

# Refreshing the Heart of the City: Vacant Building Receivership As a Tool for Neighborhood Revitalization and Community Empowerment

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As many postindustrial American cities contend with a half-century of decline and population loss,<sup>1</sup> their once-teeming neighborhoods struggle to retain, or regain, their vitality. The number of vacant houses<sup>2</sup> in any such neighborhood constantly marks the success, or failure, of each one of these revitalization campaigns. Abandoned by its former residents and neglected by its current owners, each vacant building provides a haven for illegal activity, presents fire dangers to adjacent homes, and defames the surrounding neighborhood as an unfit place to live.<sup>3</sup>

Community members, driven both by civic pride and by the need to protect personal investments, are confronting blight in various ways. They lodge official complaints about particular buildings, nudging forward the standard bureaucracy for the processing of local building code violations. They band together to form neighborhood associations to increase the effectiveness of their advocacy for code enforcement and other public services. Increasingly, however, inner-city neighborhoods are moving beyond these reactive strategies and forming their own community development corporations (CDCs).<sup>4</sup> These community-based nonprofit organizations act directly to renovate vacant buildings if they can acquire them.<sup>5</sup>

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Community revitalization interventions leverage the greatest amount of private investment in neighborhoods where housing rehabilitation projects need little or no public subsidy to be financially viable. Such urban areas, in the heart of the city's economic spectrum, may need only a well-timed infusion of capital to induce a continuous flow of solid private investment. On the other hand, even temporary inaction in responding to vacant houses' messages of chaos and capital flight can lead to a downward spiral of disinvestment and proliferation of blight. To secure economic stability, healthy urban communities must induce rehabilitation of their vacant houses both by current owners and by new developers.

Traditional code enforcement actions can coerce an owner, if he or she can be located, to either renovate the vacant property or transfer it to someone who will. Sophisticated CDCs or private developers can use tax foreclosure proceedings to acquire vacant properties that are also tax delinquent, even if the owner is nowhere to be found.<sup>6</sup> Independently of each other, though, neither in personam code enforcement nor in rem foreclosure strategies can absolutely assure community leaders that, in the end, the derelict property will be renovated. To guarantee vacant property rehabilitation, they must be combined into an in rem code enforcement remedy tailored to address the nuisance of vacant houses. Communities with development capacity need to issue an ultimatum to owners of such abandoned properties: "Fix it or lose it! Cure your vacant house of all code violations, or you will have your interest in the property liquidated." Such communities need vacant building receivers empowered to sell derelict houses to qualified developers.

This article examines vacant building receivership as a tool for ensuring the renovation of vacant buildings and as a means by which communities can develop increased confidence in and control of residential development in their neighborhoods. After discussing the need for a vacant house strategy tailored to support mid-level urban neighborhoods, the article, in its second section, will analyze how Baltimore's vacant building receivership remedy succeeds in situations that defy resolution by more conventional means. The third section studies the implications of vacant building receivership for empowerment of community organizations to coordinate and shape local housing investment, drawing upon examples from the experiences of a particular Baltimore urban neighborhood.

### **Vacant Houses in Healthy Urban Neighborhoods**

#### *Importance of Community-Based Intervention*

Many older central cities in America compete for new taxpayers in regional housing markets that, like the universe itself, are sprawling outward at astronomical speeds.<sup>7</sup> A typical American "weak-market"<sup>8</sup> inner city must look to healthy neighborhoods in the middle of its economic spectrum for new life.<sup>9</sup> Its few wealthy communities are fully occupied and will, successfully, resist any increases in neighborhood density. On the other hand, its poorest neighborhoods need intensive investment that, if avail-

able at all, should be made in the interests of social justice and stability and not with any plans for short-term economic gain for the city as a whole.<sup>10</sup> Without abandoning strategies appropriate to these extremes on the economic spectrum, a city cannot afford to allow vacant houses to remain unrenovated in the bellwether neighborhoods that make up its fiscal heart.

To secure market stability, a city must involve the community organizations of these neighborhoods both in the eradication of nuisance vacant houses and in the coordination of capital improvements. Instead of responding to community members' frustration about code enforcement, local government needs to make them partners in the process. Rather than verbally assuring homeowners and other stakeholders of the wisdom of upgrading their own properties, the city should encourage these investors to build up the confidence of one another. Far from romantic notions, these moves toward decentralization and communal economic decision making are born of the inescapable economic reality of urban life.

In a densely developed city neighborhood, an owner quickly realizes that the return on any improvement that he or she makes to a property will be determined almost entirely by the investment decisions of his or her neighbors in the community.<sup>11</sup> With the parcels so close together, the appeal of any one house depends almost as much on the appearance of and the activity taking place at the neighboring properties as it does on that house's own physical condition. If the building next door to this house is vacant, the resident owner may have to deal with illegal activity there that could involve noise, violence, or fire. The cost of this neighboring property owner's neglect, far from affecting only the value of the vacant property itself, will almost certainly have a greater impact on the properly maintained properties around it. One vacant house can curtail the return that owners of neighboring properties can expect from capital improvements or even basic maintenance. Faced with such a limit, many will not invest at all and seek a way out before it is too late. Their disinvestment will start the cycle anew. These externalized costs, or externalities, that vacant buildings inflict not only shape investment patterns directly but also broadcast messages of chaos and decay.

Indeed, the sociological theory that traces epidemics of disorder to highly visible contextual symbols takes its name from a prominent feature of vacant buildings: broken windows. In his book *The Tipping Point*, Malcolm Gladwell summarizes the Broken Windows theory: "If a window is broken and left unrepaired, people will conclude that no one cares and no one is in charge. Soon, more windows will be broken and the sense of anarchy will spread from the building to the street on which it faces, sending a signal that anything goes."<sup>12</sup> Gladwell goes on to illustrate how superficial, but highly visible, details in our everyday environment shape our behavior.<sup>13</sup> In a subway system overwhelmed by graffiti, muggings just seem natural; somehow both the perpetrator and the victim know this and they act accordingly. Likewise, a neighborhood that cannot get rid of a few vacant houses can expect more crime not only because vacant houses offer

a convenient site for such activity but also because the vacant houses tell all who see them that such a neighborhood is the kind of place where criminal activity is supposed to occur.

For those committed to the health of urban communities then, vacant houses present two separate but related challenges. First, the city and the community must act to make a delinquent owner's negligence an internalized cost for him or her and not just an externalized cost for the neighbors; in short, the owner should feel their pain. Administrative and judicial code enforcement proceedings need to hold the owner accountable for his or her malfeasance. Second, the city and the community must take these and other nuisance abatement actions<sup>14</sup> in a manner that encourages both capital and personal participation from existing stakeholders as well as newcomers. Like the vacant houses themselves, the responsive action must be highly visible so that all in the community will see that destructive behavior will not be tolerated. Because the opportunity to avert irreversible decline may evaporate suddenly, community leaders must act swiftly but selectively, especially in their use of punitive measures. Even as they swing their sticks quickly and visibly, enforcers must take care not to do so wildly. If stakeholders in the community identify with an accused perpetrator, they may look to exit the community for fear that they may be next. The community must also come to see the vacant buildings as opportunities that will entice legitimate developers frustrated in their attempts to find projects in other parts of the region. A strong, sensible code enforcement strategy will encourage the complete renovation of vacant houses, making them vanishing opportunities not to be missed.

An efficient, professional municipal code enforcement agency can hold vacant building owners publicly accountable. But only direct community involvement in code enforcement prosecution can build a sustainable sense of resident confidence and control in the future of the neighborhood. The personal stake that community leaders have in the outcome causes them to respond quickly and aggressively. Because they want real results and not just good publicity, community activists' claims of victory will not only be heard but also be believed by fellow residents. Most importantly, through a community-based approach to confronting vacant house owners, neighbors will see that their accountability to meet basic standards flows to one another rather than to an outside entity over which they have no control. This sense of reciprocity and shared control over the health of their community can serve as the foundation of confidence necessary for coordinated investment if the communal action taken actually rids the neighborhoods of the vacant houses. To achieve this bottom-line result, community advocates must surmount the obstacles that have stymied traditional code enforcement responses to chronic vacant houses in healthy neighborhoods.

#### *Difficulty of Eradicating Vacant Houses*

Owners of chronically vacant properties can generally be divided into two categories: those who choose not to comply with basic code require-

ments and those who lack the means to bring their properties up to code.<sup>15</sup> Both kinds typically own vacant buildings in healthy neighborhoods. Traditional code enforcement remedies run into dead ends with owners in each of the two categories.

A speculating investor, as an example of the former, may acquire a vacant property with no intention of ever renovating the property. The investor will buy up dilapidated properties cheaply and do nothing but continue to pay the taxes on them. He will hope that the revitalization work of others in the community will make the neighborhood as a whole more attractive, thereby enhancing the value of his investment. By the time the investor sells, the property will be in worse shape than when he bought it. If property values in the area have increased sufficiently, however, the sale price, although still low, may net a large percentage gain on his total investment.<sup>16</sup> Of course, not all of his vacant buildings will rise in value; some may be in neighborhoods where too many vacant buildings are owned by free riders like the investor and the entire area suffers from broad-based disinvestment. If the speculator himself is to have any chance of overall success, he must spread his risk by owning many vacant buildings in different areas. This commitment to continuous acquisition leaves the investor little or nothing to invest in maintenance or repairs.

