE MANUAL: REHABILITATION VS. NEW CONSTRUCTION, [http://www.design.upenn.edu/his\\_pres/student/studio2003/manual/rehab.htm](http://www.design.upenn.edu/his_pres/student/studio2003/manual/rehab.htm) (discussing the costs of rehabilitation versus the costs of new construction and illustrating the financial advantages that rehabilitation offers). See also RYPKEMA, *supra* note 43 (providing case studies to illustrate that new construction is more costly than preservation).



nuisance properties to make way for new development, banking vacant land for resale, and seizing foreclosed homes and transferring them to creditworthy buyers.<sup>159</sup> These tactics do not work for places like Cincinnati's OTR and other distressed urban neighborhoods. These neighborhoods are far from stable, and many buildings have gone through years of deterioration. Properties cannot quite as simply be resold to new buyers when those buyers cannot necessarily obtain credit to purchase and rehabilitate the property.<sup>160</sup> Additionally, the aggressive demolition tactics used to clear deteriorating foreclosed homes are more problematic in these distressed urban neighborhoods. First, the buildings themselves are often significant from a historical perspective. Second, the vacant lots left in the wake of demolition are not as likely to be redeveloped for the same reasons the buildings themselves stood vacant: economically distressed neighborhoods have a weak real estate market. Therefore, municipalities must adopt distinctive solutions for the distinctive problems faced by these neighborhoods. It is clear that Cincinnati and many other municipalities are taking a one-size-fits-all approach to dealing with vacant and abandoned properties.

Another major shortcoming in Cincinnati's program goals is their narrow focus on housing. This is not surprising, since the NSP was established for the purpose of addressing foreclosed properties, which are overwhelmingly residential. However, many urban core neighborhoods are characterized by their mixed-use commercial and residential building stock, and in economically depressed neighborhoods, most of the storefronts sit empty. A municipality's failure to address commercial properties results not only in the potential loss of valuable historic buildings, but it also hinders the ability of the community to revitalize and stabilize neighborhoods. Affordable housing may suffer without proximity to affordable businesses and job opportunities, and neighborhoods without a healthy mix of businesses struggle to attract new residents. Therefore, commercial revitalization should be a priority.

#### *D. Land Reutilization Corporation*

---

159. See THE U.S. CONFERENCE OF MAYORS, *supra* note 56, at 6–13 (summarizing the actions of several municipalities in abating the problem of vacant and abandoned foreclosure properties).

160. See A Plan for Preservation, Part II, *supra* note 59, at slides 14–15 (discussing problems with obtaining financing for rehabilitating properties in OTR).

In recent years, many communities have established land banks to address the growing foreclosure problem.<sup>161</sup> A land bank is a “governmental entity that focuses on the conversion of vacant, abandoned, and tax-delinquent properties into productive use.”<sup>162</sup> In simpler terms, a municipality operating a land bank may assume title to tax-delinquent properties, rehabilitate or demolish buildings, and then transfer the properties to new developers or homeowners who will put them back into productive use.<sup>163</sup> One important function of a land bank is the ability to clear title to the property to ensure effective resale.<sup>164</sup> While the land bank model allows municipalities to acquire improved lots and rehabilitate the existing buildings, many municipalities choose to focus on acquiring vacant lots for redevelopment.<sup>165</sup> These cities find vacant lots easier to maintain<sup>166</sup> and that the resulting open land provides more flexibility in shaping the redeveloped neighborhood.<sup>167</sup> “[I]f a land bank assembles several parcels containing small, one-family homes, a developer may wish to demolish all of them and instead build larger homes, condominiums, or mixed-use development. This type of strategic acquisition and release which promotes economic development represents the ultimate goal of a land bank entity.”<sup>168</sup>

Ohio retooled its land bank legislation in 2009 and greatly expanded the authority of its counties to acquire tax foreclosed properties.<sup>169</sup> The new legislation authorizes the establishment of land reutilization corporations (“LRC”).<sup>170</sup> The LRC must adopt a board of directors and draft a

---

161. Thomas J. Fitzpatrick, *Ohio's Land Bank Legislation: Modernizing an Aged Model*, 19 J. AFFORDABLE HOUS. & CMTY. DEV. L. 127, 128 (2010).

162. *Id.* at 128.

163. *Id.* at 128–29.

164. *Id.* at 131.

165. *See generally* THE U.S. CONFERENCE OF MAYORS, *supra* note 56, at 12–13 (identifying the land bank programs of the seventy-seven survey cities and indicating that many utilize a process of either focusing solely on the acquisition of vacant lots or demolishing existing buildings for the redevelopment of the lots). *See, e.g.*, CMTY. RESEARCH PARTNERS, *supra* note 10, at 3–11 (summarizing land bank programs in Cleveland and Lima, Ohio, which focus on the assemblage of vacant lots to spur large-scale development); THE U.S. CONFERENCE OF MAYORS, VACANT AND ABANDONED PROPERTIES: SURVEY AND BEST PRACTICES 46 (2009), <http://www.usmayors.org/pressreleases/uploads/VACANTANDABANDPROP09.pdf> (detailing the goals of the Houston, Texas land bank program, which seeks to bank vacant and developable inner city lots for affordable housing).

166. BUS. & PROF. PEOPLE FOR THE PUB. INTEREST, HOW CAN MUNICIPALITIES CONFRONT THE VACANT PROPERTY CHALLENGE? A TOOLKIT 41 (2010).

167. *Id.* at 40.

168. Matthew J. Samsa, *Reclaiming Abandoned Properties: Using Public Nuisance Suits and Land Banks to Pursue Economic Redevelopment*, 56 CLEV. ST. L. REV. 189, 213 (2008).

169. H.B. 313, 128th Gen. Assemb., Reg. Sess. (Ohio 2009).

170. OHIO REV. CODE ANN., §§ 1724.01–1724.11.

development plan.<sup>171</sup> The organization may then acquire, hold, and transfer property and borrow money for the purposes of implementing the plan.<sup>172</sup> Hamilton County's LRC maintains a database of banked properties and a blog that lists foreclosed properties for sale and provides other information that will help prospective bidders navigate the process.<sup>173</sup> The blog currently lists 462 properties for sale, including vacant lots and condemned or vacated buildings of varying ages and conditions.<sup>174</sup> As of 2012, the county received \$5.8 million through the Moving Ohio Forward Demolition Grant Program,<sup>175</sup> a newly minted state grant program that disburses demolition funds to counties with functional land banks, and put up matching funds of \$5.3 million.<sup>176</sup> Funding is available for the county to demolish at least seven hundred properties and as many as one thousand properties.<sup>177</sup> Cincinnati has aggressively pursued grant funding of its own and pledged \$3.49 million in matching funds for 2013.<sup>178</sup> The city has more than three hundred demolition-ready properties but could demolish up to 450 under the grant program.<sup>179</sup>

The land bank system, at both the state and municipal levels, is inherently a very valuable tool for economic development. The land bank can hold existing buildings, as well as vacant lots, and help match properties in distressed areas with interested buyers. However, most land banks favor demolition and the aggregation of vacant lots for large-scale development.<sup>180</sup> Putting aside the loss of historic building fabric, this type of

---

171. *Id.*

172. *Id.*

173. HAMILTON CNTY. LAND REUTILIZATION CORP., <http://www.hamiltoncountylanbank.org/#> (last visited Aug. 31, 2013).

174. *See generally* HAMILTON CNTY. LAND REUTILIZATION CORP., UPCOMING PROPERTIES AT THE HAMILTON COUNTY SHERIFF'S SALE, <http://hcssheriffssale.blogspot.com/p/about-this-blog.html> (last visited Aug. 26, 2013).

175. OHIO ATTORNEY GENERAL'S OFFICE MORTG. FORECLOSURE UNIT, MOVING OHIO FORWARD GRANT PROGRAM (2012), [www.ohioattorneygeneral.gov/OhioAttorneyGeneral/files/f4/f4882fe3-4cac-40c4-8a29-a2f45a8bf157.pdf](http://www.ohioattorneygeneral.gov/OhioAttorneyGeneral/files/f4/f4882fe3-4cac-40c4-8a29-a2f45a8bf157.pdf). Ohio's Attorney General Mike Dewine fueled this aggressive blight remediation program at the start of 2012 with the goal of cleaning up over 100,000 properties in Ohio. President of the Hamilton County Commission Greg Hartmann stated that while demolishing properties is the goal, the empty lots should not be the end result. The goal is large-scale redevelopment for residential and retail use, but Hartmann concedes that funding is currently lacking for moving projects ahead, Lisa Bernard-Kuhn, *Deal Funds Blight Fight*, CINCINNATI.COM (Feb. 13, 2012), <http://news.cincinnati.com/article/20120213/BIZ/302130110>.

