

HANGING OUT THE NO VACANCY SIGN: ELIMINATING THE BLIGHT OF VACANT BUILDINGS FROM URBAN AREAS

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Despite recent aggressive efforts to revitalize distressed urban communities, city governments have been unable to find an effective solution for the problem of vacant buildings. Such properties adversely affect the surrounding community, increasing crime and the risk of fire while posing health hazards to nearby residents. Because many owners continue to pay taxes on vacant buildings with the speculative hope of future profit from sale or condemnation, city governments have a particularly difficult time seizing the properties without paying exorbitant amounts of just compensation. In this Note, David Kraut suggests a new way for city governments to eliminate these properties. First, Kraut argues that municipal governments should have the power they currently lack to seize vacant buildings with a substantial number of local housing code violations or that have been vacant for a significant amount of time. Kraut then suggests lowering the amount of just compensation paid for these buildings by discounting the property based on how much it would cost to bring the property up to code standards. He concludes by discussing some of the potential constitutional issues that could be raised by disgruntled property owners.

INTRODUCTION

Miserable and disreputable housing conditions may . . . be an ugly sore, a blight on the community which robs it of charm, which makes it a place from which men turn. The misery of housing may despoil a community as an open sewer may ruin a river.¹

Every day, in urban communities across the country, vacant buildings haunt neighborhoods, blighting the city landscape, lowering surrounding property values, increasing crime and the risk of fire, and posing hazards to children.² Often, owners hold these buildings for speculative purposes, ignoring maintenance with the hope that property values in the surrounding community will rise.³ While cities can

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¹ *Berman v. Parker*, 348 U.S. 26, 32-33 (1954).

² See *infra* Part I.A.

³ See *infra* Part I.B.

use their tax authority to seize abandoned buildings⁴ because of tax delinquency,⁵ cities have no such financial claim on vacant buildings and thus cannot intervene until the property poses a health or safety threat to the community.⁶

Yet, even when properties do pose such a threat, the traditional channels of seizure, or condemnation,⁷ have proven expensive and time-consuming.⁸ While courts have granted cities broad power to seize property for public use under the Fifth and Fourteenth Amendments,⁹ this power is limited by the requirement that the government provide "just compensation" to the deprived owner.¹⁰ Such a requirement ultimately benefits owners, some of whom purchase property

⁴ This Note distinguishes between vacant and abandoned buildings, defining the latter as vacant properties that are also tax delinquent and for which services are not paid or provided. See Michael R. Greenberg et al., *The TOADs: A New American Urban Epidemic*, 25 *Urb. Aff. Q.* 435, 437-38 (1990) (citing definition from 1971 National Urban League and Center for Community Change study). In addition, vacant and abandoned buildings are distinguished from short-term vacant buildings. Short-term vacancy is a normal and healthy part of the real estate cycle, providing opportunities for residents and business owners to find units whose net utility gain is greater than their current unit. See generally Denise DiPasquale & William C. Wheaton, *Urban Economics and Real Estate Markets* 227 (1996).

⁵ See, e.g., New York, N.Y., Code § 11-401(4) (1997).

⁶ See, e.g., 35 Pa. Cons. Stat. § 1712.1 (1998) (specifying eight criteria relating to health and safety threats that city can claim in condemning property); Tenn. Code Ann. § 13-21-202 (1999) (allowing county to condemn property that is vacant and blighted if owner does not respond to repair requests); New Britain, Conn., Code ch. 7, art. III (Supp. 1995) (allowing city to fine and eventually condemn blighted vacant buildings).

⁷ Condemnation is generally defined as "the process by which private property is taken for public use without the consent of the property owner upon the award and payment of just compensation." Rev. Rul. 58-11, 1958-1 C.B. 273.

⁸ See Thomas W. Merrill, *The Economics of Public Use*, 72 *Cornell L. Rev.* 61, 80 (1986) (arguing that government does not use eminent domain in markets where supply is fixed because condemnation is too expensive); see also *City Tackles Abandoned Property*, *The Providence Sunday J.*, Aug. 4, 1996, at 4B, available in Lexis, News Library, PRVJNL file (describing Providence's seizure of blighted buildings as "time-consuming and expensive to implement"); Carol Napolitano, *Plan Raises Landlord's Appeal Fee*, *Omaha World Herald*, May 31, 1996, at 15, available in Lexis, News Library, OMWHLD file (finding that condemnation cases in Omaha take average of 18 months to close).

⁹ See U.S. Const. amend. V ("[N]or shall property be taken for public use, without just compensation."). For discussion of how courts analyze eminent domain seizures, see *infra* notes 177-82 and accompanying text. While the Fifth Amendment applies only to the federal government, the Fourteenth Amendment extends the Fifth Amendment to the states. See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 122 (1978) (affirming that Fifth Amendment is applicable to states through Fourteenth Amendment).

¹⁰ U.S. Const. amend. V; see also Frank I. Michaelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 *Harv. L. Rev.* 1165, 1236 (1967) (explaining that just compensation forces government to internalize condemnation decision and discourages rash uses of eminent domain power).

with the hope of profiting from city condemnation,¹¹ but it can be an exorbitant cost for financially strapped cities.¹²

Even when the cost is affordable for cities, red tape can obstruct the condemnation process so completely that by the time the city has taken title to the building, the structure is beyond repair and must be demolished.¹³ The subsequent vacant lot leaves dead space in neighborhoods, attracting crime and detracting from the cohesiveness of a residential or commercial environment.¹⁴ As a result, demolition can add to the problems posed by vacant buildings. Moreover, even if the city gains title to the building and the structure is redeemable, city ownership is generally inefficient and can only exacerbate the problems caused by the vacant building.¹⁵

This Note advocates a potential solution to this dilemma: Allow the city to force owners of vacant buildings to fix all housing code violations that adversely affect the surrounding community. Owners who refuse to abide by these requests would have their properties seized through eminent domain,¹⁶ but instead of paying fair market value, the city would pay only the value of the property less the cost of remedying the code violations. The property would then be transferred at no cost to third parties, such as nonprofit community devel-

¹¹ See, e.g., *Foiling Rappaport-ism: To Stop This Blight-Maker, the City Must Be as Shrewd and Resourceful as He Is*, *Philadelphia Inquirer*, Apr. 16, 1993, at A22 (describing how developer has profited from holding properties without maintaining them until they are condemned).

¹² See Bruce Lindeman, *Anatomy of Land Speculation*, 42 *J. Am. Inst. Planners* 142, 150 (1976) (noting that government often pays excessively in condemnation proceedings).

¹³ See Task Force on City Owned Property, *The In-Rem Organizer's Sourcebook 2* (Michelle Cotton ed., 1995) (asserting that buildings seized through in rem program were greatly deteriorated); Lee Bey, *Rehab Can Lift Old Buildings off Fast Track*, *Chi. Sun-Times*, Oct. 12, 1998, at 16, available in Lexis, News Library, CHISUN file (quoting Housing Commissioner Julia Starch as lamenting that by time city got title to 146 abandoned buildings, "they were so far gone they had to be demolished"). In rem forfeitures have been defined as "confiscations of property rights based on improper use of the property, regardless of whether the owner has violated the law." *Austin v. United States*, 509 U.S. 602, 624 (1993) (Scalia, J., concurring).

¹⁴ "Environmental criminologists argue that construction designs that minimize dead space and maximize public surveillance can substantially reduce the incidence of crime." Mitchell B. Chamlin & John K. Cochran, *Social Altruism and Crime*, 35 *Criminology* 203, 221 (1997).

¹⁵ See John O. Norquist, *How the Government Killed Affordable Housing*, *Am. Enterprise*, July-Aug. 1998, at 68, 68 (arguing that government "intervention in housing has been a disaster for cities and the people who live in them"). But see Michael H. Schill, *Privatizing Federal Low Income Housing Assistance: The Case of Public Housing*, 75 *Cornell L. Rev.* 878, 910 (1990) (claiming that government housing can improve certain neighborhoods and provide housing where private sector fails).

¹⁶ "Eminent domain is the power of government to force transfers of property from owners to itself" or sometimes to other private parties. See Jesse Dukeminier & James E. Krier, *Property* 1102 (4th ed. 1998).

opment corporations and for-profit developers, who are interested in immediately developing the property.¹⁷ Such a policy would encourage active maintenance of vacant buildings and prevent owners from allowing their properties to deteriorate to the point where other residents and owners are adversely affected. Moreover, unlike a seizure that requires the city to pay fair market value despite the dilapidated condition of the vacant building, this proposal minimizes the cost for cities if the building is in poor shape and denies speculators profit from a city's condemnation process.

Part I.A of this Note surveys the empirical data and academic research that establishes the negative effects vacant buildings have on urban communities. Part I.B discusses why owners keep their buildings vacant. Part I.C examines two cities' attempts to combat this problem: New York City's Local Law 37, which allows the city to transfer tax-defaulted, distressed dwellings from their owners to third parties, and Chicago's Fast Track program, which allows the city to demolish vacant one- to two-story residential buildings. Part II then proposes an alternative law based on previous city and state efforts, but aims to make such efforts more cost effective by mandating reduced compensation due to a vacant building's blighted condition. By offering an alternative, this Note hopes to inspire city officials to take a new activist stance against speculative and absentee property owners.

I

THE BLIGHT OF VACANT BUILDINGS

Developer Samuel Rappaport had a unique impact on the city of Philadelphia. The largest commercial landlord in the downtown Center City neighborhood, Rappaport was famous for purchasing buildings, letting them sit vacant while putting little or no money into their maintenance, and waiting for years and sometimes decades for the right time to sell.¹⁸ Blocks of Center City were filled with his empty buildings, marked by broken windows and graffiti and populated by drug dealers and derelicts.¹⁹ Rappaport continued to pay taxes on the buildings in order to keep legal possession for future sales, but the poor condition of the buildings meant that the taxes

¹⁷ While for- and nonprofit owners are driven by different motives, this Note assumes that under the requirements of the proposed solution, both types of owners will at least keep the properties well maintained and will make strong efforts to find tenants.

¹⁸ See Ginny Wiegand & Anthony R. Wood, *Speculation Breeds Decay and Dismay*, *Philadelphia Inquirer*, Apr. 4, 1993, at A1.

¹⁹ See *id.*

were minimal.²⁰ Thus, Rappaport's properties had all of the disadvantages of an abandoned building, but his diligence in paying taxes meant the city could not seize the property without condemning it. Such action would result in the city paying inflated amounts of just compensation based not on the tax assessment, but rather on speculative future use.²¹

This particular dilemma illustrates why most city blight ordinances target abandoned, not vacant structures. While vacant buildings can have the same adverse effects on the surrounding neighborhood as abandoned structures, the continued presence of the vacant building's owner greatly increases the cost of using legal mechanisms to resolve such problems. This Part explores what effects vacant buildings have on the surrounding community, explains why property owners let their buildings remain vacant, and examines some methods cities are currently using to combat the problem.

A. Vacant Buildings: Their Economic and Psychological Effects

Merely eliminating vacant buildings cannot alleviate all the problems in dense urban areas—a significant number of independent social ills affect such communities.²² However, as this section will demonstrate, vacant buildings contribute greatly to the woes of urban areas because they are typically untended and undermaintained.²³ Yet, despite the adverse effect vacant buildings have on the surround-

²⁰ See *id.*

²¹ Court records showed that, on average, Rappaport sold his properties to the government or private developers for two-and-a-half to three times what he paid for them. See *id.*

²² For a more detailed discussion of these problems, see generally William Julius Wilson, *The Truly Disadvantaged* (1987).

²³ See J. Eck and William Spelman, *Problem-Solving 67-72* (1987) (showing that vacant apartments provided easy criminal staging grounds for gangs); William Spelman, *Abandoned Houses: Magnets for Crime?*, 21 *J. Crim. Just.* 481, 488 (1993) (showing that because of lack of supervision, vacant buildings are attractive to illegal users). In this respect, vacant buildings are identical to abandoned buildings. The similarity explains why many studies on distressed housing use the terms "abandoned" and "vacant" interchangeably. See, e.g., William T. Nachbaur, *Empty Houses: Abandoned Buildings in the Inner City*, 17 *How. L.J.* 3, 10-14 (1971) (using vacant and abandoned interchangeably in study of Washington, D.C., properties); Spelman, *supra*, at 484 (defining abandoned building as "any residential building that had been vacant for three months or more or had been vacant for less time but was not uninhabitable"); George Sternlieb and Robert W. Burchell, *Fires in Abandoned Buildings, in The Social and Economic Consequences of Residential Fires* 261, 262 (Chester Rapkin ed., 1983) (observing that abandoned usually "refers to buildings that are vacant of tenantry"). Even some cities consider neglected, vacant buildings to be "abandoned." See Chicago Dep't of Bldgs., *Abandoned Buildings* (visited Sept. 1, 1999) <<http://www.ci.chi.il.us/Buildings/Community/AbandonedBuildings.html>> (defining abandoned buildings as those "that are vacant, hazardous to the surrounding community and deteriorating due to an owner's lack of interest"). Likewise, this Note will use studies on

ing neighborhood, owners continue to hold on to them in the hope that future condemnation or development in the area will dramatically increase the value of the land.²⁴ This strategy demonstrates the important distinction between the value of the land and the value of the building on the land. While a building may decrease in value because of age and use, land will often appreciate due to events in the surrounding community, such as a major urban revitalization event.²⁵ Thus, in the hope of an increase in land value, owners are often willing to forego maintenance on their own property, which generally results in a decrease in the building value. Such a strategy ultimately creates untended property.

Sociologists James Wilson and George Kelling have described the problem of untended property as the "Broken Windows" syndrome.²⁶ Their theory postulates that one broken window, if left in disrepair, will actually lead people to break more windows. The underlying assumption of such behavior is that where no one is tending the property, breaking more windows poses little risk.²⁷ Applying this theory

both types of buildings to demonstrate the adverse effects of untended, vacant structures on a neighborhood.

²⁴ See *infra* Part I.B.

