

## Addressing Vacant Property in the Wildland Urban Interface

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## ADDRESSING VACANT PROPERTY IN THE WILDLAND URBAN INTERFACE

MICHELE STEINBERG, MEGHAN HOUSEWRIGHT

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# ADDRESSING VACANT PROPERTY IN THE WILDLAND URBAN INTERFACE

MICHELE STEINBERG,\* MEGHAN HOUSEWRIGHT\*\*

## ABSTRACT

*Governments cope with the dilemma of absentee landowners in a variety of contexts throughout the United States, including enforcement on vacant property to curb urban blight and address crime and nuisance hazards. In rural and agricultural areas, unmanaged woodlands and farmlands are often the unaddressed responsibility of absentee landowners. In the context of wildland urban interface (WUI) areas, absentee landowners present the same kind of problem when undeveloped lots, resort and rental properties and secondary residences are not managed carefully to mitigate wildfire risk on the property and with care as to the impacts of neighboring properties. This paper explores the prevalence of this problem in WUI areas across the United States and provide examples of the hazards that unmitigated properties – whether vacant lots or second homes – present in terms of potential wildfire disasters. The paper includes examples of places where effective action has been taken to motivate absentee landowners to participate in safety upgrades, whether voluntary or regulatory. Examples from other contexts such as urban blight and woodlands management provide inspiration for possible approaches to addressing this problem in the WUI context.*

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## I. INTRODUCTION

Individual efforts to reduce wildfire risk to homes and other structures are rendered much less effective when nearby properties are left over-grown and fire-prone. While encouraging the cooperative action necessary to ensure all homes and properties within a community adhere to wildfire mitigation best practices can be a difficult task,<sup>1</sup> it is significantly more difficult in communities plagued with vacant or abandoned properties and absentee landowners.<sup>2</sup> In recent years, particularly

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1. See David T. Kraut, *Hanging Out the No Vacancy Sign: Eliminating the Blight of Vacant Buildings*, 74 N.Y.U. L. REV. 1139, 1154–55 (1999).

Agreeing on collective action to maintain their properties is difficult, especially if a large number of the owners are absent from their property. Without a tightly knit social group, efforts at voluntary coordination fall victim to free-rider problems. Each owner will delay investment for fear that nearby vacant properties will jeopardize any improvements or will attempt to free ride on improvements made by others. Either strategy, if adopted by every owner, will result in no improvements at all.

2. Some commentators distinguish between the categories of vacant and abandoned based on the characteristics of the property. However, since their impacts on a community can be similar, many commentators and statutory schemes do not attempt to distinguish between the two. *E.g., id.* at 1140 n.4 (distinguishes abandoned from vacant on the basis of tax delinquency and the shut-off of utility services); *cf.* William Spelman, *Abandoned Buildings: Magnets for Crime?*, 21 J. CRIM. JUST. 481, 484 (1993) (defining abandoned buildings as “any residential building that has been vacant for three months or more or had been vacant for less time but was now uninhabitable”); see also NAT’L VACANT PROPS. CAMPAIGN, VACANT PROPERTIES: THE TRUE COST TO COMMUNITIES (2005), <https://www.smartgrowthamerica.org/app/legacy/documents/true-costs.pdf>.

[V]acant properties [are] residential, commercial, and industrial buildings and vacant lots that exhibit one or both of the following traits: [t]he site poses a threat to public safety (meeting the definition of public nuisance), or [t]he owners or managers neglect the fundamental duties of property ownership (e.g., they fail to pay taxes or utility bills, default on mortgages, or carry liens against the property) . . . State laws and uniform building codes further refine what constitutes an abandoned building, but these vary from jurisdiction to jurisdiction. Often these structures have been unoccupied for over a year, are beyond repair, and pose serious danger to public safety.

Because this Note is primarily concerned with abating risk of wildland fire—and the barrier unoccupied private property can play in abating those risks—the terms vacant and abandoned as used here refer to land where the owner is not immediately present in the community and is unresponsive to mandates or

after the 2008 financial crisis, a number of cities across the country have been faced with an onslaught of vacant properties. Because these properties depress surrounding property values, attract crime, and create health and safety risks, city leaders, community activists, and academic commentators have developed strategies and initiatives to encourage code abatement and the return of the properties to productive use. However, comparatively fewer efforts have looked at the issue of vacant or abandoned property expressly from the perspective of its impacts on wildfire mitigation efforts. This Note looks at the impact vacant and abandoned properties have on effectively implementing wildfire mitigation strategies and discusses potential remedies drawing from literature on vacant property remediation on a municipal level.

Section II of this Note describes the wildfire challenge facing at-risk communities, describing steps property owners in those communities can take to reduce the risk of losing homes and structures to wildfires and the challenge absentee property owners present to communities intent on taking steps to reduce risk. Section III offers an overview of the approaches used in addressing vacant property in urban communities. Finally, Section IV discusses the challenges and opportunities present in translating urban strategies to wildland urban interface (WUI) communities, which are often more rural.

## II. WILDFIRE RISK MITIGATION AND THE CHALLENGE OF VACANT PROPERTY

### A. Addressing Wildfire Risk

In the United States, there are a significant number of communities at risk from wildfire, with some estimates indicating there are more than forty-three million homes near areas prone to wildfires.<sup>3</sup> Recent analyses of thirteen Western states indicate there are 4.5 million homes categorized at high or extreme risk of damage or destruction from wildfires.<sup>4</sup> While the number of homes and businesses destroyed by wildfire is difficult to calculate year-to-year, major incidents that result in hundreds, or even thousands of homes destroyed continue to occur annually.<sup>5</sup> Idaho ranks fifth in the number of households at high or extreme risk from wildfires and second only to Montana in the percentage of households (26%) at high or extreme risk from wildfires.<sup>6</sup>

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voluntary efforts to undertake wildfire mitigation on the property. Thus, in this Note, these terms include land held by absentee owners as well as land that is occupied seasonally.

