STATE POLICY AND PROBLEM PROPERTY REGULATION

Alan Mallach

Center for COMMUNITY PROGRESS
Vacant Spaces into Vibrant Places

About the Author

Alan Mallach is a senior fellow at the Center for Community Progress (Community Progress), America's nonprofit leader for turning "Vacant Spaces into Vibrant Places."

Mallach is a city planner, advocate and writer, nationally known for his work on housing, economic development, and urban revitalization. He has worked with local governments and community organizations across the country to develop creative policies and strategies to revitalize cities and neighborhoods.

A former director of housing & economic development in Trenton, New Jersey, Mallach currently teaches in the graduate city planning program at Pratt Institute in New York City. He has worked at the Brookings Institution and the Federal Reserve Bank of Philadelphia, and has spoken on housing and urban issues in the United States, Europe, Israel and Japan. He was a visiting scholar at the University of Nevada Las Vegas for the 2010-2011 academic year.

Mallach's most recent book is The Divided City: Poverty and Prosperity in Urban America, which charts the course of change in shrinking Rust Belt cities, and the uneven effects of urban revival on lower income residents and communities of color. Among his other books are A Decent Home: Planning, Building and Preserving Affordable Housing, and Bringing Buildings Back: From Vacant Properties to Community Assets, which has become a resource for thousands of planners, lawyers, public officials and community leaders dealing with problem property and revitalization issues.

Mallach is a member of the College of Fellows of the American Institute of Certified Planners and holds a B.A. degree from Yale University.

About Center for Community Progress

The mission of Center for Community Progress is to foster strong, equitable communities where vacant, abandoned, and deteriorated properties are transformed into assets for neighbors and neighborhoods. Founded in 2010, Community Progress is the leading national, nonprofit resource for urban, suburban, and rural communities seeking to address the full cycle of property revitalization. The organization fulfills its mission by nurturing strong leadership and supporting systemic reforms. Community Progress works to ensure that public, private, and community leaders have the knowledge and capacity to create and sustain change. It also works to ensure that all communities have the policies, tools, and resources they need to support the effective, equitable reuse of vacant, abandoned, and deteriorated properties.

Center for COMMUNITY PROGRESS
Vacant Spaces into Vibrant Places

1101 14th Street NW, Suite 510
Washington, DC 20005

(877) 542-4842 | info@communityprogress.org

communityprogress.org

This report is derived from a working paper prepared by Alan Mallach pursuant to a joint program agreement between the Center for Community Progress and the Lincoln Institute of Land Policy. The working paper is available at https://www.lincolninst.edu/publications/working-papers/state-policy-problem-property-regulation.

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INTRODUCTION

How American cities conduct their affairs is heavily determined by the laws, policies and practices of their state government. States exercise overt or latent control over almost every significant activity of local government, from how they raise their operating revenues to the conditions under which they can finance redevelopment projects. Nowhere is this more true than in the area of problem property regulation, which includes the design of housing codes, the administration of code enforcement, the regulation of rental properties, and the ability to address the problems of vacant, neglected and abandoned properties.

All of these areas are governed by state laws, which give local governments varying degrees of discretion, while in many cases discretion is further hemmed in by state regulations, guidelines and fiscal or administrative practices.

The need to regulate problem properties is not widely contested. Problem properties, whether a derelict, unsecured vacant house or an occupied apartment building with irregular heat and mold on the walls, are a danger to their residents and a nuisance to their neighbors. They trigger severe health problems, including lead poisoning and asthma, they can do harm to nearby properties and their residents, undermine the quality of life in the neighborhood and depress property values, stealing the modest wealth of long-time homeowners. They reduce municipal tax revenues while burdening local governments with unnecessary costs for police, fire, health care, demolition and property maintenance. They disproportionately burden low-income renters, whose limited financial resources put them at the mercy of landlords, many of whom may be financially strapped themselves.

While people may legitimately disagree about the most appropriate way to regulate problem properties, or the best way to handle specific conditions, few would disagree that some form of effective regulation is needed. Regulations, however, are never an end in themselves. *The purpose of code enforcement and other property regulations is not to issue citations or collect fines, but to improve the community's quality of life by improving housing and neighborhood conditions.* Since those conditions are the product of social and economic forces, political dynamics and ongoing practices of racial discrimination, property regulations disproportionately affect the housing and neighborhoods of lower income people and communities of color, raising issues of social, economic and racial justice and equity. During the course of this paper, I will try to highlight key points where these issues interconnect with and are affected by specific approaches to problem property regulation.

Since the scope of property regulation is defined by state laws and state government, a short overview of state power over local government is appropriate. Municipalities, as the saying goes, are 'creatures of the state'. While that phrase preceded him, the 1868 definition of the relationship between states and municipalities written by Justice John F. Dillon of the Iowa Supreme Court has come to be known as Dillon's Rule:

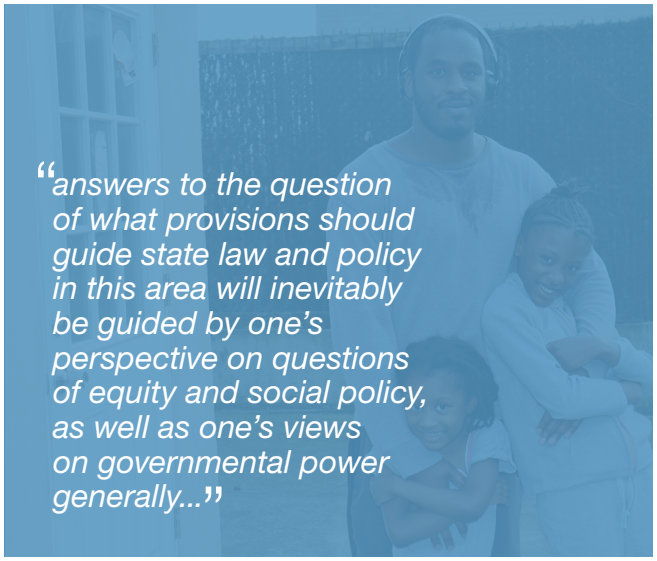
> Municipal corporations owe their origins to, and derive their powers and rights wholly from, the legislature. It breathes into them the breath of life, without which they cannot exist. As it creates, so may it destroy. If it may destroy, it may abridge and control. […] We know of no limitations on this right so far as the [municipal] corporations themselves are concerned. They are, so to phrase it, the mere *tenants at will* of the legislature.

While Dillon's Rule remains the foundational statement of the underlying constitutional relationship between states and local governments in the United States, few states other than Virginia and North Carolina adhere strictly to that rule today. In those two states, municipalities can only exercise those powers that have been *explicitly* granted them by the state legislature.

Elsewhere, Dillon's Rule has been gradually modified to allow varying and often significant levels of municipal discretionary action known as "home rule" provisions. These provisions often appear in state constitutions, such as that of Montana, which reads that "a local government unit adopting a self-government charter may exercise any power not prohibited by this constitution, law, or charter" (Art. VI, Sec.6), or in state statutes.

Home rule provisions allow municipalities to use their initiative to come up with individual ways of addressing local concerns and needs under what is known as the municipal "police power," which means the power to establish and enforce laws protecting the public welfare, safety, and health. Under this definition of the police power, the New Jersey Supreme Court has upheld the validity of municipal rent control ordinances, and California municipalities enacted ordinances requiring lenders to maintain properties going through foreclosure during the 2007-2008 foreclosure crisis.

'Home rule' provisions all make clear, however, that in the final analysis, the state is always supreme. Home rule provisions permit municipalities to exercise power *in the absence of conflict with state rules*. Thus, *any* action by local government can be undone by what is known as 'pre-emption' by state legislative or executive action. Pre-emption has been a major issue in recent years as legislatures or governors in some states have found themselves at political odds with their major cities. The Texas legislature nullified an Austin ordinance barring landlords from discriminating against tenants with Housing Choice Vouchers, while the Georgia legislature passed a law restricting the permissible scope of municipal vacant property registration ordinances. More recently, in a seemingly counterproductive response to the recurrence of the COVID-19 pandemic, the governor of Texas issued an executive order barring local governments from requiring or mandating mask wearing.[1] Similarly, state courts can nullify local ordinances if they find they are ultra vires, which means that they go beyond the permitted scope of municipal authority. Thus, what the state government does and what it does not do ultimately determine the room for municipal action, whatever the underlying state constitutional principles may be. Municipalities are never independent actors.



This report examines how state laws affect municipalities' ability to regulate problem properties in order to further the public welfare, safety and health within their borders. It goes beyond simply looking at those laws, but asks the question: what should the provisions of state law in this realm be? In other words, what powers are most appropriately wielded by local government as they seek to tackle the challenges of problem properties, and what should be proscribed?

This is not a simple question, because property regulation is not a simple matter. Property regulation, as I will discuss further in the next section, affects people's health, welfare and quality of life in many ways. Moreover, because of the many intersections between problem properties and poverty, as well as their disproportionate impacts on communities of color, issues of racial, social and economic equity are deeply interwoven with decisions about the ways in which problem properties are regulated.

In the end, answers to the question of what provisions should guide state law and policy in this area will inevitably be guided by one's perspective on questions of equity and social policy, as well as one's views on governmental power generally, and more specifically, the relationship between that power and private property rights. Readers are free to accept, modify or reject the answers that I offer to those questions.

I have framed positions on those questions in the next section, in order that these report be a document that can be a resource for practitioners and policymakers, both at the state and local levels. This report is designed to be useful to people working to frame more effective strategies to deal with problem properties and work with state governments and legislatures to enact new laws and amend older ones to that end. Moreover, it should be useful locally as well,

1 "Governor Abbott issues Executive Order Prohibiting Government Entities from Mandating Masks", Press Release, Office of the Texas Governor, May 18, 2021. There is a legal question, which is currently before the Texas courts, over whether the Governor has this power, but if a similar prohibition had been enacted by the Texas Legislature, it is unlikely that any serious legal question would arise whatever its substantive merits.

alerting local officials and advocates to where their city may not be using (or may be misusing) the tools provided by their state's laws, or to where opportunities for creative action exist by virtue of the absence of conflicting state laws.

The first section of this report looks at three larger issues that cut across specific forms or regulation. First, I provide an overview of the different elements that fall under the rubric of problem property regulation; second, I address the critical issue of the balance between regulation and private property rights; and third, I try to frame an answer to the central question of what good policy in this area should look like, and propose six principles to guide sound state policy. Those principles are offered as a lens to help readers better evaluate the state laws and policies governing problem properties that are discussed in the following sections of the report, and place them in the context of their local conditions.

Section two looks at the foundations of problem property regulation, property registration and code enforcement, while section three looks specifically at the issues associated with regulating rental properties. Section four then addresses the challenges of dealing with vacant neglected properties, particularly those properties that have been literally or effectively abandoned by their owners. At the end of the paper, an appendix distills my own and others' experience working for policy changes in state and local government over many years, in order to offer lessons from successful campaigns and useful thoughts about effective advocacy.

This paper focuses on *residential* properties, particularly in Section 3, which addresses residential rental properties. The discussion of vacant properties, however, while focusing mainly on residential buildings and vacant lots, is also relevant to other vacant properties, such as commercial and industrial buildings. The distinct environmental issues associated with brownfields properties, however, are not addressed in this paper.[2]

What About Problem Owner-Occupied Properties?

The reader may notice that owner-occupied properties do not appear on the table on page 8. There is no question that some owner-occupied properties can be problem properties, affecting either or both their owners and their neighbors. They inhabit a different policy sphere from other problem properties, however, for a number of reasons. First, the incidence of problems in owner-occupied properties is much lower than in rental properties, and even more so than compared to abandoned, vacant properties. Second, such problems as arise are more likely to be matters of their owners' poverty and inability to make repairs, their lack of knowledge, or incapacity, as in the case of frail, elderly owners, than indifference or intent. Third, owner-occupants are neither engaging in business transactions with unrelated third parties nor holding title to properties they have abandoned, which raise very different property rights issues.

That does not mean that local code enforcement actions are not relevant. Housing inspections, which are often triggered by a neighbor or family member's concerns, are often the way in which problems in owner-occupied homes are discovered, including many problems that may seriously affect the health and well-being of the owners, such as hoarding, malfunctioning sewer systems, or lack of heat. At that point, however, the role of code enforcement often becomes more a matter of finding help for the owners, by providing the owners with emergency assistance, connecting them to social service agencies, or helping them obtain financial assistance to make needed repairs, rather than enforcing local regulations.

[2] Brownfields properties, which are vacant properties which suffer from environmental contamination as a result of their former – usually industrial – use, are a special case, which are subject to a complex body of interlocking state and federal laws and regulations, largely distinct from and unrelated to the general body of state problem property laws addressed in this paper. For a good overview, see Leah Yasenchak, "Brownfields: Dealing with Environmentally Contaminated Properties" in Alan Mallach, Jessica Bacher & Meg Byerly Williams, ed. *Vacant and Problem Properties: A Guide to Legal Strategies and Remedies*. Chicago, IL: American Bar Association (2019).

1. KEY ISSUES IN PROBLEM PROPERTY REGULATION

This section looks at three foundational issues affecting the regulation of problem properties. First, I address the scope and purpose of problem property regulation, followed by a discussion of the perennial issue of the relationship between regulation and property rights. Finally, I ask a critical question: how can we define 'good' state policy in this area?

A. PROBLEM PROPERTY REGULATION: SCOPE, PURPOSE AND EQUITY CONSIDERATIONS

What are problem properties? What is problem property regulation?

A problem property is a building, structure or vacant land parcel that by virtue of its physical condition poses potential harm to its occupants, neighboring residents or properties, or the community as a whole. Harm can be physical, where properties create health and safety hazards to their residents or neighbors, social or economic. Problem property regulation encompasses any measure taken by local government or others to prevent or minimize any such harm from problem properties, either by addressing harms that arise or by taking proactive steps to prevent them from arising.

Activities that fall under that rubric arguably go beyond the narrow meaning of the term 'regulation', a term I use for convenience. As shown in Table 1 on the following page, they begin with information gathering, and may ultimately lead to steps under which local government or its agents may enter, take physical control, or take ownership of a property. While these activities and powers are generally reserved for local governments, many state statutes allow local governments to delegate powers to third party agents, while some state laws grant certain powers in the regulatory sphere to non-governmental bodies.

Act 135 in Pennsylvania allows any affected entity, known as a "party in interest," to petition the court to appoint a conservator to take control of a vacant, blighted property and restore it to productive use. Both formal delegation in state law as well as local delegation under the police power offer many opportunities for effective partnerships between municipal agencies, community organizations and neighborhood residents which can improve regulation and make it more responsive to the concerns of distressed communities and their residents.

After **information gathering**, which is an essential foundation for any program or strategy, Table 1 distinguishes between three layers of property regulation, each of which plays a critical role.

- **Harm prevention** refers to steps that a municipality can take to create a strong framework that will encourage owners to take responsibility for their properties, try to anticipate potential property problems, and put in place pro-active regulatory frameworks to prevent problems from arising. The key to effective harm prevention is to have a sold body of codes and local ordinances in place.

  Harm mitigation refers to how a municipality acts to address problems that have arisen, such as code violations in an occupied building or signs of neglect on a vacant building suggesting that it may have been abandoned by its owner. It is principally driven by the use of the regulatory power to motivate the owner to prevent or mitigate the problem, but can include direct municipal action, as when a city work crew enters a property in order to secure it from vandalism.

TABLE 1: THE SCOPE OF PROBLEM PROPERTY REGULATION

	Information Gathering	Harm Prevention	Harm Mitigation	Restoration under new ownership
Definition	understanding the environment and tracking properties	Creating a strong framework under which property owners take responsibility for their properties	Taking effective steps to get property owners who fail to take responsibility for their properties to do so.	Taking control of properties from problem owners as a last resort to address problem conditions or reuse properties.
Threshold standards	Effective data systems	Modern codes and strong ordinances	Effective enforcement capacity	Effective enforcement and reuse capacity
Occupied rental properties	Rental registration	Rental licensing	Code enforcement	Rental receivership
		Proactive property inspections	Legal sanctions	
		Performance-based inspection regime	Nuisance abatement	
			Condemnation (note 1)	
Vacant properties	Vacant property registration	Lender responsibility ordinances	Code enforcement	Vacant property receivership
			Legal sanctions	Vacant property
			Lot cleaning and anti-dumping	Forfeiture and other forms of taking
			Cleaning and boarding	Land banking
			Demolition	Code lien foreclosure

(1) Condemnation in the sense of declaring the building unfit or unsafe for occupancy and requiring that it be vacated by the owner, rather than as a synonym for eminent domain.

- **Restoration under new ownership** is when efforts to motivate owners have been unsuccessful, and it becomes necessary for the city or another third party such as a land bank or a nonprofit entity to take temporary or permanent control of the property in order to restore it to sound condition, or in the case of abandoned properties, to productive use.

In every case, the starting point for the regulation is a ***code***; specifically, **a document setting forth the standards that govern the condition, use and maintenance of the properties in a community**.[3] Codes can be extremely detailed, or relatively general in nature. In most cases, details are important, since they provide clarity to both property owners and inspectors as to precisely what is expected; a code that simply requires an owner to board the doors and windows on a vacant structure, without specifying how the boarding is to be done to properly secure the property, invites abuse and slipshod work.

As I pointed out earlier, regulation is not about issuing citations or collecting fines. It is a series of tools available to local government, and sometimes to non-governmental entities, by which they can improve people's quality of life by improving housing and neighborhood conditions. Thus, *all regulatory tools, be they the codes themselves, the ordinances that government the enforcement of those codes, or the ways in which the jurisdiction implements those ordinances, need to be focused on that goal – will they lead to improvement in the community's housing and neighborhood conditions?*

In that respect, the relationship between codes and equity is often overlooked. Two examples can help illuminate that relationship:

- In one city, complaints and enforcement of the overcrowding provisions in the city's ordinance were focused on homes with Latinx occupants, in particular homes occupied by undocumented immigrants, who were ordered to vacate; and

[3] This definition is somewhat more expansive than what is sometimes found in the local government literature, which sometimes treats the term 'code' as being limited to the physical condition and facilities of the property.

- One city enacted a rental registry ordinance that provided that if the owner failed to comply with the ordinance, the city could require them to vacate the rental unit.

In both cases, vulnerable populations were targeted, one explicitly and one implicitly, by problem property regulation. Aside from the equity issues involved, from a legal standpoint, code enforcement activities that negatively impact classes of people protected by civil rights laws can make a local government vulnerable to litigation.[4]

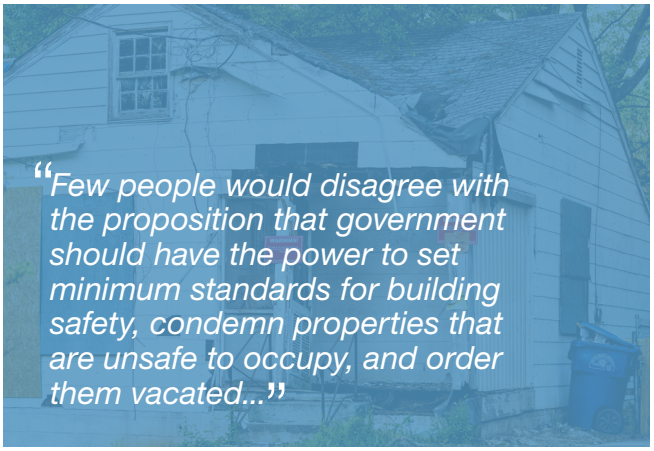
Hester Street, a New York City-based planning and design organization, has prepared a useful guide for equitable code enforcement.[5] They recommend three guiding principles:

- Acknowledge and address the impact of systemic and institutional discrimination;
- Prevent disparate impacts for vulnerable populations, including low-income communities, communities of color, and immigrant communities;
- Deploy code enforcement as a tool for community building by integrating it within larger planning, engagement and development strategies.

These points are important to remember as one reads the rest of this report.