²⁵ See, e.g., Audie Blevins and Katherine Jensen, *Gambling as a Community Development Quick Fix*, 556 *Annals Am. Acad. Pol. & Soc. Sci.* 109, 117 (1998) (describing escalation in land prices due to speculation about profits from building casinos when gambling was legalized in Deadwood, South Dakota); Fred E. Foldvary, *Market-hampering Land Speculation: Fiscal and Monetary Origins and Remedies*, 57 *Am. J. Econ. & Soc.* 615, 622 (1998) (noting that "[s]peculators who anticipate where the next subway will be built or influence where government will lay out the infrastructure servicing a new development can reap the subsequent rents"); Donald G. Hagman, *Open Space Planning and Property Taxation—Some Suggestions*, 1964 *Wis. L. Rev.* 628, 638 (1964) (observing that fair market value of parcel of land can increase dramatically in response to market forces extrinsic to parcel itself).

²⁶ For a detailed explanation of this theory, see James Q. Wilson & George L. Kelling, *Broken Windows*, *Atlantic Monthly*, Mar. 1982, at 29, 29-38. For criticism of the theory, see Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 *Mich. L. Rev.* 291, 295-96 (1998) (discounting Broken Windows theory by performing studies to show disorder is not significantly related to crime); Gary Stewart, Note, *Black Codes and Broken Windows: The Legacy of Racial Hegemony in Anti-Gang Civil Injunctions*, 107 *Yale L.J.* 2249, 2251 (1998) (arguing that Broken Windows theory's grant of broad police discretion can result in violations of civil liberties and oppression of minorities).

²⁷ See James Q. Wilson & George L. Kelling, *Making Neighborhoods Safe*, *Atlantic Monthly*, Feb. 1989, at 46, 48; see also Diane M. Samdahl & Harriet H. Christensen, *Environmental Cues and Vandalism: An Exploratory Study of Picnic Table Carving*, 17 *Env't & Behav.* 445, 454 (1985) (demonstrating that picnic tables that had been scratched and carved were more than twice as likely to be damaged further compared to other tables); Maryalice Sloan-Hewitt & George L. Kelling, *Subway Graffiti in New York*, in *Situational Crime Prevention* 242, 242-49 (Ronald V. Clarke ed., 2d ed. 1997) (presenting case study of New York City subways showing that rapid removal of graffiti reduced total amount of

to a larger scale, other sociologists contend that a physical breakdown in a neighborhood's appearance, typically signaled by a vacant or abandoned building,²⁸ can indicate to both community residents and outsiders that no one is in control or concerned about enforcing the neighborhood's rules of order and thus gives free license to those engaged in destructive behavior.²⁹

Another way to understand a vacant building's effect on a neighborhood is through "epidemic" theory, which postulates that social problems behave like infectious agents and thus spread at a faster rate and to a larger group when they reach a certain threshold or "tipping point."³⁰ This analysis has been applied to explain a variety of sociological phenomena, including white flight,³¹ the effect of highly educated and salaried workers in a neighborhood on the development of

graffiti on subways); Wilson & Kelling, *supra* note 26, at 31 (describing similar phenomenon with parked cars); Martha J. Smith, *Assessing Vandalism Cues in an Experimental Setting* 310-11 (1996) (unpublished Ph.D. dissertation, School of Criminal Justice, Rutgers, The State University of New Jersey) (on file with the *New York University Law Review*) (finding that fences showing signs of vandalism and graffiti were more likely to be damaged compared to clean fences).

The "Broken Windows" theory has become the basis of many cities' approach to fighting crime. See, e.g., George L. Kelling & Catherine M. Coles, *Fixing Broken Windows* 197-98 (1996) (describing how Baltimore community reduced crime by addressing such disorderly problems as vacant property and drug dealers). See generally William J. Bratton, *The New York City Police Department's Civil Enforcement of Quality-of-Life Crimes*, 3 J.L. & Pol'y 447 (1995) (former New York City police chief describes how enforcing small quality-of-life crimes reduced crime).

²⁸ See Wesley G. Skogan, *Disorder and Decline* 40 (1990) (noting that presence of abandoned buildings indicates neighborhood's unhealthy condition); see also Catherine E. Ross & John Mirowsky, *Disorder and Decay: The Concept and Measurement of Perceived Neighborhood Disorder*, 34 *Urb. Aff. Rev.* 412, 413 (1999) (finding that abandoned buildings indicate decay and disorder in neighborhoods and correspond highly to crime levels); Ralph B. Taylor & Stephen Gottfredson, *Environmental Design, Crime, and Prevention*, in *Communities and Crime* 387, 403 (Albert J. Reiss, Jr. & Michael Tonry eds., 1986) (citing criminologist's study that used vacant housing as physical sign of incivility causing disorder).

²⁹ See Wilson & Kelling, *supra* note 27, at 48. Sociologist Sidney Brower articulates a similar idea when discussing the "occupancy" mechanism. Sidney N. Brower, *Territory in Urban Settings*, in *Human Behavior and Environment: Advances in Theory and Research* 179, 184-87 (Irwin Altman et al. eds., 1980). Brower explains that occupancy, communicated to outsiders through signs of investment and responsibility, indicates "the exclusionary nature of the occupancy" and wards off potential intruders. *Id.* at 186.

³⁰ See Jonathan Crane, *The Epidemic Theory of Ghettos and Neighborhood Effects on Dropping Out and Teenage Childbearing*, 96 *Am. J. Soc.* 1226, 1227 (1991); see also Malcolm Gladwell, *The Tipping Point*, *New Yorker*, June 3, 1996, at 32, 38.

³¹ "White flight" refers to the urban phenomenon where a recognizable minority group in a neighborhood reaches a size that motivates others, typically white families, to leave. See generally Thomas C. Schelling, *A Process of Residential Segregation: Neighborhood Tipping*, in *Economic Foundations of Property Law* 307, 307 (Bruce A. Ackerman ed., 1975).

youth,³² and the growth of gangs and gang violence.³³ In addition, it has been applied to explain the negative effect of vacant and abandoned buildings on the residents of a neighborhood.³⁴ Once there is a critical mass of these buildings in a neighborhood, residents leave, and incidents of vacancy and abandonment skyrocket.³⁵ This critical mass need not even be large. A study by the Department of Housing and Urban Development identified the tipping point for abandoned buildings as being between three to six percent of the structures in a neighborhood.³⁶

³² See Crane, *supra* note 30, at 1235-42 (finding that rates of teen pregnancy and school dropouts doubled once percentage of high-status workers dropped below five percent).

³³ See H. Range Hutson et al., *The Epidemic of Gang-Related Homicides in Los Angeles County from 1979 through 1994*, 274 JAMA 1031, 1031, 1034-35 (1995) (relating increase in homicides in Los Angeles to increase in gang activity); see also Colin Loftin, *Assaultive Violence as a Contagious Social Process*, 62 Bull. N.Y. Acad. Med. 550, 550, 554 (1986) (analogizing assaultive violence to disease).

³⁴ See James W. Hughes & Kenneth D. Bleakly, Jr., *Urban Homesteading* 57-58 (1975) (describing how negative effects of abandoned housing can create undesirable neighborhood environment and drive out current homeowners); U.S. Dep't of Hous. and Urban Dev., *Abandoned Housing Research* 9 (1973) [hereinafter *Abandoned Housing*] (concluding that tipping point phenomenon for abandoned buildings exists); Irvin Dagen & Edward C. Cody, *Property, et al. v. Nuisance, et al.*, 26 Law & Contemp. Probs. 70, 73-74 (1961) (positing that legislature could treat blighted housing like "contagious disease which, if not eliminated, will infect the entire community"); Robert A. Solomon, *Building a Segregated City: How We All Worked Together*, 16 St. Louis U. Pub. L. Rev. 265, 315 (1997) (claiming that "vacancies prove to be a major tipping factor" in decline of neighborhoods).

³⁵ See Nachbaur, *supra* note 23, at 10-11 (describing how abandoned buildings drive away residents and owners); Richard K. Green & Michelle J. White, *Urban Abandonments: A Possible Cause and Consequences* 15 (1998) (working paper on file with the *New York University Law Review*) (concluding that "abandonments are good predictors of negative externalities"); see also Jim Haner, *Drugs, Decay and Despair Hover Around City School*, *Baltimore Sun*, Oct. 4, 1998, at 1A, available in Lexis, News Library, BALSUN file (quoting landlord's lawyer as contending that "[n]o landlord in the city wants to spend money fixing a house that's anywhere near a blighted property for the simple reason that the blight will likely spread and destroy [the] investment"). But see William G. Grigsby & Louis Rosenberg, *Urban Housing Policy* 208 (1975) (questioning whether abandonments instigate cycle of withdrawals).

³⁶ See *Abandoned Housing*, *supra* note 34, at 9 (suggesting that at this point "investment psychology becomes so depressed that reversal of the abandonment process is impossible without major external intervention"); Keith Aoki, *Race, Space, and Place: The Relation Between Architectural Modernism, Post-Modernism, Urban Planning, and Gentrification*, 20 *Fordham Urb. L.J.* 699, 804 (1993) ("If even one home in the neighborhood slips into the eyesore/menace category, remaining residents begin devaluing the area and consider moving out if possible."); Marcia Duncan et al., *Redlining Practices, Racial Resegregation, and Urban Decay: Neighborhood Housing Services as a Viable Alternative*, 7 *Urb. Law* 510, 521 & n.52 (1975) (claiming that even one vacant building can drive residents out of neighborhood); Green & White, *supra* note 35, at 14 (finding that probability of neighborhood with one abandonment in 1989 having more than one abandonment in 1993 was greater than neighborhood with no abandonment in 1989 having one abandonment in 1993).

The negative reaction of neighboring landowners to increased vacancy is supported by empirical research. A 1993 study by criminologist William Spelman found that city blocks blighted by unsecured vacant buildings had crime rates that were twice as high as those found in "control blocks" without vacant structures.³⁷ A 1995 community experiment in Baltimore mirrored Spelman's findings.³⁸ Spelman's study also indicated that secured vacant buildings are not as significant a problem for urban areas.³⁹

One of the most common illegal activities in vacant buildings is the distribution and use of narcotics.⁴⁰ As unoccupied properties, va-

³⁷ See Spelman, *supra* note 23, at 485, 488-91 (using scheme where control blocks were two blocks away from case block and resembled case block in predominant land use and ethnic and financial composition); see also Dennis C. Duffala, *Convenience Stores, Armed Robbery, and Physical Environment Features*, 20 *Am. Behav. Scientist* 227, 239-40 (1976) (finding convenience stores near vacant land or away from other places of commerce were more likely to be robbed than those in dense commercial areas); Roslyn Corenzwit Lieb et al., *Student Project, Abandonment of Residential Property in an Urban Context*, 23 *DePaul L. Rev.* 1186, 1195 (1974) (citing 1960s Chicago Police Department statistics showing correlation between substantial increase in structural abandonment and murder rate).

Oscar Newman, an influential urban planner, disagrees with such findings, arguing that crime causes abandonment, not the other way around. See Oscar Newman, *Community of Interest* 90 (1980) (citing 1975 U.S. Department of Housing and Urban Development (HUD) study to show that crime causes vacancy); see also Nachbaur, *supra* note 23, at 11 ("Vacant buildings do not cause the crime problem even though they worsen it."). Spelman responds to such criticism by arguing that the abandoning owners in his study were absentee landlords, not residents, who reacted to plummeting real estate prices caused by the drop in regional demand, not higher crime rates. See Spelman, *supra* note 23, at 491; see also Leo Schuerman & Solomon Kobrin, *Community Careers in Crime*, in *Communities and Crime*, *supra* note 28, at 67, 68 (showing in study of Los Angeles's highest-crime areas that neighborhood structural deterioration precedes crime).

³⁸ In a high-crime, dilapidated section of town, the city government and residents joined forces to board up vacant houses, turn vacant lots into gardens, and pursue nuisance abatement cases against six drug dens. See Kelling & Coles, *supra* note 27, at 197. The result was a 56% drop in violent crime from 1993 to 1995 and an 80% decline in narcotics complaints and arrests. See *id.* at 198.

³⁹ See Spelman, *supra* note 23, at 488-89 (revealing that while only 34% of secured vacant buildings were being used for illegal activities, 83% of unsecured vacant buildings were being used for illegal activities, and that blocks with vacant but secured buildings had only about 30% more reported crimes than control blocks). Spelman's study defined illegal activities as drug crimes, prostitution, and property crimes, but Spelman suggested that his findings were an underestimate because evidence of illegal use may have been removed by owners, neighbors, or illegal users prior to the inspections. See *id.* at 489.

While securing vacant buildings alleviated some problems, Spelman and other academics have shown that such measures can still be sabotaged by vandals. See *id.* at 487 (showing that 19% of secured vacant buildings in study were broken into); see also Sternlieb & Burchell, *supra* note 23, at 267 (citing fire officials' estimate that average life span of plywood as securing device for abandoned structures is less than one day, which results in owners eventually giving up in attempting to secure buildings).

⁴⁰ See Greenberg et al., *supra* note 4, at 436 (conducting study showing that in 14 of 15 largest American cities, vacant buildings are frequently used as crack houses); see also Steve Berry, *Developer Given Two Weeks to Board Buildings Marked for Quake Repairs*,

cant buildings are ideal places for the trade, storage, and sale of drugs because activity within them cannot be seen from the street and police officers are reluctant to enter due to the constitutional constraints on searching private property⁴¹ and the minimal chance of making a significant arrest.⁴² Other crimes commonly committed in vacant buildings include prostitution⁴³ and sexual assaults.⁴⁴ In addition, Spelman discovered that almost all of the unsecured buildings in his study were plundered by trespassers and that eight percent of all the abandoned residential buildings studied contained stolen goods.⁴⁵

Gang members are also likely to use the buildings as hangouts where they can plan crimes, fight, or engage in other activities that would attract public attention.⁴⁶ These criminal hangouts pose a significant risk to people who live or work nearby since offenders rarely commit crimes outside of their "awareness space," the areas in which they live, work, or entertain themselves.⁴⁷

L.A. Times (Valley Edition), Feb. 12, 1997, at B4, available in Lexis, News Library, LAT file (describing how vacant buildings in earthquake-damaged area became sites for drug dealing); Nightline: *Bushwick—Coming Back* (ABC television broadcast, Feb. 6, 1997), transcript available in Lexis, News Library, ABCNEW file (describing how abandoned buildings were used for drug sales).