The success of the investor's speculation strategy, therefore, hinges on his not making the repairs required by local building codes. Traditional code enforcement mechanisms attempt to coerce a property owner into renovating his vacant house through fines and court orders. But these in personam remedies require a high level of due process. If a code enforcement attorney wants to obtain a judicial order mandating the owner to correct the violations, the attorney must first show the court that the owner has been personally served with notice of the case. A subsequent finding of contempt for failure to obey the order would require proof that the owner actually knew that the order had been made.<sup>17</sup>

A speculating owner can frustrate attempts at personal service by creating sham ownership entities or just by providing the vacant house as the only mailing address for himself as owner of the property. Although the owner may be unable to achieve complete anonymity, he may succeed in making pursuit of him just difficult enough to induce a code enforcement attorney to use the agency's limited resources on a more attainable defendant.

A less sophisticated, and more sympathetic, owner serves as an example of someone who cannot bring his or her vacant property into compliance with the code. As a former resident of the community, this owner might retain ownership of her long-time home even though her age, health, or other factors have led the owner to relocate elsewhere. The owner may barely have the money to maintain a new place much less be able to access the cash to fix up the neglected house back in the old neighborhood. Yet the owner may still pay the relatively small tax bill on the property that comes every year.

The code enforcement attorney may find it comparatively easy to locate the owner and extend the court's personal jurisdiction over her. Likewise, the court may readily grant an order to correct the violations. Enforcing that order, however, will be another matter. The owner's lack of finances will not only prevent her from making the repairs but also make it impossible for the code enforcement attorney to demonstrate that he or she is willfully violating the order. Without such a finding as to the owner's intent, the court will be unable to hold her in contempt.<sup>18</sup> Of course, even if the court could punish the owner, the nuisance would likely still persist.

The code enforcement attorney and the court can, however, urge the owner to transfer the property. Many times, especially in healthy neighborhoods, conventional code enforcement actions succeed in facilitating transfers of vacant houses from those unable to maintain them to others who have the resources to develop them responsibly. All too often, however, the owner, due to unpaid mortgages or judgment liens, does not have the ability to transfer good title at all.

Thus, in the scenarios involving the bad faith speculator and the more innocent former community resident, conventional code enforcement faces limitations that flow directly from its emphasis on personal liability for code violations. In the speculator's case, the coercive and punitive aspects of conventional code enforcement necessitate a high level of process that hampers its effectiveness against those who know how to avoid discovery. For the former community resident, the failure of the personal accountability approach is more direct. Not all vacant houses come to be nuisances through the deliberate neglect of their owners; in certain cases, the properties fall into disrepair despite reasonable efforts by the owners. In these cases, bringing the owners to justice will not necessarily result in a renovated house.

In both the speculating investor and the former resident situations, renovation of the property appears to require a change in ownership. Yet tax foreclosure, as one promising method of redistribution, does not present itself as an immediate option. In the examples above, both the speculator and the former resident have kept the property taxes current, making tax foreclosure impossible for the time being. The relative stability of the surrounding community may support the financial wisdom of these payments. After all, if the neighborhood were to become attractive suddenly, the former resident could reap a gain on resale right along with the speculator.

Traditional code enforcement cannot force all vacant property owners to the realization that if they want to continue to own their houses then they must bring them into compliance with the code. Even if fines and other coercive mechanisms succeed in bringing about the rehabilitation of a great number of properties, those vacant houses that are beyond the code enforcement's reach persist as a threat to an urban neighborhood in transition. This danger will multiply if investors perceive a potential profit in

exploiting the limits of conventional approaches to code enforcement. The economic security of urban-healthy neighborhoods and the cities requires an additional approach to vacant building code enforcement.

### **Baltimore's Vacant Building Receivership Ordinance**

Even before vacant buildings rose to the top of so many urban development agendas, the shortcomings of conventional in personam code enforcement required the development of alternative approaches. In the mid-1960s, leading academic authorities, such as Columbia Law School's Frank Grad, wrote about the limitations of intent-based punitive sanctions and encouraged the move toward more flexible civil fines and newer in rem approaches.<sup>19</sup> At that time and for many years after, urban policy innovators directed their attention to code enforcement in occupied properties, especially large apartment buildings.

For landlords who either would not or could not maintain their tenements, authorities used their statutory power to seize these buildings and place them under the control of judicially supervised receivers.<sup>20</sup> The receiver had the power to collect rents, make repairs, and even borrow money.<sup>21</sup> Under many of these statutes, the receiver could subject the property to a lien that took priority over preexisting mortgages.<sup>22</sup> Faced with the loss of rental income, many owners who had been hiding from conventional code enforcement proceedings stepped forward to demonstrate their newfound commitment and ability to making all necessary repairs. Those with no prospects of operating their buildings responsibly could not regain control and eventually lost them through foreclosure. A second generation of receivership statutes vested direct authority in tenants and community groups to initiate receivership.<sup>23</sup> In the context of occupied apartment buildings, receivership laws were empowering communities to address chronic code violations that defied traditional solutions.

Recognizing receivership's potential for addressing Baltimore's many vacant building violations, Anne Blumenberg, Executive Director of the Community Law Center,<sup>24</sup> authored an amendment to the Baltimore City Building Code<sup>25</sup> and spearheaded a successful advocacy effort for its passage by the local city council in 1991.<sup>26</sup> Blumenberg had worked in urban communities for many years both before and after becoming a lawyer. She had authored several articles on acquiring vacant properties for rehabilitation for *The Cost Cuts Manual*,<sup>27</sup> a nonprofit housing developer's technical assistance guidebook published by the Enterprise Foundation in 1987. Her research had shown her how tenant associations, working with nonprofit development organizations, had wrested control of poorly maintained apartment buildings away from delinquent landlords, sometimes permanently. In adapting code enforcement receivership from occupied apartment buildings to vacant rowhouses, she gave Baltimore community residents the tool that they needed to assure themselves of vacant building renovation throughout the neighborhood.

Under Baltimore's vacant building receivership ordinance, the city, or its community nonprofit designee,<sup>28</sup> has the power to ask a court to appoint a receiver for any property that has an outstanding vacant building violation notice.<sup>29</sup> An owner, a mortgagee, or any other party with a preexisting interest in that property has to demonstrate the ability to rehabilitate the property without delay in order to avoid the appointment of the receiver.<sup>30</sup> Once appointed, the vacant building receiver's administrative and rehabilitation expenses become a super-priority lien on the property.<sup>31</sup> Other code enforcement receivership statutes have most of these elements, but the Baltimore ordinance adds something unique that makes it particularly effective in dealing with vacant rowhouses.

Most code enforcement receivership statutes require long waiting periods prior to a receiver's foreclosure on his or her special lien.<sup>32</sup> For these statutes, oriented toward occupied buildings, foreclosure is a last-resort means of recouping the net expenses of renovating the tenant's houses. Baltimore's law, however, allows the court to have the receiver foreclose on this lien before rehabilitation work has even begun and auction the property off to a developer who has demonstrated the ability to rehabilitate the property immediately.<sup>33</sup> Rather than require the receiver to go out and locate the monies necessary to make repairs, vacant building receivership, under the Baltimore code amendment, offers the court the option of privatized nuisance abatement.

In examining vacant building receivership's strengths and the challenges that its unique features create, this section will discuss three aspects of the vacant building receivership ordinance. Like its apartment building forebears, vacant building receivership enjoys all of the benefits of in rem jurisdiction. Unlike them, it allows private parties to take permanent ownership of the delinquent properties as a step toward renovation. Like tax foreclosure, vacant building receivership can be used to release delinquent properties from all manner of preexisting private claims that might cloud the title. As a whole, vacant building receivership addresses those vacant building problems unreachable by conventional means, thereby plugging a gap in a healthy urban community's defense against property abandonment.

#### *Vacant Building Receivership As In Rem Code Enforcement*

Because vacant building receivership focuses on fixing the vacant property itself rather than punishing its owner, speculators' attempts at evasion no longer pose a problem. Although the ultimate power of the court to induce compliance presupposes the owner's physical presence in the courtroom, the owner's attendance is not required for a receivership hearing to be effective. The focus of the proceeding is no longer the owner's culpability, but the termination of the owner's rights in the property.