B. FINDING THE BALANCE BETWEEN PROPERTY RIGHTS AND THE GENERAL WELFARE

An underlying tension in all regulation of property is how to find the right balance between private property rights and the general welfare. The right to private use and ownership of property is recognized as a fundamental right in American society. For some, this means that government has no right to limit their use of their property or their right to engage in buying, selling or leasing property, and that those transactions should solely be dictated by the market. That is an extreme position. Most people would agree that there are situations where some regulation is needed; moreover, most people would agree that the need for regulation arises



when the use of the property gives rise to potential harms to others. As the saying goes, "Your right to swing your arms ends where the other man's nose begins."[6]

Two conditions give rise to regulation:

- Where the potential or actual harm is to the *occupant* of the property, or
- Where the potential or actual harm is to the *neighbor* of the property, or the community at large.

Few people would disagree with the proposition that government should have the power to set minimum standards for building safety, condemn properties that are unsafe to occupy, and order them vacated; or that government should have the power to restrict a property owner from conducting a business or other activity that harms their neighbors, as with a factory that generates noxious fumes that affect the health of the residents of a densely populated residential area. These matters go directly to peoples' health and safety, fundamental concerns of government.

In a complex, inter-connected society, however, misuse of property, even short of direct health and safety effects, can have other problematic implications. For example, can government step in where someone's use or misuse of property does *economic* harm to their neighbors, or imposes excessive fiscal burdens on the municipality? These are widely seen as legitimate roles for government. The State of Utah agreed with the latter by authorizing local governments to impose a *disproportionate rental fee*

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4 In an unusual case, the federal Circuit Court found against a code enforcement strategy being pursued by the city of St. Paul, Minnesota in a challenge by landlords, who argued that the strategy violated the Fair Housing Act by reducing the supply of affordable housing, which disproportionately affected the ability of minorities to find decent housing. *Gallagher v. Magner* 619 F. 3D 823 (2010). For a good discussion of the relationship between civil rights laws and property regulation, see James J. Kelly, Jr. Just, Smart: Civil Rights Protections and Market-Sensitive Vacant Property Strategies. Washington DC: Center for Community Progress (2014)

5 The Power and Proximity of Code Enforcement: A Tool for Equitable Neighborhoods (2019), available online at https://hesterstreet.org/wp-content/uploads/2019/07/CR_-Phase-I-_Equitable-Code-Enforcement-report_FINAL-JUNE-2019.pdf

6 For a history of this saying, see https://quoteinvestigator.com/2011/10/15/liberty-fist-nose/#:~:text=%E2%80%9CYour%20right%20to%20swing%20your,than%20thirty%2Dfive%20additional%20years. One could reasonably argue, moreover, that if someone was in the habit of repeatedly swinging their arms very close to other people's noses, it would be appropriate for someone else to stop them, on the grounds that their actions were creating a realistic potential harm to others' noses.

defined as "a fee adopted by a municipality to recover its disproportionate costs of providing municipal services to residential rental units compared to similarly-situated owner-occupied housing."[7]

More broadly, the Pennsylvania Supreme Court upheld a Philadelphia ordinance that required the owners of vacant buildings to install workable windows and doors, as distinct from simply boarding the windows and doors – a not-insignificant expense for the owners – in order to combat blight in surrounding areas.[8] The city had cited five justifications for the ordinance:

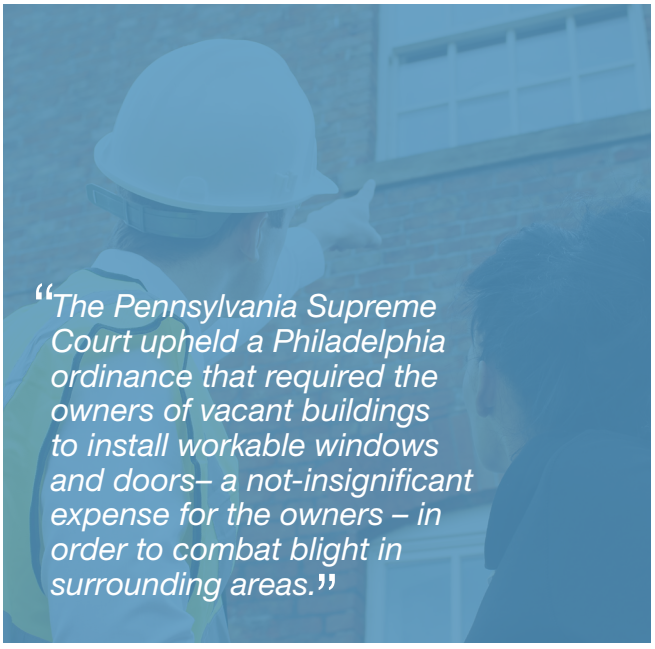
> that the lack of windows and/or entry doors has a significant adverse influence on the community based on the following factors: (a) deterioration and/or safety of the property; (b) safety of the surrounding community; (c) the value of intact, occupied properties in the surrounding vicinity of the property; (d) marketability of the property; and (e) community morale."[9]

The ordinance was challenged on the grounds that it was solely aesthetic in nature, and therefore *ultra vires*, or beyond the scope of municipal authority. Although the plaintiffs prevailed in the lower courts, those decisions were reversed by the Pennsylvania Supreme Court, which held that the city had shown that its ordinance was a reasonable exercise of the city's "legislative prerogative in furtherance of its compelling interest in combatting blight".[10]

The court found the city's arguments compelling. Vacant abandoned properties, unattended, clearly do harm to their neighbors. And it is clearly the owner's responsibility, not the city's, to prevent that harm. The city's responsibility is to use its regulatory powers to ensure to the extent feasible that owners are held accountable for their properties.

It should be clear that an owner's right to use their property can be limited by regulation in the public interest. Operating a rental property is a good example. The key point is that *a landlord is conducting a business activity that is unrelated to property ownership as such*. It is well-established law that reasonable regulation of business conduct does not violate constitutional due process standards.[11] Closely tied to this is the principle that government can require that businesses obtain a *license* in order to conduct their business, and set conditions on eligibility for a license, as long as they are reasonable and there is a legitimate public interest involved. Thus, states may license barbers to make sure they know how to cut people's hair, or restaurants to ensure that they understand proper food safety procedures. While the use of licensing has arguably become excessive in many states,[12] the act of charging members of the public for access to shelter – a fundamental human need – clearly falls within the reasonable scope of the licensing power. A state or city has a compelling public interest to see that housing units that are unsafe or unhealthy are not offered to unsuspecting tenants. To do so clearly falls in the realm of harm to others. It is also an equity issue, as renters are generally of lower income than homeowners, and those most likely to be victimized by unsafe or unhealthy housing are likely to be the community's poorest and most vulnerable residents.

There are specific regulations or enforcement practices that may raise further property rights issues. Some of these will be addressed in later sections. But as a matter of principle, the power to regulate property in the interest of the general welfare is well-established in law as an important governmental function.



7 Utah Code, Title 10, Ch. 1-203.5. On its face, this may appear to raise equity issues. The state law, however, requires any municipality that imposes such a fee to rebate all but a minimal amount to any landlord who complies with the Good Landlord program requirements established in the statute.

8 The ordinance provisions were triggered by vacant properties on blocks that were at least 80% occupied. *Anthony Rufo and TR Gretz LP v. Board of License and Inspection Review and City of Philadelphia*, 192 A.3d 1113 (Pa. 2018)

9 Philadelphia Property Maintenance Code, Sec.202.

10 192 A.3d 1113 at 1122.

11 See *Nebbia v. New York*, 291 US 502 (1934)

12 This is a serious issue. Many states either require licenses for trivial activities that have little effect on the public welfare, or establish burdensome occupational or educational requirements as license conditions, suggesting that many licensure requirements have more to do with restricting competition than ensuring competence. For a good discussion of this issue, see Conor Friedersdorf, "The Disappearing Right to Earn a Living", *The Atlantic*, Nov. 17, 2017. https://www.theatlantic.com/business/archive/2017/11/the-right-to-earn-a-living/546071/

C. WHAT CONSTITUTES GOOD STATE POLICY TOWARD LOCAL REGULATION OF PROBLEM PROPERTIES?

In order to evaluate state policies governing local regulation of problem properties, and offer recommendations for changes to state policies to render local regulation more effective, one must have a frame of reference as to what constitute "good" policies. The text box on the following page lays out six principles which I use to define good policies. They are reflected in the analysis and recommendations in the balance of this paper. Recommendations appear in **bold** type.

In the following pages, I will provide many examples of what statutes or policies may be consistent with or conflict with these principles. It is worth offering one example, though, to illustrate how often it is the details of the statute, rather than its broad thrust or intent, that constitute the problem.

The Arizona legislature has enacted a rental receivership law, permitting local officials to gain control of "slum properties" in order to restore them to sound condition.[13] While seemingly reasonable and constructive in its intent, the relevant section of the law that defines "slum properties" provides that *in addition* to being in "a state of disrepair," properties must meet at least one of four additional criteria: structurally unsound features; lack of adequate water or sewer facilities; hazardous electrical or gas connections; or lack of safe, rapid egress.[14] While it is true that all of these are serious problems, they leave out more than they include. Thus, an Arizona municipality may not pursue receivership against a building with numerous serious code violations affecting the health or safety of its residents if they cannot check off one of those four boxes.

Six Principles for State Laws and Policies

1. State law should grant clear and explicit authority to local government to regulate problem properties in the public interest
2. State law should offer a diverse body of regulatory tools for use by local government to address the full range of problem conditions that may be present in the community.
3. Regulatory tools should be flexible in order to allow local government to deal effectively with conditions as they arise, up to and including provisions for taking control of properties where other efforts have been unsuccessful.
4. Regulatory tools should incorporate provisions that allow quasi-governmental entities such as land banks, qualified nonprofit entities, and residents, as appropriate, to act to resolve problem property conditions.
5. Regulatory tools should provide clear procedural standards to guide local officials, property owners, residents, and where appropriate, the courts.
6. Regulatory tools should provide for transparency and responsiveness to diverse community concerns, and actively further equity in enforcement.

[13] Arizona A.R.S. §33-1903.

[14] Arizona A.R.S. §33-1901. The term "state of disrepair" is not defined in the statute.

2. LAYING THE FOUNDATION

All efforts to regulate problem properties begin with key foundational elements. Those three elements are as follows:

- The ability to know the territory; that is, gain access to, gather and organize relevant property information;
- the existence of clearly defined, reasonable and transparent codes and standards to enforce; and
- the availability of the means, in terms of organizational framework, capacity and resources, to enforce those standards.

Without all three, local efforts will at best fall short of the need, and at worst be totally ineffectual.

TERMINOLOGY NOTE

The term 'rental registration' or 'rental registry' are sometimes used by municipalities to encompass level of regulation that go beyond the basic information requirements needed to identify the owners of each rental property and be able to contact them as needed. When I use 'rental registration' in this paper, I am referring, however, solely to these information requirements.

A. KNOWING THE TERRITORY

Knowing the territory begins with the ability to get information from property owners about their properties, a procedure generally referred to as registration. Most state and municipalities distinguish between the sort of information gathered for occupied rental properties, and that gathered information for vacant properties. The following section outlines the key features of both forms of registration, and how those are affected by state laws.

1. Rental registration ordinances

Having basic information about properties and their ownership is a sine qua non of effective regulation. *If a municipality does not know how to contact a landlord, or responsible agent, to provide information, serve legal notices, and deal with emergencies, they cannot effectively enforce the law.*

State laws should at a minimum (1) allow municipalities to require all landlords[15] to register their properties with the municipality; (2) not place arbitrary restrictions on the information that a municipality can require of a landlord. Preferably, state law should affirmatively require registration by landlords with respect to basic ownership and contact information.[16]

Most states do not appear to have statutes governing rental registration. Two exceptions, in addition to the New Jersey law described below, are Arizona and Ohio, both of which require landlords to register with the county, rather than the municipality.[17] The New Jersey Landlord Identity Law[18] requires all landlords to register their properties. Owners of one and two-family rental properties must register with the municipality, while owners of three or more family properties

15 As distinct from limiting registration to only landlords in specially designated districts, or landlords with histories of code violations, etc.

16 A state landlord registry, assuming the state government has the will and capacity to maintain it properly, and which is available to the public on the web, is a good idea, since at a minimum it allows interested parties to track the holdings of problem landlords across municipal boundaries. New Jersey maintains a statewide registry of properties with three or more units, but does not make it publicly accessible online.

17 A brief survey suggests that the state law is seen as pre-empting municipal registration authority in Arizona, but not in Ohio.

18 N.J. Stats. Ann. 46:8-28. This law has been on the books, with periodic amendments, since 1974.

register with the state, which is charged by statute with inspecting those properties. The law requires that landlords provide the following information:[19]

a. The name and address of the record owner or owners of the premises and the record owner or owners of the rental business if not the same persons. In the case of a partnership the names of all general partners shall be provided;

b. If the record owner is a corporation, the name and address of the registered agent and corporate officers of said corporation;

c. If the address of any record owner is not located in the county in which the premises are located, the name and address of a person who resides in the county in which the premises are located and is authorized to accept notices from a tenant and to issue receipts therefor and to accept service of process on behalf of the record owner;

d. The name and address of the managing agent of the premises, if any;

e. The name and address, including the dwelling unit, apartment or room number of the superintendent, janitor, custodian or other individual employed by the record owner or managing agent to provide regular maintenance service, if any;

f. The name, address and telephone number of an individual representative of the record owner or managing agent who may be reached or contacted at any time in the event of an emergency affecting the premises or any unit of dwelling space therein, including such emergencies as the failure of any essential service or system, and who has the authority to make emergency decisions concerning the building and any repair thereto or expenditure in connection therewith and shall, at all times, have access to a current list of building tenants that shall be made available to emergency personnel as required in the event of an emergency;

g. The name and address of every holder of a recorded mortgage on the premises; and

h. If fuel oil is used to heat the building and the landlord furnishes the heat in the building, the name and address of the fuel oil dealer servicing the building and the grade of fuel oil used.

The Law requires that a copy of the certificate with this information be provided to each tenant as well.

All of the items on the New Jersey statutory checklist are useful and relevant, which makes it is a good minimum starting point, but municipalities seeking to address their rental housing issues proactively should be allowed to require additional information, as long as it is not unduly burdensome to the landlord and does not violate the privacy of the tenants.[20] Regrettably, however, neither the State of New Jersey nor any of its major municipalities appears to provide on-line access for residents to registration information.

By contrast, in 2016, the state of North Carolina enacted a law barring municipalities from enacting either registration or licensing (which I discuss later) ordinances, except under extremely limited circumstances:

> In no event may a city […] adopt or enforce any ordinance that would require any owner or manager of rental property to obtain any permit or permission from the city to lease or rent residential real property, or to register rental property with the city, except for those individual rental units that have either more than four verified violations in a rolling 12-month period or two or more verified violations in a rolling 30-day period, or upon the property being identified within the top 10% ten percent (10%) of properties with crime or disorder problems as set forth in a local ordinance.[21]

This is an example of how states can abuse their power to pre-empt local authority, in this case by removing the ability of a municipality to carry out what most people would consider not only a valuable but a largely painless (either to the municipality or the landlord) governmental function. Fortunately, such statutes appear to be rare.

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19 The law does not prevent municipalities from adding additional questions to the registration form.

20 Some New Jersey municipalities have integrated their rental registration and rent control programs, using a single form to get both the landlord identity and rental control information. For a good although perhaps slightly overly broad discussion of ways in which rental registration can be used proactively by local government, see Shane Phillips, "We Need Rental Registries Now More than Ever" *Shelterforce*, Dec. 18, 2020, accessible at https://shelterforce.org/2020/12/18/we-need-a-rental-registry-now-more-than-ever/

21 Session Law 2016-122, Sec. 2(c), amending G.S. 160A-424 (c).

2. Vacant property registration ordinances (VPROs)

While, as the New Jersey statute indicates, rental registration programs go back many years, ordinances requiring registration of vacant properties are a more recent phenomenon. The earliest ordinances appear to be those in Cincinnati, enacted in 1997, and Wilmington, Delaware in 2003.[22] They became more common, however, after the foreclosure crisis of 2006-2007, when vacant properties proliferated across the country, challenging many communities which had not previously seen them as an important concern. The growth of VPROs paralleled a movement to hold lenders responsible for maintaining vacant properties through what are generically known as *creditor responsibility laws* (or ordinances), which I discuss in Section 4 of this paper. According to the Safeguard Properties database of vacant property registration ordinances, over 1,600 municipalities have VPRO ordinances in place.

Typical VPROs contain three elements:

- A requirement that the owner register the property and provide local contact information for service and emergencies;
- Property maintenance conditions, including mowing of yards, boarding of doors and windows, and maintenance of insurance coverage;[23] and
- A fee, which in many cases is graduated; i.e., it rises each additional year the property remains vacant.

Most states leave it up to their municipalities to adopt such ordinances under the police power. Virginia, West Virginia and Nebraska have adopted statutes providing authority to local governments to adopt VPROs, with reasonable flexibility provided to tailor ordinances to local conditions.[24] Georgia, by contrast, in response to pressure from property owners and financial institutions, adopted a significantly more restrictive statute, prescribing strict (and sometimes problematic) rules to govern local VPROs.[25] Issues associated with fees for vacant property registration are discussed Section 4. A number of states have adopted statutes requiring that foreclosing lenders either register their properties with the state, including New York and Maryland; or that they register with the municipality, such as Connecticut.

There is an argument that states should adopt a uniform statewide standard for VPROs; namely, that it is a serious inconvenience for the owners of properties in multiple jurisdictions to understand and conform with widely varying provisions of local ordinances. I would argue that that is a weak, even trivial argument to set against the value of local governments having the flexibility to adopt reasonable ordinances that address their particular local conditions.

If, however, a state chooses to adopt a statewide standard, the Nebraska statute, which gives local governments considerable flexibility and establishes a maximum fee schedule that we would suggest is reasonable, may be a useful model.

3. Providing access to information

Not only local governments, but NGOs, community organizations and concerned residents need good information about properties and property transactions in order to address problem properties effectively. In practice, even information routinely gathered by state agencies or pursuant to state law is often not available, or available only at a cost or with difficulty.[26] Ironically, while data on individual properties is often accessible; i.e., a user who is looking for information about a particular address can often find out a great deal, databases that allow local officials or NGOs to analyze patterns, identify hot spots, and measure trends, are often less readily available.

In recent years, local property databases have become increasingly sophisticated. One example, the Building Blocks database created by Tolemi[27] and used by some 100 municipalities around the country allows users to organize mapped property information on the basis of many different layers (vacant or occupied, out of state owner, etc.) as well as zoom in with detailed information on individual properties. Some of the municipalities using these databases make them accessible to members of the public.[28] Parcel by parcel

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22 See, generally, Joseph Schilling, "Code Enforcement and Community Stabilization: The Forgotten First Responders to Vacant and Foreclosed Homes", *Albany Government Law Review*, Vol.2 (2009), 101-162.`

23 Strictly speaking, many of these provisions are likely already to be in municipal codes. Many municipalities, however, appear to find it handy although perhaps redundant to incorporate them into their VPRO ordinance.

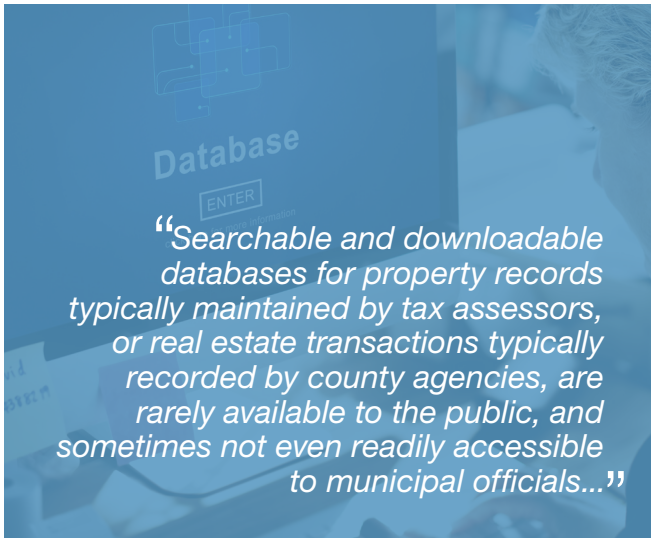
24 Virginia Code § 15.2-1127, West Virginia Code, §8-12-16c. and Nebraska Revised Statutes §19-5401 to 5408. The Virginia statute, however, does not grant similar authority to counties, which provide basic public services to the state's large unincorporated areas.