176. Jason Williams, *Blighted Houses to Start Coming Down*, CINCINNATI.COM (Jul. 16, 2012), <http://news.cincinnati.com/article/20120716/BIZ/307160103/Blighted-houses-start-coming-down>.

177. *Id.*

178. *Id.*

179. *Id.*

180. *See, e.g.*, GENESEE CNTY. LAND BANK, <http://www.thelandbank.org/history.asp> (last visited Sep. 08, 2013) ("The objective [of the land bank] is to restore the integrity of the community by

land-use plan is troublesome at best. In the most economically distressed neighborhoods, developers may be unwilling to risk such large-scale projects. Meanwhile, the land sits vacant indefinitely. And even more prosperous neighborhoods may fall victim to market stagnation. Any amount of time that the aggregated lots remain vacant is detrimental to the community—the lots remain untended and become a nuisance, people become isolated in the urban prairie or move out of the neighborhood, more buildings become vacant and abandoned, those buildings are demolished, and the process starts anew. The pressure to aggregate lots for large, contiguous development makes demolition even more attractive to municipalities.

Adding fuel to the fire is the Moving Ohio Forward Demolition Grant Program, which disburses funds only for demolition.<sup>181</sup> In fact, the stated goal of the program is to “maximize the number of demolitions of blighted, vacant or abandoned residential structures.”<sup>182</sup> Blight is defined in accordance with the state eminent domain statute, discussed in Part III, granting the individual counties with broad discretion to make demolition determinations.<sup>183</sup> The guidelines further specify that funds shall not be used for property maintenance, either before or after demolition.<sup>184</sup> Counties must take advantage of the money when it is available and spend it in less than two years.<sup>185</sup> The solution: bulldoze as much as possible, while the funding is available, and worry about the consequences later. However, when “later” arrives and the cities and counties do not have the funds to kick-start development, they cannot revive the demolished buildings. Even supporters of historic preservation find it hard to pass up the ample grant funds, reasoning that if money for rehabilitation is lacking, at least the deleterious harms of blighted properties can be eradicated with the

---

removing dilapidated structures and redeveloping abandoned properties.”). Land banking, by its name, focuses heavily on the land itself rather than the improvements, which are seen as having little value. *See generally* Silva, *supra* note 143, at 614–22 (defining land banking and discussing its history as a tool for acquiring and redeveloping vacant land).

181. OHIO ATTORNEY GENERAL’S OFFICE, *supra* note 175, at 7. *See* Paula Boggs Muething, *Demolition Just One Way to Fight Blight*, CINCINNATI BUS. COURIER (Apr. 20, 2012), <http://www.bizjournals.com/cincinnati/print-edition/2012/04/20/demolition-just-one-way-to-fight-blight.html?page=all>. In addition to providing matching funds to municipalities, the program unlocks the limits on demolition placed on the third round of the NSP, allowing 100% if third round funds to be used for demolition, rather than just ten percent. *Id.*

182. OHIO ATTORNEY GENERAL’S OFFICE, *supra* note 175, at 7.

183. OHIO REV. CODE ANN. § 1.08 (2007).

184. OHIO ATTORNEY GENERAL’S OFFICE, *supra* note 175, at 8.

185. OHIO ATTORNEY GENERAL’S OFFICE, *supra* note 175, at 6. The Attorney General accepted the first round of grant applications in May and July 2012, and all work must be completed by December 31, 2013. *Id.*

demolition funding.<sup>186</sup> Basically, the Moving Ohio Forward program has turned land banking, an otherwise effective revitalization tool, into a modern day “slum” clearance initiative.<sup>187</sup>

### PART III. IMPLEMENTING AGGRESSIVE MUNICIPAL-DRIVEN REHABILITATION LEGISLATION

#### *A. Comprehensive Vacant Building Registration Program*

A comprehensive vacant building registration program is an important first step in addressing vacant and abandoned buildings because it affords the city an opportunity to inventory the extent of the problem, monitor conditions, and raise funds for rehabilitation. As stated in Part II, Cincinnati’s existing VBML was upheld in *Etzler* as a valid exercise of the city’s authority to regulate building conditions, and the court found no facial violations of either substantive or procedural due process rights. In implementing a more comprehensive vacant building registry, the city should ensure that it has the authority under both the police power and the state enabling legislation.

#### 1. Legal Opportunities and Challenges

Municipalities find the authority to regulate the public health, safety, and welfare under the police power, and regulating building conditions falls squarely within that power.<sup>188</sup> In 1926, in *Village of Euclid v. Ambler Realty Co.*, the Supreme Court upheld land-use regulations against substantive due process challenges under the Fourteenth Amendment.<sup>189</sup> Over the past century, the Court has increasingly adopted a more permissive reading of “public health, safety, and welfare,” even finding constitutional such activities as aesthetic regulations and historic preservation.<sup>190</sup> While any use

---

186. Muething, *supra* note 181. “Demolition is not the best solution for many of our distressed structures that contribute to our regional quality of life and sense of identity. But this . . . legislation is welcome news at a time when the need for dollars to demolish structures and stabilize neighborhoods is growing, while the . . . local government entities to fund such programs is diminishing.” *Id.*

187. See Restore our Neighborhoods Act of 2012, H.R. 4210, 112th Cong. (2012) (seeking to provide \$4 billion in federal funds for residential and commercial demolition projects). The failed proposal, which was sponsored by three Ohio Representatives, had all the earmarks of the federal urban renewal program that wiped out historic urban neighborhoods from the 1950s through the 1970s. *Id.*

188. OHIO REV. CODE ANN. § 3:9 (West 2012).

189. See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 397 (1926) (upholding Euclid’s cumulative zoning plan against plaintiff’s claim that it diminished his property value).

190. See *Pa. Cent. Transp. Co. v. New York*, 438 U.S. 104, 113 (1978) (upholding the New York City Landmark Ordinance that imposed development restrictions on landmark properties).

of the police power must be crafted to avoid implicating constitutional rights, the aggressive rehabilitation of vacant and abandoned buildings is undoubtedly a valid exercise of the police power, since the city would be eradicating a problem that impacts the physical, aesthetic, and economic welfare of the public.

The police power is one that has been reserved to the states through the Tenth Amendment but may be delegated to municipalities through state enabling legislation.<sup>191</sup> Ohio municipalities operate under a home rule charter, which affords the local body greater self-governing authority.<sup>192</sup> Pursuant to the Ohio Constitution, municipalities have the “authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.”<sup>193</sup> A state statute takes precedence over a municipal ordinance if: (1) the ordinance is in conflict with the state statute; (2) the ordinance is an exercise of the police power; and (3) the statute is a general law.<sup>194</sup> A general law is one that is part of a comprehensive legislative enactment that promotes statewide uniformity and generally prescribes a rule of conduct upon the citizenry.<sup>195</sup> A general law must also set forth police, sanitary, or similar regulations rather than merely grant or limit a municipality’s legislative power.<sup>196</sup> At the judicial level, the courts are extremely deferential to the decisions of the municipality—i.e., an ordinance maintains a strong presumption of constitutionality<sup>197</sup> and will be upheld if it bears “a real and substantial relationship to the public health, safety, morals or general welfare, and . . . is not unreasonable or arbitrary.”<sup>198</sup> Furthermore, any doubt about the city’s legislative power must be resolved in favor of the local governing body.<sup>199</sup> Thus, Ohio municipalities enjoy a wide berth for adopting and implementing ordinances that protect the health, safety, and welfare of their citizens.

Assessments are key to the registration process because the municipality must leverage financial resources to remedy adequately the nuisance. Cincinnati’s VBML fees have been upheld because the fees are

---

191. MCQUILLIN MUN. CORP. § 24:38 (3d ed.).

192. *Id.* § 4:81.

193. OHIO CONST., art. XVIII, § 3.

194. *Cleveland v. State*, 974 N.E.2d 123, 127 (Ohio Ct. App. 2012).