⁴¹ See, e.g., *Camara v. Municipal Court of San Francisco*, 387 U.S. 523, 528-29 (1967) ("[A] search of private property without proper consent is [a violation of the Fourth Amendment] unless it has been authorized by a valid search warrant.").

⁴² See Spelman, *supra* note 23, at 488 ("[T]here is minimal payoff associated with a street-level bust. Narcotics officers are after bigger fish and open street dealers."); see also Nightline, *supra* note 40 (describing how abandoned buildings allow drug dealers to hide from police).

Spelman found evidence of drug use in 19% of the vacant buildings in his study. See Spelman, *supra* note 23, at 488; see also Douglas Longshore, *Prevalence and Circumstances of Drug Injections at Los Angeles Shooting Galleries*, 42 *Crime and Delinq.* 21, 27 tbl.3 (1996) (citing data that shows 26.2% of current injection drug users utilized vacant buildings as sites for drug use).

⁴³ See Spelman, *supra* note 23, at 488 (finding evidence of sexual activity and prostitution in 20% of all abandoned residential buildings in study); see also Berry, *supra* note 40, at B4 (describing how vacant buildings in earthquake-damaged area became sites for prostitution).

⁴⁴ See Andrew Martin, *City Teardown Policy Has Gone Too Far, Critics Say*, *Chi. Trib.*, Mar. 1, 1998, at C1 (quoting Commander Ronald Evans as saying that Chicago's demolition of abandoned buildings reduced number of sexual assaults in his area by 20% in one year); Sharman Stein, *Abandoned Buildings Are Prime Crime Sites*, *Chi. Trib.*, Feb. 10, 1992, at C1 (reporting that five percent of Chicago's sexual assaults occurred in abandoned buildings, with five rapes in one week, two of preteenage children).

⁴⁵ See Spelman, *supra* note 23, at 488-89; see also Eck & Spelman, *supra* note 23, at 72 (finding from case study of Virginia public housing complex that burglary rate dropped by 35% after vacant buildings were sealed).

⁴⁶ See Spelman, *supra* note 23, at 482.

⁴⁷ See Patricia L. Brantingham & Paul J. Brantingham, *Notes on the Geometry of Crime*, in *Environmental Criminology* 27, 35 (Paul J. Brantingham & Patricia L. Brantingham eds., 1981). See generally J. Douglas Porteous, *Environment and Behavior* 19 (1977) (discussing how the urban environment influences human behavior).

Unwatched and full of combustible material, vacant buildings can become easy targets for arsonists. A study of Newark, New Jersey, in the early 1970s found that despite amounting to less than 5% of the total number of structures in the city, vacant buildings constituted 21.2% of all severe fires from 1970 through 1971.⁴⁸ Vacant buildings are also frequently below housing standards and sometimes exhibit signs of substantial deterioration.⁴⁹ These dilapidated conditions put passersby and neighbors at risk and pose a special threat to children, who may wander in and injure themselves.⁵⁰

Economists might describe the effects of vacant buildings as a negative financial externality⁵¹ because the buildings reduce the value of neighboring homes⁵² and lead to disinvestment in the neighborhood.⁵³ They also have a significant impact on a city's fiscal health. Since the assessed value of vacant property is almost always less than

⁴⁸ See Sternlieb & Burchell, *supra* note 23, at 264; see also Edward D. Sargent, *Criminals Are Right at Home in District's Vacant Buildings*, Wash. Post, Mar. 19, 1981, at D.C.1 (describing roving arsonist who set fire to 30 vacant buildings in five month period).

⁴⁹ See Spelman, *supra* note 23, at 488 (finding only 42% of vacant buildings up to standard).

⁵⁰ See Peter C. Olden, *Well-Being Revisited: Improving the Health of a Population*, 43 *J. Healthcare Mgmt.* 36, 44 (1998) (reporting that many pediatric admissions at Harlem Hospital Center were for injuries sustained in abandoned buildings); see also *Runkel v. City of New York*, 123 N.Y.S.2d 485, 489 (App. Div. 1953) (finding property owner liable for injuries to trespassing infants).

⁵¹ The classic definition of a negative externality is an activity that adversely affects another person without that person being compensated for bearing the burden of the activity. See Paul A. Samuelson & William D. Nordhaus, *Economics* 745 (16th ed. 1998). Urban economists have also described abandoned buildings as negative externalities. See Edwin S. Mills & Bruce W. Hamilton, *Urban Economics* 227 (4th ed. 1989); Arthur O'Sullivan, *Urban Economics* 374 (3d ed. 1996).

⁵² See Andrew J. Gold, *The Trinity Initiative in Economic Perspective: Place or People Prosperity?*, 30 *Conn. L. Rev.* 1317, 1337 (1998) (reporting study of Minneapolis that suggested abandoned housing negatively affects value in neighboring housing); Greenberg et al., *supra* note 4, at 436 (finding that abandonment lowers property values of surrounding community); see also Stephen J. Polaha, *Housing Codes and the Prevention of Urban Blight—Administrative and Enforcement Problems and Proposals*, 17 *Vill. L. Rev.* 490, 500 (1972) (describing how blighted property deters individuals from purchasing homes in neighborhood); cf. Bruce Gottschall and Francine Justa, *NeighborWorks Is Working*, *Mortgage Banking*, Sept. 1997, at 38, 52-53 (observing that after rehabbing almost one hundred vacant buildings in Chicago's Roseland Neighborhood, property values rose). But see Mills & Hamilton, *supra* note 51, at 230 (asserting that empirical studies have failed to find systematic negative effect on price of single-family homes caused by "undesirable" neighboring land uses, although absence of such finding may be due to methodological limitations).

⁵³ See *Abandoned Housing*, *supra* note 34, at 52-53; Richard P. Taub et al., *Paths of Neighborhood Change* 136-37 (1984) (presenting evidence that high levels of vandalism have negative effect on neighborhood's perceived economic future and on financial investments residents are willing to make); Duncan et al., *supra* note 36, at 511, 514 (observing that lenders withdraw capital from neighborhoods they consider unstable); Polaha, *supra* note 52, at 500 ("When signs of blight . . . appear in an area, banks and other financial

that of improved land, a large number of vacant buildings will erode the city's tax base as well as reduce property values of neighboring buildings.⁵⁴ In addition, the city generally has to absorb the added costs of nuisance abatement for vacant property by sealing buildings and attempting to keep them free of debris and weeds.⁵⁵ Even when a city places liens on the property to recover these costs, it rarely receives any money from the owner.⁵⁶ With a reduced tax base and smaller population to serve, some cities respond by decreasing fire and police services to an area, further damaging the neighborhood and its residents.⁵⁷

Attracting disorder⁵⁸ and crime to an area, vacant buildings intimidate law-abiding citizens, limiting their activity in the neighborhood⁵⁹ and causing a breakdown in the area's "natural surveillance" system. In *The Death and Life of Great American Cities*, Jane Jacobs described how pedestrian activity creates this system by providing "eyes upon the street" that contribute to the safety of a neighborhood.⁶⁰ Pedestrian activity also gives residents and business owners a

institutions, in anticipation of a potential decline in land values in the area, become hesitant to invest there.").

⁵⁴ See Philadelphia City Planning Comm'n, *Vacant Land in Philadelphia* 15 (1995) [hereinafter *Vacant Land*].

⁵⁵ See *id.*; see also Nancy Trejos, *Tackling an Ugly Program*, *L.A. Times*, Dec. 18, 1998, at B2 (finding city absorbs cost of rehabilitation of abandoned buildings at average of \$8,000 per building).

⁵⁶ See *Vacant Land*, *supra* note 54, at 15. A 1985 study by the Philadelphia City Planning Commission documented that multiple years' worth of accumulated liens on vacant properties often exceeded the market value of the property itself. See *id.* (citing Philadelphia City Planning Comm'n, *Demolition/Vacant House Treatment Study* (1985)).

⁵⁷ See Michael R. Greenberg et al., *Community Organizing to Prevent TOADs in the United States*, 28 *Community Dev. J.* 55, 65 (1993); see also Hannelore Sudermann, *Tax Appeal by Soup Plant Spells Park Budget Trouble*, *Sacramento Bee*, Mar. 7, 1996, at N9, available in 1996 WL 3287874 (describing how declines in Sacramento neighborhood's land values has resulted in decrease in fire protection). Ironically, the reduction in property tax revenues has led some cities to cut their housing inspection budgets, contributing further to the decline of a neighborhood's properties. See Spelman, *supra* note 23, at 483.

⁵⁸ "Disorder" refers to two types of breakdowns in a neighborhood: social disorder and physical disorder. Visible signs of social disorder include fights and trouble among neighbors and the presence of people hanging out on the streets, drinking, taking drugs, panhandling, and creating a sense of danger. See Ross & Mirowsky, *supra* note 28, at 413. Physical disorder refers to the overall physical appearance of a neighborhood, including buildings that are in disrepair, abandoned, or have been vandalized. See *id.*

⁵⁹ See Wilson & Kelling, *supra* note 27, at 48 (observing that signs of disorder such as graffiti and urban decay deter law-abiding citizens from walking on streets).

⁶⁰ Jane Jacobs, *The Death and Life of Great American Cities* 35, 39-40 (1961); see also Oscar Newman, *Defensible Space: Crime Prevention Through Urban Design* 15 (1972) ("Designers can . . . prescribe paths of movement and areas of activity so as to provide inhabitants with continuous natural surveillance of the street. . . . [I]nstead of relegating the responsibility to others, it is assumed by the residents in the natural flow of their everyday activities."); Urban Land Inst., *Revitalizing Low-Income Neighborhoods* 24 (1994) (dis-

reason to watch the streets, creating even more surveillance and security.⁶¹ Without this natural surveillance mechanism, studies show that criminals feel their chances of being identified are minimal and “may be confident that no one will interfere in their affairs.”⁶² In a national study of ten neighborhoods and 13,000 individuals, sociologist Wesley Skogan found a substantial negative relationship between physical disorder, as evidenced by vacant buildings,⁶³ and neighborhood solidarity. Skogan demonstrated that when levels of disorder are high, residents tend to “go their own way” and avoid helping others.⁶⁴ Skogan also found a high positive relationship between levels of crime and disorder, even when controlling for poverty, stability, and racial composition.⁶⁵ Skogan concluded that disorder does in fact cause crime and leads to a general neighborhood decline.⁶⁶

In addition to its impact on the community, disorder can adversely affect individual well-being. Sociologist Catherine Ross demonstrated that people who live in distressed neighborhoods marked by such nuisances as boarded-up buildings or vacant lots report worse health and higher rates of depression, in part because they

cussing how front porches are essential elements for neighborhood security because they allow residents to monitor street activity conveniently). For criticism of the natural surveillance theory, see generally Stephanie W. Greenberg & William M. Rohe, *Neighborhood Design and Crime: A Test of Two Perspectives*, 50 *J. Am. Plan. Ass'n* 48 (1984) (showing that evidence does not support proposition that impediments to surveillance cause increased neighborhood crime); R.I. Mawby, *Defensible Space: A Theoretical and Empirical Appraisal*, 14 *Urb. Stud.* 169 (1977) (same); Sally E. Merry, *Defensible Space Undefended: Social Factors in Crime Control Through Environmental Design*, 16 *Urb. Aff. Q.* 397, 405-09 (1981) (same).

⁶¹ See Jacobs, *supra* note 60, at 37; see also Newman, *supra* note 60, at 15. But see Thomas A. Repetto, *Residential Crime* 45 (1974) (presenting study that claims pedestrian activity has no effect on crime).

⁶² Skogan, *supra* note 28, at 10 (“Where disorder is common and surveillance capacities are minimal, criminals will feel their chances of being identified are low”); see also Newman, *supra* note 60, at 14 (noting that criminals are attracted “to an urban environment which is at the same time increasingly anonymous and decreasingly self-protective”); Spelman, *supra* note 23, at 482 (arguing that abandoned buildings foster and exacerbate crime by reducing usual social surveillance mechanisms, thereby eroding criminals’ self control, promoting their group cohesion, and creating illusion of invulnerability). But see Paul J. Brantingham & Patricia L. Brantingham, *The Spatial Patterning of Burglary*, 14 *How. J. Penology & Crime Prevention* 2, 18, 21 (1975) (arguing that in border blocks, where community is more disorganized and impersonal, activity may encourage crime by providing cover for strangers to circulate).

⁶³ See Skogan, *supra* note 28, at 54.

⁶⁴ See *id.* at 70 (finding that disorderly activities demonstrate disregard for standards of public behavior and delegitimize individual intervention). See generally Dan A. Lewis & Greta Salem, *Fear of Crime* (1986).

⁶⁵ See Skogan, *supra* note 28, at 73.

⁶⁶ See *id.* at 75.

walk less and isolate themselves inside their homes.⁶⁷ Such problems further reduce the number of law-abiding citizens on the street, sabotaging the natural surveillance system and creating vacant neighborhoods.

The cumulative effect of these problems significantly impacts the long-term health of America's cities. Yet the notion that owners would buy property, maintain mortgage and tax payments on it, and then let the property lie fallow or deteriorate seems nonsensical. In the next section, this Note will explain why owners do in fact purposely retain vacant properties.

B. Why Property Owners Let Their Properties Remain Vacant

A significant portion of vacant buildings are owned by speculators who buy inner-city property cheaply in the hope that future development, whether spurred by the government or by private developers, will allow them to sell their land for a substantial profit.⁶⁸ Speculators are encouraged to engage in this behavior because most cities' property taxes impose relatively low burdens on land holding,

⁶⁷ See Catherine E. Ross, *Fear of Victimization and Health*, 9 J. Quantitative Criminology 159, 170-71 (1993); see also Russell A. Ward et al., *Fear of Crime Among the Elderly as Person/Environment Interaction*, 27 Soc. Q. 327, 336-37 (1986) (showing evidence that among elderly, fear of victimization from crime reduces subjective well-being); Peter Yin, *Fear of Crime as a Problem for the Elderly*, 30 Soc. Probs. 240, 242-43 (1982) (same).