3. Eric Hamilton, *More Homes Built Near Wild Lands Leading to Greater Wildfire Risk*, UNIV. WIS.-MADISON (Mar. 12, 2018), <https://news.wisc.edu/more-homes-built-near-wild-lands-leading-to-greater-wildfire-risk/>.

4. Arindam Samanta, *Key Findings from the 2017 Verisk Wildfire Risk Analysis*, VERISK (July 12, 2017), <https://www.verisk.com/insurance/visualize/key-findings-from-the-2017-verisk-wildfire-risk-analysis/>.

5. See *Wildland Fire Summaries*, NAT'L INTERAGENCY FIRE CTR. (2014-2017), [https://www.nifc.gov/fireInfo/fireInfo\\_statistics.html](https://www.nifc.gov/fireInfo/fireInfo_statistics.html) (last visited Mar. 14, 2019) (Recent wildfire incident documentation shows thousands of structures destroyed not only in California but also in Colorado, Texas, and Tennessee).

6. Samanta, *supra* note 4; *Verisk Wildfire Risk Analysis*, VERISK, <https://www.verisk.com/insurance/campaigns/location-fireline-state-risk-report/> (last visited Mar. 14, 2019).

Despite these dire statistics, post-fire research, experiments, and fire modeling show that individual homes and communities can be modified to minimize the potential for ignition from flames and embers and to prevent wildfires spreading through the community.<sup>7</sup> Disastrous outcomes are not inevitable. Through mandatory and voluntary measures, communities and property owners can lower their risk. These measures include better planning, building codes, and property maintenance ordinances.<sup>8</sup> Unfortunately, very few communities have taken these actions. A 2011 study commissioned by the Fire Protection Research Foundation found that few jurisdictions adopt model codes designed to protect homes exposed to wildfire, and the few that do often pass significant amendments, tend to pick and choose elements from codes rather than adopt a holistic safety approach.<sup>9</sup>

While mandatory measures may be politically untenable in many towns and areas of the country, voluntary programs offer an alternative way to significantly reduce risk and foster community capacity. Firewise USA is one such well-known program. Run by the National Fire Protection Association, the program recognizes communities that have taken action to address wildfire risk.<sup>10</sup> The program criteria includes a community risk assessment, the creation of a local board or committee charged with developing an action plan, an annual public event, as well as a risk reduction activity undertaken on an annual basis that meets a certain level of effort, measured in dollars or hours.<sup>11</sup> The program is based on fire science findings that demonstrate that modifications to homes and their immediate surroundings can be highly effective in helping them resist ignition from the embers and flames of a wildfire.<sup>12</sup> Because a flammable home or outbuilding is also fuel for a wildfire, wildfire behavior dictates that homes close enough to one another to ignite one another

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7. See, e.g., Jack D. Cohen, *Preventing Disaster: Home Ignitability in the Wildland-Urban Interface*, 98 J. FORESTRY 15 (2000); Stephen L. Quarles, *Vulnerabilities of Buildings to Wildfire Exposure*, EXTENSION (Apr. 25, 2012), <http://articles.extension.org/pages/63495/vulnerabilities-of-buildings-to-wildfire-exposures>; David E. Calkin et al., *How Risk Management Can Prevent Future Wildfire Disasters in the Wildland-Urban Interface*, 111 PROC. NAT'L ACAD. SCI. U.S. 746, 747 (2014), <http://www.pnas.org/content/pnas/111/2/746.full.pdf>.

8. See Menka Bihari et al., *Understanding the Role of Planners in Wildfire Preparedness and Mitigation*, 2012 INT'L SCHOLARLY RES. NETWORK FORESTRY (2012), <https://www.hindawi.com/journals/isrn/2012/253028/> (last visited Mar. 14, 2019); see also NAT'L FIRE PROT. ASS'N, COMMUNITY WILDFIRE SAFETY THROUGH REGULATION: A BEST PRACTICES GUIDE FOR PLANNERS AND REGULATORS 1 (2013), <https://www.nfpa.org/-/media/Files/Public-Education/By-topic/Wildland/WildfireBestPracticesGuide.ashx?la=en>.

9. CHRIS DUERKSEN ET AL., FIRE PROT. RES. FOUND., ADDRESSING COMMUNITY WILDFIRE RISK: A REVIEW AND ASSESSMENT OF REGULATORY AND PLANNING TOOLS 2 (2011), <https://www.nfpa.org/-/media/Files/News-and-Research/Archived-reports/rfwuiregulatoryassessment.ashx?la=en>.

10. Nat'l Fire Prot. Ass'n, *How to Become a Firewise USA® Site*, NFPA.ORG, <https://www.nfpa.org/Public-Education/By-topic/Wildfire/Firewise-USA/Become-a-Firewise-USA-site> (last visited Mar. 14, 2019).

11. *Id.*

12. See JACK D. COHEN, U.S. DEP'T OF AGRIC., AN EXAMINATION OF THE SUMMERHAVEN, ARIZONA HOME DESTRUCTION RELATED TO THE LOCAL WILDLAND FIRE BEHAVIOR DURING THE JUNE 2003 ASPEN FIRE (Aug. 1, 2003), <http://www.tucsonfirefoundation.com/wp-content/uploads/2014/05/2003-Summerhaven-Home-Destruction.pdf>; JACK D. COHEN & RICHARD D. STRATTON, U.S. DEP'T AGRIC., HOME DESTRUCTION EXAMINATION: GRASS VALLEY FIRE, LAKE ARROWHEAD, CA (June 2008), [https://www.fs.fed.us/rm/pubs\\_other/rmrs\\_2008\\_cohen\\_j001.pdf](https://www.fs.fed.us/rm/pubs_other/rmrs_2008_cohen_j001.pdf).