Of course, to assert its jurisdiction, even in rem jurisdiction, the court must be satisfied as to the sufficiency of the notice provided to the defendant. The vacant building receivership law provides two levels of notice

to owners of delinquent properties. At least ten days prior to filing any lawsuit, the would-be petitioner must notify all owners and mortgagees of its intent to seek the appointment of a vacant building receiver.<sup>34</sup> The written notification should include a copy of the violation notice itself.<sup>35</sup> The rules for delivering the predicate notice are identical to those that inspectors have to follow in issuing the original vacant building violation notice. Personal delivery or certified mail will suffice.<sup>36</sup> If one attempt at either fails, posting the subject property will start the ten-day notice period.<sup>37</sup>

After the petition has been filed, personal service on the owner must be attempted. But such service will be more easily deemed sufficient in an *rem* proceeding than if the relief being sought were personal to the defendant. Although the constitutional standard for adequacy of notice is the same for both in *rem* and in *personam* jurisdiction, actual statutory and judicial standards tend to be significantly higher for the latter. In *Mullane v. Central Hanover Bank & Trust Co.*,<sup>38</sup> the U.S. Supreme Court found that the Due Process Clause required that notice of any court action affecting a person's rights be made in a manner "reasonably calculated" to give actual notice.<sup>39</sup> This standard was not diminished by the fact that the rights in question might be limited to a particular piece of property located in the jurisdiction. As applied to public lien foreclosure proceedings, this rule invalidated procedures that involved notice only by publication with no attempt at more direct contact.<sup>40</sup> But, once personal delivery has been attempted, in *rem* proceedings may be allowed to proceed by alternative service where in *personam* cases might need to wait for a showing that the defendant is deliberately evading service of process.<sup>41</sup>

The speculating owner can no longer hide from his building code obligations with the satisfaction that no news is good news. If the owner's efforts at obscurity have been successful, the receiver can transfer the property without the owner even knowing it. The owner's anonymity, a strength in the arena of in *personam* code enforcement, becomes a weakness in this in *rem* context. If the owner wants to be notified of in *rem* proceedings like vacant building receivership, he will need to provide contact information that will allow him to be given notice. Whether or not the owner makes his whereabouts known, he will need to come forward and appear in the lawsuit to preserve his stake in the property. Faced with the unwelcome choice between repairing the property and seeing it transferred through judicial sale, our speculator could try to contest the allegations in the suit or even challenge the legitimacy of the vacant building receivership law itself.

#### *Vacant Building Receivership As Privatized Nuisance Abatement*

Unfortunately for the evasive speculator, the vacant building receivership law makes it simple to prove the need for judicial action. To establish a case for the appointment of a receiver, the petitioner need only show that a vacant building violation notice was properly issued and remains unabated because the property has not been rehabilitated.<sup>42</sup> Under Baltimore's

building code, a vacant building is defined as “an unoccupied structure that is unsafe or unfit for human habitation or other authorized use.”<sup>43</sup> The code declares such buildings to “be a fire hazard and a nuisance per se.”<sup>44</sup> The code also provides specific factual bases for the issuance of such a violation notice that are readily observable by a passerby and can be documented easily by photographs.<sup>45</sup> Other states’ receivership statutes, which deal with occupied buildings, generally require an additional finding that the code violations are sufficiently serious to constitute a nuisance or a threat to the health and safety of the residents.<sup>46</sup> Because Baltimore’s code provides such a clear and practical definition of the nuisance to be addressed, a petitioner in a vacant building receivership case can prepare for trial with confident ease.

Once the case has been established, the speculating owner, in order to avoid appointment of a receiver, will not only have to ask for a reasonable period of time to carry out the renovation but also have to post a completion bond to guarantee performance.<sup>47</sup> If the property goes through the vacant building receivership auction process, even a fair judicial sale may leave the owner with nothing after the receiver’s costs and expenses have been deducted from the proceeds. Confronting the prospect of losing all of his vacant properties in subsequent receivership actions, the owner may attack the constitutionality of the remedy itself by claiming that the vacant building receivership process involves a governmental taking of property without just compensation. Although, generally speaking, private property advocates have tightened takings scrutiny over the last two decades, the defendant owner will again fall short in his efforts to evade accountability.

*Is the Prerehabilitation Sale a Taking Without Just Compensation?*

Although, like eminent domain, vacant building receivership can be useful for assembling dilapidated properties for redevelopment, it remains, fundamentally, a means of enforcing the building code standard that requires that no “unoccupied structure” be “unsafe or unfit for human habitation or other authorized use.”<sup>48</sup> The owner can avoid any interference with his rights simply by demonstrating his prospective ability to renovate the property. If the owner does not, the ordinance allows the court, in its discretion, to sell the property as a means of achieving code compliance.

Although the purpose of the sale is to transfer the property to a developer that will abate the nuisance, the vacant building receivership sale still employs the mechanism of a lien foreclosure. The owner can avoid, or at least postpone, the sale by paying down the receiver’s lien.<sup>49</sup> But, unlike the sales provided for by other receivership statutes, the vacant building receivership auction is not merely a method of recouping the expenses of nuisance abatement; it is the means by which the nuisance will be abated. To defend the legitimacy of the sale by referring to the lien would only point up the need to justify the lien. Since the lien is composed entirely of administrative expenses, most of which relate to the sale preparation, jus-

tifying the sale of the property solely as a creditor's remedy begs the question of justifying the debt to be paid.

Through a special auction at which only qualified, committed developers can bid, the government is bringing the resources of the market to bear on the vacant house problems that threaten to destroy those communities. Even though vacant building receivership can result in a forced sale that cannot be justified as a mere creditor's remedy, a vacant building receivership sale prior to rehabilitation to the property, does withstand constitutional review under the "nuisance exception."

In *Mugler v. Kansas*,<sup>50</sup> the U.S. Supreme Court articulated the so-called "nuisance exception" to the general requirement that a governmental deprivation of property rights be accompanied by just compensation. *Mugler* affirms that the state's inherent power to prevent and abate nuisances justifies enforcement actions that would otherwise require compensation under the Fifth and Fourteenth Amendments to the U.S. Constitution.<sup>51</sup> As with tests of the police power against the Contracts Clause<sup>52</sup> or the Equal Protection Clause, the nuisance exception to the Eminent Domain, or Takings, Clause requires that the governmental action under review survive both parts of a two-prong test. First, the public policy objective must involve a legitimate state interest within the scope of the police power. Second, the governmental action itself must have some logical means-end connection to the permissible policy goal.

As the nature of government intervention expanded from prohibition of noxious activity to promotion of social goods, the understanding of the police power also evolved. Rather than question whether a legislature should be taking an interest in the protection of fragile ecosystems or the promotion of a robust economy, takings decisions began to focus on whether or not a particular regulation's benefits could be enjoyed, at least in a general sense, by those disadvantaged property owners forced to bear the burdens that the law imposed.<sup>53</sup> Advocates for stronger protection of property rights, however, argue that governmental interference with one person's rights can be justified only by the defense of another individual's private property interests.

In his book *Takings*, Richard Epstein contends that the scope of the police power should not extend beyond the restriction of wrongful interference with the rights of others.<sup>54</sup> Analogizing to private law, he compares the doctrine of self-defense, which authorizes forceful response to wrongful acts without liability, to the tort law notion of private necessity, which sanctions use, by a party in distress, of another person's property but which requires actual compensation.<sup>55</sup> Some legitimate state interests justify interference without compensation; other policy objectives, while still legitimate, necessitate compensation to those affected.

More halfheartedly, Epstein suggests that the means used by the governmental action should have a substantial relationship to the objective sought.<sup>56</sup> Here, however, the analogy to private law fails him. Unlike the fundamental principles that govern liability, the law determining the ap-

propriateness of different remedies varies greatly. In such a situation, even Epstein “cannot demand of the state any greater precision in its choice of remedies than is demanded of the private persons it represents.”<sup>57</sup> Epstein would not have to wait too long for consolation and, at least partial, vindication. Seven years after publishing *Takings*, he witnessed the adoption of his private law approach, at least with regard to ends scrutiny, in the U.S. Supreme Court case of *Lucas v. South Carolina Coastal Council*.<sup>58</sup>

In the Court’s official opinion, Justice Antonin Scalia wrote that a governmental action that effectively destroyed all of a property owner’s economic interest could not be justified merely by the desire to promote a general societal good. Instead, the rationale for a total taking must arise from the need to prohibit some activity that was *never* properly part of the owner’s legitimate rights of ownership. “Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State’s law of property and nuisance already place upon land ownership.”<sup>59</sup>

For these total takings situations, *Lucas* requires that the legislature restrict itself to corrective actions sanctioned by common law. In effect, a policymaker needs to imagine herself as a nineteenth century landowner neighboring the private activity that she wishes the government to restrict and ask herself: “What would Josiah do?” If Josiah, the imaginary estate holder, had a cause of action at common law to defend the same interest that the government now wishes to protect, then that policy objective can justify a total taking under the nuisance exception. Otherwise, the legislator and her colleagues should be prepared to enact a companion appropriations bill to pay compensation to affected owners, if a total taking results from the new regulation.<sup>60</sup>

With regard to vacant buildings, no owner has a property right to keep his or her house, even an unoccupied house, in a visibly uninhabitable condition. Vacant houses, at least as defined in Baltimore’s building code, are nuisances per se and not merely because the building code explicitly declares them to be so. They are, as the code states, fire hazards.<sup>61</sup> Because vacant rowhouses are involved in so many fires, adjacent homeowners find it difficult if not impossible to obtain casualty insurance as required by their mortgage agreements.<sup>62</sup> Those vacant houses open to casual entry harbor all manner of illegal activity. The chronic interference with quiet enjoyment of neighboring property owners and the economic detriment to their interests go to the very heart of nuisance law. Vacant houses are properly classified among the very “noxious uses”<sup>63</sup> that takings jurisprudence first embraced as preventable through harsh governmental action without compensation. Assured then that vacant building receivership meets this recently hardened standard for core police power objectives, we now examine the methods by which it achieves these crucial goals.