⁶⁸ See Thomas L. Daniels et al., *The Vermont Land Gains Tax: Experience with It Provides a Useful Lesson in the Design of Modern Land Policy*, 45 Am. J. Econ. & Soc. 441, 443 (1986) ("In numerous American cities, many buildings and tracts of land sit underused or vacant while the owners wait for real estate values to rise . . ."); Frank F. DeGiovanni, *Patterns of Change in Housing Market Activity in Revitalizing Neighborhoods*, 49 J. Am. Plan. Ass'n 22, 33 (1983) (finding that more than 45% of all properties sold in two neighborhoods studied were sold more than once without being repaired or occupied by resident owner before resale); Walter Rybeck, *The Land Game and the Real Estate Crisis: A Way Out*, 52 Am. J. Econ. & Soc. 343, 354 (1993) (blaming massive numbers of vacant lots and buildings on speculation, which is encouraged by tax system that "rewards blight and the abuse of land"); see also Fred Harrison, *The Power in the Land* 67 (1983) (citing study of South Wales showing that of 56 vacant sites, 64% were held idle for 15 years or more, and most popular duration of vacancy was between 15 and 19 years); Lawrence K. Kolodney, *Eviction Free Zones: The Economics of Legal Bricolage in the Fight Against Displacement*, 18 Fordham Urb. L.J. 507, 512 n.16 (1991) ("Investors or landlords, suspecting that a building in a gentrifying neighborhood will eventually be able to attract a higher rent, will pay more for the building.").

Some economists argue that speculators play a valuable role by forcing developers to make efficient decisions regarding the timing and location of development. See Mills & Hamilton, *supra* note 51, at 140-42. However, many followers of the influential economist Henry George believe speculators often hold land beyond its natural limit and thus should be forced to use the land as soon as need arises. See, e.g., Henry George, *Progress and Poverty* 277 (Robert Schalkenbach Found. 1955) (1879).

but heavy burdens on land using.⁶⁹ By keeping buildings vacant, speculators pay less in taxes while avoiding the problems of dealing with tenants.⁷⁰ Maintenance is typically ignored “because it does not affect actual property prices in a way that makes speculation more profitable.”⁷¹ Some owners also retain vacant buildings to use as collateral for mortgages, which can finance other business ventures.⁷²

This is not to imply that speculation is the only cause of vacant buildings. However, it can be the most destructive. Speculators tend to purchase large sections of property in one particular area, which distorts the free market and creates significant housing shortages by withholding supply in a market where the supply is fixed.⁷³ These shortages adversely affect the surrounding neighborhoods, creating

⁶⁹ See Harrison, *supra* note 68, at 143 (“At the local level, property taxes favour the hoarding of vacant land.”); Daniels et al., *supra* note 68, at 443 (noting that vacant building owners “do not invest in their properties for fear of higher property taxes.”); Rybeck, *supra* note 68, at 354 (“The finer you build and the better your upkeep, the higher your assessments and taxes. Let your building deteriorate or tear it down and taxes are reduced.”); Rachel L. Schowalter, *Reuse, Restore, Recycle: Historic Preservation as an Alternative to Sprawl*, 29 *Env'tl. L. Rep.* 10418, 10426 (1999) (noting that:

Under most tax systems, property owners are penalized whenever they increase their property's value through rehabilitation and repair because as their property value increases so does their tax liability. Under this system, the owners of rundown or vacant buildings and lots enjoy low property taxes because the value of the structure on top of the property is low, even if the value of the underlying property is high.);

see also J. Anthony Coughlan, *Land Value Taxation and Constitutional Uniformity*, 7 *Geo. Mason L. Rev.* 261, 262 (1999) (observing that Pennsylvania is only state to use land value taxation, which taxes only value of land, not value of building or improvements); cf. Alanna Hartzok, *Pennsylvania's Success with Local Property Tax Reform: The Split Rate Tax*, 56 *Am. J. Econ. & Soc.* 205, 205-06 (1997) (discussing how Pennsylvania's split rate tax on property is different than that of other states because tax is decreased on buildings, giving owners incentive to maintain and improve properties, while tax is increased on land value, discouraging land speculation).

⁷⁰ Philadelphia developer Sam Rappaport was famous for letting his properties deteriorate, then arguing that he should pay less in taxes because of their dilapidated condition. See Michael A. Riccardi, *Land Dealers Liable for City Taxes*, *Legal Intelligencer*, Sept. 9, 1996, at 1.

⁷¹ Hans Skifter Andersen, *Motives for Investments in Housing Rehabilitation Among Private Landlords Under Rent Control*, 13 *Housing Stud.* 177, 197 (1998); see Daniels et al., *supra* note 68, at 443 (claiming that speculators do not invest in property because such investment leads to higher property taxes and thus less profit). While not conclusive regarding the United States, a 1997 survey by the Danish government found speculators' buildings to be the most poorly maintained properties in Denmark. See Andersen, *supra*, at 197.

⁷² See Wiegard & Wood, *supra* note 18, at A1 (describing how late speculator Sam Rappaport used dilapidated vacant building as collateral for \$5.5 million second mortgage).

⁷³ See Rybeck, *supra* note 68, at 344 (noting that:

The market has no self-correcting mechanism for land speculation. When Washington area investors held back strategic sites mainly for their future value (instead of using them to meet current demands), competitors couldn't

blocks of vacant buildings that discourage investment while pushing developers to build in rural suburbs on cheaper, well-kept land.⁷⁴ The shortages also can artificially inflate housing prices and deny a basic human need for family housing.⁷⁵ Moreover, speculation has an effect on the entire economy, slowing down construction, which can account for a quarter or more of total investment; impacting the durable goods industries, which make many of the furnishings and equipment for new buildings; and even causing bank failures.⁷⁶ Speculators ultimately change the nature of the commodity itself, encumbering it with mortgages and other restrictions.⁷⁷

Such speculation poses an even greater danger to the community when the property is also neglected. At that point, surrounding property owners find themselves nearly powerless to protect their own investment.⁷⁸ Agreeing on collective action⁷⁹ to maintain their properties is difficult, especially if a large number of the owners are

import cheap West Virginia land to force these sites out of cold storage or bring their prices down.);

Note, *Reassessing Rent Control: Its Economic Impact in a Gentrifying Housing Market*, 101 *Harv. L. Rev.* 1835, 1840 (1988) ("Land differs from other housing price determinants because its supply is fixed, regardless of the price."); see also R.W. Archer, *Land Speculation and Scattered Development: Failures in the Urban-Fringe Land Market*, 10 *Urb. Stud.* 367, 370 (1973) (citing 1962 study that showed speculators received average of \$129 in land rent per acre per year while generating social costs of \$1,360). But see Michael D. Wyatt, *A Critical View of Land Value Taxation as a Progressive Strategy for Urban Revitalization, Rational Land Use, and Tax Relief*, 26 *Rev. Radical Pol. Econ.* 1, 6-7 (1994) (arguing that "[t]he idea that the supply of land is fixed is untrue for all practical purposes, and true only in an aggregate sense").

⁷⁴ See Mills & Hamilton, *supra* note 51, at 139 ("This speculative withholding of land from the market means that today's development must take place at a more remote location than would otherwise be the case."); Foldvary, *supra* note 25, at 629 ("Land speculation also induces urban sprawl as developers skip over lands awaiting future development."); Rybeck, *supra* note 68, at 344 ("[T]he bulk of new growth was pushed into the wrong places as speculation distorted land use patterns."). See generally Joel Garreau, *Edge City* (1988) (discussing phenomenon of suburban sprawl in United States).

⁷⁵ See James D. Wright & Julie H. Lam, *Homelessness and the Low-Income Housing Supply*, 17 *Soc. Pol'y* 48, 49-51 (1987) (describing effects of housing prices on poor and homeless).

⁷⁶ See Foldvary, *supra* note 25, at 623.

⁷⁷ See Lindeman, *supra* note 12, at 151.

⁷⁸ See Polaha, *supra* note 52, at 500 ("[Building] neglect hastens deterioration and overburdens community facilities, and as one structure after another becomes blighted, the character of the neighborhood worsens, investors demand that their capital be returned more quickly, and the downward spiral accelerates.").

⁷⁹ Collective action is defined as "the choice by all or most individuals of the course of action that, when chosen by all or most individuals, leads to the collectively best outcome." Jon Elster, *Rationality, Morality, and Collective Action*, 96 *Ethics* 136, 137 (1985).

absent from their property.⁸⁰ Without a tightly knit social group, efforts at voluntary coordination fall victim to free-rider problems.⁸¹ Each owner will delay investment for fear that nearby vacant properties will jeopardize any improvements⁸² or will attempt to free ride on improvements made by others.⁸³ Either strategy, if adopted by every owner, will result in no improvements at all.⁸⁴

Even without free-rider problems, obstacles such as a lack of information and unrealistic valuations of the property can prevent owners from acting in what would be their own, and society's, best interest.⁸⁵ Because of these obstacles, economists have traditionally recognized that government must intervene when imperfections prevent an efficient allocation of resources.⁸⁶ This inefficiency, also referred to as a market failure, motivates government to regulate markets, sometimes placing demands on private actors to work toward the public good.⁸⁷ The next section will examine two cities' attempts to regulate such failure.

⁸⁰ See, e.g., John Perritano, *Hartford's Housing Crisis*, *Hartford Advocate*, Nov. 28, 1996 (visited May 24, 1999) <<http://www.hartfordadvocate.com/articles/housing.html>> (citing study that rate of absentee ownership for vacant buildings in Hartford is 40%).

⁸¹ See Robert C. Ellickson, *New Institutions for Old Neighborhoods*, 48 *Duke L.J.* 75, 76 (1998); Gold, *supra* note 52, at 1338 (asserting that absentee owners are particularly susceptible to collective action investment problem). A free rider is someone who benefits from the positive externalities of another person's investment without paying for them. See Lloyd Cohen, *Holdouts and Free Riders*, 20 *J. Legal Stud.* 351, 362 (1991).

⁸² See Polaha, *supra* note 52, at 500 ("As the neighborhood begins to deteriorate, present owners, whether they be occupiers or landlords, begin to lose faith or fear that future rental income will not be sufficient to warrant further investment, and therefore permit the property to go without basic maintenance.").

⁸³ See O'Sullivan, *supra* note 51, at 367-68 & tbl.14-1 (finding that one-unit increase in exterior quality of buildings increases market value of adjacent property by average of 5% while also increasing value of other buildings on block by 2.5-3%).

⁸⁴ See Otto A. Davis & Andrew B. Whinston, *The Economics of Urban Renewal*, 26 *Law & Contemp. Probs.* 105, 107-11 (1961).

⁸⁵ A study of inner-city Manchester, England, for example, found that a major obstacle to redeveloping abandoned sites was the unwillingness of owners to sell their property at other than relatively high prices. See C.D. Adams et al., *The Availability of Land for Inner City Development: A Case Study of Inner Manchester*, 25 *Urb. Stud.* 62, 73 (1988). According to the study's authors and other academics, such unrealistic expectations concerning the value of property are a significant barrier to urban redevelopment in both England and the United States. See *id.* at 73; see also Mark Setterfield, *Abandoned Buildings: Models for Legislative and Enforcement Reform 6* (visited May 17, 1999) <<http://www.trincoll.edu/~tcfn/resrch23.htm>> (professor's project published on Trinity College website) (contending that experts believe such expectations are "a more significant barrier to the spontaneous re-development of abandoned property within the private sector than any regulatory restrictions imposed by local government planning authorities").

⁸⁶ See Samuelson & Nordhaus, *supra* note 51, at 285-86.

⁸⁷ See, e.g., Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 *Harv. L. Rev.* 817, 863-71 (1991) (arguing for government or legal regulations in new car sales to eliminate gender and racial discrimination); Keith N. Hytton &

C. *Municipalities' Attempts to Combat Vacant Buildings*

The proliferation of vacant buildings in urban areas has spurred some municipalities to adopt programs to combat the problem. In recent years, New York and Chicago have enacted two of the more novel approaches. New York's Local Law 37 (LL37) allows seizure of property from an owner under the authority of the city's tax power and transfer of the property at little or nominal cost to a third party to develop.⁸⁸ Chicago's Fast Track Program authorizes demolition of vacant buildings, but allows the owner to retain possession of the subsequently vacant lot.⁸⁹

Though both approaches introduce important elements in alleviating the problems of vacant buildings, LL37 fails to target vacant buildings specifically, and Fast Track only exacerbates their negative effects. Consequently, neither program is effective by itself in solving the problems of vacant buildings. Nevertheless, LL37 offers precedent for the idea of third-party transfer of neglected property, while Fast Track directly addresses the typically ignored problem of vacant buildings. Elements from both schemes are present in the novel program proposed in Part II.

1. *New York's Local Law 37*

Disturbed by the significant number of tax-delinquent, distressed properties, the New York City Council enacted LL37 in 1996 to transfer dilapidated property with outstanding tax bills to successful for-profit and nonprofit housing operators who could correct code violations and hazardous housing conditions.⁹⁰ The program is currently being implemented in certain neighborhoods in New York City.⁹¹

Vincent D. Rongeau, *Lending Discrimination*, 85 *Geo. L.J.* 237, 257 (1996) (explaining how unregulated decisions by individual banks may be rational but ignore social impact on community); Michael Klausner, *Market Failure and Community Investment: A Market-Oriented Alternative to the Community Reinvestment Act*, 143 *U. Pa. L. Rev.* 1561, 1573-80 (1995) (arguing that Community Reinvestment Act does not effectively solve market imperfections); Leonard I. Nakamura, *Information Externalities: Why Lending May Sometimes Need a Jump Start*, *Fed. Reserve Bank Philadelphia Bus. Rev.*, Jan.-Feb. 1993, at 3, 7 (arguing that Community Reinvestment Act of 1977 helps banks overcome lack of information problem and reach social optimum).

⁸⁸ See New York, N.Y., Code §§ 11-401 to -412 (1997).

⁸⁹ See Chicago, Ill., Mun. Code § 13-9-010 (1998).