(generally less than fifty feet apart) must both be modified to reduce ignition potential.<sup>13</sup> The Firewise USA recognition program builds this neighbor-to-neighbor connection into its criteria.<sup>14</sup>

### B. The Challenge of Vacant Property

Successful results from participating in Firewise USA depend on community members agreeing to take collective action. Vacant or abandoned properties can leave a hole in that effort. Homes and properties left untreated endanger those around them and can negate the efforts of neighbors working to maintain their properties to ignition-resistant standards.<sup>15</sup> When a property is vacant either due to abandonment, long-term disuse, or simply seasonal occupancy, merely communicating the objectives and the urgency to the property owner may be difficult, let alone persuading her to take action.<sup>16</sup> Studies have demonstrated that barriers to successful wildfire risk reduction in communities include the challenge associated with lack of participation by absentee landowners.<sup>17</sup> The perception that part-time or absentee owners are a challenge to community-wide risk reduction is borne out in recent surveys asking homeowners about vulnerability to wildfire risks and motivational factors related to engaging in wildfire risk reduction and mitigation.<sup>18</sup>

The strength and success of programs like Firewise USA have made the voluntary approach attractive to those municipalities which prefer to avoid using regulatory tools that require action on private property.<sup>19</sup> However, when voluntary efforts are not enough to persuade the owners of property where a nuisance or hazards exist, communities have few tools at their disposal to compel landowners to action. Even in communities which have enacted property ordinances, forcing action, or taking action on property without the express consent of an owner can be challenging.

In addition to the ongoing challenges faced by hundreds of communities to either enforce requirements on non-participating residents or persuade them to

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13. See Nat'l Fire Prot. Ass'n., *Preparing Homes for Wildfire*, NFPA.ORG, <https://www.nfpa.org/Public-Education/By-topic/Wildfire/Preparing-homes-for-wildfire> (last visited Mar. 14, 2019).

14. See Nat'l Fire Prot. Ass'n., *supra* note 10.

15. See Alexander Maranghides et al., *NIST Technical Note 1796, A Case Study of a Community Affected by the Witch and Guejito Fires*, NVLPUBS.NIST.GOV (2013), <https://nvlpubs.nist.gov/nistpubs/technicalnotes/nist.tn.1796.pdf>.

16. Soren M. Newman et al., *Land Development Patterns and Adaptive Capacity for Wildfire: Three Examples from Florida*, 111 J. FORESTRY 167, 169–71 (2013).

17. James D. Absher et al., *Overcoming Barriers to Firewise Actions by Residents: Final Report to Joint Fire Science Program*, FS.USDA.GOV (2013), <https://www.fs.usda.gov/treesearch/pubs/44796>.

18. See SARAH AUERBACH, ONE SPARK IS ALL IT TAKES: A QUALITATIVE ANALYSIS OF THE EXPERIENCES OF FIREWISE COMMUNITY REPRESENTATIVES IN NEW MEXICO (N. Ariz. Univ. 2015); ERIC CLIFFORD STEFFEY, PREDICTING HOMEOWNER WILDFIRE MITIGATION BEHAVIORS IN THE WILDLAND-URBAN INTERFACE 94 (2016), [https://repository.asu.edu/attachments/176526/content/Steffey\\_asu\\_0010E\\_16545.pdf](https://repository.asu.edu/attachments/176526/content/Steffey_asu_0010E_16545.pdf); Timothy W. Collins and Bob Bolin, *Situating Hazard Vulnerability: People's Negotiations with Wildfire Environments in the U.S. Southwest*, 44 ENVTL. MGMT. 441, 442 (2009), <https://link.springer.com/content/pdf/10.1007%2Fs00267-009-9333-5.pdf>.

19. Faith Berry et al., *Firewise: The Value of Voluntary Action and Standard Approaches to Reducing Wildfire Risk*, 48 ARIZ. ST. L.J. 181, 202 (2016).

take action, sometimes events can lead to abandoned property on a large scale. The state of Florida, for instance, is just one area of the country where the 2008 housing crisis collided with a wildfire prone landscape. In some Florida counties, there were as many as 40,000 home foreclosures in 2008,<sup>20</sup> and rates of foreclosure on home loans originating at the height of the housing bubble did not start to fall significantly until this past year.<sup>21</sup> Many of these Florida properties, stuck in drawn out foreclosure processes, have remained empty and have fallen into states of disrepair.<sup>22</sup> These vacant properties now sit in a landscape highly susceptible to wildfire; the Southern Group of State Foresters estimated that 95.5% of the state's wildland urban interface communities, which in total comprise approximately 6.5 million acres, are at high or extreme risk of wildfire damage.<sup>23</sup>

Vacant property in any community can lead to a host of negative externalities.<sup>24</sup> For communities at risk of wildfire though, such properties can be the difference between surviving a wildfire and losing the entire community. Research into wildfire disasters, those fires where hundreds to thousands of homes burned down, shows that structure-to-structure ignition is a major factor in complete property destruction.<sup>25</sup> In such cases, the forest and the surrounding vegetation is no longer the major threat.<sup>26</sup> Rather, an ignited home becomes a much more significant threat because it burns for a much longer period than the vegetation, generating much more heat and emitting larger embers.<sup>27</sup> Untreated properties raise the threat of a neighborhood conflagration, and where property owners are absent, treating those properties becomes that much more difficult.<sup>28</sup>

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20. Bill Smith & Greg Stanly, *Great Recession 10 Years Later: Foreclosure Crisis Cut Deeply; the Sting is Still Felt*, NEWS PRESS (Feb. 21, 2018), <https://www.news-press.com/story/news/local/2018/02/17/great-recession-10-years-later-foreclosure-crisis-cut-deeply-sting-still-felt/1079686001/>.

21. Don Johnson, *Florida Still Ranks High in Number of Foreclosures*, TAMPA PATCH (Jan. 19, 2018), <https://patch.com/florida/southtampa/florida-still-ranks-high-number-foreclosures> ("In Florida last year, there were 24,215 foreclosure proceedings filed, compared to 43,772 in 2016, according to ATTOM Data, a multi-sourced property database.").