If a governmental action pursues a legitimate objective of the police power, the methods used to achieve that goal will be sustained as long as those means substantially advance the objective,<sup>64</sup> do not burden a fun-

damental right,<sup>65</sup> and do not create a suspect classification.<sup>66</sup> Even though property rights advocates have succeeded in limiting the scope of objectives that the government can most aggressively pursue, the choices that governments make in how to deal with core nuisance issues remain free from heightened scrutiny.<sup>67</sup> Even so, vacant building receivership's judicially authorized and supervised remedy of sale of a nuisance property to a qualified buyer overflows with the sound policy rationales for its choice as the means for nuisance abatement. For their own fiscal solvency, city governments need these houses brought up to minimal housing standards. The public resources available to address the problems are insufficient to demolish them much less to renovate them. Private developers will renovate them if they can get clear title. The logic of the local government using a prerehabilitation sale device to facilitate the renovation is inescapable. Thus, even if a court subjected this innovative remedy to intermediate scrutiny's comparison with available alternatives, prerehabilitation sale would still be sustained as constitutional.

Ironically, those market-oriented critics of activist governments most hostile to takings may be among those who find the prerehabilitation sale device most appealing. Privatizing nuisance abatement, far from conflicting with strong protections for private property, frees the market to redistribute from those who cannot, or will not, meet basic standards to those who will, giving the latter an appropriate competitive advantage. Moreover, the court, although mandated to appoint a receiver for a vacant building,<sup>68</sup> has complete discretion to decide whether or not the receiver will be able to move straight to the auction process.<sup>69</sup> The court will not sell a property until it is satisfied that such a sale constitutes the most effective and most just means of achieving the nuisance abatement goals of the receivership. Under intermediate means scrutiny, constitutional review would also involve weighing the advantages and disadvantages of less invasive means of achieving the same objective.<sup>70</sup> By charging the court with the power and responsibility of deciding the appropriate use of the prerehabilitation sale remedy, the ordinance insulates itself against intermediate scrutiny, should it be applied. Although the prerehabilitation sale remedy may not pass a strict scrutiny test that it be the only means available of achieving the policy goal of vacant house renovation, its well-considered approach and responsiveness to judicial concerns will sustain it under the intermediate scrutiny urged by Epstein and certainly through the deferential standard currently used.<sup>71</sup>

*Vacant Building Receivership's Ultimatum: Fix It or Lose It*

The sustaining of the prerehabilitation sale remedy brings the speculator's healthy neighborhoods strategy to an end. He will no longer be able to pick up isolated vacant buildings in gentrifying areas and wait for the offers to peak while he does nothing to contribute to the neighborhood's revival. Through vacant building receivership's sale remedy, the owner's failure to bring the property into code compliance represents just as great

a threat to his title as his delinquency in paying property taxes would. If the owner is still unwilling or unable to renovate the property, his most promising exit strategy is to find a buyer who will pay the owner the true market value of the property.

Not just any buyer will do, however. Although the vacant building receivership does not directly prevent transfer of the property, the filing of the lawsuit itself will influence those who might be interested in acquiring the property. The vacant building receivership law provides for notice of the filing of the suit to the Bureau of Liens, which, in turn, is directed to note it on any lien certificate, usually purchased in connection with a title search of the property.<sup>72</sup> This action puts potential buyers on notice of the intention to place a lien on the property and then foreclose on that lien. Even if the owner finds an unsuspecting buyer, the sale may never go to closing as the settlement company may refuse to issue a title insurance policy.

The speculator will soon realize that the developer, already identified by the community as a qualified bidder in a receivership auction, may be his best hope for recouping some, if not all, of his original investment. The developer will almost certainly be happy to get the property through a direct sale and then wait for the auction process to run its course. Because the developer may be among the few to commit to immediate rehabilitation of the property, it may be able to obtain the property for even less than what it would have paid at auction. By resolving the matter before a receiver has been appointed, both the speculating owner and the purchasing developer can retain some of the monies that would have covered the transaction costs of a judicial sale.

Our other difficult code enforcement defendant, the former resident unable to repair her former home, will also sell the vacant house to the qualified developer unless clouds on her title prevent her from transferring the property. The defendant may have not yet paid off a mortgage or may have judgments against her from unpaid medical bills. Since the foreclosure of the receiver's super-priority will clear out private lien creditors and mortgagees, these other stakeholders in the property may see the wisdom of consenting to the sale free and clear of their liens. By allowing the voluntary transfer, they may get something for their security interest in the property. Given the strong incentives to settle, only those defendants with little or no clear financial stake in the property usually allow their properties to go all the way through to a vacant building receivership auction.

#### *Vacant Building Receivership As Title-Clearing Mechanism*

Sometimes the title to a vacant house is obscured by so many claims that receivership sale, or another title-clearing mechanism such as tax foreclosure, offers the only practicable way to transfer the property to a new owner. An interested purchaser would be unable to devote the time to negotiate releases from each and every person or entity with a lien on a particular vacant property of marginal value. Frequently, a vacant property

can remain in limbo for a long time. The owner defaults on the mortgage payments, but the mortgagee does not act. The property's value, especially when weighed against the potential code enforcement liability, may not justify immediate foreclosure proceedings by a mortgagee.

If neither the owner nor the mortgagee keep up the payments to the city, the vacant house might then be put up for tax sale. But, in healthy neighborhoods, investors purchase tax sale certificates, not with the intention of taking title to the property, but with the plan of waiting for someone to step forward and redeem the property by paying the back taxes and the high interest rate due the investor by law. In a vacant building receivership action, all of these stakeholders are given notice of their last chance to protect their interests in the property by seeing to its renovation. If they do not, they will be cleared out by the foreclosure sale along with the owner of the property.

Especially in complete default situations, the capacity to clear title effectively is defined by the availability of title insurance to the successful bidder at the receivership auction. Focusing on the unavailability of the court's jurisdiction, title insurance underwriters will want to know everything about how those with interests in the property were notified of the proceedings. Once they are satisfied, the receiver's grant of title will be just as marketable as a conventional bargain and sale deed.

By putting market forces to work in an effective in rem code enforcement proceeding, vacant building receivership has dealt with the bottom-line code enforcement goal of eradicating those vacant buildings not amenable to conventional solutions. The speculator can no longer expect to reap the benefits of community revitalization without keeping his own property up to code. Without punishing the former community resident for being in her predicament, vacant building receivership relieves her of responsibility for a property that she cannot maintain. Vacant building receivership supplements traditional code enforcement remedies in a manner that makes community organization central to the process of eradicating vacant houses. This multifaceted empowerment of neighborhood structures takes vacant building receivership beyond reactive problem solving and into the realm of market-based community building.

#### **Means of Community Empowerment**

As a community development buzzword, empowerment has already shown surprising longevity. William Peterman dates the sudden ubiquity of this contemporary bit of newspeak, appropriately enough, to 1984.<sup>73</sup> In the two decades since, empowerment has become the declared goal of innumerable private and public social programs despite—or, perhaps, because of—its lack of clear definition.

The undying fixation on empowerment, however, points up more substantial lessons. In examining the code enforcement needs of healthy urban neighborhoods, we see that the fragile nature of the community's economic stability requires a strengthening of stakeholder confidence in the market.

Although competent municipal personnel are indispensable to public trust, direct community participation in the code enforcement process offers the very sense of control and ownership that concerned citizens need in order to feel secure in their decisions to invest, both personally and financially. Despite its overuse, empowerment still invokes that sense of buy-in so essential to the survival of urban communities.

Joel Handler begins his book on the devolution of government functions, *Down From Bureaucracy*,<sup>74</sup> by defining comparatively straightforward terms such as decentralization and privatization. The use and abuse of “empowerment,” however, requires him to begin with its different political manifestations.<sup>75</sup> Both a conservative and a liberal see poor and middle-class citizens as the subjects—or, more accurately, objects—of empowerment as each proposes it. A conservative emphasizes their access to markets and economic independence. A liberal, on the other hand, stresses meaningful political participation and control of public resources.<sup>76</sup> Later in the work, Handler cuts through the spin with this indisputable definition: “Empowerment is the ability to control one’s environment.”<sup>77</sup>

Vacant building receivership offers community empowerment in each of the ideological senses and in a third form that can only be captured by Handler’s own neutral definition. First, CDCs, those nonprofit neighborhood businesses, get a first-rate acquisition tool that turns their willingness to invest in the neighborhood into a competitive advantage over speculators. Second, established community associations are vested with direct authority to enforce local building codes.<sup>78</sup> Third, by engaging qualified developers and delinquent owners alike in dialogue about how and when vacant houses will be renovated, neighborhood associations, acting as vacant building receivership petitioners, gain an understanding of and some control over residential revitalization in their communities.