25 O.C.G.A.Sec.44-14-14. By contrast, the Virginia authorizing statute also sets a maximum $100/year fee, but otherwise allows municipalities broad flexibility to with respect to other ordinance provisions.

26 Not only do many jurisdictions, particularly small ones, still use only paper records, but many that use computerized databases allow members of the public to access the data only in the municipal offices, and often only during limited hours.

27 https://www.tolemi.com/buildingblocks/

28 A good example is the Rochester NY database, available at https://rochester-ny.tolemi.com/



surveys have been done in many cities, creating databases of property condition and occupancy, some of which are publicly accessible in searchable or spreadsheet form.[29]

The picture is highly uneven, however, and much information is not readily available. While many city or county websites provide for a search of individual property information, based on a street address or owner's name, searchable and downloadable databases for property records typically maintained by tax assessors, or real estate transactions typically recorded by county agencies, are rarely available to the public, and sometimes not even readily accessible to municipal officials. One exception is New Jersey, where regularly updated databases of all property records and real estate transactions for all municipalities in the state are made available through cooperation between state government and the state Association of County Tax Boards. In the absence of publicly available data, creating property databases has become a moderately lucrative business for companies like Zillow or CoreLogic, which compile public record data and sell it in more usable formats.

States should ensure that databases covering all public record property data, including current ownership records, real estate transactions, foreclosure filings and foreclosures are available without charge to local governments and others as a public service.

B. HOUSING CODES AND CODE ENFORCEMENT

Regulation of the condition of problem properties begins with a set of legally-enforceable standards for properties known as a *code*. There are various codes. *Building* codes refer to the standards for new construction or rehabilitation. Standards for existing buildings are usually known as *housing* codes or *property maintenance* codes. Some states, including New York and New Jersey, have passed legislation mandating that all municipalities in the state use a uniform code adopted by the state. Elsewhere, the decision to adopt a code and its contents is left up to the municipality.

As the International Property Maintenance Code (IMPC) created by the International Codes Council has become widely accepted as the standard code,[30] and widely adopted by local governments, the standards used to evaluate property conditions have improved compared to the recent past. Some small municipalities around the country, however, still lack a housing code, while others make do with inadequate or antiquated codes, or patch together a variety of separate codes, such as fire codes, health codes, and sanitary codes, often enforced by different agencies of local government. Even where municipalities have adopted the IPMC, however, given their limited technical resources, many fail to track the updates, published every three years by the International Codes Council. As a result, they may be using versions of the IMPC that are 10, 15 or more than 20 years old.

States should adopt a uniform code based on the IPMC, adapted as necessary to local conditions, and updated regularly, to supersede locally adopted codes.[31]

The existence of adequate codes is one thing, but having the capability and resources to enforce them effectively is another. Most municipalities employ one or more individuals with the full-time or part-time job of enforcing the municipality's housing or property maintenance code. State laws vary widely in terms of first, whether code enforcement officers need to be certified and meet minimum standards, and second, and if so, what those standards are. Texas, for example, requires that code enforcement officers be certified, but requires only that they pass an exam after a modest 36 hours of training.[32]

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29 A good example is the 2019 parcel survey of Trenton, New Jersey conducted by Isles, Inc., which can be accessed online at https://www.restoringtrenton.org/vacant-property-stats

30 The International Property Maintenance Code can be viewed online at https://codes.iccsafe.org/content/IPMC2018

31 Municipalities should not have the power unilaterally to amend the state code, even if local conditions may justify amendments, but instead, a non-burdensome state review process should be established to enable municipalities to submit amendments for state review and, where appropriate, approval.

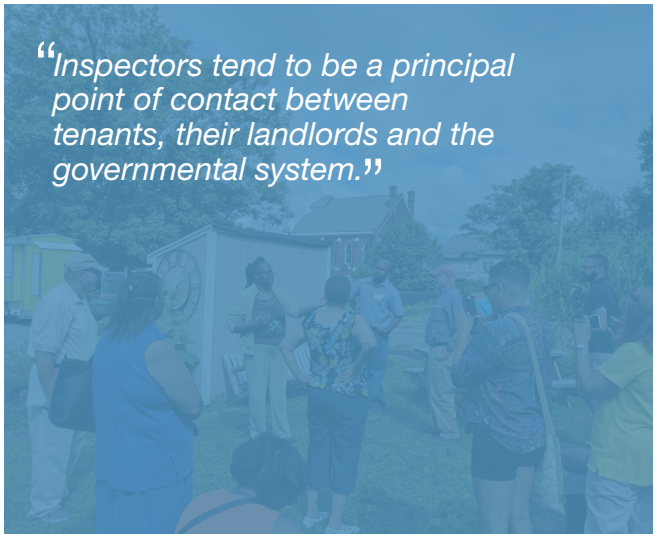
32 Texas Administrative Code, Title 16, Part 4, Rule §62.20 et seq. States tend to be much more demanding in the standards they set for training and certifying building code inspectors, presumably on the principle that they might have some liability if a building they approved were to collapse and kill someone.

State government should establish reasonable standards for certifying code enforcement personnel, and make sure that the necessary training programs are in place to make it effective.

Code enforcement officer training needs to go well beyond the basic knowledge of the physical conditions giving rise to code violations. Inspectors tend to be a principal point of contact between tenants, their landlords and the governmental system. Their actions affect people directly, and disproportionately affect lower income people living in distressed communities. Inspectors must have the skills to communicate effectively with people in difficult conditions and under stress, and to recognize the equity implications of many of their activities. State government should ensure that these skills are addressed in the training and certification of inspectors, and support local departments by providing continuing education programs and information materials, over and above the certification process.[33]

Assuming inspectors are well-qualified, in the broad sense suggested above, poor leadership, and inadequate staffing levels and technology still significantly constrain local government's ability to address problem properties effectively.[34] In a 2016 study of code enforcement in Southern California, *81 percent* of code enforcement officers felt that lack of staff capacity led to under-enforcement of codes in their jurisdiction.[35] One city of nearly 300,000 population with high poverty levels and an aging housing stock I studied a few years ago had only twelve inspectors, each of whom spent over half of their time doing paperwork because the city lacked technology they could use to enter information in the field or move it through the enforcement process.

There is no uniform standard for staffing of municipal code enforcement agencies, since the demand will vary depending on the type and age of the housing stock, the distribution of tenure, the extent of vacancy and abandonment, and the economic condition of the city's residents. Moreover, at a time of severe fiscal constraints in local government, it would be problematic for the state to set minimum staffing requirements for those agencies. That said, state government can prepare analyses to show what staffing levels would be appropriate, information and training on the use of field technology, as well as possible one-time grants to enable cities to upgrade their technological capacity.[36]



Another feature that can significantly enhance local code enforcement efforts is community engagement and partnerships. Between 2008 and 2016, the city of Cleveland, Ohio had formal partnership agreements with its neighborhood-based community development corporations under which they supplemented the efforts of city code enforcement personnel, focusing on resolving relatively minor problems and fostering code compliance, through informal, hands-on engagement with property owners.[37]

Formal partnership agreements like Cleveland's are rare, but less structured partnerships, in which neighborhood residents are trained to act as code 'deputies,' 'citizen inspectors' or, in Texas, 'code rangers' have been created in a number of cities. Fort Worth partners with neighborhood associations to train their members as 'code rangers.' The city sees the program as not only supplementing inspector resources, but creating "a greater sense of community in each neighborhood by encouraging cooperation and increasing neighborhood pride."[38] At the same time, cities enlisting resident volunteers need to be careful that their activities remain within the bounds of legitimate code enforcement and do not turn into invidious racial or ethnic targeting.

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33 This raises a related issue; namely, who is responsible for code enforcement training and certification at the state level, and do those people have the requisite level of background and engagement to responsibly address these issues? In many cases, the answer is likely to be negative.

34 As well as politics. In many municipalities, the interlocking relationships between rental property ownership and political connections (including holding political office) can pose obstacles to comprehensive, fair-handed code enforcement.

35 Jake Wegmann and Jonathan Pacheco Bell, "The Invisibility of Code Enforcement in Planning Praxis: The Case of Informal Housing in Southern California" Focus 13: Journal of the City and Regional Planning Department, Cal Poly (2016) 20-29. The next highest category was 30% who cited political interference.

36 This would be an appropriate use for municipal funds received under the 2021 American Rescue Plan.

37 For a description of the Cleveland program, see Frater, Mark, Colleen Gilson and Ronald O'Leary, The Cleveland Code Enforcement Partnership (2009), available at https://www.communityprogress.net/filebin/pdf/CLE_CE_Partnership.pdf

38 https://www.fortworthtexas.gov/departments/code-compliance/initiatives/code-rangers

3. ENFORCING HEALTH AND SAFETY IN RENTAL HOUSING

Rental properties are usually the largest part of a city's body of problem properties. Some cities have large numbers of vacant properties, but *all* cities have large numbers of rental properties. They are an essential part of any city's housing inventory and accommodate large shares of city residents, including a disproportionate share of their lower income residents.

While most rental properties are well maintained and pose no problem to their residents or the community, a significant minority, particularly in low-income neighborhoods, are be problems, including many where building conditions or lack of maintenance create health or safety risks for tenants or neighbors. Rental regulation needs to find a balance between not over-regulating sound properties and effectively fostering improvement to problem properties.

Almost every local jurisdiction has one or more inspectors charged with addressing these issues through code enforcement.[39] In most cases, however, their role is limited to responding to complaints from tenants or neighbors. While that may help address immediate problems in specific properties, it does nothing to deal with similar problems in other rental properties, as well as other problems in the buildings that are the subjects of the complaint. It is common to find that the same buildings are the source of repeated complaints over the years, without any sustained improvement in their condition.[40]

As a result, many cities are moving from complaint-driven inspections to more proactive or strategic code enforcement, to get ahead of problems rather than forever chase after them. A variety of approaches are being used, in what one might call the ladder, or continuum, of rental regulation, as seen in Table 2.[41] Registration and complaint-based inspections have been described earlier, and are rarely limited by state law. Indeed, as a general proposition and in sharp contrast to the state of the law regarding vacant properties, *most* municipalities arguably have *most*

TABLE 2: THE CONTINUUM OF RENTAL REGULATION

CATEGORY	DESCRIPTION	
Performance-based rental licensing	License requirements, inspection frequency and fees are adjusted based on the past track record of the properties and the landlord.	MORE
Rental licensing	All landlords are required to obtain a license conditional on their properties complying with code and other criteria.	
Registration + inspection	All landlords are required to register their properties and all properties are inspected on a regular basis.	
Rental registration	All landlords are required to register their properties and provide contact information for emergencies and service of notice.	
Complaint-based inspection	Properties are inspected only in response to complaints.	LESS

39 All states provide local governments with authority to do so. In some cases, state law may require that the municipality enact a local ordinance to that effect before exercising code enforcement powers.

40 Some code enforcement agencies refer to these buildings and their owners as "frequent flyers".

41 As noted earlier, different jurisdictions may use different terms to refer to the categories in the table.

of the tools they need to implement reasonable local rental regulations. There are significant exceptions, especially as municipalities move up the ladder and go beyond basic code enforcement into actions such as receivership.

A. THE POWER TO INSPECT PROPERTIES

Any serious effort to go beyond complaint-based inspection involves inspecting properties on a regular basis, *whether or not there has been a complaint or knowledge of a specific health and safety condition in the property.* Only by inspecting properties regularly can a local government identify the full range of problem property conditions in the community, particularly those conditions affecting the health and safety of the community's most vulnerable residents, and make sure that they are properly addressed. This is the fundamental tool for mitigating and preventing harm from unsafe or unhealthy housing conditions.

The underlying constitutional authority to conduct such inspections is clear. Following the U.S. Supreme Court 1967 *Camara* decision,[42] that authority and the relevant ground rules that govern it can be summarized as follows:

1. A municipality may carry out a regular program of 'routine periodic inspections of all structures'[43] in order to achieve universal compliance with the minimum standards of the housing code.
2. An inspector may enter the property to carry out such inspections *with the consent of the occupant*.[44]
3. If consent is not granted, the municipality must obtain a warrant to enter the property. Such a warrant is generally referred to as an *administrative warrant*, and does not require a showing of probable cause with respect to the individual property.

Some states have adopted statutes providing explicit standards and procedures for issuing administrative warrants for code enforcement, such as the State of Florida.[45] The Florida statute makes clear that a warrant can be issued if "if reasonable legislative or administrative standards for conducting a routine or area inspection are satisfied with respect to the particular place, dwelling, structure, or premises."[46] Where states do not provide such guidance, local officials may find themselves uncertain as to which court has jurisdiction or what standards must be met and procedures followed to obtain warrants.

While the overall constitutional framework for regular inspections is clear, the scope of local action under state law is not always clear, and in some cases is severely constrained. North Carolina bars municipalities from conducting regular periodic inspections of rental property except where the property has a history of violations or where the city has knowledge of specific violations. A modest exception exists for properties in "blighted areas",[47] which, however, may encompass no more than 5 percent of the municipality's land area or 1 square mile, whichever is greater.[48] Although the language of the statute is ambiguous, on its face Arizona prohibits regular inspections of all but "slum properties", which must meet at least one of four particularly egregious unsafe or unhealthy conditions.[49]

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42 *Camara v. Municipal Court of the City and County of San Francisco*, 387 US 523.

43 Id. At 536

44 Constitutional law is clear that the tenant or occupant of a property has the right to grant or withhold consent to enter the property; whether the landlord has that right is a gray area under federal law, and in many states. See Mallach, Alan "Addressing Problem Rental Housing", in Mallach, Alan, Jessica Bacher and Meg Byerly Williams, ed. *Vacant and Problem Properties: A Guide to Legal Strategies and Remedies*. Chicago, IL: American Bar Association (2019), pp.138-139 for a detailed discussion of this question.

45 Florida Statutes, Ch. 933.20-933.30.

46 Florida Statutes, Ch. 933-22.

47 North Carolina General Statutes, § 160A-503(2).

48 For an excellent discussion of North Carolina laws in this area see, Mulligan, C. Tyler, "Residential Rental Property Inspections, Permits and Registration: Changes for 2017". University of North Carolina School of Government, Community and Economic Development Bulletin No.9 (2017).

49 Arizona Revised Statutes, Sec. 33-1904. The four conditions are (a) Structurally unsound exterior surfaces, roof, walls, doors, floors, stairwells, porches or railings. (b) Lack of potable water, adequate sanitation facilities, adequate water or waste pipe connections.(c) Hazardous electrical systems or gas connections.(d) Lack of safe, rapid egress.

Wisconsin prohibits periodic inspections outside of "blighted areas," as well as imposing other arbitrary limits on municipal inspection authority.[50] Indiana prohibits inspections on properties where the property is managed by a "professional real estate manager" or where the owner submits a report by a qualified professional that the property meets basic habitability standards.[51] These statutes have various rationales, including preventing municipalities from imposing what their drafters considered undue burdens on landlords; or, as in the case of the Wisconsin statute, reversing what they considered regulatory "overreach" by the city of Milwaukee. While, as I have stressed, it is important that regulatory impositions on landlords be reasonable and not burdensome, many of these statutes go too far; *they serve no legitimate purpose and arbitrarily constrain local government's ability to address the health and safety conditions of its residents*.

At a minimum, state laws should either explicitly permit regular inspection of all rental properties without regard to number of units in the structure[52] or any other limitation, or, in states where municipalities exercise home rule powers, place no statutory obstacles in their way. Since court procedures fall within state purview in most states, state laws should also provide a clear, expeditious process for local inspectors to obtain administrative warrants where needed to carry out inspections mandated by local ordinances.

In addition to not imposing obstacles, a capable, responsive state government can provide valuable support to local governments in the following ways:

1. Technical assistance and training for local officials to implement rental inspection programs.
2. Model rental registration and inspection ordinances, including provisions for performance-based inspection programs.
3. Specific guidance with respect to ensuring equity and avoiding disparate impacts on low income tenants and communities of color in municipal inspection programs.

B. THE POWER TO LICENSE LANDLORDS AND PROPERTIES

The definition of "license" in Black's Law Dictionary begins, "a permission, accorded by a competent authority, conferring the right to do some act which without such authorization would be illegal," adding that "the license can place rules, requirements and limitations upon the licensee."[53] If those rules or requirements are violated, the issuer of the license can revoke or void the license, thereby making it illegal to continue to conduct the licensed activity. As I discussed earlier, licensing rental properties or landlords is on its face a reasonable use of governmental power to protect health and safety.

While no state requires that landlords receive a license in order to rent their property, some place obstacles in the path of local governments to do so. Wisconsin bars municipalities from imposing licensing requirements.[54] North Carolina bars municipalities from requiring landlord permits (the same as licenses) except for properties with extensive histories of verified code violations, and then only with respect to the individual dwelling unit rather than the property as a whole.[55] The Illinois state constitution reserves the power of licensing solely to those municipalities that have home rule status.[56] State courts' interpretation of a quirk of New Jersey state law bars municipalities from using the term "licensing" in their rental regulations, while not preventing municipalities from conducting any of the substantive activities associated with the term.[57]

Rental licensing raises the bar for landlords significantly. *Without a licensing requirement, the sanctions that can be imposed on problem landlords and their properties are often ineffective*. The owner may continue to rent the unit and collect rent even though the property may not be up to code, fines may be modest and no more than a cost of doing business, judges may be sympathetic to the landlord and reduce the fine or grant repeated extensions of time to comply, or the owner may be outside the effective reach of the courts.

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50 Wisconsin Statutes 66.0104(e)(1). Among restrictions are a provision that if a property passes inspection, it may not be inspected again (except in case of complaint) for five years, and that buildings less than 8 years old may not be subject to a periodic inspection regime.

51 Indiana Code §36-1-20-4.1

52 While I am not aware of any state law that explicitly bars regular inspection of 1 and 2 family properties, many local ordinances exclude them for no apparent reason. Indeed, in many areas, 1 and 2 family properties are more rather than less likely to pose health and safety problems for their tenants.

53 The Law Dictionary, http://thelawdictionary.org/license/

54 Wisconsin Statutes 66.0104(e)(4)

55 North Carolina General Statutes 160D-1207(c).

56 Illinois Constitution, Art. VII, Sec.6. Illinois Municipal Code Sec. 11-60-2, however, grants non-home rule municipalities the power to "define, prevent and abate nuisances," which may provide a legal framework for some forms of strategic regulation. Fewer than 300 of Illinois' nearly 1,300 municipalities are home rule municipalities.

57 *See Christopher C. Cona v. Township of Washington, NJ. App. Div (2018)*

The most effective sanction – and in many cases, the only truly effective sanction – that a municipality has against a problem landlord is the ability to prevent the landlord from collecting rent on the property. Except in extreme cases where a building is condemned and ordered vacated, that can only be achieved where the ability to rent out a dwelling to a third party is treated as a license rather than a right. Licensing ordinances may authorize the municipality to withhold from landlords the ability to rent out vacant units, evict tenants, or even collect rent from sitting tenants, if they do not hold valid licenses. The circumstances under which a municipality can bar a landlord from collecting rent are discussed further in the next section.

Licensing can also give local governments valuable tools to influence landlord behavior. They can require problem landlords to participate in training programs, or even to prepare mitigation plans,[58] as the city of Brooklyn Center, Minnesota requires. Moreover, where municipalities have the authority to require licensing, they also have the authority to establish a performance-based licensing and inspection system, in which the frequency of inspections, the fees charged and the imposition of other conditions all vary based on the track record of the landlord and the property.[59] Having such a system, as in Brooklyn Center, enables the municipality to focus its resources on problem landlords rather than spread them thinly across the entire rental stock, as well as to use a "light touch" with respect to responsible landlords who maintain their properties well.[60]

At the same time, rental licensing can be abused. Some municipalities have incorporated questionable so-called "crime-free" conditions in their licensing requirements. One Illinois municipality requires a landlord to evict any tenant where crimes of almost any nature have been committed on the premises by "the tenant, member of the tenant's household, guest, or other party" as a condition of retaining their license.[61] The equity implications of such ordinance have been spelled out in a report from the Sargent Shriver National Center on Poverty Law:

> When these ordinances negatively impact the availability of rental housing in a municipality, this can disproportionately harm groups that are protected by fair housing laws – such as racial and ethnic minorities, female-headed households, and disabled households – because they are often more likely to live in rental housing. By creating a harmful result that is more likely to affect one or more protected groups these ordinances can violate fair housing law, unless they are justified because necessary to achieve an important municipal objective. In addition, fair housing law is violated if a municipality in adopting or enforcing these ordinances is intentionally targeting the members of protected groups who live in rental housing.[62]

Nuisance laws in a number of New York State municipalities have been shown to have similar effects.[63]

State governments should allow municipalities to adopt and enforce rental licensing ordinances. At the same time, however, states should adopt laws barring tenant eviction or revocation of landlord licenses based on "crime-free" ordinance conditions that unduly and unreasonably disproportionately affect tenants generally, and protected groups in particular, as discussed above.[64]

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58 While the scope of the mitigation plan is not explicitly defined in the city's ordinance, it is a plan that must be prepared by a landlord whose properties were in the lowest of four tiers used in the city to show how they will address the problems that have led either to repeated code violations or nuisance complaints.