22. Allison Fitzgerald Kodjak & Gerard Bennett, *'Zombie Homes' Haunt Florida Neighborhoods*, CNTR. PUB. INTEGRITY (Sept. 15, 2014), <https://www.publicintegrity.org/2014/09/15/15519/zombie-homes-haunt-florida-neighborhoods>.

23. FLA. DEP'T OF AGRIC. CONSUMER SERVS., DIV. FORESTRY, WILDFIRE RISK REDUCTION IN FLORIDA: HOME, NEIGHBORHOOD, AND COMMUNITY BEST PRACTICES 4 (2010), [http://freshfromflorida.s3.amazonaws.com/Wildfire\\_Risk\\_Reduction\\_in\\_FL.pdf](http://freshfromflorida.s3.amazonaws.com/Wildfire_Risk_Reduction_in_FL.pdf).

24. See e.g., Joseph Schilling, *Code Enforcement and Community Stabilization: The Forgotten First Responders to Vacant and Foreclosed Homes*, 2 ALB. GOV'T L. REV. 101, 108–11 (2009) (describing impacts of vacant and abandoned property on communities).

25. Jack D. Cohen, *Structure Ignition Assessment Model (SIAM)*, USDA FOREST SERV. GEN. TECH. REP. 90 (1995), [https://www.fs.fed.us/psw/publications/documents/psw\\_gtr158/psw\\_gtr158\\_05\\_cohen.pdf](https://www.fs.fed.us/psw/publications/documents/psw_gtr158/psw_gtr158_05_cohen.pdf).

26. *Id.* at 92.

27. Cohen, *supra* note 7; see also Cohen, *An Examination of the Summerhaven, Arizona Home Destruction Related to the Local Wildland Fire Behavior During the June 2003 Aspen Fire*, U.S. DEP'T OF AGRIC. (Aug. 1, 2003), <http://www.tucsonfirefoundation.com/wp-content/uploads/2014/05/2003-Summerhaven-Home-Destruction.pdf>; Jack D. Cohen & Richard D. Stratton, *Home Destruction Examination: Grass Valley Fire, Lake Arrowhead, CA., U.S. DEP'T OF AGRIC.* (June 2008), [https://www.fs.usda.gov/Internet/FSE\\_DOCUMENTS/fsbdev3\\_046340.pdf](https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fsbdev3_046340.pdf).

28. See Connor McGuigan, *5 Ways to Protect Your Home from Wildfires*, SIERRA (Nov. 25, 2017), <https://www.sierraclub.org/sierra/5-ways-protect-your-home-wildfires> (featuring recommendations from the National Fire Protection Association on how to best protect homes from wildfires, starting with attention to the roof, reducing hazards immediately around the home, mitigating further into the landscape to

## III. LESSONS FROM VACANT &amp; ABANDONED PROPERTIES IN THE URBAN CONTEXT

## A. Vacant Properties in American Cities

Efforts to address “zombie subdivisions” left unfinished in the wake of the 2008 foreclosure,<sup>29</sup> as well as the many hollowed-out neighborhoods in older industrial cities like Baltimore and Detroit, offer some lessons to WUI communities with vacant properties in their midst. Baltimore, Detroit, and other aging Northern American cities have been struggling for years against the growth in vacant structures.<sup>30</sup> For example, at least 16,500 buildings sit vacant in the city of Baltimore.<sup>31</sup> In 2014, there were an estimated 40,000 such buildings in Detroit.<sup>32</sup> Natural disasters, like Hurricane Katrina, have also left thousands of vacant properties in their wake.<sup>33</sup> All in all, between 2000 and 2010, the number of vacant housing units in the U.S. increased by 4.5 million, an increase of over 44%.<sup>34</sup>

Vacant and abandoned properties often foster crime<sup>35</sup> and are at an increased risk of fires.<sup>36</sup> Many are also tax delinquent,<sup>37</sup> further straining city budgets that must contend with the increased need for fire, police, and code official response,<sup>38</sup> as well as the high demolition costs of removing vacant and abandoned structures.

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minimize the impact of flames and embers, and finally, working together as neighbors to reduce risks associated with potential urban conflagrations.)

29. Jan G. Laitos & Rachel Martin, *Abandoned and Unfinished Residential Properties in America and Europe: Comparative Strategies for Removal and Prevention*, 91 *DENV. L. REV.* 65, 69 (2014).

30. Schilling, *supra* note 24, at 109–10.

31. Associated Press, *Baltimore Continues to Struggle with Vacant Homes*, *WTOP NEWS* (April 26, 2018), <https://wtop.com/baltimore/2018/04/baltimore-continues-to-struggle-with-vacant-homes> (Reporting that despite eight years of effort and “tens of millions of dollars” the official vacant count has only fallen by 300 units; also reporting that the actual count may be higher, around 30,000).

32. Monica Davey, *Detroit Urged to Tear Down 40,000 Buildings*, *N.Y. TIMES* (May 27, 2014), <https://www.nytimes.com/2014/05/28/us/detroit-task-force-says-bligh-cleanup-will-cost-850-million.html>.

33. Gillian B. White, *A Housing Crisis Amid Tens of Thousands of Abandoned Homes*, *ATLANTIC* (Aug. 20, 2015), <https://www.theatlantic.com/business/archive/2015/08/new-orleans-bligh-hurricane-katrina/401843/> (citing estimate of 26,000 abandoned homes before the catastrophic hurricane in 2004 and over 43,000 by 2010).

34. ALAN MALLACH, *BROOKINGS METRO. POL’Y PROGRAM, LAYING THE GROUNDWORK FOR CHANGE: DEMOLITION, URBAN STRATEGY, AND POLICY REFORM 3* (2012); *cf.* Schilling, *supra* note 24, at 108 (noting it is difficult to estimate total number of abandoned and/or vacant properties because there is no national database and property conditions change constantly in terms of ownership and physical conditions).