It is worthwhile, before going any further, to explore the differences between neighborhood associations and CDCs. Neighborhood association and community association, at least as used in this article, each refer to an independent, voluntary membership organization that advocates for the interests of a group of residents of a defined geographic area.<sup>79</sup> In urban areas, these groups have grown out of community-organizing efforts historically rooted in the labor movement.<sup>80</sup> As private, and then governmental, disinvestment overwhelmed city neighborhoods, committed activists formed CDCs, essentially nonprofit businesses, to attract outside discretionary investment.<sup>81</sup> But even as demands for justice have made room for proposals promising measurable productivity, both types of organizations play central roles in urban rebirth.<sup>82</sup>

### Empowering CDCs As Market Participants

CDCs have produced thousands upon thousands of units of redeveloped urban housing in the last quarter-century.<sup>83</sup> They have faced, and continue to struggle with, many obstacles to the transformation of their neighborhoods.<sup>84</sup> Acquiring the properties to be rehabilitated is far from

the least of these barriers.<sup>85</sup> Many groups have underestimated the difficulty of getting clear title to derelict properties. Some even start with the supposition that their official recognitions as charitable organizations will attract sufficient donations of vacant houses to keep their construction crews busy. Frequently though, such groups will not even be able to contact the property owners to begin transfer talks of any kind. CDCs with such limited capacity need everything that vacant building receivership has to offer.

As already discussed, vacant building receivership provides community-based housing developers with critical acquisition leverage for closing voluntary transfers and a mechanism for clearing title to properties that cannot be sold free and clear by their owners. Vacant building receivership also offers a means of gaining quick experience in the legal and financial realities of their business—the residential real estate market. Explanation of the basics about vacant building receivership includes valuable information about the land title system and the ways in which building codes are enforced. This education brings the personnel of a CDC into a world already well-known by its market competitors.

The true empowerment of CDCs, though, comes from negotiations with the owners of and other stakeholders in vacant properties in the neighborhood. Using the threat of a vacant building receivership sale, a CDC realizes the competitive advantage that it has from its willingness and ability to renovate vacant buildings and its strong relations with the community. After delivery of even the threat of receivership litigation, groups previously unable to establish contact with the owner of a vacant property will find that same owner calling them to make a deal. Most importantly, the negotiations need never end in failure. If the price demanded for a vacant property is extortionate, the receivership litigation moves to the next stage. Ultimately, the property must be rehabilitated, or it will be sold to someone who will rehabilitate it.

In the Patterson Park neighborhood in Baltimore, vacant building receivership was particularly effective in dealing with foreclosing mortgagees. Lenders had developed their own strategies for avoiding direct liability for code violations. Sometimes they would commence foreclosure proceedings in which they would buy the property at the sale but would not record a deed until they were ready to sell the property. During this period, they would make any tax payments necessary to preserve their interest in the collateral. They were never prepared, however, to conduct full-scale renovation of the property in order to keep it. Moreover, the appointment of the vacant building receiver effectively stalled their foreclosure proceedings.<sup>86</sup> Such mortgagees, like their speculator kin, had difficulty in finding buyers willing to face the community's effective demand for immediate rehabilitation. The lenders' lack of alternatives left the Patterson Park CDC in very strong bargaining positions. Staffers who earlier could not get through to the out-of-state personnel handling the disposition of the foreclosed properties were now receiving offers of sale from them.

Because the Patterson Park CDC encouraged the neighborhood associations initiating receivership actions to concentrate on blocks where it already owned rental property, it recognized economic gain whether the property was transferred to them or not. If the Patterson Park CDC purchased the vacant house, it gained another income-producing property. If the threat of receivership induced the owner to renovate the derelict building, the Patterson Park CDC had rid itself of another vacant building, raising the value of its assets and the quality of life for the tenants on that block. As often as not, vacant building receivership leveraged the Patterson Park CDC's rehabilitation efforts by forcing owners who wished to retain their properties to invest their own money to improve the block.<sup>87</sup>

The sources of the Patterson Park CDC's success as an engine of neighborhood revitalization cannot be limited to the benefits from its participation in the vacant building receivership process. Its beautiful renovations and successful marketing of both its own properties and the neighborhood as a whole laid the foundation for the widespread legitimate private development that the community is now witnessing. At a critical time in the neighborhood's revitalization, however, vacant building receivership gave the Patterson Park CDC the staff development and market leverage that it needed to succeed as a player in a then-volatile and uncertain real estate market. Moreover, vacant building receivership strengthened the Patterson Park CDC's collaboration with the neighborhood associations that had advocated for its creation and were essential partners in lifting up the community.

#### **Empowering Neighborhood Associations As Sublocal Authorities**

Earlier in the first section's discussion of the importance of community involvement in code enforcement, healthy urban neighborhoods were shown to need the direct resident engagement and reciprocal accountability that only community-based code enforcement strategies could offer. Vacant building receivership involves community residents not merely as witnesses or advisors but as the actual petitioners requesting the judicial relief. Once it has given the designation, the city does not control the resolution of the proceedings. The community association decides under what circumstances it will settle the matter with the delinquent property owner. By designating neighborhood groups on a case-by-case basis, the city retains the power to hold associations accountable for how they handled the grant of municipal code enforcement authority in prior receivership suits. The vacant building receivership makes the community petitioners responsible to the head of code enforcement without compromising their independence.

Vacant building receivership's focus on nuisance abatement, as opposed to punishment, makes it the most appropriate code enforcement tool for such direct community control. The aggravation that community residents have endured because of a vacant house increases their zeal for a speedy resolution. Asking a court to impose a just punishment on the owner, how-

ever, requires a prosecutorial independence that a victim can never have. The solution-oriented vacant building receivership remedy gives resident leaders a sense of control over vacant houses without turning them into neighborhood tyrants.

The effectiveness of this community advocacy tool allows neighborhood activists to build confidence among homeowners in their control over basic property standards. Through vacant building receivership's community designation feature, residents and other local stakeholders can go to a monthly meeting of the neighborhood association and hear progress reports on vacant house remediation cases from their own neighbors, the people directing those efforts. The realization that they have a meaningful voice in a group that can bring about renovation of vacant buildings gives these community members the reassurance they need to make investments in their own properties without fear that the neglect of others will render those improvements valueless. Indeed, the power that neighborhood association members can realize from their use of vacant building receivership can take them beyond minimal code standards and allow them to push the market forward toward the community vision that they share.

#### **Empowering Community-Based Coordination of Market Investment**

Through designation as a vacant building receivership petitioner, a neighborhood group controls a remedy that both holds delinquent owners strictly accountable and offers developers a means of acquiring new projects. Community associations use this authority to ensure a base level of building quality that will communicate stability and vitality to all who pass through the neighborhood. But their control over the initiation of a receivership suit and its resolution allows them to obtain more than just the bare minimum in renovations.

For instance, a community that values the historic character of its homes can use its ability to initiate receivership litigation to encourage historically appropriate rehabilitation. Such a neighborhood may have already obtained approval from the federal government as a historic district. This type of recognition allows neighborhood renovators to take advantage of tax credits for historically appropriate improvements<sup>88</sup> without requiring that every homeowner first clear unsubsidized work with a review committee. Neighborhood leaders may wish to see the vacant buildings in the neighborhood restored to their former beauty. They are able not only to seek out developers experienced in historic renovation but also to condition the association's commencement of the case on the developer's written promise to renovate the property according to federal historic preservation standards, regardless of the developer's interest in seeking out historic subsidies. An agreement between the community association and the developer can also set out a timetable for renovation and occupancy as well as deal with any adjustments to zoning that might concern the community. If the restrictions imposed do not substantially reduce the potential value of the vacant house and therefore do not deprive the defendants of their

right to a fair auction of their property, then agreement to the conditions can be made a prerequisite for bidding in the auction by any qualified developer.