59 I know of no case where a state permits licensing, but prohibits its implementation on a performance basis.

60 For a more detailed discussion of performance-based rental licensing, see Mallach, *op.cit.*, note 44 *supra*, pp.154-159.

61 Village of Schiller Park, Illinois Code Sec.98.4(E)(1).

62 Emily Werth, The Cost of Being "Crime Free": Legal and Practical Consequences of Crime Free Rental Housing and Nuisance Property Ordinances. Chicago, IL: Sargent Shriver National Center on Poverty Law (2013). For HUD guidance on crime free ordinances and fair housing, see https://www.hud.gov/sites/documents/FINALNUISANCEORDGDNCE.PDF

63 See the report by the ACLU Women's Rights Project, Silenced: How Nuisance Ordinances Punish Crime Victims in New York (2015), available at https://www.aclu.org/sites/default/files/field_document/equ15-report-nuisanceord-rel3.pdf

64 I am not suggesting that a municipality should not be allowed to enact *any* provisions to address crime in rental properties; rather, that such provisions must find a reasonable balance between the municipality's reasonable desire to discourage criminal activity and imposing undue, unreasonable or potentially illegal burdens on tenants (and their landlords).

C. RENTAL RECEIVERSHIP

Receivership refers to a legal procedure under which a court appoints a receiver to take control of a property or business asset where some reasonable purpose is served by taking control from the owners of the property or asset. For our purposes, two forms of receivership are relevant. First, taking control of occupied rental properties in order to protect the interests of the tenants; and second, taking control of vacant properties in order to bring them back to productive use. I discuss the first here, and the second in Section 4.C of this paper. In this section I also look at the related question of when and how municipalities should be allowed to bar a landlord from collecting rent short of full-dress receivership.

Rental receivership goes beyond regulation because it involves taking action directly to remedy problem property conditions, rather than pressing the owner to do so. As such, it is typically used by local government only when regulatory efforts to motivate the owner of a rental property to maintain it properly, or provide essential services such as heat or running water, have failed. In other cases, it may be used by tenant or community-based organizations as a remedy where the municipality has failed to enforce its codes effectively. In either case, the party in interest or affected party[65] petitions the court to appoint a receiver to take control of the property and make necessary repairs or restore essential services.

In contrast to the regulations discussed previously, where many states grant broad discretion to local governments under the police power, receivership is a judicial procedure which usually falls within state jurisdiction. As a rule, therefore, receiverships can only take place where permitted either by state statute or case law, under the ground rules set forth in that statute or decision.[66]

State laws authorizing rental receivership are common.[67] In most cases, however, the problem is not whether a statute permitting rental receivership exists, but whether it is written in a way that permits receivership to be an effective remedy. The standard for rental receivership statutes is straightforward. *Can it be applied in all relevant conditions, and once applied, is it likely to be effective not only in addressing the immediate problem, but creating a more positive long-term outcome for the building and its tenants?* By this standard, many of the statutes on the books fail that test. The key elements of a state statute that should be in place to meet the standard are shown in Table 3. Three key areas are particularly worth further discussion.

TABLE 3:
GOOD PRACTICE STANDARDS FOR AN EFFECTIVE STATE RENTAL RECEIVERSHIP STATUTE

ISSUE	GOOD PRACTICE STANDARD	PROBLEMATIC PROVISIONS (EXAMPLES)
Who may bring receivership petition?	Statutes should provide that any party with a legitimate interest; e.g., municipal government, tenants and tenant organizations, and other qualified organizations can bring petitions	Statutes that permit only governmental entities to bring petitions (Arizona, Connecticut)
What conditions can trigger a receivership?	Statutes should provide for receivership in cases where there is either (1) a specific violation affecting the health and safety of the tenants; and (2) a pattern and practice of repeated violations over time.	Statutes that permit receivership only when specific designated conditions are found (Arizona, Texas)
Who can be appointed by the court as a receiver	Statutes should require that it be an entity (1) with demonstrated qualifications to manage and repair buildings; and (2) with no financial connection to the ownership entity, but should not set specific other requirements.	Statutes that set occupational criteria (lawyer or real estate broker) or limit receivers to public officials.
Can receiver borrow funds for repairs?	Statutes should allow receivers to borrow funds to cover repair and upgrading costs.	Statutes that are silent or limit receiver's ability to borrow funds (Connecticut)
Can funds borrowed by the receiver become a priority lien on the property?	Statutes should allow the funds borrowed by the receiver to become a lien on the property, taking priority over existing non-governmental liens.	Statutes that are silent or do not allow receiver's liens, or do not give them priority status (Michigan, Minnesota)
What conditions must the owner meet to regain control of the property?	Statutes should set strict controls over the owner's regaining control in order to ensure that the conditions triggering the receivership will not recur.	Statutes that are silent or automatically return control to the owner once repairs are made and costs are covered but provide no accountability going forward (Connecticut, Delaware, Missouri)
Are there provisions for sale of the property if owner does not regain control?	Statutes should provide for sale to a qualified entity under court supervision if owner does not regain control.	Statutes that are silent or that require owner's approval for sale (Wisconsin)

[65] State laws vary widely in terms of which parties are considered to be *parties in interest* and thus have a right to bring such a petition.

[66] The only state with which I am familiar in which case law preceded statutory law in this area is Illinois, where in *Community Renewal Foundation, Inc. v. Chicago Title Trust Co.* (1970), 255 N.E.2d 908, the court took the position that "We regard the appointment of a receiver to obtain compliance with the building codes, where because of continuing violations the property has become unsafe and a danger to the community, as within the inherent powers of an equity court". (p913).

[67] Mallach, Alan. *Bringing Buildings Back: From Abandoned Properties to Community Assets*. Montclair, NJ: National Housing Institute and Rutgers University Press (2005; 2nd edition 2010), pp.52-59, describes receivership statutes in 18 states in effect in 2005. Spot checks suggest that all or most are still in place today.

Who may bring a receivership petition? Receivership statutes generally permit the municipality and/or some number of tenants to bring a receivership petition; the New York State law, which authorizes receiverships only in New York City and the surrounding metropolitan counties, allows the city and one-third or more of the affected tenants to do so.[68] Such laws may limit the utility of the receivership process. Historically, local government agencies have hesitated to intervene in property matters, whether for reluctance to become enmeshed in the difficulties of managing and repairing properties, or reluctance to take action against property owners. Separately, tenants may be aggrieved by building conditions, but may not on their own have the organization or capacity to bring the petition. Thus, any statute that does not provide broadly for qualified non-profit organizations to bring petitions, including clearly authorizing such organizations to represent the tenants of a building, will inevitably fail to be utilized in situations where it would be appropriate or necessary.

Can the receiver borrow and can those funds become a priority lien? Even in a building with a strong rent roll, the monthly net cash flow is rarely adequate to cover the cost of making major repairs. Thus, if receivers cannot borrow, they must either forgo repairs, or delay them until adequate cash has accumulated, neither of which are acceptable outcomes. Few if any lenders will lend funds to a receiver, however, where liens already exist on a property, unless their loan can take priority over existing liens. Thus, to be effective, a statute should provide for both borrowing and priority status for receivers' liens.

What conditions must the owner meet to regain control over the property? The most difficult aspect of rental receivership in many respects is the end game. The receiver may have remedied the conditions that led to the receivership, but if the owner – who allowed those conditions to happen – simply gets the building back, there can be no assurance that those conditions will not recur. Indeed, this raises the issue of moral hazard, in that owners may see receivership as getting them 'off the hook.' Thus, any statute that does not provide for some form of oversight of the owner, such as posting a bond to cover future deficiencies or providing for continuing monitoring by the receiver or the court, risks becoming a revolving door for problem conditions.

As the table suggests, the fact that a state law is silent with respect to some key provisions is almost as bad as having inadequate or problematic provisions. In such situations, an owner's attorney is likely to argue that the state legislature had no intent to impose conditions beyond those spelled out in the law, and may well get a sympathetic hearing from judges reluctant to go beyond interpreting the statute as written.

Rental receivership is an underutilized remedy for rental property problems, whether because of statutory problems, limited financial capacity, lack of qualified, willing receivers, or other concerns. A strong state statute can go a long way toward seeing receivership become more widely used and offer redress to low-income tenants suffering from serious deficiencies in the dwellings they occupy. States should enact effective receivership laws, or amend existing ones to make them more effective, following the good practice guidelines in Table 3. States can also facilitate receiverships by creating revolving loan funds for receivers.

D. RENT ESCROWS

There are some conditions where a strong remedy short of taking control of the property may be necessary or appropriate. A more limited, but still powerful, remedy in those cases may be to take away the owner's ability to collect the rent due from their rental property. This may arise as a result of the owner's failure to uphold either their contractual obligations to the tenant, or their legal obligations to the municipality. There are a number of circumstances under which this may be appropriate.

1. Where the property contains significant deficiencies, the landlord has been notified, and has failed to correct the deficiencies.

A number of states have laws that authorize tenants facing this condition to place their rent in an escrow account rather than pay it to the landlord. Under the laws of Minnesota, Ohio and Maryland,[69] and other states the tenant may pay the rent to a court official, which can trigger a court order that the landlord make the necessary repairs. The city of Detroit has established an escrow fund to which tenants can make payments.[70] The city then orders the landlord to make the necessary repairs. If the repairs are made in 90 days, the landlord receives the rent from the city (less a $20 administrative fee); if they are not, the tenant receives the money back from the city, less the fee.[71]

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[68] Consolidated Laws of New York, Ch.81, Real Property Actions & Proceedings, Art. 7-A, Sec. 770. New York State provides no means for municipalities in the rest of the state to pursue rental receiverships.

[69] §504B.385 MN Statutes, Ohio Rev. Code §5321.07 et seq. and MD Code Real Property Art. §8-211.

[70] https://detroitmi.gov/departments/buildings-safety-engineering-and-environmental-department/bseed-divisions/property-maintenance/rental-property/rental-property-escrow#documents-block

[71] Robin Runyan, "Escrow kiosks pop up for tenants of noncompliant rental properties." *Curbed Detroit*, Aug. 17, 2018. Unfortunately, the city's website provides no explanation of how the program works, or what happens subsequent to the tenant receiving their money back.

States should provide an explicit statutory right for tenants to escrow rent under appropriate circumstances, and should authorize municipalities to act as the escrow agent to order landlords to make necessary repairs.[72]

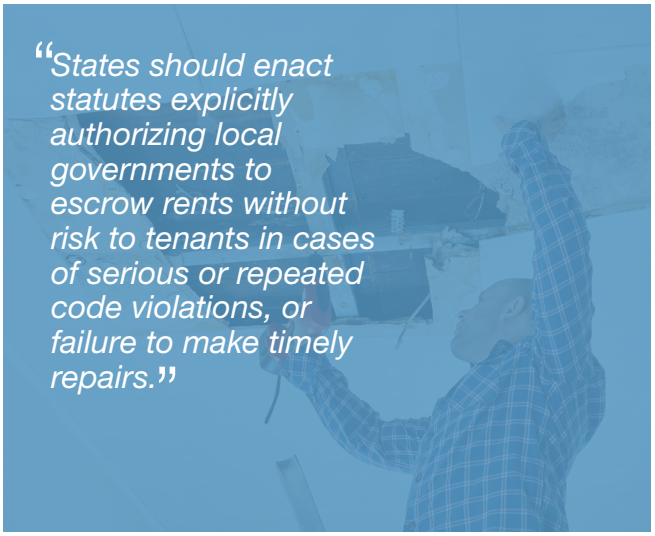
2. Where the landlord has failed to comply with a material provision of municipal ordinances.

As discussed earlier, many municipal ordinances require landlords to obtain a rental license and pay a fee. Some *performance-based* ordinances, such as that of Brooklyn Center, Minnesota, place additional obligations on landlords who have a history of code violations or nuisance complaints, such as participating in training programs or submitting remedial action plans. These are not trivial matters. While many ordinances provide for fines for failure to comply with these requirements, fines are often modest, long delayed, and often not imposed by courts more sympathetic to landlords than to tenants or the municipality. The power to order rents to be escrowed until the landlord is in compliance with the ordinance, and subtract fees or fines from the rent, can be an effective vehicle for obtaining compliance.

While It is possible that local governments in states with strong home rule provisions could enact such ordinances under their police powers, it would be preferable to have state laws enabling such ordinance provisions. States should enact statutes explicitly authorizing local governments to escrow rents without risk to tenants in cases of serious or repeated code violations, or failure to make timely repairs.

3. Where property tax payments are delinquent

As is well known, the process by which local governments attempt to collect delinquent taxes from property owners who fail to pay is slow and uncertain. State laws provide variously for sale of tax liens or properties for collection of back taxes, but it often takes many years from when taxes stopped being paid, while third parties may not step up and buy the liens or the properties where the property is in poor condition or located in a distressed neighborhood. In some cases, irresponsible owners deliberately decide not to pay taxes in order to increase their earnings from the property, knowing that it will be many years, if ever, before they lose the property through tax foreclosure. While such laws may or may not be effective vehicles for collecting delinquent taxes, they risk putting properties in limbo for years, with potentially devastating effects on their tenants and neighbors.



Where an owner fails to make property tax payments on a rental property over an extended period, local governments should be able to get a court order that the rent on that property be paid directly to them, and applied to the taxes, fees and penalties due. Since this would affect the property tax system, which is generally a matter governed by state law, it would require a state statute. The state of New Jersey explicitly authorizes municipalities to do so wherever taxes have been delinquent for more than six months.[73] While not explicit on that point, the New Jersey statute contains language that can be interpreted to allow the municipality to use the money more broadly, including making repairs to the property.

States should enact laws similar to this New Jersey statute, authorizing municipalities to be appointed receivers of rents from tax delinquent properties, not only to recover taxes due, but to make repairs to properties where needed.

E. FEES

Most states give municipalities broad discretion to set fees for costs incurred or services provided by the municipality. Thus, if a municipality has a registration program that provides for annual inspections of rental properties, it can reasonably charge a rental registration fee that covers both the administrative costs of the program and the cost of the inspection. In practice, registration fees tend to run

[72] While common law principles arguably entitle tenants to escrow rent with a third party, such as an attorney, in the absence of appropriate statutory language, such an act potentially makes the tenant vulnerable to an action by the landlord for eviction for non-payment of rent. While the tenant can use the condition of the property as a defense in the eviction proceeding, at that point they are at the mercy of the court, which may or may not support their position.

[73] N.J.S.A. §54:4-123. This statute applies to non-residential as well as residential properties.

from $0 to $150 per unit per year.[74] Some municipalities bundle registration, the initial inspection and (sometimes) one reinspection into a single fee, while others charge separately for each. State statutes and case law are largely clear that fees charged for rental registration or licensing programs *must* be used for the purpose of regulating rental housing, and cannot be diverted into the municipal general fund to be used for unrelated purposes.[75] Few states have laws explicitly limiting rental registration or licensing fees; one of the few is Indiana, which bars municipalities from charging more than a nominal $5 per year.[76]

While it is clear that rental registration and licensing fees may not legally be used for general municipal purposes,[77] two further areas are unclear in either state statutes or case law:

1. Can a municipality charge higher fees for problem properties than for others?
2. Can fee proceeds be used for activities to address problem properties over and above the specific property on which the fee is assessed?

The former would appear to be readily accommodated within a legal fee structure, as long as the higher fee bears a reasonable relationship to higher costs imposed on the municipality by problem properties. The latter is less clear. It actually involves two separate questions:

Can the fee be based not only on the direct cost of inspection, along with whatever administrative costs are directly associated with the program, but also on the total costs to the municipality, including such matters as police and fire calls and legal costs associated with rental housing?

The state of Utah has explicitly sanctioned such an approach by authorizing municipalities to impose a Disproportionate Rental Fee, defined as "a fee adopted by a municipality to recover its disproportionate costs of providing municipal services to residential rental units compared to similarly-situated owner-occupied housing."[78] Such a fee must be based on a cost study conducted for that purpose and must be combined with a Good Landlord program which provides for a waiver of the fee for qualifying landlords. Fes can be as high as $200/unit/year, of which typically 95 percent is waived for landlords participating in the Good Landlord program. The program is widely used by Utah municipalities.

Can fees charged to cover the "expense of regulation" be expanded to include the cost of affirmative steps to ameliorate problem rental housing conditions, such as the cost of nuisance abatement or the cost of running training programs or providing technical assistance to property owners lacking the skills or knowledge to be effective, responsible landlords?

From a policy perspective, it appears reasonable, but in the absence of state enabling legislation or supportive state case law, however, its fate in a legal challenge would appear uncertain.[79]

Municipalities in some states, most notably Minnesota and Illinois, appear to be particularly aggressive in imposing fees on rental properties. Under Minneapolis' performance-based rental licensing program which classifies all properties into three tiers, rental properties are charged a basic fee per building plus a per unit fee, both of which vary by tier, and a supplemental fee for properties in Tiers 2 and 3. Thus, a three unit building in Tier 1 (highest quality properties) will pay $170/year ($80/building + $30/unit), while a similar property in Tier 3 (lowest quality properties) will pay $580/year ($100/building + $160/unit) in basic fee and $205 in a supplemental fee for a total of $785/year. In addition, Minneapolis charges a $1000 rental conversion fee when properties are converted from owner occupancy to rental use.[80]

States should not impose dollar limits on municipal rental registration and licensing fees, but should adopt statutory language barring use of such fees for general fund purposes, while permitting fees to include the cost of municipal expenses associated with rental regulation and amelioration of problem rental conditions.

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74 The highest fee I have been able to identify ($150/unit/year) is imposed by Syracuse and Troy, both in New York State. Most municipal fees are substantially lower than that.

75 Depending on the state law, these funds may or may not have to be deposited in a dedicated or trust fund account, something which is explicitly required by Indiana law.

76 Indiana Code §36-1-20-5. It is not clear on the face of the statute whether the fee is per unit or per property.

77 That does not mean, of course, that such fees are never used for general purposes. In practice, many cities quietly divert fees to the general fund, hoping that they will remain under the radar.

78 Utah Code Ann. § 10-1-203.5(1)(b) (West 2018). The statute lists 10 distinct categories of municipal service that may be included in the cost basis for the disproportionate rental fee.

79 Its prospects would probably be greater in a state like New Jersey or California where the scope of the local police power to protect the public health and safety has been broadly defined by the courts, particularly if the manner in which the collected funds are to be used and the dedication of funds to those uses are both clearly defined in a municipal ordinance or other formal document.

80 Minneapolis Code of Ordinances, §244.1870. My search of Minnesota statutes did not uncover any explicit statutory authority for rental conversion fees, which are charged by a number of Minnesota municipalities.