35. See Spelman, *supra* note 2, at 488–91 (finding that city blocks blighted by unsecured vacant buildings had crime rates twice as high as those in control blocks—those without vacant structures); see also Kraut, *supra* note 1, at 1147–48 (discussion of the correlation of criminal activity between secured versus unsecured buildings).

36. Spelman, *supra* note 2, at 488 (citing finding that only 42% of vacant buildings meet code).

37. NAT’L VACANT PROP. CAMPAIGN, *VACANT PROPERTIES: THE TRUE COST TO COMMUNITIES 7* (2005) (“Taxes are often lost on vacant properties because of tax delinquencies. Abandoned properties often become tax delinquent because the cost of paying taxes on the property may well exceed the value of the property.”); see also Kraut, *supra* note 1, at 1149–50 (citing PHILA. CITY PLANNING COMM’N, *VACANT LAND IN PHILADELPHIA 15* (1995)).

38. Schilling, *supra* note 24, at 111.

<sup>39</sup> These conditions depress the property values<sup>40</sup> for surrounding homes too and can increase insurance premiums for neighboring homeowners.<sup>41</sup> Over time, these conditions conspire and vacancies can spread throughout a neighborhood or city.<sup>42</sup>

## B. Local Government Strategies for Addressing Vacant Properties

In response to metastasizing blight in their communities, states and local governments have developed strategies to address vacant properties and promote neighborhood stabilization and rehabilitation. These strategies focus on the code enforcement, property seizure, land banks, and land trusts.<sup>43</sup> As noted by the National Vacant Property Campaign,<sup>44</sup> common elements of successful, comprehensive strategies include real property information systems, code enforcement efforts, and property acquisition and re-use programs.<sup>45</sup> These are discussed below.

### i. Data & Tracking

Data is an essential tool for decision makers confronted with vacant properties in their communities. Integrated databases that include property information such as foreclosure status, physical condition, legal title, and occupancy status,<sup>46</sup> are the best tools for prioritizing enforcement and abatement efforts as well as detecting areas at risk for vacancy and abandonment. Developing this type of a system, though, requires the integration of information spread throughout the government or owned by private parties—foreclosure filings, assessment and judgment liens, ownership history, probate status, sheriff sale records, tax delinquencies, code violations, and utility shut-offs—thus few local governments have developed comprehensive systems.<sup>47</sup> However, simple spreadsheets listing problem

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39. See e.g., NAT'L VACANT PROP. CAMPAIGN, *supra* note 37, at 5–6; see also MALLACH, *supra* note 34, at 4–5.

40. Schilling, *supra* note 24, at 111–12 (citing WILLIAM C. APGAR, ET AL., HOMEOWNERSHIP PRESERVATION FOUND., THE MUNICIPAL COSTS OF FORECLOSURES: A CHICAGO CASE STUDY 28 (2005)); Dan Immergluck & Geoff Smith, *The External Costs of Foreclosure: The Impact of Single-Family Mortgage Foreclosure on Property Values*, 17 HOUS. POL'Y DEBATES 57, 57–58 (2006) (examining the effects of abandoned property on property values in the Chicago area based on data compiled from 1997-1999).

41. NAT'L VACANT PROP. CAMPAIGN, *supra* note 37, at 11 (reporting “[a]n interview with an insurance agent in Washington, DC representing a national insurance company revealed that the presence of a ‘high hazard’ property (which includes condemned properties) within forty feet of a solid masonry building and 100 feet of a non-masonry building would lead to a cancellation or non-renewal of an insurance policy.”).

42. See e.g., Kraut, *supra* note 1, at 1143–51.

43. Schilling, *supra* note 24, 135–44 (discussing activities in Wilmington, Delaware; Cincinnati, Ohio; and Chula Vista, California).

44. The National Vacant Properties Campaign was launched in 2003 by the non-profit organization, Smart Growth America. Steve Davis, *Second Reclaiming Vacant Properties Conference Begins Today*, SMART GROWTH AM. (June 1, 2009), <https://smartgrowthamerica.org/second-reclaiming-vacant-properties-conference-begins-today>.

45. Schilling, *supra* note 24, at 113–14.

46. *Id.* at 114.

47. *Id.* at 114–15 (noting that Cleveland and Philadelphia have built these databases with assistance from universities).

properties, along with key indicators of vacancy or abandonment—like tax delinquency, nuisance abatement actions, utility shut-offs, or foreclosure filings—are a reasonable starting point.<sup>48</sup>

## ii. Code Enforcement

Local governments frequently enact housing and property maintenance codes, which require maintaining structures in a state of good repair and abating nuisance property conditions,<sup>49</sup> or they have the authority to do so.<sup>50</sup> Courts have typically viewed these attempts to regulate safety or uphold quality of life and property values in the community as a valid use of local authority.<sup>51</sup> However, while many local governments have such codes on the books, enforcement is still a challenge. Particularly in the wake of the foreclosure crisis, code officials can struggle in the “often surreal, Alice in Wonderland-esque world of the mortgage industry and local foreclosure rules and processes.”<sup>52</sup> At the outset, simply locating the responsible party for the purpose of providing notice can be difficult.<sup>53</sup> This can be a deliberate tactic on the part of mortgage service providers or true owners and result in considerable time spent by code officials searching through records to find the current mortgage holder or owner, who may not even reside in the United States, let alone in the state where the property is located.<sup>54</sup> Compliance may also be reluctantly given during the foreclosure process when the mortgage company is not yet

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48. BUS. PROF'L PEOPLE FOR PUB. INT., CHI. METRO. AGENCY FOR PLANNING & METRO. MAYORS CAUCUS, HOW CAN MUNICIPALITIES CONFRONT THE VACANT PROPERTY CHALLENGE? 4–6 (2010).

49. See, e.g., NEW HAVEN, CONN., CODE OF ORDINANCES, tit. V, art. 5 (2018); MODESTO, CAL., CODE OF ORDINANCES, tit. 9, ch. 8–9 (2009).