195. *Id.*

196. *Id.*

197. *State v. Knight*, 749 N.E.2d 761, 771 (Ohio Ct. App. 2000).

198. *Ottawa Cnty. Bd. of Commrs. v. Marblehead*, 711 N.E.2d 663, 666 (1999) (quoting *Canton v. Whitman*, 337 N.E.2d 766, 771 (1975)).

199. *City of Cleveland v. Brooks*, 974 N.E.2d 217, 220–21 (2012).

used to provide a direct benefit to the individual properties upon which they have been assessed.<sup>200</sup> The *Etzler* court did not reach the issue of the excessiveness of the fees but stated that the fees should be proportionate to remedying the harm and should not be unduly punitive.<sup>201</sup> The VBML program uses the money it collects to inspect buildings, enforce codes, and provide municipal services to the registered properties. The fees currently do not cover demolition or rehabilitation costs; if the city undertakes one of those abatement procedures, it typically attaches a lien to the property. However, when the property owner fails to pay off the lien, the city loses out on the money it initially fronted for the demolition or rehabilitation costs and its scarce resources are further depleted. The ability to raise money in advance to perform the necessary rehabilitation work is key to the success of any abatement program and will minimize the city's reliance on demolition grant funds from other state or federal programs. An assessment can be properly tailored to meet the city's rehabilitation needs. The following section recommends a more comprehensive registration program that targets a wider range of vacant and abandoned buildings; grants more flexibility to owners seeking to rehabilitate their properties; incorporates a fee structure that is not unduly burdensome but allows the city to leverage more funds to assist rehabilitation efforts; and provides more localized oversight.

## 2. Recommendations

Cincinnati's vacant building registry should be expanded to include any property that: (1) has been vacant or abandoned for more than ninety days; (2) is not currently undergoing rehabilitation or in any stage of rehabilitation planning; and (3) is not actively and reasonably being marketed. The burden should fall on the property owner to demonstrate that the building need not be registered. If the property owner demonstrates that the building is being rehabilitated or is on the market, the city should revisit the case after another ninety days to ensure the owner is still reasonably attempting to put the property to good use.

All registered buildings should be secured against the weather and against trespassers. Buildings should be inspected monthly to ensure that conditions are not deteriorating and that the building remains secure. If at any point during the first year an otherwise sound building violates a building code or suffers serious damage—e.g., fire damage or flooding—

---

200. *Etzler v. City of Cincinnati*, No. 1:07-CV-1035, 2013 WL 1196649, \*6-9 (S.D. Ohio 2013).

201. *Id.*

the property should be placed immediately in the nuisance abatement program. For otherwise sound buildings, the property owner should have one year to put the property back into productive use without intervention; if the owner has not made a reasonable and good-faith effort to rehabilitate or market the building during that year, it should be placed in the nuisance abatement program.

The fee schedule should be graduated on a monthly basis, starting out low and increasing exponentially each month the building sits empty. Fees should cover the cost of administering the program, providing municipal services, assisting property owners with rehabilitation costs in situations of undue hardship, and covering the costs of nuisance abatement in situations where the city is unable to recoup abatement costs from delinquent owners. The fees should be severe enough to deter bad behavior yet lenient enough to allow good-faith property owners to save money for maintaining or rehabilitating their buildings. A first-time failure to pay a fee should result in a stiff penalty, and a second failure should result in prosecution in housing court. However, fees should be waivable on a showing of undue hardship.

Each neighborhood or district should organize a community development corporation that oversees the registration and inspection processes, assists property owners in drafting rehabilitation plans, and collects and disburses funds.

### *B. Expanding the Public Nuisance Doctrine to Allow for Early Municipal Intervention*

Public nuisance abatement remains a useful tool for remediating the impacts of vacant and abandoned buildings, as long as it is tailored toward rehabilitation and code compliance rather than demolition. While there is a need for municipalities to condemn and demolish buildings that pose a serious public hazard, the exercise of this broad power should be undertaken only in carefully selected situations. Public nuisance doctrine is well-suited to address situations in which an individual property owner is unwilling or unable to bring a building up to code. In these cases, the municipality must be able to intervene. The public nuisance doctrine is flexible enough to allow Cincinnati to reconsider the current system under which it operates.

#### 1. Legal Opportunities and Challenges

Public nuisance abatement is inherent in any local government's power to regulate the health, safety, and welfare and has been broadly upheld



against both substantive due process and regulatory takings challenges.<sup>202</sup> The Ohio legislature has already enacted laws that authorize municipalities to regulate buildings, abate nuisances, appropriate property, and undertake a number of other activities related to protecting the public health, safety, and welfare.<sup>203</sup> These state laws merely grant or limit a municipality's legislative power and do not, therefore, preempt the ability of the municipality to regulate in that area if it so chooses. Furthermore, the language in these statutes is broad enough to give municipalities wide discretion to enact policies that are tailored to individual conditions and challenges. As stated in Part II, Cincinnati's building code deems any "dangerous and unsafe" premises a public nuisance and enumerates five structural defects that constitute such dangerous and unsafe conditions.<sup>204</sup> As this public nuisance requirement is more restrictive than the definition outlined in the state statute, which allows for a determination that any structure that threatens the public health, safety, and welfare by reason of abandonment constitutes a public nuisance,<sup>205</sup> the city should be able to draft an ordinance that allows for municipal intervention upon a lesser showing of nuisance than severe structural defects. More aggressive intervention on the part of Cincinnati to force rehabilitation of vacant and abandoned buildings and return these buildings to productive use finds no conflict with any general laws of the state.

Ohio's public nuisance jurisprudence is well developed and has swelled in recent years with claims of insufficient notice, improper demolition, and inverse condemnation. The validity of public nuisance suits was guaranteed by the Ohio Supreme Court in *Solly v. Toledo*, in 1966.<sup>206</sup> Since then, the courts have broadly upheld a municipality's power to remediate conditions that threaten the public health, safety, and welfare. While the terms of the state statute are broad enough to encompass a range of conditions, the courts have added a judicial gloss to the municipal power that places some procedural limits upon its use.

---

202. See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 386–88 (1926) (inferring that a municipality already has the power to regulate nuisance conditions and deciding whether the existence of one type of use in the wrong area constitutes a nuisance); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992) (noting that a regulation will not constitute a taking if it "inhere[s] in the title itself, in the restriction that background principles of the State's law of property and nuisance already place upon land ownership").

203. See generally OHIO REV. CODE ANN., §§ 701.01–765.04 (discussing powers of municipal corporations when regulating buildings and property).

204. CINCINNATI, OHIO, BLDG. CODE, § 1101-63 (2011).

205. OHIO REV. CODE ANN., §§ 715.26–715.263.

206. *Solly v. City of Toledo*, 218 N.E.2d 463, 466 (Ohio 1966) (holding that a "charter city may enact legislation authorizing summary abatement of public nuisance and the destruction of property used in maintaining such nuisances when reasonably necessary to effectuate their abatement").

The courts are deferential to the substance of local public nuisance ordinances, as long as they remain focused on public and not private harms, and the public harm itself is often defined so broadly that it need not be actually physical.<sup>207</sup> The courts' primary focus has been on guaranteeing that affected parties have sufficient notice of the action—that both the statute itself provides a reasonable basis for affording notice and that the local officials have actually exercised the notice procedures properly—and that the type of harm alleged can be traced to the actual misconduct of the defendant.<sup>208</sup>

Notice is a critical component of the constitutional due process guarantees, and when private property rights are involved, the courts are fastidious about assessing the procedures carried out by local officials.<sup>209</sup> When demolition is involved, the courts have properly required a showing of actual notice to the appropriate party responsible for maintaining the property.<sup>210</sup> Even more critical to the process is the requirement of a public hearing. Courts find that all procedural due process mandates have been met when the aggrieved parties have had the opportunity to challenge the nuisance determination in a public forum.<sup>211</sup> However, due process is undermined by the fact that property owners must present sufficient evidence to counter the nuisance claim, rather than the municipality itself proving danger. This burden creates a large hurdle for the owner in protecting his or her property rights. Furthermore, the process suffers when the municipality determines that the public is in imminent peril. While it is

---

207. See *Columbus v. Bahgat*, No. 10AP-943, 2011 WL 2586841, at \*4 (Ohio Ct. App. 2011) (holding that property owner's failure to comply with historic district guidelines when replacing windows on building a public nuisance).