⁹⁰ See Alan S. Oser, *The New Approach on Tax-Delinquent Property*, *N.Y. Times*, Mar. 3, 1996, § 9 (Real Estate), at 7.

⁹¹ The South Bronx was the first place chosen for a pilot program under Local Law 37 (LL37). See Brian P. Kavanagh et al., *No Title: Preventing Abandonment Without City Ownership Under NYC Local Law 37 of 1996*, at 26 (1997) (paper prepared for New York University School of Law Seminar in Land Use, Housing, and Community Development) (on file with the *New York University Law Review*).

LL37 defines "distressed properties" as residential properties for which the total unpaid taxes are at least fifteen percent of the property's total value and which significantly violate the housing maintenance code, as indicated either by an average of five or more serious code violations or a city lien for emergency repairs in excess of one thousand dollars.⁹² The city, which takes action on groups of properties,⁹³ notifies all owners, mortgagees, or lienors whose buildings have been targeted through direct mail, by publication in newspapers, and by posting at courthouses.⁹⁴

Once a court orders foreclosure on the tax lien and enters a judgment in favor of the city, the owner of the distressed property has a four month statutory redemption period during which time she can pay off the taxes owed.⁹⁵ If the four months elapse without any activity by the owner or another interested party, then the city has another four months in which it can either take title or transfer title directly to a third party.⁹⁶ If the city decides to transfer the title, it selects from a list of qualified buyers a new owner,⁹⁷ who can receive the subsidies and loans that are traditionally offered to low-income developers.⁹⁸ In transferring the property, the city forgives any prior tax liens.⁹⁹

At first glance, LL37 appears to provide an efficient solution. Rather than demolish abandoned buildings, the city transfers them to third parties who have the expertise and resources to renovate the property. While New York City loses the money it would have collected in back taxes from the original owners, it invests in the opportunity for private revitalization of neglected and devastated urban

⁹² See New York, N.Y., Code § 11-401(4) (1997).

⁹³ As originally drafted, LL37 required that the list of delinquent properties be based on an entire borough or tax section. Recognizing the logistical problems of seizing so many properties at once, a 1997 amendment allowed the City to act within an area as small as one city block. See id. § 11-405a (amending §§ 11-405(a), 11-406(b), 11-409(f)).

⁹⁴ See id. § 11-406.

⁹⁵ See id. § 11-412.1(d).

⁹⁶ See id. § 11-412.1(c). The city will be using an intermediary to retain the property before transferring it to a third party. See Interview with Michael Schill, Professor of Law at New York University School of Law and Director of the Center for Real Estate and Urban Policy at New York University School of Law (Dec. 15, 1998). If the four-month period expires, title reverts to the original owner. See New York, N.Y., Code § 11-412.1(i) (1997).

⁹⁷ Third parties are chosen based on a variety of criteria. See, e.g., *infra* notes 153-54 and accompanying text.

⁹⁸ See Oser, *supra* note 90, § 9, at 7. One example is the Participation Loan Program, which offers 30-year mortgage loans to interested low-income developers at one percent interest in combination with loans from banks at market interest. See Dep't of Hous. Preservation and Dev., The Participation Loan Program (visited May 19, 1999) <<http://www.ci.nyc.ny.us/html/hpd/html/landlord/encouraging-owners.html#plp>>.

⁹⁹ See Oser, *supra* note 90, § 9, at 7.

neighborhoods. The city also avoids rehabilitating and managing the buildings itself, a process which is both time-consuming and expensive.

LL37, however, does not go far enough. By targeting buildings where owners have failed consistently to pay their taxes, LL37 misses those buildings that sit unused while their owners pay the minimal taxes owed in order to profit significantly from possible future growth in the neighborhood.¹⁰⁰ Hence, it does not provide a solution to the substantial problem of speculation as a cause of vacant buildings.

2. *Chicago's Fast Track Program*

Faced with blocks of neglected, vacant buildings, Chicago took a different approach to solving the problem by demolishing the properties. Authorized by an Illinois statute to demolish, repair or seal one- and two-story residential buildings that are open and vacant,¹⁰¹ Chicago enacted a 1993 municipal ordinance known as the Fast Track Demolition Program to destroy open, readily accessible vacant buildings.¹⁰²

Fast Track avoids the delays common in typical condemnation proceedings by using a combination of certified mail, posting, and

¹⁰⁰ See Vernon Loeb, *Vacant Properties Hold Level in City*, Philadelphia Inquirer, Mar. 6, 1986, at B12, available in Westlaw, PHILINQ database (citing city report that showed 60% of vacant lots and buildings were not tax delinquent); see also Rybeck, *supra* note 68, at 354 ("Taxes on [derelict properties] were paid gladly because their growing value has more than repaid the speculator-owners for this holding cost.").

¹⁰¹ See 24 Ill. Comp. Stat. Ann. 5/11-31-1 (West 1998).

¹⁰² See Chicago, Ill., Mun. Code § 13-9-010 (1998); see also *Rebuilding Chicago*, Chi. Sun-Times, Oct. 13, 1998, at 29, available in Lexis, News Library, CHISUN file. Fast Track was created partly as a response to the failure of Chicago's Abandoned Property Program (CAPP), which allowed the city to take abandoned properties from their owners and give them to third parties for rehabilitation. See Jeanette Almada, *City Helps Rehabbers Get Busy Working on Abandoned Buildings*, Chi. Sun-Times, Dec. 6, 1996, at 4, available in Lexis, News Library, CHISUN file. Because buildings could only be considered for the program if several court summonses to fix or demolish the property had been ignored, see Leon Pitt, *South Side Diamonds in the Rough: City Helps Turn Around Houses into Homes*, Chi. Sun-Times, Oct. 28, 1996, at 16, available in Lexis, News Library, CHISUN file, CAPP ended up being ineffective. By the time the city claimed title and gave the properties to third parties, the properties required either gut rehabilitation, where the shell of the building is retained but the interior is completely redone, or demolition. See Almada, *supra* (quoting Department of Housing Commissioner Dave Doig as saying that 10 to 12 buildings on CAPP list solicit no interest because they are too dilapidated and that most buildings acquired through CAPP "require gut rehabs and are in pretty bad shape. They have been abandoned and neglected for a long time."); Maudlyne Ihejirika, *Breathing Life into Chicago's Abandoned Buildings: CAPP Is Opening Doors to Hope for Homeless*, Chi. Sun-Times, Oct. 25, 1993, at 4, available in Lexis, News Library, CHISUN file (quoting local community builder William Jones as saying that "CAPP is a difficult program to implement, because by the time the city gets these buildings, they're in very bad condition").

publication to notify owners, rather than a court summons.¹⁰³ Furthermore, the determination to demolish the building is made without going through the often cumbersome and time-consuming court system; instead, it is decided by a city agency.¹⁰⁴

The Fast Track process is set in motion by a complaint of a nearby resident to the city's Building Department or by the recommendation of a Building Department inspector.¹⁰⁵ If the building is open and vacant, and considered an immediate, continuing hazard to the community, an inspector generally will recommend that it be placed on Fast Track.¹⁰⁶ If no action is taken by the owner within thirty days after the last date of notice, an inspector conducts a final inspection and, dependent on departmental approval, demolition occurs as soon as a few days later.¹⁰⁷

Fast Track offers an apparently effective solution. Vacant buildings are demolished, eliminating both a criminal staging ground and a potential fire and health hazard. Demolition is also relatively cheap—about \$1.25 per square foot.¹⁰⁸ However, the rate at which Fast Track demolishes buildings¹⁰⁹ and the process by which the city targets buildings sparked a federal lawsuit by property owners who claimed the city had violated their due process rights by mistakenly destroying salvageable buildings and failing to notify the owners.¹¹⁰ While the city won in the Court of Appeals, the court acknowledged that some owners of redeemable property might have their buildings mistakenly demolished.¹¹¹

¹⁰³ See Chicago Dep't of Bldgs., *supra* note 23.

¹⁰⁴ See *id.*

¹⁰⁵ See *McKenzie v. City of Chicago*, 964 F. Supp. 1183, 1186 (N.D. Ill.), *rev'd*, 118 F.3d 552 (7th Cir. 1997). Any owner or tenant of real property within 1200 feet of the building can file a request for the demolition of the building. See 24 Ill. Comp. Stat. Ann. 5/11-31-1(b) (West 1998). With so many complaints to handle and so little staff, some cities end up relying on the complaints rather than their own inspections. See Spelman, *supra* note 23, at 492 (finding in Austin, TX, that 85% of housing inspections are conducted after citizen complaint); Chicago Dep't of Bldgs., *supra* note 23 (noting that city becomes aware of most abandoned buildings through citizens or community group reports).

¹⁰⁶ See Chicago, Ill., Mun. Code § 13-9-010 (1998); see also *McKenzie*, 964 F. Supp. at 1186.

¹⁰⁷ See *McKenzie*, 964 F. Supp. at 1188.

¹⁰⁸ See Spelman, *supra* note 23, at 492.

¹⁰⁹ The program demolishes between 200 and 1000 buildings a year. See Leon Pitt, *Swifter Pace of Razing Buildings Raises Concern*, Chi. Sun-Times, Oct. 3, 1996, at 14, available in Lexis, News Library, CHISUN file; see also Bey, *supra* note 13, at 16 (claiming program razes about ten buildings a week).

¹¹⁰ See *McKenzie*, 964 F. Supp. at 1184.

¹¹¹ See *McKenzie*, 118 F.3d at 558 (stating that "errors are endemic to human activity" and analogizing that "program of slaughtering livestock to curtail the spread of disease is bound to kill some healthy animals").

Many critics of Fast Track have also questioned whether creating more vacant lots actually improves the neighborhood. Often, the lots generate new aesthetic, litter, and crime problems, in part because they are still untended.¹¹² Years can pass without any action to build or renovate the lots¹¹³ while the lots continue to serve as staging grounds for crime, especially if located between other buildings.¹¹⁴ In addition, it is generally more economically efficient to preserve and renovate buildings than to demolish and then rebuild them.¹¹⁵ Consequently, an increase in vacant lots in poor neighborhoods could actually hurt the community more than vacant buildings do, especially if the demolished buildings are not replaced.

II

SEIZING VACANT BUILDINGS: A NEW APPROACH TO URBAN BLIGHT

Fearful of exorbitant costs and time-consuming lawsuits, cities have generally avoided addressing the problem of vacant buildings that are not tax delinquent. Yet, as shown in the previous Section, these buildings can create as many problems as the abandoned buildings about which many critics complain. In order to attack the problem of vacant buildings successfully, the city must enforce housing code violations and quickly seize properties from recalcitrant owners before the buildings fall into disrepair.

¹¹² See Antonio Alves et al., *Environmentalism in the Dudley Street Neighborhood*, 14 Va. Envtl. L.J. 735, 737 (1995) (describing environmental and aesthetic problems of vacant lots); Charles P. Lord, *Environmental Justice Law and the Challenges Facing Urban Communities*, 14 Va. Envtl. L.J. 721, 723-24, 731 (1995) (arguing that vacant lots create health, environmental, aesthetic, and crime problems in urban neighborhoods); see also Martin, *supra* note 44, at C1 (explaining how vacant lots create further problems because buildings are usually destroyed with no concrete plans to replace them).

¹¹³ See Martin, *supra* note 44, at C1 (quoting Joyce Probst, community reinvestment director for Chicago Rehab Network, as saying: "We've seen that [in some communities] there could be a gap of 10 to 20 years between the time of demolition and the time something else is built.").

¹¹⁴ See Jim Haner & John B. O'Donnell, *Dreams, Debts, Demolitions*, Baltimore Sun, Apr. 8, 1997, at 1A (describing how vacant lots between buildings create "holes" that drug gangs use for refuge from police and as defensive strongholds against rivals).

¹¹⁵ See Joshua A. Newberg, *Anatomy of a Housing Program: Urban Homesteading in Theory and Practice*, 8 J.L. & Pol. 731, 745 (1992) (asserting that it is more efficient to produce unit of housing by rehabilitation than by building new structure); Ted Rohrlich, *Housing Providers Miss Golden Chance*, L.A. Times, June 21, 1994, at B1 (showing that building new apartments for poor costs \$150,000 each while foreclosed unit costs average of \$37,000, not including renovation costs). But see James Malone, *Demolition of Old Houses Ignites Debate over Renewal in Paducah*, Courier J. (Louisville, Ky.), Apr. 27, 1998, at A1, available in Lexis, News Library, LCOUJR file (quoting Tom Barnett, Paducah, Kentucky, Community Development Director, as saying that city can build 20 houses for cost of renovating one old one).

This Note proposes a process that forbids long-term detrimental speculation and stimulates urban revitalization. This process, which will be referred to as the Vacant Building Transfer (VBT) program, would condemn a vacant building under the power of eminent domain if the building has a substantial number of housing code violations¹¹⁶ or if the building has been vacant for a significant amount of time. The program then would transfer buildings to third parties at minimal or no cost, thereby offering these rehabilitators the opportunity to renovate and operate the properties. Such a proposal raises significant policy and constitutional issues, both of which will be addressed in this Part.

A. *The Proposal*

The VBT program requires owners to seal or repair vacant buildings that violate housing codes and adversely affect the community.¹¹⁷ If the owners take no action after a short, designated period of time,¹¹⁸ VBT allows the city to use its eminent domain power to seize the property. To reduce the costs often associated with just compensation that is paid for condemned buildings, VBT utilizes the housing code and the law of nuisance to minimize the amount of just compensation paid for buildings that adversely affect the surrounding community.¹¹⁹

If the owners do respond to the city's order to repair, they would be allowed to keep the building vacant for an additional period of time.¹²⁰ However, VBT would not allow a building to be held vacant

¹¹⁶ See H. Laurence Ross, *Housing Code Enforcement and Urban Decline*, 6 *J. Affordable Housing & Community Dev. L.* 29, 31 (1996):

Housing codes differ from building codes in that they are not primarily concerned with structure and materials but rather with function and condition. Thus, a building code might specify acceptable design and construction materials for a building, whereas a housing code would be more concerned with the maintenance of the property.