50. See, e.g., 53 PA. STAT. AND CONS. STAT. ANN. § 58105-A (West 2015) (providing for the enactment of property maintenance codes by incorporated towns and boroughs).

51. See, e.g., *Metromedia, Inc. v. City of San Diego*, 610 P.2d 407, 429 (Cal. 1980) (finding that improving the appearances of a community falls within city's authority under its police powers), *rev'd on other grounds by* *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981); *State v. Jones*, 290 S.E.2d 675, 681–82 (N.C. 1982) (holding that a local ordinance requiring fencing around a junkyard for aesthetic reasons was a valid exercise of the police power); *Shelton v. Twin Township*, 30 N.E.3d 1047, 1052 (Ohio Ct. App. 2015) (finding township was properly carrying out a government function provided for under state statute when it initiated action to remove an unsafe, dilapidated barn on appellant's property).

52. Schilling, *supra* note 24, at 120.

53. See *id.* at 121.

54. *Id.* at 124 (“The number one complaint from code officials is the tremendous difficulty they have tracking down and then holding lenders and mortgage servicers responsible for maintaining their properties.”); see also Emily Badger, *Anonymous Owner, LLC: Why it Has Become So Easy to Hide in the Housing Market*, N.Y. TIMES (Apr. 30, 2018), <https://www.nytimes.com/2018/04/30/upshot/anonymous-owner-llc-why-it-has-become-so-easy-to-hide-in-the-housing-market.html> (reporting that about one third of rental units in the U.S. are owned by L.L.C.s, reducing the transparency of the property system and enabling, among other things, investors “to walk away from vacant properties and tax bills,” particularly in less wealthy cities); cf. Schilling, *supra* note 24, at 127 (reporting 2008 remarks made by Deputy Comptroller for Community Affairs that the Office of the Comptroller of Currency would work with the Mortgage Bankers Association to increase local government access to the Mortgage Electronic Registration System (MERS)); see also *About MERSCORP Holdings, Inc.*, MERS, <https://www.mersinc.org/about> (last visited Mar. 14, 2019) (claiming “[t]he MERS system is the only national database that provides free public access to servicer information for registered home mortgages . . . [including to] local governments . . . to identify parties responsible for maintaining vacant properties and addressing code violations.”).

the “mortgagee in possession” with a recorded deed.<sup>55</sup> At this point, not only may their legal responsibility be limited,<sup>56</sup> but they may also fear potential trespass liability.<sup>57</sup> Even when the mortgage servicer does not fear liability, most will perform only the bare-minimum maintenance such as clearing the property of the most obvious public nuisances.<sup>58</sup>

Where code officials perform abatement work, recouping the cost can present an even larger challenge. In some states a nuisance abatement lien has the same superseding priority as a municipal tax lien.<sup>59</sup> In other states though, it has the same priority as a judgment lien, making its repayment a lower priority than any mortgages or outstanding judgments against the property.<sup>60</sup> The uncertainty of funding the activity can deter code departments from undertaking the abatement work.<sup>61</sup>

To assist with and help fund these tasks, an increasing number of cities are turning to vacant property ordinances.<sup>62</sup> These ordinances, which take a variety of approaches to determining which properties must register,<sup>63</sup> share common objectives—facilitating the tracking/monitoring of vacant property, the identification of

55. See *Banking Law, Commercial Foreclosure and Lender Liability Law*, JIMERSON & COBB, P.A., <https://www.jimersoncobb.com/blog/resources/faqs/banking-law-commercial-foreclosure-and-lender-liability-law/> (last visited Mar. 14, 2019).

56. See, e.g., *Kubczak v. Chem. Bank & Tr. Co.*, 575 N.W.2d 745 (Mich. 1998) (Bank-mortgagee held not liable in a tort action for personal injury that occurred on the premises of a foreclosed property before the expiration of the redemption period, because the bank, while owner, was not in possession).

57. Schilling, *supra* note 24, at 125.

58. *Id.* at 125; see also FRANK ALEXANDER & SARA TOERING, CTR. FOR CMTY. PROGRESS, JUDICIAL IN REM CODE ENFORCEMENT AND JUDICIAL IN REM TAX SALES: OPTIMUM TOOLS TO COMBAT VACANCY AND ABANDONMENT IN ATLANTA 8 (2014), [https://www.communityprogress.net/filebin/Full\\_Atlanta\\_TASP\\_Report\\_Final.pdf](https://www.communityprogress.net/filebin/Full_Atlanta_TASP_Report_Final.pdf) (reporting that in the first six months of 2014, the Atlanta Police Department’s “Code Enforcement Section issued 1687 notices of violation[s].” Only 899 (53%) of the violations led to “voluntary compliance by the property owner by the date of the second inspection.” Owner-occupants were the most likely to comply).

59. See, e.g., ATLANTA, GA., HOUSING CODE art. V § 56(b) (1987).

60. See, e.g., *City of Palm Bay v. Wells Fargo Bank*, 114 So. 3d 924, 929 (Fla. 2013) (holding that the municipality’s ordinance establishing the super priority of code abatement loans was in contradiction with state statutory scheme establishing priority rights of interest in real property and was thus invalid).

61. Schilling, *supra* note 24, at 121–22; see also ALEXANDER & TOERING, *supra* note 58, at 12 (describing the in rem review board in Atlanta, which serves as the option of last resort for unresponsive owners who cannot be located and will not take action to abate code violations on their properties. The board can authorize the use of public funds for abatement, but it is not authorized to use public funds to assist vulnerable owners who are willing but unable to comply).

62. Keith Hirokawa & Ira Gonzalez, *Regulating Vacant Property*, 42 URBAN L. 627, 629–30 (2010); see also *Property Registration*, SAFEGUARD PROPS., [www.safeguardproperties.com/Resources/Vacant\\_Property\\_Registration.aspx](http://www.safeguardproperties.com/Resources/Vacant_Property_Registration.aspx) (last visited Mar. 14, 2019) (safeguard tracks and monitors more than 3,000 ordinances on our real property registration matrix, including rental property registration requirements).