208. See *City of Cleveland v. Ameriquest Mortg. Secs., Inc.*, 615 F.3d 496, 505 (6th Cir. 2010) (holding that financing subprime loans is completely distinct and not directly linked to the alleged harms of property neglect, fires, looting, and drug dealing).

209. See *Turner v. Englewood*, 944 N.E.2d 731, 735 (Ohio Ct. App. 2010) (emphasizing that "[a] hearing before a taking—especially a taking-by-demolition—is critical"); *City of Cleveland v. Bedol*, No. 93061, 2010 WL 1795351, at \*3 (Ohio Ct. App. 2010) (stating that "where a city has failed to provide a property owner with an opportunity for hearing or appeal prior to razing of property, the city has denied the owner due process of law") (citing *City of Cleveland v. W.E. Davis Co.* (July 18, 1996), Cuyahoga App. No. 69915); *Holtz v. City of Toledo*, No. L-05-1217, 2006 WL 1793684, at \*3 (Ohio Ct. App. 2006) ("Procedural due process demands at a minimum that one who is to be deprived of property by the state be given notice of the action and an opportunity to be heard."); See *Nucklos v. Bd. of Bldg. Appeals*, No. 2001CA00092, 2001 WL 1606806, at \*4 (Ohio Ct. App. 2001) (finding that property owners were unable to comply with repairs to building because they were not given notice of the "particulars" of the unsafe conditions).

210. See *Cincinnati v. York Rite Bldg. Ass'n*, 843 N.E.2d 250, 253-54 (Ohio Ct. App. 2005) (holding that Cincinnati did not serve property owner with actual notice of public nuisance hearing when city continued to send notice to building that was known to be vacant).

211. See, e.g., *Bartoe v. City of Wellston*, No. 524, slip op. at \*3 (Ohio Ct. App. Sept. 26, 1986) (holding that property owner's attendance at public hearing satisfied notice requirement even though the actual notice was not properly delivered).

true that the courts will require a higher showing from the municipality that the imminent peril exists,<sup>212</sup> this judicial intervention occurs only after the property owner has filed a negligent demolition action against the municipality. The courts may find that the local officials failed to satisfy the requirements of imminent peril, but the building is already lost. Whether this “process” has adequately protected the individual’s constitutionally protected property interests is questionable.<sup>213</sup> Complicating this process even more is the fact that municipalities in Ohio are still largely immune from tort liability—i.e., the defendant cannot collect any damages from the municipality or its employees for wrongful conduct in carrying out discretionary duties.<sup>214</sup> Because public nuisance determinations are discretionary, requiring a weighing of economic, safety, and other considerations, local officials are not deterred from taking dramatic action if all they stand to lose are the recouped demolition costs.

The threat of inverse condemnation (takings actions) also fails to deter municipalities from making hasty demolition decisions. A line of regulatory takings cases handed down from the Supreme Court over the past several decades addresses the role of nuisance in inverse condemnation claims.<sup>215</sup> The Court in *Lucas v. South Carolina Coastal Council* emphasized that “when a regulation is designed to prevent ‘harmful or noxious uses’ of property akin to public nuisances, no compensation is ow[ed] under the Takings Clause regardless of the regulation’s effect on the property’s value.”<sup>216</sup> The reasoning behind this theory is that the behavior that constitutes a nuisance was never part of the bundle of sticks (property

---

212. See, e.g., *Nucklos v. Bd. of Bldg. Appeals*, No. 2001CA00092, 2001 WL 1606806, at \*4 (Ohio Ct. App. 2001) (finding the notice of demolition sent by the city to a building’s owners insufficiently specific as to particular repairs and thus did not give owners a reasonable amount of time to bring the building up to code).

213. See *Goldberg v. Kelly*, 397 U.S. 254, 268–69 (1970) (holding that a higher procedural due process bar may be required when an individual is deprived of certain constitutional rights). *Goldberg* involved the termination of benefits to welfare recipients. The Court found that, although the state agency had granted recipients the right to a post-termination hearing, the hearing still did not satisfy the mandates of due process because it temporarily deprived them of their welfare benefits. Notable, however, is the Court’s willingness to extend the requirements of due process when certain rights are at stake. The Court stated that “[t]he opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard.” *Id.*

214. See *Chalker v. Howland Twp. Trs.*, 74 Ohio Misc. 2d 5, 26 (1995) (holding that city officials, acting in their official capacities, could be afforded qualified immunity for wrongful demolition if the act was performed in good faith or under an objective, reasonable belief that it was lawful); See *Champion Mall Corp. v. Champion Twp. Bd. of Trs.*, No. 2009-T-0102, 2010 WL 1840619, at \*4–5 (Ohio Ct. App. 2010) (holding that township was entitled to sovereign immunity from trespass liability and wrongful demolition of shopping mall).

215. This line of cases stems from *Mugler v. Kansas*, 8 S. Ct. 273, 287 (1887), in which the Court stated that “[t]he right to compensation for private property taken for public use is foreign to the subject of preventing or abating public nuisances.”

216. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1003 (1992).

rights) and that prohibitions on nuisance inhere in the title to the property.<sup>217</sup> While municipalities should not be required to compensate property owners who create nuisance conditions and should be allowed to abate nuisances without fear of legal recourse, in reality municipalities can easily abuse this power by forcing the demolition of nuisance properties. Because the courts are so deferential to public nuisance determinations, Cincinnati should take the initiative to safeguard against such abuse in its ordinance.

In linking the public harm to the actions of the defendant, the courts have held that a municipality must show proximate cause—i.e., the nuisance condition must be connected to the action of the defendant.<sup>218</sup> In most suits involving nuisance properties, the neglect of the owner in maintaining the building and complying with codes is clearly linked to the resulting deteriorated condition. While tax delinquency is one of the conditions that satisfies a determination of blight for the purposes of eminent domain, mere tax delinquency alone is not likely to result in deteriorated conditions if other factors are not present. Along this line of reasoning, the Sixth Circuit held that the act of predatory lending in and of itself was not directly linked with the property deterioration that resulted from the foreclosure crisis.<sup>219</sup> However, the courts have squarely rejected the idea that a municipality must show that the public suffered a tangible injury—i.e., the local government need not wait until the public health hazard has actually caused harm to take steps to abate the nuisance.<sup>220</sup> In one of its earlier public nuisance cases, the Ohio Supreme Court emphasized that “[a] municipality . . . is authorized to regulate and suppress all places that in its judgment are likely to be injurious to the health of its inhabitants.”<sup>221</sup>

This Ohio Supreme Court precedent would appear to support a municipality’s determination that any building in a distressed neighborhood that stands vacant or abandoned could be abated before a hazardous situation occurs, thus avoiding the need to wait until the building is so deteriorated that demolition is the only perceived option. The existence of

---

217. *Id.* at 1004.

218. *See City of Cleveland v. Ameriquest Mortg. Secs., Inc.*, 615 F.3d 496, 504 (6th Cir. 2010) (finding no proximate cause between financing subprime loans and the eventual neglect of foreclosed properties, because the and the neglected property conditions were too remote to ascertain whether or not they were a result of the impact of the lending).

219. *Id.* at 505.

220. *See Coy v. Montgomery Cnty. Bd. Health*, No 18083, 2000 WL 353139, at \*3–4 (Ohio Ct. App. Apr. 7, 2000) (holding that old tires, vermin, and other debris on defendant’s property were a public nuisance even though no harm had yet been caused to the public).

221. *Id.* at \*4.

strong data that demonstrate the likelihood of such a property becoming a nuisance would satisfy the condition that the harm be “more than fanciful.”<sup>222</sup> However, Cincinnati must be wary of drafting a statute that merely states that any vacant or abandoned property is a public nuisance subject to abatement. This type of automatic determination by ordinance strips property owners of their due process rights.<sup>223</sup> Accordingly, the city must still allow a public hearing in order to weigh the evidence for and against the nuisance and make a showing that the condition attached to that specific property on those facts and circumstances is likely to create a nuisance.