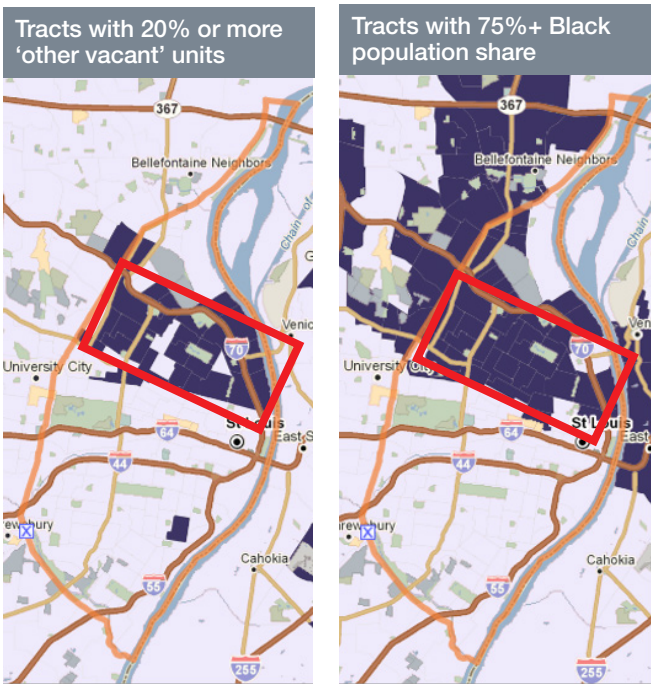
4. ADDRESSING VACANT ABANDONED PROPERTIES

While rental properties are community assets unless poorly maintained or unsafe, vacant and abandoned properties are potential community nuisances unless well maintained and secured. Even then, they are at best neutral; they are not assets unless they are put back to productive use. Moreover, while the goal of problem rental regulation is to address building deficiencies while keeping them in use, the goal of vacant and abandoned property regulation is to put them back into productive use. That calls for a very different and in some respects much more aggressive regulatory approach.

Not all vacant properties are a problem. Properties in good condition and temporarily vacant while being marketed for sale or rent are not only not a problem, but are an essential element of the housing stock, without which residential mobility would be impossible. This section does not discuss those properties, but focuses on those vacant properties that have been effectively abandoned by their owners and are not in habitable condition. In this section, the terms 'vacant' and 'abandoned' will be used as synonyms.

Effective regulation of vacant properties is both an economic and racial equity issue. Vacant properties are disproportionately located in low income neighborhoods, which are in turn disproportionately likely to be occupied by people of color. The overlap of vacancy and race are illustrated in Figure 1 for the city of St. Louis. Although many predominately Black areas do not have elevated vacancies, with only one small exception, *all* elevated vacancy areas are predominately Black. Within these neighborhoods, the presence of vacant properties, particularly when either the buildings, their grounds or both are not well maintained and secured, does immeasurable harm to the social and economic well-being of their neighbors.

FIGURE 1:
OVERLAP OF PREDOMINATELY BLACK AREAS AND AREAS WITH 20% OR MORE 'OTHER VACANT'[81] UNITS IN ST. LOUIS



SOURCE: 5-year American Community Survey 2015-2019. Maps by PolicyMap

[81] 'Other vacant' units are a category used by the census to denote units that are vacant and not being marketed, held for seasonal occupancy or any other purpose. The category is a rough proxy for abandoned units.

There is a vast literature that documents the harm done by abandoned buildings on virtually every significant aspect of neighborhood conditions and quality of life, including health, trauma, crime incidence, fire risk, property values and neighborhood confidence.[82] In addition to the harm they do to neighborhoods and their residents, they impose significant costs for police, fire, code enforcement and other expenditures. While adverse economic conditions in many communities may make eliminating abandoned properties beyond their reach, economic factors are often compounded by other factors, including dysfunctional municipal and state taxation systems, lack of owner or developer capacity, and more.

At a minimum, state laws should provide the tools for local governments and NGOs to mitigate the harms of vacant and abandoned properties, remove the impediments, and to the extent feasible, provide local government with effective tools to foster vacant property reuse in their communities.

The state legal environment for local governments and others trying to deal with vacant properties is more problematic than with respect to rental regulation. When it comes to rental property regulation, either by virtue of state laws or the police power, most cities can access most tools they need to address their challenges. States like Indiana or North Carolina that have arbitrarily placed constraints on local government action tend to be the exceptions rather than the rule. When it comes to abandoned property regulation, however, where many of the tools municipalities require local government to actively intervene in the status of the property, and thus require state enabling authority, the states that offer the tools tend to be the exceptions, although they are growing in number. This is particularly true for local governments that want to go beyond minimizing the harm abandoned properties do toward actively furthering their reuse.

After a discussion of tools to minimize the harm from vacant properties, this section focuses on tools that can be used to foster reuse, including vacant property receivership, tools to enable local governments or others to take title to vacant and abandoned properties, and land banking.

A. MINIMIZING NEGATIVE EFFECTS

The first level of any municipal effort to address abandoned properties lies in minimizing the day to day damage they do to neighborhood quality of life and property values. Municipalities have strong legal authority to do so under the legal powers granted them to abate public nuisances.[83] The process of minimizing harm begins with the vacant property registration ordinance or VPRO. As noted earlier, most VPROs, in addition to the registration provisions, typically require the owner to maintain and keep the grounds clean of debris, and properly secure building openings. Philadelphia's "doors and windows" ordinance incorporated strict standards to govern securing properties on blocks where at least 80 percent of the remaining properties were occupied. Some ordinances either include specific technical standards for boarding and securing openings, or empower a municipal officer to promulgate such standards. State laws are rarely an impediment to enactment of such ordinances; the problems, instead, tend to lie with local enforcement, including failure to get owners to comply with the ordinances.

At least four states have adopted state laws governing vacant property registration. The Georgia statute, mentioned earlier, is particularly restrictive, and creates a number of burdens on municipalities, including an unrealistically low maximum fee, discussed in Sec. 4(D) below. Leaving aside the fee question, the provisions of the Virginia,[84] West Virginia[85] and Nebraska[86] statutes do not impose undue restrictions on the municipal ability to craft an ordinance that fits their particular conditions. As a general proposition, it is reasonable to assume that in any state which grants municipalities home rule powers, a VPRO would probably be considered to fall within the police power. Questions about fees charged under VPRO ordinances are a different matter, and are discussed later.

While VPROs hold the owner, meaning the entity that holds legal title to the property, responsible for the property, a different problem took on particular urgency during the years of the foreclosure crisis, when millions of properties went into foreclosure, and where thousands of owners abandoned their properties long before the foreclosure actually took place and title passed to a new owner. These properties,

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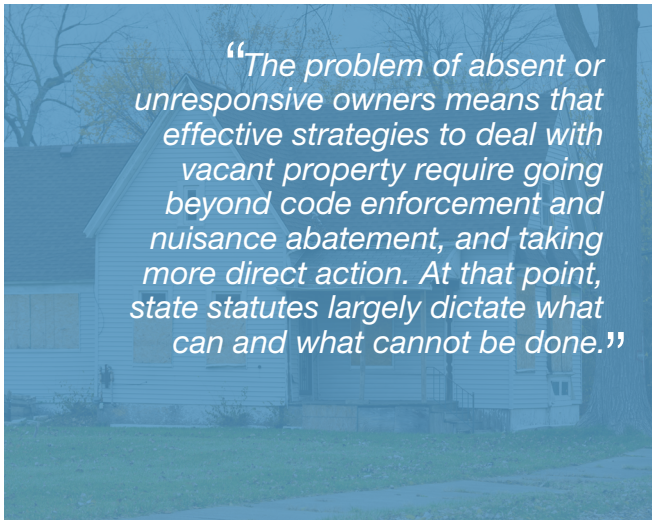
[82] A number of studies are summarized in Mallach, Alan. What Drives Neighborhood Trajectories in Legacy Cities? Understanding the dynamics of change. Cambridge, MA: Lincoln Institute of Land Policy (2015). See also De Leon, Erwin and Joseph Schilling, Urban Blight and Public Health. Washington DC: Urban Institute (2017). Among recent specific studies are Garvin, Eugenia et al. "More than just an eyesore: local insights and solutions on vacant land and urban health." *Journal of urban health: bulletin of the New York Academy of Medicine* vol. 90,3 (2013): 412-26 and Hye-Sung Han (2014) The Impact of Abandoned Properties on Nearby Property Values, *Housing Policy Debate*, 24:2, 311-334, among many that could be cited.

[83] Common law, as well as statutes in some states, also authorizes non-governmental bodies, including individuals, to take action to abate nuisances. This has been used in some cases to deal with abandoned properties. See *Bringing Buildings Back*, pp155-156, also Louise A. Halper "Public Nuisance and Public Plaintiffs: Rediscovering the Common Law (Part I)" 16 *Environmental Law Reporter* 10262 (1986).

[84] Virginia Code § 15.2-1127.

[85] West Virginia Code § 15.2-1127.

[86] Nebraska Revised Statutes Title 19, §5407.



sometimes called "zombie properties" were a particular problem in judicial foreclosure states like New York or New Jersey, where the period from initial foreclosure filing to title conveyance could be two, three years or longer. The upshot was a series of what are generically known as *creditor responsibility laws* (or ordinances) requiring the foreclosing creditor to register and maintain the property from the initial foreclosure filing if the property is abandoned by the title owner. While the magnitude of foreclosures today is not what it was from 2007 through 2011 at the height of the crisis, it remains an ongoing issue in many areas, and may potentially grow in the wake of the current COVID-19 pandemic.

The first such ordinance was enacted in Chula Vista, California in 2007 and was followed by many other California municipalities.[87] It appears to be broadly accepted that that ordinance falls within the local police power or the power to abate nuisances under California law, and has not been challenged in court. Imposing a duty to maintain a property on an entity other than the title owner, however, has been seen elsewhere as a matter for state rather than local action. The Massachusetts Supreme Judicial Court found in 2014 that such an ordinance enacted by the city of Springfield violated state laws exempting secured lenders from responsibility,[88] while New York and New Jersey have enacted statewide creditor responsibility laws.[89] Both require any entity filing a foreclosure motion to notify a state agency and a municipal officer when initiating a foreclosure, and require that entity to maintain the property if it subsequently becomes vacant, whether or not the entity has yet taken title to the property.

Since, almost by definition, abandoned properties are in violation of municipal housing, health or fire codes, municipalities can use code enforcement as a vehicle for addressing the problems caused by those properties. Code enforcement, however, is often ineffectual where owners, who often see no financial interest in maintaining the property, are either unresponsive or unavailable. In such cases, municipalities can take action directly to address those problems by cleaning grounds, boarding and securing buildings, or demolishing abandoned buildings under the power to abate public nuisances. These activities are usually carried out pursuant to a court order, except in emergency situations, although a number of states, including Michigan[90] and Indiana,[91] have created administrative procedures to enable local governments to respond more expeditiously. While there are few questions about the legal powers of municipalities to take them, they pose problems of their own. The problem they attempt to deal with is only temporarily resolved, while the (often considerable) costs are unlikely to be recovered by the municipality. Even with demolition, the resulting vacant lot can become a nuisance itself if not regularly cleaned.

The problem of absent or unresponsive owners means that effective strategies to deal with vacant property require going beyond code enforcement and nuisance abatement, and taking more direct action. At that point, state statutes largely dictate what can and what cannot be done.

B. VACANT PROPERTY RECEIVERSHIP

Vacant property receivership is based on the same legal principles as rental receivership, and as a general rule, cannot be pursued by a local government or NGO in the absence of authorizing state legislation. A notable but singular exception is the city of Baltimore, discussed below. At least twenty-one states and the city of Baltimore have legislation authorizing vacant property receivership, although their provisions vary widely.[92] Some states have separate statutes dealing with vacant properties and

87 Code of Chula Vista, California, §15.60.

88 *Easthampton Sav. Bank v. City of Springfield*, 470 Mass. 284 (2014).

89 New York Real Property Actions & Proceedings Laws, §1307-1310 and New Jersey Stats. Ann. 46:10B-51.

90 MCL §117.4q(4).

91 IC 36-7-9-4.5.

92 Stevens, Amanda, "Receivership as a Tool for Preservation and Revitalization" (2020). Master's Thesis, Historic Preservation, University of Pennsylvania. https://repository.upenn.edu/hp_theses/703A, provides a detailed national survey of vacant property receivership laws. An earlier survey with a useful commentary is Melanie B. Lacey, "A national perspective on vacant property receivership", *Journal of Affordable Housing & Community Development Law* Vol. 25, No. 1 (2016), pp. 133-161. Three state statutes and the Baltimore ordinance are discussed in more detail in *Bringing Buildings Back*, pp. 162-164.

occupied rental properties, while some, like Ohio and Massachusetts, apply a single statute to both. Perhaps to distinguish it from rental receivership, vacant property receivership is legally termed 'possession' in Illinois and New Jersey and 'conservatorship' in Pennsylvania.

Receivership can be a particularly powerful tool to deal with vacant properties, since it can be used to address properties where conventional code enforcement remedies are usually ineffective. Moreover, as Baltimore and other jurisdictions have found, bringing a receivership petition can often bring owners out of the woodwork. Facing potential loss of their property, owners often comes forward in the court proceeding and commit to restore the property themselves. *Receivership is a remedy of last resort, and should not be pursued until or unless the municipality has made a serious effort to get the owner to comply with legal requirements through the regulatory process.*

While many of the issues affecting vacant property receivership are similar to those discussed above with respect to rental receivership, there are some key differences.

- Since vacant properties usually require extensive rehabilitation, and no cash flow is coming from the property, a source of funds is necessary. In the absence of government subsidies, the receiver will almost always have to borrow money for rehabilitation, thus making it *essential* that state law grant the receiver's lien a priority position. Most, but not all, state receivership laws do so.
- Since in many cases the owner of the property may be unresponsive, having a clear legal path for sale of the property to an appropriate third party at the end of the receivership is critical. That path must include provisions for clearing any outstanding nongovernmental liens, whether through foreclosure or court order.

The most effective vacant property receivership program in the United States is that of the city of Baltimore, which operates under a municipal ordinance enacted under that city's broad home rule powers[93] rather than by state statute.[94] It contains an (almost) unique feature, which states should seriously consider. While vacant property receivership laws typically provide for appointment of a receiver to rehabilitate the property without conveying title, the Baltimore ordinance offers an alternative path, which is the appointment of a receiver *for purposes of transferring title to the property to an entity that will rehabilitate and reuse it appropriately.*[95] To that end, the city of Baltimore has created a single nonprofit entity to act as receiver and take title to properties pursuant to court judgments, and subsequently sell them through public auction to entities that are qualified to rehabilitate them.[96]

There are many important advantages to the direct transfer receivership model:

- The court procedure transferring title extinguishes outstanding liens, to the extent that they are not satisfied from the auction proceeds.
- The rehabilitating entity takes title to the property before beginning rehabilitation, which means that the entity will be more willing to use their own funds as well as more readily be able to borrow for the rehabilitation.[97]
- Subsequent use or resale of the property is not constrained by a potentially slow or cumbersome after-rehabilitation sale process.
- No provision needs to be made for the eventuality that the former owner wishes to regain control of the property after its having been rehabilitated.
- There is no uncertainty about the ultimate status of the property.

Due process dictates that such a drastic remedy only be imposed after it is clear that the owner is incapable or unwilling to mitigate the harm being done by their property. The Baltimore process provides that *on three separate occasions*, the owner is given notice that their property is in violation of municipal codes, and is given time to correct the violation by putting the property back into use. Only if and when an owner has failed to respond at each stage is the receivership petition granted by the court and the property changes hands.

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93 The City of Baltimore has had broad home rule authority since the 1914 Home Rule Amendment to the Maryland Constitution; as one commentator has written, "For Baltimore City, the constitutional power of the General Assembly over the city government passed directly to the city when the Home Rule Amendment was adopted". Rasin, Martha Frisby. "Case Notes: Charter Home Rule — Charter Material — Exercise of Police Power by Non-Legislative Body — Citizens' Right to Initiate Legislation — Electorate 's Exercise of Police Power in Charter Amendment Form Violates Home Rule Amendment of State Constitution. Cheeks v. Cedlair Corp., 287 Md. 595, 415 A.2d 255 (1980)" *University of Baltimore Law Review*, Vol.11, Issue 1 (1981).

94 Baltimore City Building, Fire, and Related Codes; section 121 Vacant Building Receiver.

95 Indiana has a vacant property receivership law that also provides for appointment of a receiver to transfer title, but its provisions are cumbersome and rarely used. See Indiana Code 36-7-9-20.5.

96 For a detailed description of the Baltimore process, see Mallach, Alan. Tackling the Challenge of Blight in Baltimore: An Evaluation of Baltimore's Vacants to Value Program. Washington, DC: Center for Community Progress (2017), pp. 37-41.

97 Despite statutory provisions giving their liens priority, anecdotal accounts suggest that many lenders are reluctant to lend to receivers who do not hold legal title to the property in question.

Vacant property receivership is a valuable tool for addressing vacant problem properties, which can only be carried out where explicit state statutory authority exists. As noted above, while many states have statutes authorizing vacant property receivership, many do not. Moreover, in many of the states where it is authorized, provisions of state law arbitrarily restrict its use in ways that conflict with local authorities' ability to use it most effectively. A few examples will serve as illustrations:

- The Texas statute permits receivership only with respect to a property that "constitutes a serious and imminent public health or safety hazard."[98]
- The Kansas statute permits receivership only with respect to properties that are abandoned and have been tax delinquent for at least two years.[99]
- The New Jersey statute only allows a municipal government or an entity acting as an agent of the municipal government to bring a vacant property receivership action.[100]

States should enact or amend vacant property receivership statutes to provide flexibility for use by local governments and qualified quasi-government or non-governmental entities, including allowing courts to transfer title directly to the receiver on evidence of owner's repeated non-compliance. State laws should further:

1. **Allow receivership of any property, residential or non-residential, that meets a broad definition of abandoned property.**[101]
2. **Allow receivers to borrow and grant priority lien status and the power to foreclose to receivers' liens.**
3. **Establish stringent standards that must be followed for owners to regain control of their properties after completion of the receivership.**
4. **Provide a clear procedure for sale of properties after receivership with clear title free of liens.**

The statute should be explicit about all the procedural steps involved, including such matters as the time allowed owners or lienholders to submit competing rehabilitation plans, as well as provisions to hold owners and lienholders who agree to restore their properties accountable. Such provisions can include requiring that they post a completion bond or appointing the entity that brought the receivership petition to monitor the owner's performance.

Over and above providing clear legal authority, state governments can do a number of things to encourage the effective use of vacant property receivership, including:

- Creating a program of loans and/or loan guarantees that receivers can draw upon to restore vacant properties.
- Certifying the qualifications of receivers, and creating a list of certified receivers that local governments and NGOs can use to select qualified entities.
- Providing informational materials, model documents and training sessions for parties involved in receivership, including local officials, judges and interested NGOs.

C. TAKING TITLE TO VACANT ABANDONED PROPERTIES

While vacant property receivership often leads to a vacant property changing hands, except where conveyance of title is built into the process as in Baltimore, parties do not pursue receivership with any certainty that that will be the outcome. There are other occasions, however, when local government gains legal title through the owner's negligence, or needs to gain title to a vacant property in order to pursue a public purpose. This may be true where a property poses a particular problem for a community, or where it is essential to assemble a number of adjacent parcels in order to pursue some improvement activity that will have a meaningful impact on the surrounding area.

A number of tools are used in different locations to that end, some of which are adaptations of long-standing governmental powers, and some of which are new legal models that have been crafted by courts or state legislatures. Except in the unusual circumstances where a court has crafted a creative remedy in the absence of an explicit state statute, none can be pursued in the absence of a grant of power by state law.

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98 Texas Local Government Code, §214.0031(e)(2).

99 K.S.A.12-1750. The Kansas statute also fails to make any provision for borrowing by the receiver.

100 N.J. Stats. Ann. 55:19-84.

101 The Baltimore ordinance allows a receivership to be brought against any property meeting the definition in §116.4 of the code for 'vacant property,' which includes any structure which is (1) unoccupied; and (2) either (a) unsafe or unfit for human habitation or other authorized use; or (b) a nuisance property, as further defined in the code. The New Jersey statute also allows receivership of a mixed use building with occupied ground floor retail space, but where the upper residential floors are vacant.