In addition, housing codes set the minimum standards for the safety, health, and welfare of residents. See Polaha, *supra* note 52, at 495.

¹¹⁷ VBT would apply to both residential and commercial areas because both suffer the same ill effects from a vacant building. See, e.g., Greenberg et al., *supra* note 4, at 442-46 (examining adverse effects of abandoned and vacant industrial and commercial sites).

¹¹⁸ Pennsylvania's Amendment to the Urban Redevelopment Act, entitled Act 1978-94, gave owners one year from the time of notice to fix all code violations before the government could take action. See 35 Pa. Cons. Stat. Ann. § 1712.1 (West 1993). Anti-blight ordinances in New Britain, Connecticut, on the other hand, only required that the blighted building be vacant for sixty days. See New Britain, Conn., Code ch. 7, art. III (Supp. 1995).

¹¹⁹ See *infra* Part II.A.2.

¹²⁰ One possibility is to give owners the span of the average business cycle to find new occupants for their secured, vacant property. While predicting how long such cycles last is an inexact science, the average boom and bust cycle over the past 30 years has lasted 7 years. See Robert A. Beauregard, *The Employment Fulcrum: Evaluating Local Economic*

indefinitely. Because of the adverse effect that even a well-maintained, long-term vacant building has on a neighborhood, VBT would require owners to utilize the space eventually or risk forfeiting it.

1. *Identifying Candidates for VBT*

Establishing which buildings should be targeted under VBT would be the first step in successfully implementing the program. In identifying candidates for seizure, VBT focuses on two aspects of a building's condition: Is it vacant, and is it maintained according to the local housing code?

To identify which buildings are vacant, cities could use the traditional "windshield" survey,¹²¹ where inspectors note exterior identifying marks like boarded-up windows, padlocked doors, and overgrown exteriors. In addition, such buildings can be identified by examining electric utility reports to find buildings in which little or no electricity has been used for three or more months.¹²² Such efforts would be incorporated into the standard work of the city's building inspectors.¹²³ To augment these efforts, the city could enlist the help of individuals and community groups. For example, citizens could inform the city of recently unoccupied buildings through a telephone hotline, allowing the city to respond rapidly and incorporate the structures in the VBT program.

While such costs may be minimal because of the utilization of existing manpower and volunteer efforts, the need for increased vigilance in identifying housing code violations may require an additional fee for all building owners. Seattle instituted such a fee when it began its housing code inspection program, charging owners twenty-six dollars per unit per year. This minimal fee covered the entire cost of investigating buildings for housing code violations.¹²⁴

Performance, 13 *Econ. Dev. Q.* 8, 13 tbl.1 (1999) (showing length of last three economic expansions and recessions). Thus, a seven year time span may be sufficient. But see Harrison, *supra* note 68, at 129 (referring to 18-year cycle in land values).

¹²¹ See Thomas Ferrick, Jr., 'Urban Ghost Towns' Haunt the City's Rehab Efforts, *Philadelphia Inquirer*, Oct. 10, 1988, at A1 (describing "windshield survey" as visual observance of vacant buildings); see also Vacant Land, *supra* note 54, at 22 (recommending that vacant property windshield surveys be reinstated in Philadelphia).

¹²² See Spelman, *supra* note 23, at 485 (using this method in study of vacant buildings).

¹²³ Whether the city's building inspectors already perform a similar function or can easily incorporate such work into their routine will be a significant factor in determining the additional cost of VBT. Los Angeles, for example, already requires building inspectors to search neighborhoods for code violations under its monitoring system called Proactive Code Enforcement (PACE). See Trejos, *supra* note 55, at B2.

¹²⁴ The program was eventually declared unconstitutional under the Washington State Constitution, which does not allow disturbance of a person's private affairs and requires that the authority of law justify a governmental invasion. See *City of Seattle v. McCready*,

After confirming that a building is vacant, VBT would next use the local housing code to determine the extent of the building's adverse effects on the community. By using housing codes to measure such effects, VBT would follow the precedent of other state and city governments.¹²⁵ Defining nuisance through the housing code allows VBT to defer to the community's standards as evidenced by its structural codes and safety ordinances.¹²⁶ Since housing codes usually address elements needed for general safety and comfort,¹²⁷ there is less danger of buildings being seized based on the community's aesthetic or cultural preferences. Deferral to these codes, however, still grants flexibility to cities to determine the extent of deterioration or harm to the community that a building can cause before it should be considered illegal.

Even if the building does not officially violate specific codes and ordinances, vacant buildings can pose a general nuisance to the community by sabotaging the natural surveillance system and acting as dead space.¹²⁸ Therefore, owners should be limited in the amount of time they can keep a building vacant, even if the property is sealed and maintained. In order to enforce this without treating owners who do not put any effort into maintenance in the same way as owners who maintain their property, VBT would offer a sliding-scale statute of limitations that would provide less time for open, untended vacant structures, but more time for sealed, maintained vacant structures.¹²⁹

868 P.2d 134, 139 (Wash. 1994). However, such a standard is "strikingly divergent from the Fourth Amendment," *id.*, and represents a tougher standard than was used by the Supreme Court in deciding *Camara v. Municipal Court*, 387 U.S. 523, 538 (1967) (concluding that suspicionless housing code inspections are reasonable). The opinion in *Camara* still stands and no other state besides Washington has challenged this ruling.

¹²⁵ Austin, Texas, for example, labels an unsecured building as dangerous (and therefore illegal) if it has "become (i) an attractive nuisance to children; (ii) a harbor for vagrants, criminals, or immoral persons; or . . . (iii) [if it] enable[s] persons to resort thereto for the purposes of committing unlawful or immoral acts." Spelman, *supra* note 23, at 486 (quoting Austin, Tex., Unif. Abatement Code § 302(12) (1988)); see also 24 Ill. Comp. Stat. Ann. 5/11-31-1(e)(1) (West 1998) (giving authority to city to take action against property considered "immediate and continuing hazard to the community"); R.I. Gen. Laws § 23-27.3-124.1 (1998) (defining unsafe conditions as building that is vacant and unguarded, allowing unauthorized entry).

¹²⁶ See Dagen & Cody, *supra* note 34, at 75. However, special interest groups, such as construction companies, can heavily influence the writing of building codes. See, e.g., Stephen R. Seidel, *Housing Costs and Government Regulations 90-91 (1978)* (describing how trade associations and unions prevented changes in pipe requirements because such changes would affect their business).

¹²⁷ See Ross, *supra* note 116, at 31 (describing elements like cleanliness and maintenance of stairway railings as concerns of housing codes).

¹²⁸ See *supra* Part I.A.

¹²⁹ Determining for which category a building qualifies would be left to the discretion of housing inspectors, but such determinations would be evident based on both the condition

VBT's emphasis on occupancy, however, raises the question of what "occupancy" is. If an owner moves someone into an apartment for one week, does that qualify as occupancy? The rule should be lenient enough to allow owners to keep their building even if their new tenants do not stay for a significant amount of time, but strict enough to prevent owners from circumventing the actual use requirements.¹³⁰

2. *Seizing the Property*

Under VBT, the government would not immediately seize the land once a piece of property is deemed to qualify under the statute. Instead, like Fast Track and LL37, the city would first notify all interested parties and then wait for a specified period for responses.¹³¹ During that period, the original property owner would be able to make an effort to fix all housing code violations, which would extend the statute of limitations for keeping the building vacant, or find occupants if the building satisfies the code.

If the response period expires without owner action, then the city could begin proceedings to seize the property and transfer title to qualified third parties. In seizing the land, cities would exercise their power of eminent domain. Consequently, they would be required to pay the owner just compensation. These acquisition costs are potentially the biggest expense of VBT and could be a major obstacle for cities in using their eminent domain powers. However, it may be possible to use the housing code and the law of nuisance to reduce these costs.

The Supreme Court has stated that the government must pay the owner the fair market value of the property at the time of the

of the building and whether it is being used by outsiders. The cost of making such determinations will depend in part on the extent to which the city's housing inspectors currently investigate buildings. See *supra* note 123.

¹³⁰ A two-month time limit seems reasonable since most landlords collect two months' rent as a security deposit, guaranteeing that even if the tenant leaves, the landlord is financially covered for those two months and has time to search for a new tenant. Keeping the limit at two months also might deter owners from placing tenants in the building for a brief period in an effort to lengthen the amount of time they can keep the building vacant. While some owners may still find it tempting to put tenants in the building for two months to gain a longer period of vacancy (e.g., seven years), the secured nature of the vacant property and the temporary occupancy are still improvements over the untended nature of most vacant buildings.

¹³¹ LL37 gives owners four months to comply, see New York, N.Y., Code § 11-412.1(c) (1997), while Fast Track gives owners 30 days, see Chicago, Ill., Mun. Code § 13-9-010A (1998). Such a period could vary depending on the extent of repairs that need to be made.

seizure,¹³² not its subjective worth to the individual.¹³³ While this rule protects against overvaluation by owners, it raises the question of how to calculate the fair market value of a building if it violates legal codes and is considered a nuisance.

Fair market value is generally considered the price that the property "would bring in the marketplace in a voluntary sale to a knowledgeable buyer."¹³⁴ Two of the more favored methods used to determine marketplace price are the comparable-sales method, which bases the price on what other comparable properties in the area have been sold for,¹³⁵ and the reproduction cost method, which estimates the reproduction cost of the property and then adjusts for depreciation.¹³⁶ Both approaches are difficult to use with vacant housing, especially in urban areas. The comparable-sales method assumes a normal market, but blighted areas are frequently abnormal.¹³⁷ One area might have deteriorated to the extent that houses are worth little, while the property values in another area slated for urban renewal may be seriously inflated. Estimating the reproduction cost is also ineffective since the building is unlikely to be reproduced in the market with its housing code violations.¹³⁸

One suggestion offered by law professor Daniel Mandelker is to measure the value of property based on the building's adherence to the housing code.¹³⁹ Instituting such a policy requires a minimum standard for housing maintenance, so minor obligations imposed by the housing code would probably have to be ignored due to fairness

¹³² See *First English Evangelical Lutheran Church v. Los Angeles*, 482 U.S. 304, 320 (1987).

¹³³ See *United States v. 564.54 Acres of Land*, 441 U.S. 506, 516-17 (1979). For criticism of this formulation, see Laura H. Burney, *Just Compensation and the Condemnation of Future Interests: Empirical Evidence of the Failure of Fair Market Value*, 1989 *BYU L. Rev.* 789, 792-801 (1989) (arguing that just compensation be based on fairness rather than on one objective standard); Michael DeBow, *Unjust Compensation: The Continuing Need for Reform*, 46 *S.C. L. Rev.* 579, 579-80 (1995) (arguing that fair market value systematically undercompensates property owners by failing to take into account unique interests).

¹³⁴ See 8A Julius L. Sackman, *Nichols on Eminent Domain* § 23.04[1], at 23-47 (3d ed. 1997).

¹³⁵ See, e.g., *Florida Rock Indus., Inc. v. United States*, 21 Cl. Ct. 161, 169 (1990).

¹³⁶ See, e.g., *United States v. 99.66 Acres of Land*, 970 F.2d 651, 655 (9th Cir. 1992). Reproduction cost is what it would cost to reconstruct the building. See 51 *N.Y. Jur. 2d Eminent Domain* § 236 (1986).

¹³⁷ See Daniel R. Mandelker, *Housing Codes, Building Demolition, and Just Compensation: A Rationale for the Exercise of Public Powers over Slum Housing*, 67 *Mich. L. Rev.* 635, 659 (1969).

¹³⁸ See *id.* at 657.

¹³⁹ See *id.* at 665-70; see also Dagen & Cody, *supra* note 34, at 73 (raising possibility of diminishing just compensation if building's improvements are detriment to community).

and cost considerations.¹⁴⁰ Instead, the minimum standard would consist of those elements related to fitness for habitation, such as sanitary facilities, plumbing, heating equipment, and structural strength.¹⁴¹

Using this minimum standard, a city could estimate the repair cost necessary to bring the structure into conformity.¹⁴² The building owner would then receive compensation equal to the difference between the value of a model structure conforming to this minimum standard and the cost of repair.¹⁴³ In cases where the cost of repair exceeds the value of the model structure, the owner will not be compensated at all. Discounting compensation in this manner would be analogous to discounts employed in eminent domain cases involving cleanup of environmental contamination, where the value of the property is reduced by the cost of remedying the contamination.¹⁴⁴ Speculative profit need not be included because the Supreme Court has ruled that speculative profit cannot be protected in takings cases.¹⁴⁵

This method allows compensation to reflect the extent to which the building complies with the community's housing maintenance standards. It also prevents the owner from benefiting if she purposely violates local housing codes and ordinances.¹⁴⁶ Not penalizing owners for such disregard of community standards would mean that a vigilant owner of a well-maintained vacant building would receive the same compensation as a negligent owner of a blighted structure. Such a policy would encourage owners to keep maintenance costs at a minimum while profiting significantly if the government finally condemns the land.¹⁴⁷

The law of nuisance can also be a factor in assessing the fair market value of a vacant building. There are two types of nuisances: private and public. A private nuisance is narrowly restricted to the

¹⁴⁰ See Mandelker, *supra* note 137, at 668 n.145 (describing overcrowding as relevant only insofar as it relates to building condition).

¹⁴¹ See *id.* at 668.

¹⁴² See *id.* at 669.

¹⁴³ See *id.* For example, if the cost of constructing a building (including the purchase of the land) with all of the elements listed in the minimum standard is \$200,000 and the cost of repairing the owner's property to adhere to the minimum standard is \$50,000, the owner would be paid \$150,000 in compensation.

¹⁴⁴ See, e.g., *Department of Health v. Hecla Mining Co.*, 781 P.2d 122 (Colo. App. 1989) (setting fair market value of property at zero because of need for expensive cleanup).

¹⁴⁵ See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 136 (1978) (refusing to provide compensation for speculative future sale of air rights).

¹⁴⁶ See Donald E. Wintrode, Note, *Determination of Just Compensation in Eminent Domain Proceedings for Land Subjected to Illegal Uses or Conditions*, 38 *Notre Dame Law* 196, 204 (1963) (concluding that in determining just compensation, courts follow principle that no one should profit from her own wrongdoing).