63. Hirokawa & Gonzalez, *supra* note 62, at 630 (noting differences between: Pittsburgh, Pennsylvania defining “vacant building” as a structure which is vacant *and* is either unsecured, secured by other than normal means, unsafe, noncompliant with housing or building codes, illegally occupied, or unoccupied for over a year with pending code enforcement citations; Red Bud, Illinois, which regulates “abandoned” properties in the foreclosures process and properties from which the mortgagee emerged from the foreclosure process with title; and the much more expansive Chula Vista, California ordinance which is triggered if the property shows any set of conditions that would lead a reasonable person to believe the property to be vacant, such as over-grown vegetation, accumulated mail, and past-due utility notices).

responsible parties, and the enforcement of codes, as well as the generation of revenue to support abatement activities.<sup>64</sup> If the conditions of the ordinance are triggered—depending on the ordinance—owners must register the status of their property and provide a description of it, as well as give their contact information and the contact information of a responsible party that can be reached by code officials, the date the property became vacant, and whether or not it is in foreclosure, among other information.<sup>65</sup> Through registration fees, which are required by nearly every ordinance,<sup>66</sup> as well as fees that escalate the longer the property is vacant,<sup>67</sup> these ordinances generate revenue to fund code activities and property tracking. In addition to registration obligations, these ordinances also impose a duty on property owners to maintain property to a certain standard (i.e., no broken windows, secured doors, trash removal, etc.),<sup>68</sup> and in some cases, requirements to maintain liability insurance and to consent to trespass enforcement actions by the police.<sup>69</sup> Non-compliance by property owners can trigger large fines or even misdemeanor criminal charges.<sup>70</sup>

Vacant property ordinances offer an effective tool to help local officials track vacant property, reduce nuisances, raise revenue for code enforcement activities, and incentivize the return of the property to productive use. However, where they do not respect a property owner's Fourth Amendment rights, they may raise constitutional questions.<sup>71</sup> For example, a vacant property ordinance in Riverdale, Georgia requires owners to provide "a letter of written consent . . . granting permission for city officials to enter and inspect the property and all structures upon it."<sup>72</sup> As held by the Supreme Court in *Camara v. San Francisco*, administrative searches, like those for code enforcement activities, are not exempt from warrant requirements.<sup>73</sup> While warrants are necessary if the owner refuses entrance, the Court in *Camara* went on to state that the "probable cause" to justify the issuance of such a warrant could be satisfied "if reasonable legislative or administrative standards" exist for conducting the inspection.<sup>74</sup> Thus, while the basis can be tailored to the inspection needs, the warrant cannot be bypassed without a grant of

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64. *Id.* at 631.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 632.

69. Hirokawa & Gonzalez, *supra* note 62, at 632–33.

70. *Id.* at 632.

71. *Id.* at 633–37.

72. *Id.* at 635.

73. *Camara v. Municipal Court*, 387 U.S. 523, 534 (1967) ("administrative searches of the kind at issue here are significant intrusions upon the interests protected by the Fourth Amendment . . . [and] such searches when authorized and conducted without a warrant procedure lack the traditional safeguards which the Fourth Amendment guarantees to the individual . . .").

74. *Id.* at 538 ("The test of 'probable cause' required by the Fourth Amendment can take into account the nature of the search that is being sought," explaining that "[e]xperience may show the need for periodic inspections of certain facilities without a further showing of cause to believe that substandard conditions dangerous to the public are being maintained," and "[s]uch standards . . . [for conducting an area inspection] will vary with the municipal program being enforced, [and] may be based on the passage of

permission from the owner. Indeed, courts have struck down a number of inspection related ordinances for warrant process defects<sup>75</sup> and upheld those requiring officials to obtain a warrant where consent is withheld.<sup>76</sup>

Drafters of vacant property ordinances may be able to steer clear of these concerns—for instance, by gauging the level of code compliance via a windshield inspection. However, they will still need a robust method of enforcement, be it for the registration requirements or code compliance. In many jurisdictions, unaddressed code citations can lead to criminal penalties.<sup>77</sup> However, while the threat of criminal liability may act as a deterrent to some against ignoring a vacant property ordinance, in personam enforcement is unlikely to reach the owners of the most heavily blighted properties—and unlikely to fix the problem property.<sup>78</sup> As one study in the city of Atlanta found, close to half of the code violation citations—47%—were ignored despite the threat of criminal liability.<sup>79</sup> Compliance was more common for code violation citations issued to owner-occupied properties.<sup>80</sup> Moreover, pursuing a criminal action requires personally serving the owner with a citation, an owner who for many of the most egregious violations, cannot be easily located.<sup>81</sup> Even where service is possible,<sup>82</sup> any punishment, either a fine or imprisonment, attaches to the owner and not the property, leaving no lien to leverage to actually address the violations.<sup>83</sup> Often, if the owner is not a speculator (i.e., an in-

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time, the nature of the building . . . , or the condition of the entire area, but they will not necessarily depend upon specific knowledge of the condition[s] of the particular dwelling.”).

75. See, e.g., *Crook v. City of Madison*, 168 So.3d 930, 936, 938–39 (Miss. 2015) (summarizing court decisions which have rejected ordinances without adequate warrant provisions and holding that an inspection ordinance that stated, “should a Tenant or Owner refuse entry, the building official shall be authorized by virtue of the Rental License to secure a judicial warrant authorizing entry,” is flawed because issuance of the warrant was predicated on participation in the regulatory program and not probable cause).

76. *Id.* at 937–39 (citing *Tobin v. City of Peoria*, 939 F. Supp. 628, 630–33 (C.D. Ill. 1996) (upholding ordinance which required landlords to submit to inspections of housing units in order to operate rental housing because the ordinance required city officials to obtain a warrant if the owner withheld consent)).