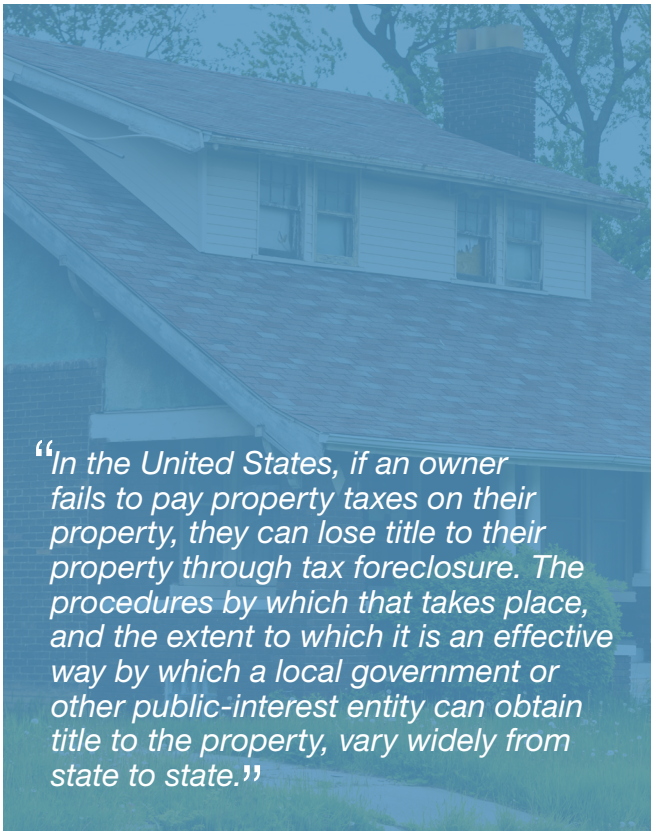
1. Tax and other lien foreclosure

In the United States, if an owner fails to pay property taxes on their property, they can lose title to their property through tax foreclosure.[102] The procedures by which that takes place, and the extent to which it is an effective way by which a local government or other public-interest entity can obtain title to the property, vary widely from state to state.

Under most state laws, the first step in the process is a *tax sale* of properties where taxes have not been paid for some period, typically between six months and two years, set by state law. The term 'tax sale' is a bit of a misnomer, since what is being sold is not the property, but a *lien on the property*. Local government offers third parties, typically investors, the opportunity to purchase a lien on the property by paying the local government the taxes due, generally through a competitive auction.[103] The lien entitles the purchaser to collect the taxes due from the owner, with penalties and interest, or, if the owner fails to redeem the property by paying the taxes due, to foreclose on the property and take title. This is sometimes referred to as a 'two-step' process. Other states, such as Michigan, follow a 'one-step' process, in that they forego the intermediate step of the tax sale. The local government itself forecloses on the properties and offers the properties for sale to bidders through an auction.

The two-step process is in some respects a modern version of what was known historically as 'tax farming', a widely abused process dating back to the Roman Empire or earlier where government hired private parties to collect taxes on their behalf, and keep a share for their efforts. By offering incentives to private investors, these procedures enable local governments to collect a healthy share of the back taxes due on tax delinquent properties. They do so, however, at the price of making the properties themselves effectively expendable. In most tax sale states, the purchaser of the lien is under no obligation to foreclose if the owner fails to redeem. As a result, the property may fall into a legal limbo and deteriorate with no one responsible or legally accountable for its condition. If the lien purchaser *does* foreclose, they are under no obligation to improve or use the property in ways conducive to the public welfare. The city or county may get their taxes, but the property and the surrounding neighborhood suffer, and the property may be back on the tax sale or tax foreclosure list in a couple of years. Many local governments may see this as an acceptable trade-off, as it enables them to collect all or most of their back taxes with little expenditure of time and money. It deprives them, however, of the ability to see that problem properties are put into responsible hands and put back into productive use.

State laws govern all aspects of the tax sale and tax foreclosure process. They were designed to maximize tax collection, not productive property reuse. As a result, they often further the revolving door process described above. Sales are generally mandatory, and offer little discretion to local governments either to hold properties back from sale or to vet the qualifications of prospective buyers. In some states, if no bidder offers the full amount of the taxes due on some properties at the initial sale, they are offered again, usually a month or so later, for deep discounts at a second sale. Such sales, known in Illinois as "scavenger sales," tend to compound the problem, as the properties tend to end up in the hands of predatory or problem owners; as a recent analysis from the University of Chicago concluded, "nothing in our analysis indicates that the failings of the Scavenger System are due to poor management or administration. To the contrary, the system appears to be functioning as designed. And that is the problem."[104] Missouri law requires a second tax sale for properties that



[102] Taking property for non-payment of taxes is known as an *in rem* (against the property) remedy. In many European countries, which also impose property taxes, they do not take the property in the event of non-payment, but attempt to collect the funds from the owner, through what are known as *in personam* remedies. For an excellent overview of the tax foreclosure process, see Alexander, Frank S. "Tax liens, tax sales, and due process." *Indiana Law Journal* 75 (2000): 747.

[103] Some states assign this responsibility to municipalities, while others assign it to counties. In a few, quite confusingly, it belongs to both. Throughout this section, when I refer to 'local governments' I am referring to whichever entity is responsible for the tax foreclosure process.

[104] University of Chicago Center on Municipal Finance. Cook County Scavenger Sale Evaluation. March 2021. https://harris.uchicago.edu/files/scavenger_sale.pdf

do not sell at the first one, and a third sale for those that do not sell at the second.[105] In the end, the only properties the local government gets to control are those that have so little value that no tax lien investor bids on them.

State laws are often indifferent to what happens to the property once the taxes have been collected. Many laws mandate long and time-consuming procedures before title passes, or fail to lead to clear, marketable title at the end of the process. While many states impose often-extended waiting periods after the tax sale before an investor is permitted to foreclose in order to give struggling homeowners adequate opportunity to redeem before they risk losing their properties, such provisions, when applied to vacant abandoned properties, mean that they sit vacant for years before anyone has effective legal control over them. By the time someone (usually the municipality) takes control, they have often deteriorated to the point that they cannot be restored and must be demolished.

To be fair, it must be acknowledged that where states have provided local governments with flexibility to gain control of problem properties and restore them to productive use to do so through the tax foreclosure process, many local governments have failed to take advantage of the opportunities offered to do so. Efforts to amend state laws to give local governments better tools need to be matched by efforts to ensure those tools are used effectively. The land banking model, discussed below, has been shown to be one way to do so.

Some advocates, most prominently Congressman Dan Kildee, when he was Genesee County Treasurer and founder of the Genesee County Land Bank, have called for a fundamental restructuring of the property tax foreclosure process, under which local governments would handle the entire collection and foreclosure process, and eliminate its tax farming features.[106] No state has enacted such a system, although the Michigan law comes closest. Some states, however, have adopted significant reforms, often in the form of different versions of what can be can be called "off-ramps", where local governments can pull properties out of the general tax sale pool, and either retain the lien themselves, or see that it goes to a qualified or pre-selected buyer.

State tax sale and tax foreclosure laws should provide for the following:

- **Give local governments power to exclude bad actors from bidding on properties at tax sale.**[107]
- **Allow local governments to forego tax sales entirely and eliminate sale of tax liens to third party buyers, or withhold properties from tax sale, and retain and foreclose on those liens directly. This would allow a municipality, if it chose, to eliminate tax farming.**
- **Allow local governments to exclude vacant abandoned properties from the regular tax sale, and hold special tax sales under which they can pre-qualify buyers and establish performance requirements for reuse of properties.**[108]
- **Eliminate requirements that local governments hold multiple tax sales or "scavenger sales"**
- **Eliminate waiting periods between tax sale and tax foreclosure for vacant abandoned properties.**
- **Reduce the period that taxes must be delinquent on problem properties before tax sales or foreclosures can take place. This should apply not only to vacant properties, but also to occupied absentee-owned properties with significant histories of code violations and nuisance complaints.**
- **Ensure that statutory notice requirements and foreclosure procedures create clear, marketable title free of subordinate liens.**[109]
- **Ensure that state statutory provisions follow constitutionally-mandated requirements for notice prior to sale.**[110]

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105 Mo. Ann. Stat. §§ 140.240 and 140.250.

106 There is little doubt that this would allow local governments to significantly benefit financially in the long run, both by retaining the value of the incentives now granted to third party tax lien buyers, as well as by reaping the value of the reuse of the properties that they would gain title to. To obtain those benefits, however, the municipality would have to make a significant short-term investment to build its capacity to manage collection, property management and reuse, which few counties or municipalities are willing to do. As a result, there is little or no support for fundamental reform from local government. Land banking, often linked to more limited tax foreclosure reforms, has emerged as a productive alternative approach in many states.

107 Pennsylvania allows municipalities to refuse to transfer properties to bidders who have failed to maintain properties, or allowed them to be used in an illegal or unsafe manner (PA Stats. Title 72 §5860.619).

108 New Jersey allows municipalities to hold special tax sales of properties determined to be abandoned properties, in which they can sell the liens for less than the amount of the taxes, pre-qualify bidders, and set performance requirements for reuse of the properties (N.J.S.A. 55:19-101).

109 Georgia enacted an expedited judicial foreclosure process designed to provide clean and marketable title (O.C.G.A. 48-4-75 through 81).

110 In its decision in *Mennonite Board of Missions v. Adams*, 462 US 791 (1983), the US Supreme Court set down specific rules governing notice to parties in tax foreclosure proceedings. Despite the many years since this decision, many state statutes do not mandate notice requirements consistent with the *Mennonite* standard. Tax foreclosures that may follow state law, but fail to meet that standard, are defective as a result, and fail to give the new buyer clear title.

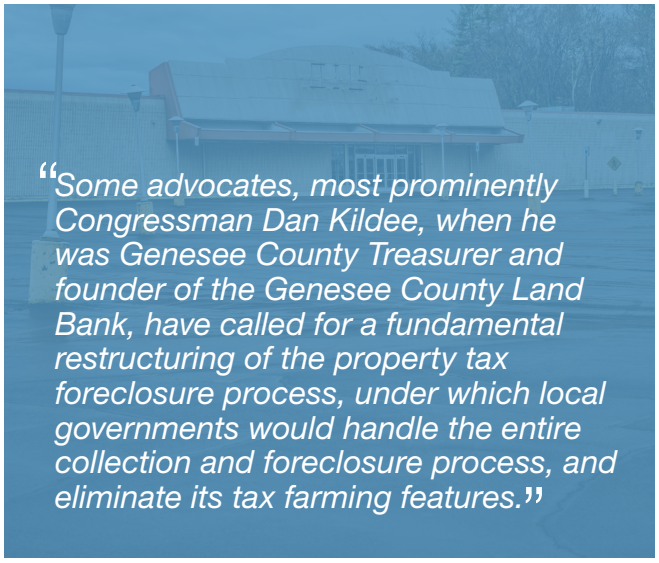
In addition to foreclosing on delinquent taxes, most states allow municipalities to place liens on vacant properties for costs incurred in addressing nuisance conditions and code violations on vacant properties, variously known as code enforcement, nuisance abatement or remediation liens.[111] In some cases, these costs can be considerable, particularly when the municipality is forced to demolish a hazardous property. The issue in most states is not whether such liens are authorized, but whether the rules governing them are such that the municipality has a realistic chance of recovering its costs, or whether the lien is more academic than substantive. Two features of state law governing code liens are critical:

- Does the lien have superpriority status; in other words, is it superior to all other liens except for state and local taxes?
- Can the lien be foreclosed independently of the tax foreclosure process, or is it added to the outstanding tax bill?

Most states do not give code liens superpriority status, and of those who do, most do not allow it to be foreclosed independently.[112] As a result, in most states, most of the costs incurred by local governments are never collected. That, of course, becomes a significant disincentive for the municipality to continue incurring such costs.

State laws governing code enforcement, nuisance abatement and remediation liens should provide for the following:

- **Local governments should have clear authority to place liens on properties for costs incurred for code enforcement, nuisance abatement and remediation, including reasonable administrative costs associated with the activities;**
- **All such liens should have superpriority status, without the requirement that local governments take any steps to that end;**
- **Local governments should have the option of adding such liens to the tax bill, or pursuing foreclosure of the liens independently from the tax sale or tax foreclosure process;**
- **The foreclosure process for code liens should be an expedited one, with a short (no more than 60 or 90 days) waiting period after the lien has been filed before a foreclosure proceeding can be initiated.**



"Some advocates, most prominently Congressman Dan Kildee, when he was Genesee County Treasurer and founder of the Genesee County Land Bank, have called for a fundamental restructuring of the property tax foreclosure process, under which local governments would handle the entire collection and foreclosure process, and eliminate its tax farming features."

2. Spot blight eminent domain

The power of eminent domain, or the compulsory taking of property from its owner for public purposes, is of ancient origin, and acknowledged in the United States Constitution. Historically, however, it was used to acquire property for explicitly public uses, such as a highway, a railroad line, or a public park. In its 1954 *Berman V. Parker* decision, the US Supreme Court expanded the scope of the law, holding that:

- The redevelopment of blighted areas was a public purpose for which eminent domain could be used; and
- Properties could be taken for redevelopment through eminent domain, and then given or sold to a private entity to redevelop, rather than being redeveloped solely for public use.[113]

That decision provided the foundation for the wave of urban renewal that transformed, often for the worse, most American cities during the 1950s and 1960s. Every state enacted an urban renewal or redevelopment statute over the next few years authorizing local governments to create redevelopment agencies, designate areas as "blighted," adopt redevelopment plans for those areas, and use eminent domain if necessary to take properties in those areas in order to have them reused according to the redevelopment plan.[114] While the backlash to the Court's

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111 Some states allow local governments to seek reimbursement for nuisance abatement costs directly from the owners of the property, through *in personam* proceedings; the broadest such statute is probably that of New Jersey, at N.J.S.A.5:19-100. In practice, when dealing with owners who have abandoned their properties, this tends to be expensive, time-consuming, and usually unproductive.

112 For a detailed discussion of issues associated with code liens, see Uzdavines, Marilyn. Superiority of Remediation Liens: A Cure for the Virus of Blight. *University of Baltimore Law Review*, Vol.45, Issue 3 (2016), 403-442. This article offers a detailed discussion of appropriate legislative remedies.

113 348 US 26.

114 For good background on this process, see Pritchett, Wendell E. "The public menace of blight: Urban renewal and the private uses of eminent domain." *Yale Law & Policy Review* 21 (2003): 1.

2005 *Kelo* decision[115] affirming *Berman* led to many states reining in different aspects of that process, eminent domain is still widely authorized for use in redevelopment.

While the redevelopment process is appropriate when a relatively large area is clearly disinvested and where a credible plan for its revitalization exists, it is a time-consuming and cumbersome process, and less appropriate when the problem is not areawide, but is a matter of scattered substandard properties where large scale redevelopment is neither necessary nor appropriate. Since the 1990s, when vacant properties first became an issue of public concern in many states, a number of states have adopted what are called *spot blight* eminent domain laws. These laws allow municipalities to use eminent domain to take individual properties which meet the blight standards of the law, and then convey them to a responsible party to be reused. Some such statutes explicitly limit use of spot blight to properties that are vacant and abandoned, while others allow taking of occupied but blighted properties.[116]

Given the power of the eminent domain process, safeguards are important. The New Jersey law, for example, requires that any property taken through spot blight must have previously been placed on a municipal abandoned property list, a procedure that includes clear findings, notice requirements, and the opportunity for the owner to appeal that designation.[117] The Tennessee law requires that each taking be reviewed by a Vacant Property Review Commission prior to any property being taken, and an additional finding be made that the owner was given the opportunity to "correct the deterioration of the property."[118]

Spot blight eminent domain is a valuable tool for local governments in dealing with vacant and abandoned properties, particularly in situations where one, or a handful of vacant properties are undermining an otherwise viable block or neighborhood. Two issues, however, that should be addressed in state law to make it fully effective are (1) timely acquisition; and (2) determination of market value.

Given that vacant abandoned properties continue to deteriorate and blight their surroundings with every passing day, time is of the essence in acquiring them and putting them back to use. Some states address this issue already by providing for what is called a "quick-take" procedure in their eminent domain laws. What this means is that once the municipality has brought the action to take the property in court, it can take title immediately, even though the fair market value due the owner may still be unresolved, a process that may take months or years.[119] Under New Jersey's quick-take proceedings, a municipality can have title under a spot blight taking within six to nine months from when the process began, a far shorter period than tax foreclosure.

The second issue is more complicated. The uncertainties of the highly subjective appraisal process used to determine fair market value[120] mean that municipalities may be required to pay significant amounts for properties that are objectively worth little or nothing; for example, where a property may have a lower resale value after rehabilitation than the cost to bring it back to productive use. The uncertainties of the appraisal process may deter municipalities from taking actions that would significantly benefit the community as a whole. Two states have attempted to address this question. In a 2016 amendment to their statute specific to Louisville, Kentucky provided that:

> In determining the market value of blighted or deteriorated property, the [condemnation] commissioners shall consider: (a) The estimated cost of repairs necessary to bring the property up to the minimum standards of the local housing or nuisance code as determined by an independent appraiser, general building or residential contractor or inspector; or (b) The cost of demolition of the property, if the commissioners determine that demolition would be the most cost-effective manner of addressing the blighted or deteriorated structures on the property.[121]

This is still fuzzy, since the statute does not specify how and in what fashion the commissioners are to 'consider' these factors.[122] The New Jersey statute is much more precisely written, and requires that fair market value in spot blight takings be determined by (1) establishing the cost to rehabilitate the property, or to demolish and rebuild a comparable structure on the property; and (2) the value of the property after rehabilitation or reconstruction. The fair market value may not exceed the difference between (2) and (1), and if (1) is greater than (2), the law provides that

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115 *Kelo v. City of New London*, 545 US 469.

116 Among the states that authorize spot blight eminent domain are Kentucky, New Jersey, Pennsylvania, Tennessee, Virginia, the District of Columbia, and Maryland (in the city of Baltimore).

117 N.J.S.A.55:19-55.

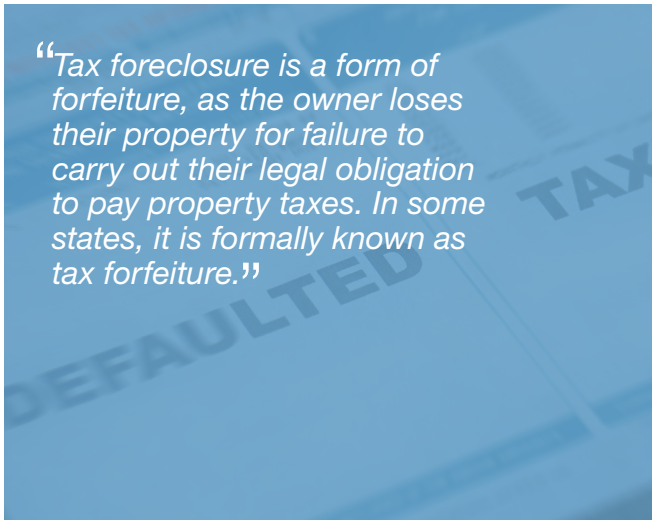
118 Tennessee Code 13-21-203 and 206.

119 In the event that a subsequent ruling finds that the municipality's offer of fair market value is insufficient, and the municipality has already taken the property, the municipality is legally obligated to provide the (former) owner with the additional amount. In the case of the vast majority of vacant abandoned properties, the amount that the municipality might have to come up with, even in the worst case, is not likely to be great.

120 Contrary to what many people may believe, the term 'fair market value' has no objective meaning or definition, but is a subjective, value-laden concept, as is the entire appraisal process.

121 Senate Bill 230 (2016) amending KRS 416.580.

122 Many state eminent domain laws provide for appointment of a panel of "condemnation commissioners," usually three individuals not associated with the local government and who have relevant expertise, such as realtors or real estate lawyers, to review the fairness of the proposed condemnation offer.



"There shall be a rebuttable presumption […] that the fair market value of the abandoned property is zero, and that no compensation is due the owner."[123]

States should enact spot blight eminent domain statutes allowing municipalities to take expeditiously individual or scattered vacant abandoned properties and convey them to responsible parties for reuse. Such statutes should contain:

1. **Procedures to ensure that any property taken meetings clear vacant and abandoned property criteria;**
2. **Procedures such as quick-take to ensure that taking can take place in a timely fashion to minimize property deterioration and harm to surrounding neighbors; and**
3. **Procedures to take the condition of the property and the cost of rehabilitation or demolition into account in determining fair market value.**

Given the built-in resistance to eminent domain from many quarters, any hope of success in getting a state legislature to approve spot blight taking is likely to depend first, on limiting it to vacant abandoned properties, and second, to providing strong procedures to ensure that only clearly neglected and problematic properties are subject to taking.