¹⁴⁷ See 4 Sackman, *supra* note 134, § 12B.15[1], at 12B-190.

invasion of interests in the use or enjoyment of land,¹⁴⁸ while a public nuisance interferes with the rights of the entire community.¹⁴⁹ A reduction in just compensation may be justified by the effect a private or public nuisance lawsuit would have on the value of the property. Courts have awarded damages to landowners whose enjoyment or use of their property is adversely affected by an adjoining private nuisance.¹⁵⁰ Buildings determined to be public nuisances carry even more potential liability because they affect a larger group on a grander scale.¹⁵¹ The possibility that such a ruling could apply to any building judged to be a nuisance automatically diminishes the building's fair market value and should consequently affect the amount of compensation given to the owner.¹⁵²

3. *Transferring the Property*

Once the property has been seized, the city must efficiently transfer it to a third party so that rehabilitation of the property can begin as soon as possible. Determining which third parties should receive the property is an important step, but there is no single perfect candidate. Such parties could come from programs similar to New York's Neighborhood Entrepreneurs Program, which proposes to match interested property owners with buildings seized under LL37.¹⁵³ Factors to consider in selecting these new owners might include residential manage-

¹⁴⁸ See William L. Prosser, *Private Action for Public Nuisance*, 52 Va. L. Rev. 997, 999 (1966).

¹⁴⁹ See *id.*; see also *Hoover v. Durkee*, 622 N.Y.S.2d 348, 350 (App. Div. 1995) (finding that racetrack was public nuisance because it caused substantial annoyance and discomfort to people in vicinity); *People v. HST Meth, Inc.*, 346 N.Y.S.2d 146, 149-50 (Sup. Ct. 1973) (finding methadone clinic to be public nuisance and requiring greater security and maintenance by owners).

¹⁵⁰ See *Antum Invs. Corp. v. Ergas*, 549 So. 2d 706, 708-10 (Fla. Dist. Ct. App. 1989) (finding neighboring hotel that was nuisance liable for plaintiff hotel's mitigation expenses and lost profits); *Puritan Holding Co., Inc. v. Holloschitz*, 372 N.Y.S.2d 500, 502 (Sup. Ct. 1975) (finding owner of nuisance building liable for difference between market value of neighbor's building before and after nuisance).

¹⁵¹ New York City's health code, for example, considers vacant buildings to be public nuisances and orders the owners to abate them by sealing or demolishing the structures. See New York, N.Y., Rules tit. 24, app. (1999) (Resolution by New York City Board of Health, October 22, 1970).

¹⁵² A ruling that a building is a private or public nuisance could also lead the city to reduce compensation to the owner proportionately to the negative effect her property has had on the community, as in the case of comparative negligence. See *Dagen & Cody*, *supra* note 34, at 84.

¹⁵³ See Alan S. Oser, *Entrepreneurs' Role in Foreclosed Housing Expands*, N.Y. Times, Nov. 22, 1998, § 11 (Real Estate), at 5 (describing success of program, which transfers tax-delinquent properties to entrepreneurs). Potential ways to select third parties include a request-for-qualifications process, a request-for-proposals process, development of a pre-qualified list, or a request-for-offer process. See, e.g., New York, N.Y., Rules tit. 28, § 8-03(d) (Supp. 2 1999) (Housing Preservation & Development (HPD) rules).

ment experience, the ability to work with government and community organizations, and neighborhood ties.¹⁵⁴

Another option for the city is to place the properties in a community land trust (CLT). This nonprofit organization is run by members of the community (both residents and nonresidents of CLT land) and experts in real estate.¹⁵⁵ By owning the land and leasing it to low-income households, the CLT promotes resident ownership while prohibiting absentee ownership.¹⁵⁶ The inclusion of neighbors in the decisionmaking process of the CLT also limits conflicts between the CLT and residents who do not want low-income housing in their community. Thus, the CLT is able to balance the interests of individual residents with those of the community and prevent the land from being neglected or allowed to lie fallow.¹⁵⁷

Regardless of who is chosen, the most important consideration is to find an owner with the financial and organizational means to manage the property successfully. If VBT simply turns property over to unprepared or inexperienced landlords, then the entire process will fail.

B. VBT's Practical Benefits and Costs for Urban Communities

VBT offers cities several tangible benefits, along with ones that are more difficult to quantify. One important benefit to consider is crime deterrence. In a study of Austin, Texas, Professor Spelman tried to estimate such benefits after securing vacant buildings. Assuming that securing the buildings would neither fully displace the crimes committed to another area nor fully eliminate all of the crimes committed in the community, Spelman calculated the average costs of crimes based on direct losses and tort settlements to determine the financial cost of crime generated by the vacant buildings.¹⁵⁸ Spelman found that the fifty-nine-block community he studied had crime costs of over three quarters of a million dollars, but that the cost of sealing

¹⁵⁴ See, e.g., New York, N.Y., Code § 11-412.1(b)(2) (1997); New York, N.Y. Rules tit. 28, § 8-03(e) (Supp. 2 1999). Applicants with a record of violations of particular city ordinances or who are suspended or debarred from contracting with city agencies would be disqualified. See, e.g., New York, N.Y., Code § 11-412.1(b)(2) (1997); New York, N.Y., Rules tit. 28, § 8-03(e) (Supp. 2 1999).

¹⁵⁵ See Inst. for Community Econ., *The Community Land Trust Legal Manual* 1-8 (1991) [hereinafter *CLT Legal Manual*]; see also *Vacant Land*, supra note 54, at 35 (describing successful CLTs in Philadelphia and Camden, New Jersey).

¹⁵⁶ See *CLT Legal Manual*, supra note 155, at 1-8.

¹⁵⁷ See *Vacant Land*, supra note 54, at 35.

¹⁵⁸ See Spelman, supra note 23, at 493 (supporting assumptions that costs of crime can be effectively calculated).

all of the buildings in the same area was only \$8400.¹⁵⁹ Moreover, as long as sealing the buildings eliminated more than five percent of the crimes from ever happening again in the community,¹⁶⁰ then securing the vacant buildings in the area had a net social benefit.¹⁶¹ Spelman also found that over a five year period, a repair program¹⁶² would provide net social benefits if half of the crimes were prevented from happening, even if the benefits of the repairs were discounted by nine percent over the five-year period.¹⁶³

In addition to crime deterrence, the extra revenue generated by bringing vacant buildings back to full valuation on the tax rolls would add enormous financial benefits. Moreover, VBT's effect on the community could generate additional business revenue by encouraging the creation of retail and commercial space in formerly dormant buildings. By creating a more well-maintained neighborhood, VBT would also contribute to reducing government expenditures for responding to fires, crimes, and other urban blight. Finally, the rehabilitation of buildings within a community restores an area's social cohesion, allowing for greater spiritual growth of the residents.¹⁶⁴ As one team of doctors and health specialists concluded, "repairing the physical infrastructure of the community permits movement, and the resulting momentum can be built into a greater force for community revitalization."¹⁶⁵ Comparing the total benefits to the potential costs indicates that VBT could be an enormously effective program, especially if acquisition costs are nominal.

Yet, VBT should not be seen as a panacea for the ills of densely populated urban areas. Given the demographic, economic, and geographic diversity among American cities, VBT would not be an effective solution for every city—its success would depend on a city's needs and priorities. In certain cities, VBT would even have to be applied selectively to specific neighborhoods. Such factors as population trends and availability of jobs must be considered in deciding whether a neighborhood should be restored to its previous housing density or

¹⁵⁹ See *id.* at 492-93.

¹⁶⁰ A reasonable assumption considering the discussion *supra* Part I.A about how disorder generates crime.

¹⁶¹ See Spelman, *supra* note 23, at 492-93.

¹⁶² Spelman estimated repair work would cost around \$15 per square foot, for an average cost of \$15,000 per building. See *id.* at 492.

¹⁶³ See *id.*

¹⁶⁴ See Mindy Thompson Fullilove et al., *Building Momentum: An Ethnographic Study of Inner-City Redevelopment*, 89 *Am. J. Pub. Health* 840, 859 (1999).

¹⁶⁵ *Id.*

whether it should be restructured to adjust to new realities.¹⁶⁶ In such cases, the demolition of buildings and the elimination of their immediate adverse effects might serve the community better than renovating property for which there is currently no demand.¹⁶⁷

In addition, VBT would be most effective in areas where third parties exist to purchase property. If a neighborhood traditionally has had little interest from third parties for condemned property, a city might reconsider whether VBT could be successfully implemented in that area. There is a definite demand for decent, affordable housing,¹⁶⁸ but rehabilitators are often discouraged from investing in distressed areas, in part because of the collective action problem and issues of financial viability.¹⁶⁹ VBT would overcome some of these issues by requiring that owners make at least a minimal investment to maintain their property. Such a requirement would motivate property owners who wanted to invest in their property but were afraid to do so because of the concern that other property owners would not maintain their properties as well.¹⁷⁰ In addition, with VBT in place, more buyers will possibly enter the market, drawn by the promise of collective revitalization. Moreover, by virtue of being a government program, VBT could introduce new owners to possible city, state, and federal programs that provide subsidies for low-income housing and

¹⁶⁶ Philadelphia, for example, has seen its total population decline over the past quarter century, especially in certain neighborhoods like Lower North Philadelphia. See Vacant Land, *supra* note 54, at 16. Combined with a shift in jobs from manufacturing to the service and information sectors, and a steady migration by city residents to the suburbs, this population decline has reduced the need for dense housing in certain neighborhoods of Philadelphia. See *id.*

¹⁶⁷ However, as Robert Wilson, editor of *Preservation Magazine*, noted, many of these shrinking cities have new housing construction on their peripheries, which indicates that there is demand to live in the region and which seems wasteful compared to building in an area where infrastructure already exists. See Robert Wilson, *Slash-and-Burn Urban Renewal*, *N.Y. Times*, July 9, 1998, at A15.

¹⁶⁸ In 1989, 15.5% of households (two million) living in unsubsidized rental units in center cities lived in inadequate housing, which was defined "in terms of presence or absence of plumbing fixtures, heating equipment and other mechanical subsystems, and information on the repair and upkeep of properties." See Mary K. Nenko, *Ending the Stalemate* 56 (1995). Moreover, 22% of households paid more than 50% of their income for rent. See *id.* Many of these households were forced to live in unaffordable, inadequate housing because of the massive loss of supply in housing inventory over the past quarter century. Central cities lost 12.9% of their housing inventories from 1960 to 1970 and 9.4% from 1970 to 1980. See *id.* During the second half of the 1980s, 483,000 units were lost on a national level. See *id.*

¹⁶⁹ See *supra* Part I.B.

¹⁷⁰ See *supra* notes 79-80 and accompanying text.

assistance with rehabilitation.¹⁷¹ Such programs can help make rehabilitation affordable for third parties.

VBT's identification of distressed properties will also indicate what potential redevelopment sites are available, eliminating some of the information asymmetries that can and often do occur in inner-city development. Furthermore, VBT will discourage detrimental speculation, where absentee owners and corporations purchase buildings and perform no maintenance, hoping instead to profit from future development or condemnation in the area. Even in neighborhoods with declining populations, VBT can play a role by stemming the loss of residents and improving the conditions for those who stay. Moreover, in cities like New York, where a steady or increasing population must deal with a loss of housing on the order of 6000 units per year,¹⁷² or in cities in the South and West, where population continues to grow at a rapid pace,¹⁷³ VBT can help increase the amount of housing available without pushing residents to the edges of the city.

One unintended cost in enforcing VBT, however, is the effect on some owners whose properties became vacant in part because of other nearby vacant buildings.¹⁷⁴ Using VBT against them seems unfair since their building's vacancy did not occur as a result of their negligence. However, VBT is not meant to be a punishment or reward system that recognizes diligent owners while penalizing negligent ones. Instead, VBT forces owners to keep their buildings maintained in the short run and actively utilized in the long run. How the cycle of blight started is less of a concern; how it ultimately will end is the more appropriate question. While responsible owners may find themselves paying to repair damage to their buildings caused by negligent neighbors, the final result will benefit the responsible owners in the long run and ensure that such a cycle does not repeat itself. More-

¹⁷¹ HUD, for example, allocates more than one billion dollars a year to states to subsidize private, affordable housing projects through its Home Investment Partnership Program (HOME). See Home Investment Partnership Program (visited Mar. 28, 1999) <<http://www.hud.gov/progdsc/home1a.html>>. States like Arkansas have successfully used HOME money to fund programs like the Leveraged Home Rehabilitation Program, which provides any low-income householder with 45% of the cost of renovation to bring a home up to standard city building code condition. See Blue Ribbon Practices in Community Development (visited Mar. 28, 1999) <<http://www.hud.gov/ptw/docs/ar01.html>>.

¹⁷² See Dennis Hevesi, *New Housing Favors Manhattan in Uneven Pattern*, N.Y. Times, Mar. 31, 1998, § 11, at 1 (quoting statistics from New York University School of Law Professor Michael Schill).

¹⁷³ See U.S. Dep't of Commerce Press Release (visited Mar. 27, 1999) <<http://www.census.gov/Press-Release/www/1999/cb99-50.html>> (showing that top ten fastest growing counties were in South or West).

¹⁷⁴ See Haner, *supra* note 35, at 1A (quoting landlord's lawyer as complaining that vacant building next door to landlord's property will likely destroy any investment landlord makes).

over, determining whose properties are responsible for neighborhood problems is a gargantuan task and probably logistically impossible. Rather than waste resources assigning blame while valuable urban areas continue to decline, VBT attacks the problem early and vigorously.

In the end, VBT would be most successful if it never seized a building. Instead, VBT's success would be tied to its ability to encourage owners to maintain their properties by utilizing both private market solutions and current government subsidies. Unfortunately, VBT cannot solve all of the problems in distressed neighborhoods. However, by focusing on the problems of neglect and by encouraging revitalization of formerly ignored areas, VBT may be able to jump start the process of rebuilding blighted communities and initiate a new cycle of activity in those areas.