These same concessions can be obtained from an owner wishing to settle a receivership case rather than face trial. In the very first receivership case filed on a Patterson Park-area vacant building, the owner wished to serve as his own general contractor for the renovation of his property. His lack of a state home improvement license did not prevent him from obtaining permits for the work, but it did make it impossible for him to secure a completion bond as required by the receivership law. The community entered into an agreement that placed the renovation funds in escrow, set up a timetable for the repairs, and provided for community inspections of the work in progress. As part of the agreement, the neighborhood association was also able to obtain a commitment from the owner that he would not divide the three-story rowhouse into multiple units and that he would make certain aesthetic improvements to the exterior of the property. Although the court probably could not have mandated such terms in an order after trial, the judge's signature on the consent order made them legally enforceable through contempt sanctions.<sup>89</sup>

Suburban communities achieve this detailed control over the character of their neighborhoods through compulsory membership in homeowners associations established at the time of neighborhood development. Robert Nelson, a long-time advocate of the benefits of local regulation, has suggested that state legislatures give residents of existing neighborhoods the ability to impose governance on themselves through neighborhood referenda.<sup>90</sup> Even in the absence of strong sublocal structures, urban renewal areas, historic districts, and other special zoning authorities have allowed urban neighborhoods to assert direct control over the development of their communities.<sup>91</sup> The dense development and resulting interdependence of urban property owners make strong coordination of uses particularly appealing. But although local decree of land use controls and standards can build up confidence in the cohesion of the community, it can also stifle new growth. A community that simply bans development of unoccupied houses as multiple dwellings may find that the market is not ready to support single-family homes throughout the neighborhood. Because of this unworkable restriction, the unoccupied properties may sit and become vacant house nuisances, moving the neighborhood closer to a disinvestment spiral. By enacting its economic aspirations into law, the community may cut off the possibility of achieving them incrementally.

Their ongoing dialogue with responsible developers and contrite owners allows neighborhood associations to use vacant building receivership to set up a truly contractarian scheme of land use that can evolve over time as the market improves.<sup>92</sup> In vacant building receivership deals, resident leaders do not set residential development standards by fiat based on scientific market analysis, generally not available to them in any case. Instead, they define their community inductively in the give-and-take of negotia-

tions with investing developers and vacant property owners.<sup>93</sup> If the market does not support the restrictions that they are urging upon community stakeholders, then their negotiations will fail to establish the standards. Community advocacy groups can use the power and flexibility of their role in the vacant building receivership remedy to explore the leading edge of the market's tolerance for community improvement. Moreover, community leaders can show risk-averse property developers the agreements that they have already reached with other receivership renovators in order to reassure them that others in the community are committing to more than the minimal level of investment required by the underlying building and zoning codes.

Although these bargains may cover only the relatively small number of vacant houses in a healthy urban neighborhood, the resulting lattice of agreements may govern a very large percentage of the major residential development in the neighborhood. Through vacant building receivership, the community associations of Patterson Park were able to take the very properties that threatened to drag the neighborhood into irreversible decline and bring about their transformation into examples of the area's appealing future. This market-based advocacy laid the foundation for further investment in this healthy urban community.

William Simon notes the importance of community-based market coordination in the stabilization of urban neighborhoods.<sup>94</sup> While praising the work that CDCs have done to bolster neighborhood development, he offers a more guarded analysis of grassroots advocacy groups.<sup>95</sup> Borrowing an organizational conflict model used to understand the development of labor unions, Simon posits that advocacy organizations have little effect in their earliest stages but contribute significantly to development when fully mature.<sup>96</sup> In between these stages, however, they pass through a sort of troublesome adolescence, during which they have the power to inflict burdens on investors generally but not enough capacity to support and coordinate legitimate investment in the neighborhood.<sup>97</sup> Engagement in vacant building receivership channels a community's frustration with vacant houses at those directly responsible for their condition. At the same time, it allows them to develop the social capital of market expertise that enables them to act as effective coordinators of community investment.

### Conclusion

By offering community associations the governmental enforcement power that they understand and covet, vacant building receivership invites them to a different type of empowerment, one that is based on recognizing the extent, and limits, of residential development that the market will support. Although the former grant of authority can be reversed, the latter type of power can never be taken away from them.<sup>98</sup> At the end of the chapter entitled *Empowerment by Invitation*, Joel Handler notes that citizens that have become dependent on bureaucratic organizations need an opportunity for self-help that allows them to understand the true nature of

their power.<sup>99</sup> Vacant building receivership's provision for delegation of authority to community groups starts a process of exploration that can go far beyond nuisance abatement. Through it, they can collectively construct a vision of the area's future, not an image that sits on an easel at a community planning meeting, but a plan that is expressed in a network of consensual commitments. Healthy urban communities and the cities that depend on them for their survival need this meaningful but flexible coordination of market activity.

By enacting legislation to make community-based in rem code enforcement proceedings like Baltimore's vacant building receivership remedy possible for their healthy urban neighborhoods, state governments can empower the residents of these areas to control the future of their communities. Vacant building receivership liberates neighborhood development previously stalled by the lingering presence of vacant houses that stubbornly defied more traditional approaches. The work involved in advancing the vacant building receivership cases educates community organizations involved in development and advocacy for their neighborhoods. Community associations can use their influence to encourage the creation of a neighborhood that reflects a shared vision. Healthy urban communities need all of these tools if they are to flourish and spread development to more impoverished areas.

For weak market cities facing loss of their tax base to the surrounding suburbs, the issue of preserving desirable urban communities could not be more vital. America's older cities face the prospect of becoming the exclusive bearers of regional poverty. Although vacant building receivership does not resolve fundamental issues of regional revenue sharing and urban sprawl, it empowers healthy urban neighborhoods to fight for their survival and to offer a meaningful alternative to unsustainable outer suburban development.

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1. Baltimore, in 1950, had a population of 949,708; the 2000 census set its population at 651,154, a 31.4 percent decrease. *Population and Race*, CENSUS NEWS 2000, No. 1, December 2001, available at [www.ci.baltimore.md.us/government/planning/census/censusnews1.pdf](http://www.ci.baltimore.md.us/government/planning/census/censusnews1.pdf) (last visited Jan. 2, 2004).

2. A vacant house is not merely an unoccupied property but is also both unfit for human habitation and readily recognizable as such. BALT., MD., INT'L BUILDING CODE §§ 115.4.1, 115.4.2 (2003).

3. As of July 2003, several urban public policy organizations have come together to launch the National Vacant Properties Campaign. Their website, [www.vacantproperties.org](http://www.vacantproperties.org), provides a wealth of resources and information about the challenges posed by vacant buildings and vacant lots and the responses of urban communities to them.

4. For a legal scholar's review of the significance of CDCs, see WILLIAM H. SIMON, *THE COMMUNITY ECONOMIC DEVELOPMENT MOVEMENT* (2001); for a more quantitative analysis, see AVIS C. VIDAL, *REBUILDING COMMUNITIES: A NATIONAL STUDY OF COMMUNITY DEVELOPMENT CORPORATIONS* (1992).

5. U.S. DEP'T OF HOUS. & URBAN DEV., VOL. 1, BARRIERS TO THE REHABILITATION OF AFFORDABLE HOUSING 9–10, 47–58 (2001).

6. As part of its Project 5000, Baltimore's city government is foreclosing on thousands of tax-delinquent vacant properties. See James J. Kelly, Jr., *Project 5000: Assembling Insurable Title through Tax Foreclosure*, GROUND RULES, No. 6, January 2003, available at [www.msba.org/sec\\_comm/realprop/Newsletter/jan03/proj5000.htm](http://www.msba.org/sec_comm/realprop/Newsletter/jan03/proj5000.htm) (last visited Dec. 22, 2003); reprinted as James J. Kelly, Jr., *Project 5000: Using Foreclosure to Spark Revitalization*, 6 GETTING SMART! 4, at 8 (2003), available at <http://www.smartgrowthonline.org/members/pdf/SGNv6-4.pdf>. For a full discussion of the significance of tax foreclosure for inner-city revitalization, see Frank S. Alexander, *Tax Liens, Tax Sales and Due Process*, 75 IND. L. J. 747 (2000).

7. For an analysis of the predicament of those inner cities unable to tap the resources of their surrounding suburbs, see DAVID RUSK, *BALTIMORE UNBOUND* (1996); GERALD E. FRUG, *CITY MAKING* 132–38 (1999).

8. The term weak-market city is taken from PAUL C. BROPHY, *MAKING NEIGHBORHOOD INVESTMENT COUNT IN BALTIMORE* (2003), a comparative study of four such cities—Baltimore, Philadelphia, Pittsburgh, and Cleveland. The term weak market refers not to the frailty of the regional housing market, as a whole, but instead to the comparative weakness of the inner-city residential market in relation to that of its suburbs. Brophy states that “all [four cities studied] can be considered ‘weak-market’ cities, places where populations are falling, as are housing prices in some neighborhoods, but the housing stock is potentially attractive to buyers and investors.” *Id.* at 3.

9. DAVID BOEHLKE, *GREAT NEIGHBORHOODS, GREAT CITY* 2–3 (2001).

10. A triage approach that focuses limited resources on those neighborhoods most likely to respond has shaped funding policies for the last twenty-five years. DENNIS R. JUDD & TODD SWANSTROM, *CITY POLITICS* 230 (2002). Historically, urban redevelopment authorities have offered up blighted neighborhoods as found real estate for new commercial activity. Benjamin B. Quinones, *Redevelopment Redefined: Revitalizing the Central City with Resident Control*, 27 U. MICH. J.L. REFORM 689, 699 (1994). True development, however, of both the people and the buildings of a poor community is a long-term investment that must be supported by increased federal assistance as well as economic returns from growth elsewhere in the city, if not the region. See DAVID RUSK, *INSIDE GAME/OUTSIDE GAME: WINNING STRATEGIES FOR SAVING URBAN AMERICA* (1999).