3. Forfeiture and related remedies

Forfeiture is a legal process that can be defined as the loss of property without compensation as a result of a breach of a legal obligation, or as a penalty for illegal conduct. Although laws and practices vary widely from state to state, forfeiture of property is applied in the United States as a remedy for a wide variety of activities that are violations of contracts, criminal or civil law.[124] Tax foreclosure is a form of forfeiture, as the owner loses their property for failure to carry out their legal obligation to pay property taxes. In some states, it is formally known as tax forfeiture.

A few states have created paths for conveyance of property without compensation based on a finding that the owner has constructively abandoned the property. While only one such procedure uses the word 'forfeiture' to describe the procedure, the legal basis is similar, in that the process is driven by the fact that the current owners, whether or not they are paying property taxes, have ceased to maintain the property and allowed it to become a nuisance to its neighbors.[125] Under those conditions, the municipality has a compelling interest to protect the health and safety of the people and properties affected by the abandoned property, while its owners have failed to live up to their legal obligation to keep their property from becoming a nuisance, and, one can assume, have failed to respond to municipal efforts to get them to do so. While the municipality could abate the nuisance conditions at its expense, and place a lien on the property to secure reimbursement of its costs, as discussed earlier, the entire process fosters a form of moral hazard and perpetuates dysfunctional property ownership, by effectively allowing the owner to escape responsibility for conditions they have created. The municipality is doing the owner's work for them, and, as discussed earlier, it is rarely able to collect on its liens.

It is important to stress that private property rights are never absolute, but conditional. In *Texaco, Inc. v. Short*,[126] the US Supreme Court held that "just as a State may create a property interest that is entitled to constitutional protection, the State has the power to condition the permanent retention of that property right on the performance of reasonable conditions that indicate a present intention to retain the interest."[127] Citing *Texaco*, the Iowa Supreme Court upheld a state statute providing for forfeiture of abandoned property, holding that:

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123 N.J.S.A.55:19-102. In practice, municipalities taking property where this is the case typically offer a modest sum such as $5,000 to the owner in order to smooth the process.

124 For example, Illinois law allows forfeiture to be used as a remedy with respect to a wide variety of violation, including *inter alia*, taking of endangered reptiles, money laundering, gambling, dumping garbage and "street crime terrorism" (See. 5 ILCS 810/). There is considerable evidence that forfeiture has been widely abused, particularly by police departments, and is currently the subject of considerable controversy and reform efforts; see, e. g., Marian R. Williams, Jefferson E. Holcomb, Tomislav V. Kovandzic and Scott Bullock, Policing for Profit: The Abuse of Civil Asset Forfeiture. Arlington VA: Institute for Justice (2010).

125 Another parallel might be drawn with the common law principle of escheat, under which property unclaimed for some extended period, often three years under many state laws, becomes the property of the state.

126 454 U.S. 516 (1982),

127 Ibid. at 526.

> By allowing the properties to persist in a condition unfit for human habitation, allowing the properties to remain vacant, and failing to make timely and reasonable efforts to remedy the public nuisances created by the properties after notification of the problems, [the Plaintiff] did not comply with the Section 657A.10A(3) criteria. Thus it failed to "indicate a present intention to retain the interest."[128]

At least three states have enacted laws that fall into this category, Illinois, New York, and Iowa. Since they may be seen as operating at the "cutting edge" of public power to address problem properties, they are worth briefly summarizing.

Illinois law allows a municipality to petition a court for a declaration of abandonment, which is granted if the property contains a building that is unsafe, unoccupied, and tax delinquent for at least two years, *and* the petition is not contested by the owner. Once such a declaration has issued and all parties in interest are notified, the property is conveyed to the municipality in 30 days unless a party in interest "files with the court a request to demolish the dangerous or unsafe building or to put the building in safe condition, or unless the owner of record enters an appearance and proves that the owner does not intend to abandon the property." If no party appears, or if one does but fails to carry out their intention, the court can then issue a deed to the municipality. That deed extinguishes all outstanding liens on the property.[129]

The Illinois law appears to have been the starting point that led to enactment of a Chicago ordinance, which provides for a similar procedure, but does not require evidence of tax delinquency to trigger forfeiture.[130]

New York law provides for a "special proceeding" to convey title to an abandoned building to the municipality. In contrast to other laws, it permits a proceeding to be brought against an occupied rental building where the owner has failed to both provide services and collect rent, as well as against vacant buildings. To be eligible for such a proceeding, the building must be the subject of a vacate order prohibiting occupancy, not guarded or secured by the owner, and at least one year tax delinquent. Municipalities can designated such buildings as abandoned, and bring a petition for conveyance of title to the municipality. If the petition is contested, the burden of proof that the property is abandoned is on the municipality, while the court has broad discretion to dismiss the petition if the owner or lienholder repairs, or secures and guards the property. If that does not happen, the court can issue a deed to the municipality. As in Illinois, the deed extinguishes all outstanding liens.[131]

Iowa law provides the most straightforward process. A municipality may bring a petition for title to an abandoned property on the basis of any combination of a total of 12 different factors, including tax delinquency, whether the building is exposed to the elements, the presence of vermin and debris, and the extent to which the municipality has expended effort to maintain the property. The court has broad latitude to consider any of the factors listed as well as "any other evidence the court deems relevant" in making a determination of abandonment. At that point, if no interested party comes forward and "make[s] a good faith effort to comply with the order of the local housing official," the court awards title to the municipality free and clear of all claims or liens.[132]

The Iowa law, which as noted has been upheld by the state supreme court, has been used by a number of Iowa municipalities to take title to and subsequently demolish or restore abandoned properties.

States should enact laws providing for taking abandoned property through a forfeiture or similar process, with the following provisions:

1. **A clear definition of what constitutes abandonment, which need not include property tax delinquency;**
2. **A requirement that the municipality show that it made reasonable efforts to get the owner to correct violations and restore the property to use;**
3. **A realistic, but time-sensitive opportunity for the owner to correct violations and restore the property after the petition is filed**
4. **An expedited time frame for hearing and acting on petitions; and**
5. **Provision that title passes to the municipality free and clear of liens or other encumbrances.**

Municipalities should only move to take title to vacant abandoned properties as a last resort, when efforts to get the owner to comply with local codes and ordinances have failed. Sadly, such circumstances have arisen often, particularly in cities with high levels of vacancy and abandonment. For those circumstances, state law should provide a variety of effective paths to title for local

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128 City of Eagle Grove v. Cahalan Investments, LLC, 904 N.W.2d 552 (2017) at 561.

129 65 ILCS 5/11-31-1(d).

130 Chicago Municipal Code §14A-3-313. A forfeiture procedure similar to that of Chicago has been used for properties in Detroit by both Wayne County and the Detroit Land Bank Authority, created through a court rule rather than a statute or ordinance.

131 New York State Real Property Actions and Proceedings Law (RPAPL), Article 19-A.

132 Iowa Code §657A.10B.

government, that can be exercised in a timely fashion so that the municipality is not forced to watch the property deteriorate further while working its way through an extended, delay-prone legal proceeding.

D. FEES

Vacant property registration fees are often significantly greater than rental registration or licensing fees, and often contain escalation provisions; that is, with every year the property remains on the vacant property rolls, the fee increases. Under the Wilmington, Delaware ordinance, which was enacted in 2003 and appears to be the first VPRO to build in an escalation clause, registration fees are as follows:[133]

Less than 1 year vacant	No fee
1 year vacant	$500
2 years vacant	$1,000
3-4 years vacant	$2,000
5-9 years vacant	$3,500
10 years vacant	$5,000
10+ years vacant	$5,000+
For every year after 10	$500

The Wilmington ordinance was challenged and upheld by the Delaware Supreme Court in an unreported decision.[134] Other municipalities have imposed initial annual fees of $1000 or more. To the best of my knowledge, no VPRO fee has been the subject of a successful legal challenge. Given the harms caused by vacant properties, and the substantial costs that are incurred by local government in dealing with them, there is little question that an argument can be made for stringent fees. Even so, where no documentation of the actual costs associated with vacant properties is provided, as is usually the case, they would appear to be potentially vulnerable for the reasons discussed earlier in Section 3.D. Moreover, high fees may discourage financially-stressed small property owners for whom $500, let alone $5,000, is a significant expenditure, to register.

At least three state laws governing vacant property registration specify maximum allowable fees. The highly-restrictive Georgia statute sets the maximum fee a municipality can charge at $100/property/year, as does the West Virginia statute.[135] $100 is arguably far less than the cost to local government to address the nuisance represented by vacant properties, let alone their fiscal harm to the municipality. The Nebraska statute sets a more reasonable maximum initial fee of $250/property/year, and permits escalation up to a maximum of $2,500.[136]

The idea of creating a separate and higher property tax rate for vacant properties raises similar concerns. Such higher tax rates, as with VPRO escalation clauses, are intended to create a financial incentive for owners to put their properties back to productive use. Indeed, in those few cases where vacant properties are found in strong markets, perhaps because the owners are speculating on future appreciation, these strategies may have that effect. That *may* be true in Washington, DC, which appears to be the only United States jurisdiction to impose a higher property tax rate on vacant and blighted properties, but solid evidence is lacking.[137] In jurisdictions where properties have less value, higher taxes may lead some owners who are currently paying taxes to stop paying and allow their properties to be taken through tax foreclosure. Since most states limit the creation of separate property taxation categories, known as classification, either by statute or in the state constitution, it would not be possible in most jurisdictions without state legislative action.

[133] Wilmington, Delaware Municipal Code §125.0.

[134] Adjile, Inc. v. City of Wilmington, 2004 WL 2827893, at *2 (Del. Super. Ct.), *aff'd* 2005 WL 1139577, at *2 (Del. 2005).

[135] West Virginia Code § 15.2-1127 is more flexible otherwise than the Georgia statute.

[136] Nebraska Revised Statutes Title 19, §5407.

[137] The property tax rate for vacant properties in DC is $5 per $100 assessed valuation, and for those vacant properties that have been designated as blighted $10 per $100. This contrasts with a general residential tax rate of $0.85 per $100. For a discussion of the effect of the provision, see Elaine S. Povitch, "Can extra taxes on vacant property cure city blight?" Pew Charitable Trusts, *Stateline*, March 7, 2017. Vancouver, British Columbia, has a similar provision.

E. LAND BANKING

As described above, a variety of tools exist by which government, and in some cases other entities, can take title to problem properties, particularly vacant abandoned properties. These are but tools, however. *Someone* has to use them, and, one hopes, use them in a systematic, effective way that ensures the greatest benefit for the community. In practice, that has turned out to be quite difficult. Most local governments have multiple and often competing responsibilities, as well as severe constraints on their financial, managerial and technical capabilities. Mounting an effective strategy to address a community's vacant abandoned properties can become a daunting task.

A critical step in such a strategy has come to be called *land banking*. In a nutshell, land banking is the process of acquiring vacant or other problem properties, maintaining them so they do not become a nuisance to their surroundings, and disposing of them in ways that benefit the community and further larger community goals. Many cities, particularly large cities with substantial vacant property inventories, have done some of this for many years. New York City in the 1980s controlled an inventory of over 100,000 housing units, most of which were vacant but which included nearly 40,000 units in occupied or partly-occupied buildings.[138] Over the following two decades, nearly all were restored and put back into productive use. Few other cities have given this issue the priority it needs, while in some states, state laws constrain local governments' ability to effectively either take control of or dispose of properties in ways that best address community needs.

Assuming a favorable state legal climate and adequate political will, a city can carry out a land banking strategy within the existing framework of municipal government. The central activities involved in land banking; that is, using governmental powers to acquire properties, maintaining them, and disposing of them in some fashion, can usually be pursued either under the police power or under authority of general municipal law.[139] A number of cities where that was true, including Trenton, New Jersey in the 1990s and Baltimore more recently, have created divisions within city departments to carry out land banking.[140] Increasingly,

however, local governments have found that these activities can be pursued more effectively by creating dedicated governmental or quasi-governmental entities specifically for the purpose of acquiring, maintaining and disposing of vacant, abandoned or other problem properties for public and community benefit.

These entities are known as *land bank entities*, created by county or municipal governments pursuant to specific state statutory authority. While the first land banks of modest scope were created in the 1970s, either by state law or intergovernmental agreement, today's more ambitious land bank entities typically date from Michigan's enactment of the Land Bank Fast Track Authority Act in 2003.[141] That Act empowered Michigan's counties and the city of Detroit to create land bank authorities, as well as creating a state land bank authority as a backstop for local land bank activities. Today, more than twelve states have enacted laws providing authority for creation of land bank entities, and over 250 cities, counties or combinations of local jurisdictions have created land bank entities under the authority granted by those state laws.[142]

In view of the body of materials available on land banks and land banking from the Center for Community Progress,[143] I will not discuss them in detail, but focus on

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138 Housing Policy in New York City: A Brief History. New York University, Furman Center for Real Estate & Urban Policy (2006).

139 For example, in New Jersey, municipalities can dispose of properties for various purposes, including affordable housing, under the provisions of the Local Lands and Buildings Law, N.J.S.A. § 40A:12-1 et seq.

140 The Trenton program was created by the author when he was Director of Housing & Economic Development for that city. The Baltimore program is described in Mallach, see note 76 above.

141 Public Act 258 of 2003, MCL 124.751 to 124.774.

142 An interactive map of land banks can be found on the Center for Community Progress web site at https://communityprogress.org/resources/land-banks/. A detailed breakdown of the provisions of the 10 state statutes in effect at the time can be found in Frank Alexander, Land Banks and Land Banking, 2nd Edition, Washington DC: Center for Community Progress (2015). This report is an invaluable guide to this subject.

143 In addition to Frank Alexander's guide cited immediately above, see Payton Heins and Tarik Abdelazim, Take it to the Bank: How Land Banks are Strengthening America's Neighborhoods. Washington, DC: Center for Community Progress (2014) as well as the materials available on the Community Progress website, at https://communityprogress.org/nlbn/

the key features of the state legislation needed to create effective land banks. Clearly, the *minimum* requirement of a state land bank entity enabling law is that it authorize the creation of land bank entities, whether public authorities or quasi-governmental corporations,[144] and grant them the basic legal powers needed to conduct business. Over and above that fundamental requirement, the best land bank statutes include other provisions which are critical to the land bank entities' ability to be effective vehicles for property reuse and community benefit:

1. The power to use various means to acquire properties, including access to whatever legal tools state law provides to local governments or non-profit entities, such as receivership;
2. The power to dispose of properties flexibly, in order to see that properties are reused in the ways that most benefit the community;
3. The power to intervene in the tax foreclosure process in ways that enable properties to move efficiently into the land bank;
4. The ability to pursue title clearing actions to ensure that the land bank can convey properties with clear and marketable title;
5. Tax-exempt status for properties while held by the land bank;
6. Revenue sources adequate to enable the land bank to effectively carry out its mission;
7. Accountability both to the governmental entity or entities that created the land bank as well as to the communities with which the land bank is primarily engaged.

Land banks typically obtain most of their properties as a result of the tax foreclosure process. Indeed, they have become a major vehicle through which tax foreclosure reforms, as discussed earlier, are implemented. A number of state land bank statutes, for example, allow land banks to make what are called 'credit bids' at tax sales or tax foreclosures, where they are not required to make an actual financial transfer in order to take the property. Similarly, a number of statutes allow bulk sales to land banks in tax foreclosure or tax sale proceedings. While the details will vary depending on the state's underlying tax foreclosure laws, provisions that empower land banks to engage effectively in the tax sale and foreclosure process are a key to a potentially effective land bank entity.

A second critical area is revenue sources. Land banks have to incur substantial costs in the course of their work. Even if they are not paying directly for the properties they acquire, as in a tax foreclosure, the transaction costs are likely to be substantial. Similarly, they must incur even more substantial costs to clean, maintain, secure, and on occasion demolish, properties in their inventory. While cities and counties can appropriate funds for the support of land banks, that is not only unpredictable, but places them in competition for limited resources with many other local entities. State land bank laws have provided for a number of potential revenue sources for land bank entities:

1. Retaining proceeds of property sales, as well as rental income on properties in the land bank inventory;
2. Receiving a share of the incremental property tax revenues realized from properties that the land bank enabled to return to the tax rolls; and
3. Specified dedicated revenue sources.

Most state statutes allow land banks to retain sales proceeds, and a number allow them to receive a share of incremental property tax revenues, most often 50 percent of the revenues for the first five years after they return to the rolls. Both of these revenue sources, however, are wildly unpredictable and dependent on the market strength of the locality, a matter well beyond the control of the land bank entity. Moreover, both tend not to be realized until many years after the land bank has begun to incur operational costs. The only state land bank law, however, that explicitly provides for a revenue source for land banks that is not dependent on market conditions and land bank performance is that

[144] New Jersey's land bank legislation, N.J.S.A.40A:12A-74 et seq., follows a somewhat different route. Rather than allowing the creation of separate governmental or quasi-governmental entities, it allows local governments either (1) to designate an existing governmental entity with redevelopment powers as a land bank entity; or (2) to designated a non-profit corporation as a land bank entity, and in either case vest the entity with specific powers associated with land banking.

of Ohio, which authorizes an increase in the penalties and interest on delinquent taxes with the proceeds to go to the land bank entity to fund its operations.[145]

Finally, while land bank entities can be powerful vehicles to further equity in property reuse and neighborhood revitalization, there is nothing inherent in the land banking mechanism to ensure that that becomes the case. Which properties are taken into inventory, how properties are maintained, and above all, what principles guide property disposition, all have powerful equity implications. This is particularly true since almost by definition, land bank entities are likely to be most active in low-income neighborhoods and communities of color, where, reflecting the legacy of racism and inequality in our communities, vacant properties are most heavily concentrated.

In the absence of specific provisions of state law, local authorities can and many do incorporate provisions in their land banks that foster equity, including creating community advisory boards, building in reporting requirements, setting community-oriented priorities for property disposition such as affordable housing and community facilities, and more. It is important, however, that state statutes also include language making clear that land bank entities must both engage constructively with the communities where they work, and identify and respond to community needs and preferences in their acquisition, maintenance and disposition activities.

States should enact laws to enable local governments to create land bank entities, including the following provisions:

1. **Allowing land banks to be created by municipalities, counties or combinations of municipalities and counties through interlocal agreements;**
2. **Necessary powers to carry out flexible acquisition, maintenance and disposition of properties, including the ability to utilize any acquisition tools available to local government or non-profit entities under state law;**
3. **Provisions to ensure the land bank's accountability to both local governments and residents of lower income communities and communities of color;**
4. **Adequate revenue sources to enable the land bank to carry out its responsibilities;**
5. **Provisions to maximize access by land banks to properties through the tax sale and tax foreclosure process.**

[145] For a detailed discussion of the provisions of the Ohio land bank law, see Thomas J. Fitzpatrick IV, Understanding Ohio's Land Bank Legislation. Cleveland, OH: Federal Reserve Bank of Cleveland (2009).

CLOSING NOTE

The preceding pages have described local regulation of problem properties as defined and often circumscribed by state laws and policies. While some states provide their cities and counties with the ability to frame regulatory strategies that effectively address the needs and concerns of their constituents and the neighborhoods in which they live, as or more often they act as constraints, limiting local governments' ability to meet their responsibilities to their residents. This report addresses that issue. It is meant to be more than descriptive; it is designed to be a resource to help those concerned with these issues, whether they be local officials, individuals working in nonprofit organizations, or the leaders of neighborhood and civic associations, work with their state governments to change the laws and policies to give local governments and their citizens the tools they need.

The report focuses on what has to change in state government, yet it also holds a mirror up to local government. Far too often, cities and counties fail to utilize the tools that state law already offers, or uses them in ways that are not necessarily in the interests of all of their residents, particularly the most vulnerable and those whose lives are most powerfully affected by the presence of problem properties. Problem properties by their nature disproportionately affect a community's lower income residents and the neighborhoods where they are most heavily concentrated. Given the historic racism that has contributed to shaping both the American economy and where people live, those residents and their neighborhoods are also likely to be disproportionately communities of color. Advocates need not only to work to get state government to provide cities and counties with strong regulatory tools, but must also work to get local government to use those tools not only effectively and responsibly, but in ways that are responsive to the needs of their most vulnerable residents.

For all the problems and difficulties described in these pages, there are many good examples to counter them. States from New Jersey to Iowa and beyond have enacted well-drafted, enlightened statutes that enable their cities and counties to address their problem properties effectively, and local governments across the country have risen to the challenge. The barriers are less often created through malice or ill-intent as they are through ignorance or lack of good information. I hope that this report will help advocates overcome those barriers.