One caveat to this permissive application of the public nuisance doctrine is that it also justifies demolishing buildings that have not yet caused any serious public harm. A municipality can safeguard against this abuse of the public nuisance power by adopting one set of conditions under which a municipality can abate a nuisance through rehabilitation and a second more stringent set of conditions under which a municipality may order demolition. It is also important to keep in mind that most public nuisance cases that come before the courts involve demolition orders. Rarely has the court ruled on a case involving a challenge to abatement through rehabilitation. Because of the severity, irreversibility, and significant economic loss involved in demolition, the courts no doubt cast a more scrutinizing eye toward the municipality’s actions in razing nuisance properties. The merits of abatement through rehabilitation, as a public policy, should guide courts in upholding aggressive intervention on the part of the city. The following section recommends a more comprehensive public nuisance ordinance that gives the city more flexibility to enforce rehabilitation, limits the authority of the city to demolish buildings, and provides more judicial involvement and aggressive prosecution of delinquent property owners.

## 2. Recommendations

The requirements for bringing public nuisance actions against buildings should be bifurcated into two prongs: (1) abating nuisance conditions with code enforcement and rehabilitation, and (2) dealing with conditions that are so hazardous as to warrant demolition.

---

222. *Id.*

223. *See* *Marathon Oil Co. v. Bd. of Zoning Adjustment*, 339 N.E.2d 856, 860–61 (1975) (invalidating ordinance on procedural due process grounds because ordinance stated that all vacant gas stations are considered a public nuisance just on the fact of their vacancy alone).

The first prong of the ordinance, which addresses code enforcement and rehabilitation, should be drafted broadly enough to include all buildings that have been entered into the vacant building registration program for more than a year without any change in activity. The ordinance must do more than state that all registered vacant and abandoned buildings will be considered a nuisance. Rather, the ordinance should specify that any registered vacant or abandoned building will be found to be a nuisance with a showing that its condition threatens the public health, safety, and welfare. The ordinance should also include a preamble that states the goals of abating public nuisance and provides a summary of the findings on why vacant and abandoned buildings threaten the public welfare. Because demolition is not involved, the burden should fall on the property owner to present evidence at a public hearing that counters these claims.

The ordinance should also enumerate the ways in which the nuisance may be abated and under what conditions: e.g., bringing a building up to code, implementing a rehabilitation plan, or placing the building on the market. The list should be exhaustive, so that property owners are on notice of what types of action may be taken, but the terms should be flexible enough to adapt to new and unforeseen circumstances. The ordinance should expressly state that demolition is not a suitable method of abatement under these conditions.

The ordinance should provide for the appointment of a receiver—a community development corporation (“CDC”)—that will have the authority to enter the property to address code compliance issues. If a more comprehensive rehabilitation plan is necessary, the CDC should work directly with the property owner to develop and implement that plan. Each neighborhood or district should have its own CDC with this power to ensure that the needs of each neighborhood are addressed individually and efficiently. Rehabilitation plans can be tailored to the facts and circumstances of each case—such as requiring a preservation plan for historic buildings. A property that the city has ordered vacated because of code violations may be re-inhabited after the nuisance has been abated. If the owner wishes to rent the space or place the building on the market, the CDC will oversee that process to ensure the building will be returned to productive use within a reasonable time.

The second prong of the ordinance should provide a very limited opportunity for demolition only under a substantial showing of imminent peril to the public and a showing that no other action is feasible. Here, the burden must be placed on the municipality to present substantial evidence demonstrating that demolition is absolutely necessary. The ordinance should specify the types of conditions that are imminently perilous and under what conditions rehabilitating the building would not be feasible—

e.g., the building is so structurally deficient that undertaking any rehabilitation will endanger neighboring properties. An expedited appeals process in a housing court should be allowed for the property owner, and the city should be allowed to demolish the property only with a court order. The historic conservation board should maintain the authority to oversee properties that are historically significant and the power to deny a certificate of appropriateness for demolition.

In all public nuisance actions, when the property owner has failed to comply with orders or pay costs, the city should seek aggressive prosecution to force compliance or cover costs. When owners are absent and tax delinquent, the city should attach the property and then obtain a default judgment from the court. Further failures on the part of the owner will allow the city to seize the property through eminent domain.

### *C. Using Eminent Domain to Acquire and Rehabilitate Vacant and Abandoned Buildings*

For a city to address proactively the problem of vacant and abandoned buildings, it must be able to exercise broad eminent domain authority. Code enforcement schemes are inherently flawed, particularly when a municipality is understaffed, property owners are unavailable, and prosecution is slow and ineffective. Even if a municipality is well-equipped to handle code enforcement, this process alone is only palliative and should serve as an intermediate step to more aggressive intervention. Under both current Supreme Court precedent and Ohio's newly amended eminent domain statute, Cincinnati should be able to seize blighted properties for rehabilitation. In assessing the scope of the city's power to acquire property it is necessary to examine the current eminent domain climate at both the federal and state levels.

#### 1. Legal Opportunities and Challenges

The use of eminent domain for blight removal is firmly rooted within the nation's takings jurisprudence. As early as 1954, in *Berman v. Parker*, the Supreme Court upheld the District of Columbia's redevelopment plan for a blighted area of the city, which also involved the appropriation of properties that were not in and of themselves blighted but were part of the larger target area.<sup>224</sup> The property owners argued that "[t]o take for the

---

224. *Berman v. Parker*, 348 U.S. 26, 35–36 (1954). Petitioners owned a department store on one of the impacted parcels. The store was not otherwise blighted but was located in the target redevelopment area in which 64.3% of the residential buildings were “beyond repair.” *Id.* at 30–31.

purpose of ridding the area of slums is one thing; it is quite another . . . to take a man's property merely to develop a better balanced, more attractive community."<sup>225</sup> In response, the Court asserted:

It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled . . . . If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.<sup>226</sup>

Accordingly, the Court upheld the city's broad interpretation of "blight," holding that a property need not constitute a direct threat to the public health, safety, and welfare to be considered blighted. Furthermore, the Court recognized that when municipalities are undertaking large-scale eminent domain projects they need to engage in comprehensive planning over the "palliative" piece-meal approach that targets individual structures.<sup>227</sup>

The Court returned to the issue of blight in *Kelo v. City of New London*, the landmark 2005 decision that validated a municipality's exercise of eminent domain power for economic redevelopment and authorized the expansion of the "public use" requirement of the Takings Clause of the Fifth Amendment.<sup>228</sup> The *Kelo* Court upheld the City of New London's economic redevelopment plan, which resulted in the appropriation of many properties that were not blighted but merely situated in an economically depressed area, and the transfer of those properties to private individuals.<sup>229</sup> The Court found that the public use requirement was satisfied because the project had a public purpose—the revitalization of a depressed city.<sup>230</sup> Furthermore, the Court found that because the development was part of a comprehensive plan that was drafted with careful deliberation, the transfer

---

225. *Id.* at 31.

226. *Id.* at 33. While the Court upholds the city's use of the eminent domain power for these aesthetic reasons, it in no way endorses the legitimacy of the actions for bringing about the desired change. They merely state that because Congress decided to take into account this wide range of values, it is not for the Court to "reappraise" them. *Id.*

227. *Id.* at 34–35. "It was believed that the piecemeal approach, the removal of individual structures that were offensive, would be only palliative. The entire area needed redesigning so that a balanced, integrated plan could be developed for the region, including not only new homes but also schools, churches, parks, streets, and shopping centers." *Id.*

228. *Kelo v. City of New London*, 545 U.S. 469, 489–90 (2005).

229. *Id.* at 475.