C. *Constitutional Issues*

In seizing property from its owners under the eminent domain power, VBT does not raise any novel constitutional issues. However, it is important to examine such issues because it is probable that a program like VBT will be the target of lawsuits from disgruntled property owners just as Fast Track and other ordinances have been.¹⁷⁵ To assuage the fears of public officials and legislators who feel VBT may be struck down by a court for violating an owner's constitutional rights, this Note briefly discusses the two most likely constitutional challenges: takings and procedural due process.¹⁷⁶

¹⁷⁵ See, e.g., *McKenzie v. City of Chicago*, 118 F.3d 552 (7th Cir. 1997); *Fruman v. City of Detroit*, 1 F. Supp.2d 665 (E.D. Mich. 1998) (owner sued city for procedural due process violation after it demolished vacant building); *Evenson v. City of St. Paul Bd. of Appeals*, 467 N.W.2d 363 (Minn. Ct. App. 1991) (owner claimed that vacant building fee was taking); *Benson v. City of Portland*, 850 P.2d 416 (Or. Ct. App. 1993) (property owner, alleging Due Process, Equal Protection, and Taking Clause violations, sought reversal of city's order declaring unoccupied residential buildings derelict and requiring them to be registered under city code).

Joan McLeod, of the Abyssinian Baptist Development Corporation, expressed concern not about whether a program like VBT could be financially successful, but whether it was constitutional. See Interview with Joan McLeod, Director, Real Estate, Abyssinian Baptist Development Corporation, in New York, N.Y. (Jan. 20, 1999).

¹⁷⁶ Two other constitutional issues, equal protection and substantive due process, are analyzed by courts under a rational basis test, where the government must simply show it has a legitimate state interest and a rational basis for believing the means chosen will serve that goal. See John E. Nowak and Ronald D. Rotunda, *Constitutional Law* § 11-4, at 391 (5th ed. 1995). This low level of scrutiny makes it unlikely that VBT would be found unconstitutional under either argument.

1. Takings

Under the Fifth Amendment, the government can seize property for a public purpose as long as the owner is compensated for the deprivation.¹⁷⁷ The Supreme Court has defined public purposes broadly, allowing the government to take land in order to create a more fair distribution of property among classes,¹⁷⁸ and to take land for urban renewal.¹⁷⁹ The standard of judicial review in determining whether the government has condemned property for a public purpose is extremely narrow.¹⁸⁰ Courts can nullify such a taking only if the government acts "in an arbitrary manner or in bad faith."¹⁸¹ Such a broad standard ensures that VBT, which is designed to improve the financial and aesthetic situation of the targeted neighborhoods,¹⁸² would pass the public purpose test.

For further support of VBT, civil forfeiture offers a strong legal precedent. Civil forfeiture was enlisted as a weapon in the war on drugs in the 1970s when Congress passed legislation allowing the seizure of any property used in the production or sale of drugs.¹⁸³ The Supreme Court and other circuit courts have upheld this legislation and its progeny.¹⁸⁴ In *Bennis v. Edwards*,¹⁸⁵ the Court extended forfeiture to allow the seizure of property used in the conduct of prostitution, which was statutorily defined as a nuisance.¹⁸⁶ The Court upheld this statute "even though the owner did not know that [her property] was to be put to such use,"¹⁸⁷ declaring that forfeiture serves a dual purpose "by preventing further illicit use of the [property] and by

¹⁷⁷ See U.S. Const. amend. V.

¹⁷⁸ See *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984).

¹⁷⁹ See *Berman v. Parker*, 348 U.S. 26, 32-33 (1954) (allowing condemnation of blighted areas).

¹⁸⁰ See *id.* at 32; see also *Amen v. City of Dearborn*, 718 F.2d 789, 798 (6th Cir. 1983) (allowing condemnation because city developed master plan for urban revitalization).

¹⁸¹ *Amen*, 718 F.2d at 798; see also *United States v. 416.81 Acres of Land*, 514 F.2d 627, 631-32 (7th Cir. 1975) (asserting that courts will overturn takings only in cases of egregious bad faith).

¹⁸² See *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 805 (1984) ("It is well settled that the state may legitimately exercise its police powers to advance esthetic values."); *Berman*, 348 U.S. at 32-33 (allowing property seizure under eminent domain for aesthetic purposes).

¹⁸³ See, e.g., *Psychotropic Substances Act of 1978*, Pub. L. No. 95-633, § 301(a), 92 Stat. 3768, 3777-78 (codified at 21 U.S.C. § 881(a)(7) (1994)); *Comprehensive Drug Abuse Prevention and Control Act of 1970*, Pub. L. No. 91-513, § 511(a), 84 Stat. 1236, 1276 (codified at 21 U.S.C. § 881(a) (1994)).

¹⁸⁴ See, e.g., *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993); *United States v. Marsh*, 105 F.3d 927 (4th Cir. 1997); *United States v. 194 Quaker Farms Rd.*, 85 F.3d 985 (2d Cir. 1996).

¹⁸⁵ 516 U.S. 442 (1996).

¹⁸⁶ See *id.* at 444.

¹⁸⁷ *Id.* at 446.

imposing an economic penalty, thereby rendering illegal behavior unprofitable.’”¹⁸⁸ In a similar ruling, the Second Circuit upheld the seizure of an entire building because part of the building had been used to facilitate narcotics distribution.¹⁸⁹

If innocent owners of nuisance-promoting property can be forced to give up their property without compensation, owners of nuisance-promoting buildings should be subject to forfeiture as well. In *Bennis*, Michigan’s law targeted “any building . . . or place . . . kept for the use of prostitutes or other disorderly persons”¹⁹⁰ because such property served as a nuisance. While civil forfeiture typically applies to criminal acts, a building that attracts crime and vagrancy can have the same adverse effects as the property ruled a nuisance in *Bennis*. Thus, the concept of civil forfeiture, upheld by the Supreme Court, strengthens the government’s position in seizing blighted property without violating the owner’s constitutional rights.

2. Procedural Due Process

The Fourteenth Amendment of the United States Constitution declares that no State shall “deprive any person of . . . property, without due process of law.”¹⁹¹ The Supreme Court traditionally has required some type of hearing, even an informal one, before the government may take an individual’s property.¹⁹² Because of the hearing requirement, the government must give the property owner notice of the potential deprivation as well as his right to a hearing.¹⁹³

¹⁸⁸ Id. at 452 (quoting *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 687 (1974)).

¹⁸⁹ See *United States v. 141st St. Corp.*, 911 F.2d 870, 882 (2d Cir. 1990).

¹⁹⁰ See Mich. Comp. Laws § 600-3801 (Supp. 1995).

¹⁹¹ U.S. Const. amend. XIV, § 1.

¹⁹² See, e.g., *United States v. James Daniel Good Real Property*, 510 U.S. 43, 53-54 (1993) (requiring hearing before taking convicted drug dealer’s home); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) (requiring hearing before termination of employment); *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 19 (1978) (requiring informal hearing before terminating customer’s utilities); *Fuentes v. Shevin*, 407 U.S. 67, 80-84 (1972) (requiring hearing before issuance of writ allowing repossession of property).

¹⁹³ See *Fuentes*, 407 U.S. at 81; see also *McKenzie v. City of Chicago*, 964 F. Supp. 1183, 1199 (N.D. Ill.), rev’d, 118 F.3d 552 (7th Cir. 1997). But see *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 618 (1974) (allowing taking without hearing because procedures minimized risk of error of wrongful interim possession). The Court has required the government to provide notice that is “reasonably calculated” to inform interested parties of the intended deprivation and the opportunity to be heard. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Typically, sufficient notice has meant direct mail to the interested party. See, e.g., *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 799-800 (1983) (requiring state to provide mailed notice); *Greene v. Lindsay*, 456 U.S. 444, 455 (1982) (same).

The Court has frowned upon notice by publication alone, finding it to be insufficient to afford adequate due process notice if the names of the property owners or the creditors

However, the Due Process Clause does not require "that all governmental decision making comply with standards that assure perfect, error-free determinations."¹⁹⁴

What will be crucial for the success of VBT is structuring the notice procedure specifically to protect subsequent third-party ownership. Otherwise, the original owners will attempt to reclaim their property even after it has been transferred to a third party by the city. If such claims were successful, then third parties would be dissuaded from participating in VBT. To look for guidance, a sheriff's sale provides a useful analogy.

Various state courts have ruled that a lawfully consummated sheriff's sale¹⁹⁵ that provides actual or mailed notice to all interested parties cannot be reversed once the sale is complete and the deed has been delivered to the purchaser.¹⁹⁶ The Supreme Court has ruled in similar fashion regarding tax sales on houses.¹⁹⁷ Thus, it appears that as long as the interested party's name and address are "reasonably ascertainable" and notice of a proceeding is mailed, the city has fulfilled its procedural due process requirement.

One remaining problem, however, is the potential correlation between the disrepair of the property and the poverty or lack of business and legal sophistication of the owners. If the owners were poor or uninformed about legal matters, they might find the prospect of filing suit against the city to be daunting.¹⁹⁸ The Seventh Circuit addressed

were readily ascertainable. See *Tulsa Prof'l Collection Serv., Inc. v. Pope*, 485 U.S. 478, 487-91 (1988); *Schroeder v. City of New York*, 371 U.S. 208, 212-13 (1962); *Walker v. City of Hutchinson*, 352 U.S. 112, 116 (1956).

¹⁹⁴ *Mackey v. Montrym*, 443 U.S. 1, 13 (1979) (allowing suspension of driver's license without predeprivation hearing); see also *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 7-8 (1979) (finding that Nebraska parole procedure offers sufficient opportunity to be heard).

¹⁹⁵ "Sheriff's sale" is defined as "[a] sale, commonly by auction, conducted by a sheriff or other court officer to carry out a decree of execution or foreclosure issued by a court. Examples include sales pursuant to attachments, liens and mortgage defaults." *Black's Law Dictionary* 1376 (6th ed. 1990).

¹⁹⁶ See, e.g., *Guardian Loan Co. v. Early*, 392 N.E.2d 1240, 1243 (N.Y. 1979); see also *Boyer v. Walker*, 714 A.2d 458, 462-63 (Pa. Super. Ct. 1998) (finding that sheriff's sale divests all junior liens on that property, even if junior lienholder's attorney was negligent in forwarding notice). In addition, only notice is required, not a pre-sale hearing. See N.Y. C.P.L.R. § 5236 (McKinney 1997). Only if the debtor can show that the city used this power as an "instrument of injustice" can the debtor reverse the sale and reclaim the property. See *Guardian Loan*, 392 N.E.2d at 1243. The court defined injustice as "oppressive or unfair conduct." *Id.*

¹⁹⁷ See *Mennonite Bd. of Missions*, 462 U.S. at 800 (holding that creditor must receive notice of tax sale prior to its occurrence).

¹⁹⁸ See *McKenzie v. City of Chicago*, 964 F. Supp. 1183, 1201 (N.D. Ill.), *rev'd*, 118 F.3d 552 (7th Cir. 1997).

this issue in *McKenzie v. City of Chicago*,¹⁹⁹ where a group of property owners whose buildings were destroyed under the Fast Track program sued, insisting that the opportunity for a predeprivation hearing was inadequate because each owner had to initiate an action in state court and pay a \$220 filing fee.²⁰⁰ Citing a previous Seventh Circuit decision, *Graff v. Chicago*,²⁰¹ the court concluded that the state can place the burden of initiating court action on an owner as long as proper notice of the opportunity for that action has been provided.²⁰² Moreover, the court found that the \$220 filing fee was insignificant compared to the value of the property and the legal fees incurred in defending the property, regardless of whether the hearing was judicial or administrative, or whether the City or the owner initiated the hearing process.²⁰³ As long as the city allows indigent persons to proceed with actions in forma pauperis,²⁰⁴ this policy seems logical and fair.

Moreover, while the owner's situation does elicit sympathy, the negative effects of the building on the surrounding community occur nonetheless. At some point, the city must stop being lenient in order to stem the tide of blight. To protect small homeowners, however, cities using VBT may want to consider creating a Small Property Owners Advocacy Unit like the one in New York City, which assists small owners with management and financial issues and aims to protect them from losing their property.²⁰⁵

CONCLUSION

As this Note has shown, the use of real property in densely occupied urban areas must strike a balance between the needs of the owner and those of the community. While owners should not be punished for keeping buildings vacant as part of the normal fluctuations of the real estate cycle, they also cannot be allowed to neglect their

¹⁹⁹ 118 F.3d 552 (7th Cir. 1997).

²⁰⁰ See *id.* at 558.

²⁰¹ 9 F.3d 1309 (7th Cir. 1993).

²⁰² See *McKenzie*, 118 F.3d at 558. The judge who issued the opinion, Frank H. Easterbrook, has written extensively on what he believes is the minimal importance of due process rights for the poor. See Frank H. Easterbrook, *Substance and Due Process*, 1982 Sup. Ct. Rev. 85 (asserting that because level of process afforded by legislature merely reflects its valuation of importance of substance of legislation, courts ought to defer). For criticism of his view, see Cynthia R. Farina, *Conceiving Due Process*, 3 *Yale J.L. & Feminism* 189, 206-07 & n.97 (1991).

²⁰³ See *McKenzie*, 118 F.3d at 558.

²⁰⁴ Opportunity to sue in forma pauperis grants an impoverished party the right to proceed without liability for court fees or costs. See *Black's Law Dictionary* 779 (6th ed. 1990).

²⁰⁵ See Lloyd Chrein, *Unhappily Ever After: Good Intentions Can't Save Some Landlords from Losing Their Buildings*, *Newsday*, Jan. 13, 1995, at D1.

property so that it deteriorates to the point where it generates crime and health hazards in the community.

As the General Counsel and Assistant Counsel for St. Louis's Urban Renewal program wrote almost forty years ago, proactive action against blighted buildings "may be the only manner in which our urban society can control the evils which have been foisted on it by greed and neglect, and which in many instances can be traced to the individuals responsible therefor."²⁰⁶ To continue to sit idly by while such forces ravage urban communities would be a concession to despair and desolation, and ultimately would surrender our futures to perpetual urban decay.

²⁰⁶ Dagen & Cody, *supra* note 34, at 84.