APPENDIX

CHANGING STATE PROBLEM PROPERTY LAWS: A PRACTICAL INTRODUCTION

The foregoing sections have established not only the pervasive role of state government in defining the tools available to localities to address problem properties, but described in some detail the nature of those tools, and what provisions of state law can make them most useful to local governments and community organizations. While some states offer many tools and many states offer some, it is unlikely that any state offers all of them, or offers them in ways that render them most effective. What this means is that *those seeking more effective local problem property regulation need to be able to make the case for legislative changes in the state capitol, and to be effective advocates for those changes.* This Appendix offers an informal introduction to those two issues.

A. MAKING THE CASE FOR PROBLEM PROPERTY LAW REFORM

As all but the most innocent know, "it's the right thing to do" is rarely in itself a guarantee of success in getting legislation passed. Not only are legislators (as well as the governor, who must ultimately sign the bill) subject to many different pressures, they may disagree on what the "right thing" is. That is particularly true with bills affecting properties, where different political camps may disagree on where the balance between private property rights and the public interest lies. A conservative property rights oriented legislator is unlikely to support a bill to create a forfeiture-like process for vacant property similar to the Iowa legislation described earlier in this paper, even if generally supportive of local efforts to address problem properties.

Within the constraints of ideological differences, however, many problem property issues, particularly those involving vacant abandoned properties, are potentially non-partisan in nature, and can potentially cut across urban/suburban/rural divides. Few legislative districts fail to contain at least a handful of vacant properties that are seen locally as a nuisance. Many rural districts contain proportionately more vacant neglected properties than most urban areas. While their presence may sometimes be less obtrusive, they are still an issue to many residents. Even in many suburbs, scattered vacant properties – perhaps a long-vacant factory or a 50s strip shopping center – may make the issue salient to the area's legislators.

While it may not get you to the finish line, making the case begins with "it's the right thing to do." Most legislators want to believe that their work matters, either to the state as a whole or their particular constituents. If you can't convince them, through some combination of data and stories, that what you're proposing will make a difference, you are unlikely to get much further. Thinking through a proposal includes a number of distinct elements:

- What is the specific problem that the legislative reform would address?

Each of the various tools discussed earlier addresses a separate issue within the larger problem property rubric. It can be a matter of being able to identify owners, motivating owners, getting control of properties, or paying for the costs of regulation.

- Why is it a problem?

It is important to spell out why the matter that the reform would address is a problem, and in what fashion. It can be a matter of health and safety, of property values, municipal revenues, or all of the above.

- How big a problem is it?

While few political decisions are made entirely on the facts, facts still do matter. Having key data points that provide an idea of the magnitude of the problem, and the extent to which it affects many communities around the state, can be useful and sometimes effective.

- How does it affect people's lives?

Numbers matter, but stories often matter more. Testimonials from individuals affected, pictures, including before and after images of successful problem property activities, are all important parts of making the case for reform.

Making the case, however, is just the beginning. The test of effective reform advocacy is the ability to get results.

B. EFFECTIVE ADVOCACY FOR PROBLEM PROPERTY LAW REFORM

The process by which an idea is turned into a bill, and a bill becomes a law, is like a complicated dance with many moves. While the formal procedures set forth in widely available 'how a bill becomes a law' pieces are not factually incorrect, they only cover the mechanics of the process. The substance lies in the informal systems and practices that determine whether a bill ultimately becomes a law, and what the final product looks like. Based on my experience with the process and that of others, this section lays out eight key points to help one understand and navigate the informal systems of the state legislative process.

1. Know what you're asking for

This may seem obvious, but it isn't. Never expect a legislator or her staff to figure out how to solve the problem you've identified. Legislators, with rare exceptions, are not "idea people", nor do they or their staffs usually have technical expertise in problem property regulation. Typically, you may want to present your proposal first as an idea – something specific but not fleshed out to address the specific problem you've identified – in order to find out if a legislator is interested and sympathetic. Be as specific as possible about what you want to happen, while avoiding the impression that you are inflexible and making a point of being open to suggestions from legislators and staff about changes. Understand that the final product may not be quite what you had in mind (see #8).

2. Understand how your state's informal legislative process works

While all legislatures work much the same way on paper, the informal systems vary from one state to another. In some states, the process by which bills come to the floor is very tightly controlled by a small group of people, while in others it is more open.[146] As partisanship becomes more intense, key decisions are often made in the majority party caucus. Most state legislatures have a central non-partisan staff responsible for bill-drafting and review, analyzing economic and fiscal impacts of proposed legislation, etc., but in others some of these matters may be handled by partisan staff or individual legislator's aides. While some legislatures like that of California are in session most of the time and legislators are full-time or nearly so, many are part-time bodies. The Texas state constitution limits the sessions of the state legislature to 140 calendar days of every odd-numbered year, although the governor can call the legislature back into special session during the intervening period. The South Dakota legislature is limited to meeting 40 working days in odd-numbered years and 35 working days in even-numbered years. In states with short or alternate-year legislative sessions, much of the background work on legislation may take place through informal discussions and meetings between sessions. By the time the official legislative session opens, many key decisions about what bills will come to the floor may already have been made.

[146] Although that state's dynamics have shifted in the last couple of years,. New York State was famous or notorious for the proposition that all decisions about what bills moved in the state legislature were made by "three men in a room" (and yes, they were always men): the House Speaker, the Senate Leader, and the Governor. Even committee chairs had little influence over the process. As this is written, however, two of the three are women.

3. Get to know legislators and legislative staff

People who have never engaged with the legislative process tend to think of it as a largely impenetrable black box, made up of inaccessible political figures dominated by highly paid corporate and special interest lobbyists.[147] Without minimizing the role of those interests, which I discuss below, state legislators and their staffs are often far more accessible than one may believe, particularly in smaller states. *In many respects, effective advocacy is about relationships*.[148]

Reaching out to one's local legislators is a good starting point.[149] A second step is to identify and reach out to other legislators who, based on their known positions or through information from knowledgeable sources, are likely to be supportive of one's legislative proposal. Learn as much as you can about each legislator's interests, positions and political background before meeting with them, so that your approach can be sensitive to where they are coming from, even though it may not comport with your political stance. In states like California, where each member of the state Assembly represents roughly 500,000 people (compared to 13,000 in South Dakota), it may be easier to get access to a senior member of the Assemblyperson's staff, such as her legislative director or policy director. Those individuals may well be interested in and politically attuned to your proposal, and may become advocates for it with their boss.

Once a legislator has agreed to sponsor a bill on a particular subject, in most states the actual drafting of the bill is the responsibility of the nonpartisan staff, usually organized in an office known as a legislative services office, legislative counsel, or something similar. Staff responsibilities in those offices are usually organized by subject area, so it is likely that there will be one person (or more, depending on the size of the office) whose remit will include problem property regulation (among many other things), but who will probably not have particular expertise in that area. While it is clearly a good idea to establish a relationship with that individual, staff in those agencies typically will not meet with outside advocates except at the request of a legislator. Once the project is at the stage of bill drafting, it's usually a good idea to ask the legislator with whom you're working to connect you with the staffer drafting the bill, so you can walk the proposal through and make sure they're on the right track. Otherwise, you may find that the bill that supposedly incorporates your ideas has distorted them, not through ill-will but through lack of understanding.[150]

4. Find a champion (or champions)

A bill may have wide support and a long list of co-sponsors, and yet never get to the floor, let alone become a law. Legislators who are largely indifferent to some proposal but have nothing against it will often nonetheless 'support' it in the sense of endorsing it, putting their name on the bill,[151] etc., yet not expend energy to make it a reality. It is a painless way to signal good intentions, and means little. Similarly, a legislator who agrees to introduce a bill at your request may be doing so in the interest of good public relations – she may want the future support of your organization for some reason – with no intention of actually working to make it happen. They are not opposed to the bill, but it is not a personal priority for them. In a typical legislative session, 10 to 15 bills may be introduced for every bill that ultimately becomes law, odds not much better than those of a high school graduate getting into Princeton.

To get a bill through the legislative process, it needs a *champion*; that is, a legislator (or more than one) who cares about the bill, actively wants to see it become a reality, and is willing to do the hard work of convincing her peers that they should support it, and getting the support of the leadership to get it through committee and onto the floor for a vote. One of the most important elements in the initial outreach to legislators is to find potential champions; the legislators who truly engage with you as you present your idea, and for whom the goal of improving housing conditions for low-income people or ridding neighborhoods of the blight of abandoned properties really matters.[152]

A champion should generally be a member of the majority party, particularly as is often the case where many key decisions are made within the majority caucus.[153] Ideally, the champion would be a member of the legislative leadership.[154]

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147 This characterization, sadly, may be more true of the US Congress. This is not, however, to minimize the influence of lobbyists on state legislators as well.

148 This is still true, even though the introduction of term limits in many state legislatures may have diminished its significance.

149 If your local legislator is a member of the minority party in the legislature, their ability to influence the legislative process is likely to be minimal. While it is still appropriate to make contact with that individual to let them know what you are trying to pursue, you will have to look elsewhere to find useful supporters.

150 In some cases, a legislator will allow (or encourage) you to draft a bill that can then be sent to the legislative services office. Given that most legislative service staff are busy, they may be quite happy to take your draft and only minimally tinker with it.

151 Typically, when a bill is introduced it has a single sponsor, who is the legislator that has taken the lead in having it drafted. Other legislators who support the bill then get their names added to the bill as co-sponsors. It takes little or no effort to do so.

152 One should avoid the automatic assumption that those legislators are necessarily going to be those who represent the districts with the greatest problem property challenges. While that is often true, a counter-intuitive champion; that is, someone whose colleagues would not assume to be engaged with those issues, may be more effective, while legislators representing low income and minority districts may have many equally important competing priorities.

153 That is true even when a legislature is closely divided, or where one house is controlled by one party, and the other house by the other. In that situation, the champion will probably look for someone in the minority party to co-sponsor the bill.

154 The term legislative leadership refers to those people who hold leadership positions, beginning with the assembly speaker, the party whips, committee chairs, and so forth. How it is precisely defined, and what leadership positions are meaningful as distinct from symbolic, may vary from state to state.

Once you have found your champion, however, you will have to take her lead in terms of legislative strategy, while being ready to support her as necessary; for example, by lining up speakers to testify in support of the bill in committee hearings.[155]

5. Understand the role of the executive branch

Many problem property issues affect, or will be of interest to, the executive as well as the judiciary branches of state government. Legal changes affecting properties directly affect state tax systems and court systems, and depending on the specific change, may affect many other aspects of state government. State agencies monitor the legislative process, and will weigh in, pro or con, on proposed legislation that they see as affecting their areas of responsibility. It is a good idea to try to anticipate these issues as much as possible and, especially if you or your allies have relationships with key state officials, perhaps to reach out to them in advance to identify issues relevant to them, and gain their support.

It is important, however, to understand the relationship between the executive and legislative branches. While legislators are generally quite jealous of their prerogatives, where both branches are controlled by the same party, there is often a fairly cooperative relationship between them, and legislators are likely to pay serious attention to concerns voiced by state agencies. In states where one branch is controlled by one party, and the other by the other party, the relationship may be more strained, and the administration's concerns may get less of a hearing.[156]

6. Understand the configuration of interests around your issues

State legislatures are hotbeds of lobbyists looking out for their clients' interests.[157] Although the dynamics may be less intense than at the federal level, they are no less important to the outcome of the legislative process. Almost every field potentially affected by legislation has someone prowling the corridors of the state capitol looking after their interests. Some trade associations will have their own full-time staff lobbyist, while others will contract with one or another of the firms that provide lobbying services in that state.[158] Since they are in and around the legislature all the time, while your involvement with legislators is likely to be more intermittent, they have a built-in advantage in getting their views known and often heeded.[159]

Legislative proposals dealing with problem property regulation, depending on the specific nature of the proposal, may potentially be perceived by many different organizations as relevant to their members. Organizations that are most likely to see their members as being affected by problem property regulation include the following:

- Realtors
- Homebuilders
- Landlords[160]
- Lenders
- Local government associations
- Civil rights and fair housing organizations
- Tenants organizations
- Planning and community development organizations

While they may not pay attention to your proposal in its early stages, if it gets to the point where it is receiving serious consideration, they will scrutinize it carefully and make any points of contention quickly known. This is particularly true if it is an ambitious effort to change the state's policy direction in some significant fashion. If the proposal is for what might be seen as a relatively small "technical" fix to existing legislation, it may sail below the relevant lobbyists' radar.[161]

It is not unlikely that during your early meetings with legislators, one or another may ask you "where do the Realtors (or homebuilders, or bankers) stand on this?" As a result, particularly if you are pursuing an ambitious proposal, it may be a good idea to meet with key organizations that are likely to have positions on the matter in advance, either to (ideally) obtain their support, or at least identify points of disagreement and potential conflict.[162] While it is worth

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155 Even if it doesn't directly affect their activities, state agencies may still weigh in on the issues. For example, the state Attorney General may review and comment on matters that affect property rights, such as a bill modeled after the Iowa forfeiture law described earlier above, even though strictly speaking it does not affect them.

156 Even when there is high-level conflict, or where there is personal strain, say, between the Governor and the Assembly Speaker, there is likely to be considerable ongoing informal contact at the working level, and staff in the nonpartisan office may well reach out to administration staff during the bill-drafting process.

157 It should be noted that the word 'lobbyist' itself is widely considered pejorative, and rarely used in those circles. Staff lobbyists will typically have titles like "director of governmental relations" or "Legislative affairs manager".

158 Most if not all states require lobbyists to register with a state agency, and file regular reports on lobbying expenditures. Depending on how extensive your legislative advocacy efforts are likely to be, you may fall within the guidelines of who may be required to register. Check out the state's rules in this respect before getting involved in the legislative process.

159 They also have the advantage that many of them make substantial campaign contributions to key legislative figures.

160 Landlord associations, perhaps because of the negative connotations of the term, are invariably known by other names, such as 'apartment owners' or 'property owners'.

161 In legislative terminology, a technical fix or correction to a bill is a non-substantive change to correct a mistake, or clarify an ambiguity in an existing law. That said, the boundary between non-substantive and substantive change is a fuzzy one, and one that is constantly being pushed.

162 There are pros and cons to this strategy. If it turns out that some organization is strongly opposed to the proposal, an early head's up may end up giving them time to build opposition to the proposal and eventually bury it.

trying, you are unlikely to be able to anticipate all of the issues that might be raised by different organizations and interests. In one case, the state homebuilders association, for which vacant abandoned properties were not otherwise a priority, weighed in when a bill that was going to significantly increase local regulatory powers was already well advanced in the process to make sure that vacant *lots* were explicitly excluded from the definition of abandoned property, in order to protect the interests of their members who might be banking parcels of land for future development.[163]

Even if many legislators are sympathetic to your proposal, if a major interest group is strongly opposed to it, it may not get to a vote. That will depend on how the interests align on a bill, which ones are on each side, and their relative power to influence the outcome. That dynamic is constantly shifting, and varies widely from state to state. In some states, bankers or Realtors may have a *de facto* veto over bills involving real estate, while in others they may have only modest influence. State municipal leagues and mayors' associations, for the most part, have only limited influence over most matters that arise in state legislatures, but when it comes to legislative proposals directly affecting the conduct of municipal government, like a bill changing code enforcement practices, however, they carry much greater weight. Such a bill is unlikely to move over their opposition.

7. Build coalitions

The organizations that typically advocate for more effective problem property regulation, like civil rights groups, community development associations, and the like, rarely have the level of influence that the highest profile interests wield. *The more substantial and far-reaching the proposal, the broader the coalition that may need to be assembled to build the support to get the bill through.*

Most legislative proposals are initiated by organizations. These can be member-based housing or community development associations; in Pennsylvania, problem property legislation has been driven by the Housing Alliance of Pennsylvania, while in New Jersey, it has been driven by the Housing & Community Development Network, a membership organization of CDCs and their supporters. In other states, leadership has come from statewide planning and smart growth advocacy groups, like the Greater Ohio Policy Center or MassINC.[164]

These are all organizations that have built legislative relationships over many years, and are recognized by legislators and legislative staff as responsible, credible advocates for their communities. That gives them an immense advantage over one-shot efforts coming from individuals, however sincere and knowledgeable, who are not known quantities to the people they are trying to influence, and who have no clearly identifiable base of support. An organization like MassINC or the Network has a lot of parts of the coalition in place, but is likely to need to broaden it further to get traction on a major legal or policy change. Otherwise, it will have to be built from scratch.[165]

The *core coalition* members are organizations and individuals that have a strong commitment to the salient issues, and a willingness to be involved with the effort. They can include housing organizations, CDCs, civil rights organizations, tenants' organizations, neighborhood and civic associations, and more. These are the groups that will actively reach out to state legislators, organize letter-writing campaigns, promote the issue on social media, and testify at committee hearings. It is critical that you be able to show that there is broad support for the proposal.

The role of local governments and their organizations will depend on their priorities and make-up. Some states have urban mayors associations, either as free-standing organizations or as affiliates of umbrella municipal leagues, which may become part of the core coalition.[166] While the municipal league or its equivalent is not likely to be an active part of the coalition, it is critical to the success of the effort that they not oppose the proposal and give it at least tacit support.[167]

Other interests are less likely to be part of a coalition, although as discussed, it is important that they not *oppose* the proposal. At the same time, support that comes from unexpected corners is that much more valuable because of it. One legislative effort to significantly tighten a state's rental receivership law unexpectedly received strong support from the state's apartment association. The organization,

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163 They got the language they wanted, and subsequently endorsed the bill.

164 MassINC (the Massachusetts Institute for a New Commonwealth) has spent many years building a coalition of local officials and state legislators in the state's smaller older cities, which they refer to as Gateway Cities, which has become an effective springboard for a number of valuable legislative initiatives in community and economic development.

165 If the necessary base of support can be identified, It is far better to try to build an ongoing, sustainable advocacy organization than to try to mobilize ad hoc coalitions around each issue or proposal.

166 Typically, since the great majority of municipalities in most states are rural or suburban, state municipal leagues are dominated by those interests. A number of states, however, have one organization that represents cities and another that represents towns/townships, in which case the former may be more attuned to supporting advocacy on problem property issues.

167 Many municipal leagues have affiliated associations; e.g., associations of municipal tax collectors, municipal finance officers, etc., etc. In some cases, although the umbrella organization's leadership may want to be supportive, one of the affiliates may not be, in which case the umbrella organization will not support the proposal. In my experience with one major New Jersey legislative effort, it was necessary to negotiate at length with the municipal tax collectors association, which was resistant to changes in the tax sale process, before the municipal league signed off on the bill.

which was dominated by large, professional apartment owners and managers who were unlikely to be affected by the changes, was eager to demonstrate that it supported policing the industry's "bad apples." One does not have to agree on everything to be a useful coalition partner on a specific issue.

8. Be prepared to negotiate

The essence of the legislative process is negotiation and compromise. The more extensive and far-reaching the proposal, the more likely that it will have to be negotiated in the course of the legislative process, and the outcome be a compromise between the initial idea and the concerns of a variety of competing interests. It is critical that you know in advance what compromises can be made without losing the essence of the proposal, and what would make it no longer worth pursuing; in other words, your bottom line.

In the course of negotiation, you will be confronted with a lot of issues raised by people and organizations representing different interests. Many of these will involve highly technical issues associated with property tax sales, lien priorities, and similar matters. It is critical that when you sit down to negotiate with the bankers, or tax collectors, that you have people with the legal and technical expertise on your side of the table to negotiate effectively, and to make sure that you don't inadvertently agree to something that guts the essence of the proposal.

In the end, the goal is to get legislation through that can incrementally improve the lives of people affected by problem properties, whether they live in an unhealthy building, or in a neighborhood plagued by the presence of abandoned buildings and trash and debris on vacant lots, not to get credit or to maintain one's ideological purity.

STATE POLICY AND PROBLEM PROPERTY REGULATION

Center for Community Progress

HEADQUARTERS
111 E. Court Street, Suite 2C-1 Flint, MI 48502

NATIONAL OFFICE
1101 14th Street NW, Suite 510 Washington, DC 20005

info@communityprogress.org

communityprogress.org
(877) 542-4842

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