230. *Id.* at 486.



of these properties to private entities did not violate of the spirit of the Fifth Amendment.<sup>231</sup>

The *Kelo* Court fostered a broader understanding of the “public use” requirement, specifically affirming the city’s power to convey the acquired property to private entities.<sup>232</sup> A well-established tenet of the Court’s eminent domain jurisprudence prohibits using the power to undertake “A to B” transfers—i.e., taking property from one individual and transferring it to another individual who may, theoretically, make better use of the parcel.<sup>233</sup> This type of transaction contravenes the innate objective of the eminent domain power, which is to confer community—not individual—benefits.<sup>234</sup> The Court in *Hawaii Housing Authority v. Midkiff*, articulated this point when it stated that “[a] purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void.”<sup>235</sup> Because eminent domain inherently operates as a restriction on absolute property rights, the limitation on A to B transfers serves to uphold the freedom of individuals to use their properties as they see fit within the confines of existing zoning and nuisance laws, and without concern that the government will seize it for a better use.<sup>236</sup> However, as stated above, *Kelo*’s transaction was not a simple A to B transfer.<sup>237</sup> Rather, several properties were acquired from individuals, and the resulting land was aggregated and passed to private individuals for a large redevelopment project that was part of the city’s coordinated economic revitalization plan.<sup>238</sup> The Court conceded that some private individuals may benefit more than others, even when satisfying the

231. *Id.* at 483–84. “To effectuate this plan, the City has invoked a state statute that specifically authorizes the use of eminent domain to promote economic development. Given the comprehensive character of the plan, the thorough deliberation that preceded its adoption, and the limited scope of our review, it is appropriate for us, as it was in *Berman*, to resolve the challenges of the individual owners, not on a piecemeal basis, but rather in light of the entire plan.” *Id.*

232. *Id.* at 480.

233. *Id.* at 477. “The Public Use Clause, in short, embodied the Framers’ understanding that property is a natural, fundamental right, prohibiting the government from ‘tak[ing] property from A and giv[ing] it to B.’” *Id.* at 511 (alterations in original) (quoting *Calder v. Bull*, 3 Dall. 386, 388 (1798)).

234. *See Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (stating that taking must be justified based on “reciprocity of advantage”—i.e. balancing burden on private property owner with benefit to public).

235. *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 245 (1984).

236. *See Kelo v. City of New London*, 545 U.S. 469, 487–88 (2005) (stating that a property cannot be taken from one private individual and passed to another merely because that person would put it to more productive use).

237. *Id.* at 472.

238. *Id.* The Court justified the transfer of properties to a private entity, stating that “[i]t is only the taking’s purpose, and not its mechanics . . . that matters in determining public use.” *Id.* at 482. “The public end may be as well or better served through an agency of private enterprise than through a department of government . . . . We cannot say that public ownership is the sole method of promoting the public purpose of community redevelopment projects.” *Id.* at 487.

public use requirement, but refrained from equating this transaction with a direct A to B transfer.<sup>239</sup>

When a municipality acquires vacant and abandoned buildings from private individuals and passes them along to other private individuals who will be financially better suited to rehabilitate and maintain them, the transaction on its face appears to be the type of A to B transfer that is prohibited under the Fifth Amendment, particularly when it appears that “B” would use the property more productively than “A.” However, an analysis of *Midkiff*, which served as the basis for the Court’s controversial ruling in *Kelo*, reveals that this type of transfer may in fact satisfy the mandates of the public use requirement, at very least the more expansive “public purpose” requirement promoted by the *Kelo* Court. In *Midkiff*, the State of Hawaii was seizing properties from a particular class of large landholders and transferring them to individual lessees in an attempt to break up the state’s land oligopoly.<sup>240</sup> The Court upheld the state’s Land Reform Act against challenges that it violated the public use requirement, reasoning that (1) the state had a legitimate interest in breaking up the oligopoly and (2) the land transfers were part of a larger comprehensive plan that furthered the state’s goals.<sup>241</sup> The Court emphasized that “[t]he Hawaii Legislature enacted its Land Reform Act not to benefit a particular class of identifiable individuals but to attack certain perceived evils of concentrated property ownership in Hawaii—a legitimate public purpose.”<sup>242</sup> The *Midkiff* approach resounds with Cincinnati’s goal of returning vacant and abandoned buildings to productive use—no identifiable class of individuals will benefit from the transfer of these properties. The city has a legitimate goal of seizing buildings from delinquent property owners, particularly speculative investors in possession of a large number of properties, and transferring them to responsible parties that have the financial means to invest in the buildings and stabilize the neighborhood.

Despite the *Kelo* Court’s attempts to root its decision in well-established precedent, opponents read its controversial holding as treading on constitutional liberties.<sup>243</sup> The controversy caused a ripple effect throughout the nation, as states hastily began amending their eminent domain legislation to prohibit the type of broad power authorized under

---

239. *Id.* at 485.

240. *Haw. Hous. Auth. v. Midkiff*, 467 U.S. at 242 (1984).

241. *Id.* at 245.

242. *Id.*

243. See Timothy Sandefur, *The “Backlash” So Far: Will American’s Get Meaningful Eminent Domain Reform?*, 2006 MICH. ST. L. REV. 709, 711 (2006) (discussing the “moral outrage” among the American people over the *Kelo* holding).

*Kelo*.<sup>244</sup> In 2007, Ohio formed the Eminent Domain Task Force, which was charged with rewriting the state's eminent domain legislation to reflect the concerns of the post-*Kelo* regulatory climate.<sup>245</sup> The new legislation was drafted during the 2007–2008 legislative session and formally adopted in 2011.<sup>246</sup> In the interim, the state placed a moratorium on any exercise of the eminent domain power for economic development purposes.<sup>247</sup> However, just under the wire, an important eminent domain case was decided before the Ohio Supreme Court. In *Norwood v. Horney*, the court struck down the City of Norwood's eminent domain ordinance and held: (1) economic benefit alone is insufficient for satisfying the public use requirement; (2) the ordinance was void for vagueness; and (3) courts must apply heightened scrutiny when reviewing eminent domain ordinances.<sup>248</sup> The court took particular issue with the city's use of the phrase "deteriorating area" in the eminent domain ordinance, as opposed to "deteriorated area."<sup>249</sup> The court found the term "deteriorating" too prospective because the term applied to areas not yet blighted, and emphasized that eminent domain cannot be used for speculative purposes.<sup>250</sup>

On the heels of *Norwood*, the Ohio statute redefined the scope of a municipality's eminent domain power and reworked its definition of "blight."<sup>251</sup> The legislative history indicates that the state was seeking to prevent the broad application of eminent domain for economic development exercised by New London in *Kelo*.<sup>252</sup> When a municipality condemns a property, the condition of that property must fall within the state statute's definition of blight and, accordingly, a municipality cannot adopt an ordinance with a broader definition of blight than that incorporated into the state law. Despite its attempts to rein in the use of eminent domain for economic development purposes, the legislature may have inadvertently

---

244. See Donald Sanders & Patricia Pattison, *The Aftermath of Kelo*, 34 REAL EST. L.J. 157, 168–70 (2005) (summarizing reactions of state legislatures to *Kelo* and noting that twenty-eight states proposed or passed legislation in 2005 to curb eminent domain for economic development).

245. S.B. 7, 127th Gen. Assemb., Reg. Sess. (Ohio 2007–2008).

246. *Id.*

247. S.B. 167, 126th Gen. Assemb., Reg. Sess. (Ohio 2005). Specifically, municipalities were temporarily prohibited from taking any private property not in a blighted area that would result in that property being vested in another private individual. *Id.*

248. *Norwood v. Horney*, 853 N.E.2d 1115, 1123 (Ohio 2006).

249. *Id.* at 1145 (stating that "deteriorating area" is a "standardless standard").

250. *Id.* See, generally, Sarah Sparks, *Deteriorated v. Deteriorating: The Void-for-Vagueness Doctrine and Blight Takings Norwood v. Horney*, 75 U. CIN. L. REV. 1769, 1779–83 (2007) (detailing the Ohio Supreme Court's and lower courts' discussions of "deteriorating" versus "deteriorated" in the city's eminent domain ordinance).