11. See SIMON, *supra* note 4, at 43–45.

12. MALCOLM GLADWELL, *THE TIPPING POINT* 141 (2000).

13. *Id.* at 142–50.

14. Although the eradication of dilapidated buildings can transform a community on many levels, I do not mean to suggest that vacant house renovation alone can revive a struggling urban neighborhood; for a review of the many components that make up a truly comprehensive community revitalization strategy, see MARCUS POLLOCK & ED RUTKOWSKI, *THE URBAN TRANSITION ZONE: A PLACE WORTH A FIGHT* 37–50 (1998).

15. For a somewhat parallel classification of landlords involved in “milking” substandard occupied apartment buildings, see Robin Powers Kinning, *Selective Housing Code Enforcement and Low-Income Housing Policy: Minneapolis Case Study*, 21 FORDHAM URB. L.J. 159, 179–81 (1993).

16. In the context of occupied apartment buildings, the market can encourage neglect to maximize return through rental income. See Duncan Kennedy, *The Effect of the Warranty of Habitability on Low-Income Housing: "Milking" and Class Violence*, 15 FLA. ST. U. L. REV. 485, 490–96 (1987).

17. *Goldsborough v. State*, 278 A.2d 263 (Md. 1971).

18. *Lynch v. Lynch*, 677 A.2d 584 (Md. 1996); *McNeil v. Director, Patuxent Institution*, 407 U.S. 245 (1972).

19. FRANK P. GRAD, *LEGAL REMEDIES FOR HOUSING CODE VIOLATIONS* (1968); Harvard Law Review Association, Note, *Enforcement of Municipal Housing Codes*, 78 HARV. L. REV. 801 (1965); Judah Gribetz, *New York City's Receivership Law*, 21 J. HOUSING 297 (1964); Judah Gribetz & Frank P. Grad, *Housing Code Enforcement, Sanctions and Remedies*, 66 COLUM. L. REV. 1254 (1966). This past year, Frank Alexander has renewed the call for a shift from in personam remedies to in rem proceedings. Frank S. Alexander, *Breaking Barriers to Living Land: Converting Liabilities to Assets* (slide 4), Remarks at the kicking off of the National Vacant Properties Campaign (July 9, 2003).

20. N.Y. MULT. DWELL. LAW § 309 (McKinney 2001); CONN. GEN. STAT. ANN. § 47a-14a (West 1994); see GRAD, *supra* note 19.

21. N.Y. MULT. DWELL. LAW § 309(5)(d)(1) (McKinney 2001); see N.Y. REAL PROP. ACTS LAW § 778 (McKinney 2003); MO. ANN. STAT. § 441.590 (West 2001 & Supp. 2002); OR. REV. STAT. § 794 (2003); R.I. GEN. LAWS § 34-44-6 (1956); OHIO REV. CODE ANN. § 3767.41 (West 1996).

22. See N.Y. MULT. DWELL. LAW § 309(4) (McKinney 2001); see also N.Y. REAL PROP. ACTS LAW § 778 (McKinney 2003); MO. ANN. STAT. § 441.590(6) (West 2001 & Supp. 2002); R.I. GEN. LAWS § 34-44-6(9) (1956).

23. See N.Y. REAL PROP. ACTS LAW § 770 (McKinney 1962 & Supp. 2003); MO. ANN. STAT. § 441.510 (West 2000); OR. REV. STAT. § 105.430 (1989); R.I. GEN. LAWS § 34-44-3 (1956); D.C. CODE ANN. § 42-3651.03(b) (2002 Supp.); OHIO REV. CODE ANN. § 3767.41 (West 1996). For a practice guide on the use of the Ohio statute for the rehabilitation of both occupied and vacant structures, see COMMUNITY ADVOCACY CLINIC OF CLEVELAND-MARSHALL COLLEGE OF LAW, *PUBLIC NUISANCE ABATEMENT AND RECEIVERSHIP* (2001).

24. Since 1986, the Community Law Center has been providing legal representation and counsel to community organizations in Baltimore. For more information, visit [www.communitylaw.org](http://www.communitylaw.org).

25. Baltimore City uses the BOCA code, now known as the International Building Code.

26. BALT., MD., INT'L BUILDING CODE § 121 (2003). To establish code enforcement receivership by local ordinance, the local government must already have the express power to create a judicial remedy to enforce the standard. Broad authority to enact building code standards is insufficient. See *City of St. Louis v. Golden Gate Corp.*, 421 S.W. 2d 7 (Mo. 1967) (striking down a St. Louis receivership ordinance as beyond municipal legislative authority).

Maryland authorizes its chartered counties, including Baltimore City, "[t]o enact local laws . . . for the protection and promotion of public safety, health, morals, comfort and welfare, relating to . . . the erection, construction, repair and use of buildings and other structures; and to enact local laws providing appropriate administrative and judicial proceedings, remedies, and sanctions for the administration and enforcement of such ordinances and amendments." MD. CODE ANN. art. 25A, §5(T) (Michie 1998) (emphasis added). Even when a state makes such

an unusual grant of local legislative authority, the resulting ordinance cannot conflict with existing state law.

27. ROBERT M. SANTUCCI ET AL., *THE COST CUTS MANUAL* (1987).

28. BALT., MD., INT'L BUILDING CODE § 121.2 (2003). Although the language of the ordinance allows the Building Code Official, the Commissioner of Housing and Community Development, to delegate his authority to commence an action to either a nonprofit housing developer or an established community association, the legitimacy of the vacant building receivership sale as a code enforcement remedy requires a separation of the petitioner and qualified developer roles. The petitioner should be free to focus on ensuring the rehabilitation of the vacant house independent of considerations of any financial gain that it might receive if the property were to be transferred to it through a vacant building receivership sale.

29. *Id.* § 121.1.

30. *Id.* § 121.7.

31. *Id.* § 121.13.

32. Ohio and Rhode Island both require that the receiver certify the abatement of the nuisance prior to selling the property. OHIO REV. CODE ANN. § 3767.41(D)(1) (West 1996); R.I. GEN. LAWS § 34-44-12 (1956). Missouri permits sale after two years of inaction by parties in interest. MO. ANN. STAT. § 441.641 (West 2000) (prior to a 1998 amendment, the law required a ten-year waiting period).

33. BALT., MD., INT'L BUILDING CODE § 121.10 (2003).

34. *Id.* § 121.3.

35. *Id.*

36. *Id.* § 123.6.2.

37. *Id.* § 123.7.

38. 339 U.S. 306 (1950).

39. *Id.* at 318.

40. *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791 (1983).

41. *Compare* MD. RULE 2-121 (2003) *with* MD. RULE 2-122 (1984).

42. BALT., MD., INT'L BUILDING CODE §§ 121.1, 121.8 (2003).

43. *Id.* § 115.4.1.

44. *Id.* § 115.4.

45. "A determination of vacancy and a determination of noncompliance with a notice or order issued under this section may be based on observation that a structure:

- a. is open to casual entry,
- b. has boarded windows or doors, or
- c. lacks intact window sashes, walls, or roof surfaces to repel weather entry."

*Id.* § 115.4.2.

In occupied properties, habitability determinations focus on interior conditions, particularly the state of kitchens and bathrooms, which are so vital to human health. The Fourth Amendment, however, does not allow housing inspectors to enter even unoccupied properties to examine the conditions within. Even if unsanitary conditions exist inside an unoccupied property that shows no external defects, a legitimate question might arise as to whether those "hidden" defects present a public nuisance. By zeroing in on outwardly visible signs of

dilapidation, the code accepts the constitutional limits placed on its investigators and strengthens its blanket declaration of nuisance.

46. See N.Y. MULT. DWELL. LAW § 309(1)(a), (2)(a) (McKinney 2001); N.Y. REAL PROP. ACTS. LAW § 772 (McKinney 1962 & Supp. 2003); MO. ANN. STAT. § 441.510(1) (West 2000); OR. REV. STAT. § 105.430 (1989); R.I. GEN. LAWS § 34-44-4.1 (1956); OHIO REV. CODE ANN. § 3767.41(A)(2) (West 1996).

47. BALT., MD., INT'L BUILDING CODE § 121 (2003).

48. *Id.* § 115.4.1.

49. *Id.* § 121.13.1. Prior to rehabilitation, however, this redemption by the owner does not terminate the receivership. A receiver could use the payments to carry out necessary repair work, perhaps by contracting with one of the qualified bidders. The lien would again grow and, perhaps, again be paid off. The renovation could continue in this manner until either the work had been completed or the owner's failure to make payments finally allowed the foreclosure to take place.

50. 123 U.S. 623 (1887).

51. *Id.*

52. For the rejection of a Contracts Clause challenge to the super-priority status of a code enforcement receivership lien, see *Matter of Dept. of Buildings of the City of New York*, 14 N.Y.2d 291, 200 N.E.2d 432 (1964).