251. OHIO REV. CODE ANN., § 1.08 (2007).

252. *Supra* note 245.

opened the door for municipalities to wield broad power for a range of economic development activities. Ohio's statute provides in pertinent part:

(B) "Blighted parcel" means either of the following: (1) A parcel that has one or more of the following conditions: . . . (c) Tax or special assessment delinquencies exceeding the fair value of the land that remain unpaid thirty-five days after notice to pay has been mailed. (2) A parcel that has two or more of the following conditions that, collectively considered, adversely affect surrounding or community property values or entail land use relationships that cannot reasonably be corrected through existing zoning codes or other land use regulations: (a) Dilapidation and deterioration; (b) Age and obsolescence; . . . (f) Noncompliance with building, housing, or other codes; (g) Nonworking or disconnected utilities; (h) Is vacant or contains an abandoned structure . . . .<sup>253</sup>

As such, a blighted parcel need not physically endanger the general health, safety, and welfare but may be one that is merely tax delinquent and in otherwise stable condition.<sup>254</sup> Furthermore, the itemized list under subsection two encompasses a broad range of conditions that are open to subjective interpretation.<sup>255</sup> While blight definitions do vary across jurisdictions, they typically incorporate common language, similar to that used in Ohio's statute, and are often adopted word-for-word by the municipalities in each state.<sup>256</sup>

In the wake of *Kelo*, many states adopted these terms in their hasty attempts to rectify what they saw as gaping holes in the public use requirement, and although the courts have yet to establish a solid body of case law regarding the constitutionality of these terms, their use clearly leaves substantial room for abuse.<sup>257</sup> The few cases that have addressed blight definitions in recent years all suggest that a municipality can alleviate vagueness concerns by incorporating enumerated lists of conditions into their ordinances—i.e., it does not matter if one term on the list is vague and

---

253. OHIO REV. CODE ANN., § 1.08 (2007).

254. *Id.*

255. *Id.*

256. See Will Lovell, *The Kelo Blowback: How the Newly-Enacted Eminent Domain Statutes and Past Blight Statutes are a Maginot Line-Defense Mechanism for All Non-Affluent and Minority Property Owners*, 68 OHIO ST. L.J. 609, 619–22 (2007) (discussing commonalities among blight definitions in state eminent domain statutes).

257. See *id.* at 610 (discussing how newly amended eminent domain statutes still leave room for abuse, particularly in regards to minority and low-income property owners).

open to interpretation if there are other conditions that must also be met.<sup>258</sup> This reasoning is clearly faulty because a property owner must still be on notice of what type of activity may potentially trigger an eminent domain action. For example, if a statute requires that a property meet two conditions, as specified in Ohio's eminent domain law, one condition may be straightforward, such as "lacking utilities," but another condition may be inherently vague, such as "deteriorated." A building that is lacking in proper utilities will not necessarily be subject to an eminent domain action; the property owner must also navigate the murky waters of "deteriorated" to determine if and when the property will be subject to condemnation. Courts typically find a statute unconstitutionally vague if individuals "of common intelligence must necessarily guess at its meaning and differ as to its application."<sup>259</sup> Clearly the parameters of such terms as "deteriorated," "dilapidated," "age," and "obsolescence" are debatable and, consequently, perniciously subjective.

The *Norwood* court further muddied the waters of the blight definition when it erroneously held that a term like "deteriorating" is unconstitutionally vague, while "deteriorated" is not. In practice, the difference is virtually non-existent. The court's reliance on the speculative nature of "deteriorating" is misplaced; the court should have instead focused on the inherent difficulty in interpreting either condition—the fact that a deteriorated condition is one that already exists does not make the term any more definite. Furthermore, the court's reasoning is also flawed when it states that speculative terms are inappropriate because what a property "might become may be no more likely than what it might not become."<sup>260</sup> While this is true, the court fails to consider that any currently existing blight is merely that: currently existing. Any existing blight could be rectified by a property owner at any time. When drafting an eminent domain ordinance or acquiring properties, a municipality gambles on existing conditions not changing and must make an educated guess about what conditions are so extreme as to justify intervention. Deteriorating is an active condition that may cease or be reversed; deteriorated is an existing condition that may be rectified at any time.

So how does a municipality work with such indefinite conditions like "deteriorated" and "dilapidated"? The conditions that satisfy these broad

---

258. See, e.g., *Willoughby v. Taylor*, 906 N.E.2d 511, 515 (Ohio Ct. App. 2009) ("We believe that a reasonable interpretation of the language of the ordinance, with its assistive examples of prohibited conduct, places a person of ordinary intelligence on fair notice of the conduct prohibited . . .").

259. *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926).

260. *Norwood v. Horney*, 853 N.E.2d 1115, 1145 (Ohio 2006).

terms may be almost infinite. Because ordinances that contain these terms already have criteria that specify uninhabitable conditions—e.g., building code violations, public nuisances, and other public health, safety, and welfare concerns—municipalities must interpret the use of deterioration and dilapidation as something less than those extremes. Are aesthetic concerns, such as peeling paint, graffiti, sagging porches, or broken windows, sufficient to determine the existence of deterioration or dilapidation? If so, how much peeling paint would be necessary to warrant municipal intervention? These are difficult questions that raise legal concerns because a property owner may not have sufficient notice that his or her property is at risk. Some legislators have attempted to avoid the vagueness problem by adopting very precise criteria, such as pinning down a specific building age—e.g., forty years or older.<sup>261</sup> However, this type of designation may sweep in entire neighborhoods of otherwise well-kept properties just so a municipality can undertake a large-scale redevelopment project. Using age as a criterion for blight is clearly an attractive proposition because its application is straightforward, but these bright-line designations are arbitrary and no more workable than broader distinctions like “deteriorated” and “dilapidated.”

When a municipality uses blight as a metric to gauge the validity of an eminent domain action, any definition is inevitably a double-edged sword, particularly for historic buildings.<sup>262</sup> A very broad definition that allows municipalities to exercise the power to acquire deteriorated buildings for rehabilitation purposes will also allow municipalities to undertake large-scale urban renewal projects that result in wholesale “slum” clearance. Along the same lines, a narrow definition may prohibit destructive urban renewal practices but also create hurdles to legitimate rehabilitation efforts. Furthermore, the broader the blight definition, the greater likelihood that the ordinance will be unconstitutionally vague, and the more narrow the definition, the greater the likelihood that the ordinance will be arbitrary. In either circumstance, property owners may not have sufficient notice as to what constitutes a blighted condition, and the municipality may exercise its authority selectively or in an arbitrary and capricious manner.

---

261. See *Cincinnati v. Clif Cor Co.*, No. C-050831, 2007 WL 196556, at \*3 (Ohio Ct. App. 2007) (listing age as a potential blighted condition).

262. See generally, Benjamin Lingle, *Post-Kelo Eminent Domain Reform: A Double-Edged Sword for Historic Preservation*, 63 FLA. L. REV. 985, 998–1009 (2011) (discussing how narrowed blight definitions may protect historic buildings from demolition for large-scale redevelopment projects but will also bar the use of eminent domain for rehabilitation of historic structures).

Ohio's revised blight definition, which has been adopted word-for-word in Cincinnati, was upheld in state court, based on *Norwood*, but is nonetheless overly broad. For the purposes of addressing vacant and abandoned historic buildings, the ordinance is too permissive. The city may acquire properties that are tax delinquent or already violating a building code<sup>263</sup>—sweeping in large numbers of vacant and abandoned buildings—and may target properties that satisfy both the “age” and “vacant and abandoned” requirements under subsection two. Even properties that are not yet of a certain age may still be swept in under the broad definitions of “deteriorated” or “dilapidated.” The risk here is that the city may abuse this power to aggregate large parcels of land to undertake urban renewal projects—squarely contravening the goal of saving and rehabilitating individual buildings. Cincinnati should seek a more focused set of definitions that will help to prevent this type of abuse, while still allowing the flexibility for remedying the vacant and abandoned building problem.

One other problem with exercising eminent domain for “blight removal” is that, historically, this power has been used to target and remove pockets of poverty.<sup>264</sup> Blight removal was the hallmark of the 1950s–1970s urban renewal program and a tactic that, although no longer unequivocally accepted, is still frequently employed.<sup>265</sup> In fact, New London's comprehensive plan in *Kelo* was so controversial because it targeted middle-class properties.<sup>266</sup> This apprehension about municipalities interfering with middle-class property rights clearly reveals a longstanding acceptance that condemnation is a form of blight removal that should target exclusively low-income neighborhoods. This discriminatory application of the eminent domain power is not only bad public policy, but it can potentially trigger equal protection challenges under the Fourteenth Amendment.<sup>267</sup> However, unless an injured party raises these constitutional concerns, a court will generally defer to a municipality's determination that

---

263. A building in an historic district may be violating a building code if the owner failed to obtain a certificate of appropriateness for an exterior alteration, a condition that violates aesthetic standards.

264. For a critique of the use of blight as a justification for condemnation see Steven J. Eagle, *Does Blight Really Justify Condemnation?*, 39 URB. LAW. 833 (2007).

265. *Id.* at 854.

266. See Ilya Somin, *The Judicial Reaction to Kelo*, 4 ALB. GOV'T L. REV. 1, 5 (2011) (emphasizing that *Kelo* was so controversial because the city was acquiring properties that were not blighted or in poor condition).

267. See *Kelo v. City of New London*, 545 U.S. 469, 522 (2005) (Thomas J., dissenting) (citing the disproportionate treatment of urban minorities in eminent domain actions). See generally, Daniel S. Hafetz, *Ferretting Out Favoritism: Bringing Pretext Claims After Kelo*, 77 FORDHAM L. REV. 3095, 3107–19 (2009) (discussing the possibility of equal protection challenges post *Kelo*).

its goals are legitimate and that the project furthers those goals.<sup>268</sup> The “heightened scrutiny” that the *Norwood* court demanded has yet to be tested, and because of the courts’ lack of expertise in municipal land use decisions, this heightened scrutiny may not have the practical effect of invalidating meritless eminent domain goals. Thus, the burden lies with the municipality to safeguard against abuse.

To that end, a municipality must look beyond the existence of the specified condition, examine the impact of that condition on the public welfare, and determine whether condemnation of that property will actually serve a public purpose. This may seem obvious, as embedded within any definition of blight is the idea that it impacts the greater public and that its removal will benefit the public, but the actual impacts versus the perceived impacts are not always properly assessed. A low-income neighborhood may be comprised of owner-occupied dwellings and small businesses but still foster the public’s perception that the neighborhood is negatively impacting the public welfare. Seizure of these buildings for either demolition or rehabilitation will serve no actual public purpose but, rather, will likely replace the low-income occupants with more prosperous ones. Conversely, a neighborhood with numerous vacant and abandoned buildings that otherwise appear well-maintained may actually be a threat to the public welfare despite its tidy outward appearance, and municipal intervention may serve a public purpose of placing these buildings back into productive use. Cincinnati should incorporate into its ordinance a set of procedures by which the city will determine that the blighted properties are actually impacting the surrounding community and that low-income properties are not being targeted merely because they are that—low income.

Ohio has directly authorized municipalities to acquire blighted properties for rehabilitation and resale through eminent domain.<sup>269</sup> Large economic development projects of the kind in *Kelo* and *Berman* typically involve demolition of existing buildings. Thus, property owners are compensated for the value of their property and forced out of the neighborhood. Even when new housing or businesses are constructed, the displaced residents or business owners are not generally offered the opportunity to exchange their existing building for one of the newly constructed buildings. This type of project results in both the loss of a

---

268. See, e.g., *Kelo*, 545 U.S. at 480 (“Without exception, our cases have defined that concept broadly, reflecting our longstanding policy of deference to legislative judgments in this field.”). See generally, Lynda J. Oswald, *The Role of Deference in Judicial Review of Public Use Determinations*, 39 B.C. ENVTL. AFF. L. REV. 243, 251–62 (2012) (discussing the heightened deference both the Supreme Court and the lower courts grant to municipalities and the state legislature in eminent domain disputes).

269. OHIO REV. CODE ANN., § 719.012 (2011).



community's unique physical character or heritage and the displacement of residents. Any individual with a personal attachment to his or her specific property loses out, even when the compensation is "just." Seemingly these types of devastating projects should be scrutinized more rigidly by the courts, rather than granting the type of deference that a court gives a municipality's police power.<sup>270</sup> When a municipality acquires a property for rehabilitation, the community does not lose the building. This type of acquisition preserves the community character and does not necessarily result in the displacement of residents. A responsible owner—i.e., one that has not let the property deteriorate in bad faith—will have the opportunity to reclaim the property if he or she has a personal attachment to remaining in the community. But more importantly, the community fabric itself remains intact, even if a new owner purchases the rehabilitated property. The following section recommends an eminent domain ordinance that is narrowly tailored toward rehabilitation and limits the ability of the city to target low-income neighborhoods and displace residents.

## 2. Recommendations

Eminent domain should be exercised when the vacant building registry and nuisance abatement programs fail. Thus, the power serves as a catchall for any properties that cannot be effectively rehabilitated and placed back into productive use after going through the registration and abatement processes. This will typically occur in situations where the property owners are either absentee or tax delinquent, or both. This may also occur when a property owner consistently fails to pay fees or comply with abatement orders. The ordinance should specifically enumerate the circumstances under which the city may exercise this power, and the ordinance should expressly state that eminent domain for demolition of blighted properties is

---

270. In *Lingle v. Chevron, U.S.A. Inc.*, the Supreme Court held that merely determining whether or not a municipality had a legitimate government interest in enacting a specific regulation, the type of rational basis review used to assess the scope of a city's police power, was an inappropriate test for determining whether or not a taking had occurred. 544 U.S. 528, 541–44 (2005) (overturning *Agins v. City of Tiburon*, 447 U.S. 255 (1980), for employing a reasonableness standard akin to that used in assessing the validity of the police power). Here, the concern is that owners may be deprived of property rights without just compensation. Eminent domain actions, on the other hand, are inherent sovereign powers, and as long as just compensation is awarded, no constitutional problems arise. Thus, the courts find no need for heightened scrutiny in reviewing these plans. However, this should not prevent the courts from more heavily scrutinizing cities' plans to ensure that these projects are really in the best interest of the public—a process that should be mandated under the "public use" clause.

not a sufficient action and that it should not be used for large-scale neighborhood clearance.<sup>271</sup>

There should be three circumstances under which the city may acquire a vacant or abandoned building: (1) when an absentee owner is speculatively holding onto one or more properties across the city and, therefore, not marketing, maintaining, or rehabilitating those properties; (2) when an owner is consistently delinquent in paying taxes and fees; and (3) when the owner has failed to comply with nuisance abatement orders. Following any of these three circumstances, the city will have the power to acquire the properties and enter them into a land bank for resale to responsible parties. Because these three circumstances will occur after the property has already passed through the VBML and nuisance abatement programs, there is no need to separately define conditions that constitute “blight.” The city will have already determined that these properties pose a threat to the community and that intervention and condemnation will rectify a public harm and, in turn, serve a public purpose.

As the above conditions apply only to buildings already vacant or abandoned, the city may be able to exercise eminent domain more broadly for otherwise blighted properties. The city should be able to intervene while these blighted buildings are still occupied in order to reduce the likelihood that the buildings will become neglected and then vacated or abandoned. Here, the city ordinance should be drafted more narrowly than the state statute. To that end, terms like “age” and “obsolescence” should be removed for their inherent arbitrariness and the fact that these conditions do not necessarily present a public harm. Plus, the city should craft vague terms more specifically—e.g., define what “deteriorated” means—and link those terms to the harms that they cause. For example, the ordinance may specify that a property that is “deteriorated” has structural defects that, if left unabated, will render the property uninhabitable within a specific time period. The condition of these structural defects should also be outlined in the ordinance and should be as technical and objective as possible to avoid abuse. For example, the ordinance may specify that a structural defect exists if a roof has lost a certain percentage of its shingles and the underlying decking and joists have rotted. Again, the city should attempt abatement through the public nuisance ordinance prior to undertaking condemnation and take the property through eminent domain only when nuisance actions fail.

---

271. This, of course, does not preclude the city from potentially demolishing buildings for road construction and other public uses that are inherent in the city’s exercise of eminent domain power.

Furthermore, the city should not be able to target entire “blighted areas,” as this allows too much discretion for the city to displace low-income or minority populations from neighborhoods. Rather, the city should require that each individual property targeted for condemnation is actually blighted under the city’s ordinance and that acquiring that property is necessary for achieving the public benefit.

#### CONCLUSION

Vacant and abandoned buildings have long been a hurdle to economic development in the nation’s rust belt, and municipalities have failed to effectuate sound policy to remediate the growing problem. Lax building codes and passive enforcement of those codes at the municipal level have resulted in large-scale demolition by neglect, and aggressive demolition programs at the local, state, and national levels have left seas of undeveloped, overgrown urban prairies in the historic hearts of these once-thriving industrial metropolises. Municipalities must take a proactive approach in addressing vacant and abandoned buildings and intervene in rehabilitating these properties and placing them back into productive use before they become too deteriorated to salvage. Vacant building registries, nuisance abatement programs, eminent domain powers, land banks, and property receivers—if tailored toward preservation and rehabilitation—can have a positive impact on these historic cities and generate new economic life in distressed neighborhoods.