53. See *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978). See also Frank I. Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967).

54. RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 108-12 (1985).

55. See *id.* at 110.

56. See *id.* at 126-29.

57. *Id.* at 127.

58. 505 U.S. 1003 (1992).

59. *Id.* at 1029.

60. For a critique of *Lucas*, as well as a discussion of interpreting cases, including a few that involve statutory standards among background principles, see Lynn E. Blais, *Taking, Statutes and the Common Law: Considering Inherent Limitations on Title*, 70 S. CAL. L. REV. 1 (1996).

61. BALT., MD., INT'L BUILDING CODE § 115.4 (2003).

62. See National Vacant Properties Campaign, *How Do Vacant Properties Hurt Communities?*, at [www.vacantproperties.org/hurt/html](http://www.vacantproperties.org/hurt/html) (last visited Dec. 22, 2003) (discussing and listing various sources examining fires among vacant properties).

63. *Lucas*, 505 U.S. at 1004.

64. *Agins v. City of Tiburon*, 447 U.S. 255 (1980).

65. *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974) (stating the right of a grandmother to live with grandchild was unduly burdened by the local zoning ordinance's definition of family). Although the ability to own real property is a significant right defensible through specific relief, the courts have never placed it in the constitutional pantheon of fundamental rights alongside the right to vote, the right to interstate travel, and those freedoms explicitly guaranteed by the First Amendment to the U.S. Constitution.

66. Vacant building receivership makes no distinction by race, religion, gender, national origin, or any other suspect category that would demand height-

ened review. Nevertheless, defendants instinctively invoke the Equal Protection Clause when they complain about their property being singled out for litigation from all of the other vacant houses in the neighborhood. Although nothing in the ordinance makes vacant building receivership vulnerable to such a challenge, petitioners should be prepared to account for their prioritization of vacant houses for prosecution.

67. Paul J. Otterstedt, *A Natural Rights Approach to Regulatory Takings*, 7 TEX. REV. L. & POL. 25, 57 (2002).

68. BALT., MD., INT'L BUILDING CODE § 121.8 (2003); even this legislative directive presupposes that the court is satisfied that a suitable candidate is prepared to serve as the receiver.

69. *Id.*

70. EPSTEIN, *supra* note 54, at 134.

71. For a discussion of how a remedy similar to vacant building receivership might withstand constitutional challenge as a species of eminent domain, see David T. Kraut, *Hanging Out the No Vacancy Sign: Eliminating the Blight of Vacant Buildings from Urban Areas*, 74 N.Y.U. L. REV. 1139 (1999).

72. BALT., MD., INT'L BUILDING CODE § 121.3.2 (2003).

73. WILLIAM PETERMAN, NEIGHBORHOOD PLANNING AND COMMUNITY-BASED DEVELOPMENT 35 (2000).

74. JOEL F. HANDLER, DOWN FROM BUREAUCRACY 6–8 (1996).

75. *See id.* at 9.

76. *See id.* Peterman offers a similar analysis of the term *empowerment*. PETERMAN, *supra* note 73, at 35–37.

77. HANDLER, *supra* note 74, at 115. Perhaps one could argue that empowerment actually refers to the process by which such control is achieved. Webster's Ninth Collegiate Dictionary (1983) defines *empower* as "to give legal authority."

78. Vacant building receivership is just one of three statutes of this type that Anne Blumenberg has championed. The Drug Nuisance Abatement Law allows community associations to seek injunctive relief against those responsible for a property being used in an illegal drug business. MD. CODE ANN., REAL PROP. § 14–120 (1996). The Community Bill of Rights allows community associations in Baltimore to seek injunctions to enforce a wide range of municipal code provisions in matters where local authorities have not yet taken such action. *Id.* § 14–123.

79. In this way, community associations differ from both neighborhood councils, which are generally advisory substructures of municipal governments, and homeowners associations, which are compulsory membership organizations that enforce land use and other rules created at the time of original development of the subdivisions.

80. Saul Alinsky is generally regarded as the father of modern community organizing. *See* JUDD & SWANSTROM, *supra* note 10, at 412–14.

81. *See* PETERMAN, *supra* note 73, at 48–49.

82. Randy Stoecker has argued that the tension between advocacy and production has become too great for the community development movement and that CDCs need to have the size, capacity, and support to focus on technical aspects while community groups must be free to advocate. Randy Stoecker, *The CDC Model of Urban Redevelopment: A Critique and an Alternative*, 19 J. URB. AFF. 493 (1997).

The Community Law Center's receivership program represents community petitioners that have no direct financial interest in any of the developers that might bid at a receivership auction. In this way, these community groups avoid any appearance of conflict of interest as they use the threat of foreclosure to enforce the building code.

83. See N. R. PEIRCE & C. F. STEINBACH, *ENTERPRISING COMMUNITIES: COMMUNITY-BASED DEVELOPMENT IN AMERICA* (1990); VIDAL, *supra* note 4. Even those skeptical of CDCs' results in areas such as consumer banking and small business development have acknowledged their accomplishments in the production of decent, affordable housing. See Nicholas Lemann, *The Myth of Community Development*, N.Y. TIMES SUNDAY MAG., Jan. 9, 1994, at 38, 54.

84. See U.S. DEP'T OF HOUS. & URBAN DEV, *supra* note 5.

85. See *id.* at 9–10, 47–58.

86. Under the doctrine of custodia legis, jurisdictional priority between simultaneous in rem proceedings goes not to the first court to receive initial pleadings but to the first court to assert possessory control over the property. See ALEXANDER GORDON, *GORDON ON MARYLAND FORECLOSURES* § 8.02 (3d ed. Supp. 1999).

87. In an eighteen-month period in 2000 and 2001, the owners of some two dozen vacant properties were notified of an imminent receivership filing. The owners rehabilitated approximately half of the properties, and the other half found their way to the Patterson Park CDC. Of the half that went to the Patterson Park CDC, only three went all the way through the receivership auction process.

88. The State of Maryland currently offers a 20 percent credit for approved work of at least \$5,000. MD. CODE ANN., TAX-GEN. § 10–704.5 (2002); MD. CODE ANN. art. 83B, § 5–801 (2002 Supp.). The availability of a pervasive subsidy like an historic tax credit can mean a lot more to the market stability of a healthy neighborhood than several infusions of project-specific subsidies.

89. *Hallock v. State*, 474 N.E.2d 1178, 64 N.Y.2d 224 (1984) (upholding enforceability of consent orders).

90. See Robert H. Nelson, *Privatizing the Neighborhood: A Proposal to Replace Zoning with Private Collective Property Rights to Existing Neighborhoods*, 7 GEO. MASON L. REV. 829 (1999).

91. See George Liebmann, *Devolution of Power to Community and Block Associations*, 25 URB. LAW 335 (1993).

92. An accompanying critique of Robert Nelson's proposal points out that imposition of local authority over those who voted against it will create inefficiencies. Steven J. Eagle, *Privatizing Urban Land Use*, 7 GEO. MASON L. REV. 905, 911–12 (1999). But the critique does not point out that even those who initially embrace the idea of creating a suburban-style scheme of land use control might later regret their support and find that exiting the community is the only way to withdraw from the system. Thus, even unanimity for the establishment of such authority does not guarantee efficiencies going forward.

93. The need for healthy urban community strategies based on functioning of the market cannot be understated. Paul C. Brophy & Kim Burnett, *Building a New Framework for Community Development in Weak Market Cities*, Community Development Partnership Network Report (2003). Paul C. Brophy and Kim Burnett stated:

Community-based organizations, especially CDCs, . . . are a critical part of any weak market agenda because they can help ensure that the ap-

proaches being taken are based on the realities of the market conditions in their areas. Community-based organizations . . . have the potential to shape community interventions based on knowledge of market forces.

*Id.* at 23.

94. SIMON, *supra* note 4, at 42–48.

95. *Id.* at 58–62.

96. *Id.* at 60–61.

97. *Id.*

98. This kind of empowerment goes to the very heart of the community organizing philosophy:

When Saul Alinsky and his Catholic friends applied the union techniques to community organization, the lesson was that the city, too, was a marketplace. Unorganized people were powerless; only organization of human resources could enable groups without money or influence to play the market game in politics and society. In 1965, the war on poverty's community action program tried to transfer resources to fund community organization, but the political stakes were too high. The government was not to foster formation of new organized groups to enter the urban struggle. Alinsky, like Gompers before him, knew it all along: the only worthwhile organizations are those people build for themselves, the only worthwhile goals are those people set for themselves, [and] the only permanent gains are those achieved through the struggles of the marketplace.

GREGORY F. PIERCE, *ACTIVISM THAT MAKES SENSE* 50 (1984), quoting David O'Brien, *Some Reflections on the Catholic Experience in the United States*, in *CATHOLIC CHURCH: UNITED STATES EXPERIENCE* 33 (Irene Woodward ed., 1978).

99. HANDLER, *supra* note 74, at 166–68.