77. See, e.g., *Hirokawa & Gonzalez*, *supra* note 62, at 632.

78. ALEXANDER & TOERING, *supra* note 58, 8–9.

79. *Id.*

80. *Id.*

81. *Id.* at 10–11 (personal service is costly and difficult particularly where owners are out of state corporations).

82. *Id.* at 10 (noting that of the 3,300 open enforcement cases, at least 400 had thus far failed to appear).

83. Without a lien, there is no ability to take action against the property. A criminal process is unlikely to reach owners of the most hazardous, most heavily blighted properties, or initiate transfer from those owners, and, inequitably, more likely to prosecute the most vulnerable. *Id.* at 12.

vestor holding out for rising land values) seeking to avoid service and code compliance obligations,<sup>84</sup> she likely has few means to remedy the violations.<sup>85</sup> Thus, the effectiveness of code enforcement can suffer if its emphasis is on personal liability.<sup>86</sup>

In contrast to in personam enforcement, in rem enforcement offers a more efficient and effective tool to address blight. In such cases, a notice of the cited code violations need only be sent to the owner by first-class mail and unaddressed citations are subject to escalating fines that attach as liens to be satisfied at sale or transfer.<sup>87</sup> Where the citation goes unanswered and the code violations remain, code officials can pursue court action to attach a lien on the property.<sup>88</sup> As an in rem action, notice requirements for a hearing can be satisfied by sending a summons to anyone with an interest in the property through certified mail, first-class mailing of summons to the property itself, as well as a notice posted on the property, and posted in the local newspaper.<sup>89</sup> If the court finds that the property is in violation of the relevant ordinance, it will issue an order requiring abatement within a specified period of time, regardless of whether the owner or owner's representative is present at the hearing.<sup>90</sup> If the owner does not heed the court order, the code department can undertake the necessary repairs or demolition work and add the cost of all public funds expended on the work to the lien against the property.<sup>91</sup> This lien is superior to all others except taxes and will generate fines and interest, just like those for delinquent taxes.<sup>92</sup>

### iii. Property Seizure

Ultimately, cities want to rid their communities of public safety hazards, recover tax revenue, and stabilize neighborhoods. Where code enforcement has been unsuccessful, and vacant properties continue to present a nuisance, local govern-

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84. James J. Kelly Jr., *Refreshing the Heart of the City: Vacant Building Receivership as a Tool for Neighborhood Revitalization and Community Empowerment*, 13 J. AFFORDABLE HOUS. 210, 214 (2004).

Traditional code enforcement mechanisms attempt to coerce a property owner into renovating his vacant house through fines and court orders. But these in personam remedies require a high level of due process. If a code enforcement attorney wants to obtain a judicial order mandating the owner to correct the violations, the attorney must first show the court that the owner has been personally served with notice of the case. A subsequent finding of contempt for failure to obey the order would require proof that the owner actually knew that the order had been made. A speculating owner can frustrate attempts at personal service by creating sham ownership entities or just by providing the vacant house as the only mailing address for himself as owner of the property.

85. *Id.* at 213–14.

86. *Id.* at 215.

87. ALEXANDER & TOERING, *supra* note 58, at 13.

88. *Id.*

89. *Id.* at 20.

90. *Id.* at 21.

91. *Id.*

92. *Id.* at 21–22.

ments can seize properties, facilitating their transfer to owners committed to returning them to productive use. Options for doing so, as summarized below, include eminent domain, receivership, and tax foreclosure.

Even though local governments may have the power of eminent domain over blighted properties, the potential costs of time-consuming litigation and the threat of paying just compensation often makes many cities reluctant to exercise it.<sup>93</sup> The city of Baltimore's experience with seeking court-appointed receivers perhaps presents an alternative approach to eminent domain. Through an ordinance, the city or its non-profit designee can petition the court to appoint a receiver for any property that has an outstanding vacant building violation notice.<sup>94</sup> Once the court appoints a receiver, any expenses incurred by the receiver are attached to the property as a super-priority lien.<sup>95</sup> Because the receiver, often a non-profit organization, may not have the resources to tackle a large abatement project, Baltimore's process allows receivership foreclosure actions in order to facilitate the return of the property to productive use.<sup>96</sup> These sales are initiated in an *in rem* proceeding,<sup>97</sup> thus lowering the notice burden for the local officials but ensuring its sufficiency to clear the title of other interests and enable one that is marketable and insurable.<sup>98</sup> In these receivership actions, only qualified bidders—those with an established capacity to return the property to productive use—may bid.<sup>99</sup>

Even though the receivership sale resembles eminent domain, Kelly argues the action falls within the "nuisance exception" and is ultimately just a means of code enforcement.<sup>100</sup> The nuisance exception, which unburdens the state of the obligation to pay just compensation for the taking, was articulated in a two-part

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93. See, e.g., Kraut, *supra* note 1, at 1140–41 (describing local governmental reluctance to exercise eminent domain to seize blighted buildings); but see Kraut, *supra* note 1, at 1161–62 (suggesting an alternative via a vacant building transfer program where the city could seize vacant property if an owner did not take action to address code violations and just compensation to the owner would be adjusted to reflect any public expenditures that went toward addressing code violations. If the city can sell the property, the resulting sale could prove sufficient to recoup abatement costs and provide the owner with compensation); *id.* (suggesting an alternative via a vacant building transfer program where the city could seize vacant property if an owner did not take action to address code violations and just compensation to the owner would be adjusted to reflect any public expenditures that went toward addressing code violations. If the city can sell the property, the resulting sale could prove sufficient to recoup abatement costs and provide the owner with compensation).

94. Kelly, *supra* note 84, at 217.

95. *Id.*

96. *Id.*

97. *Id.* at 218. Compare *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 318 (1950) (holding the Due Process Clause requires notice of any court action affecting a person's rights to be made in a manner "reasonably calculated" to give actual notice), and *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 800 (1983) (invalidating process for public foreclosure sale on the grounds that notice solely published in local newspaper with no attempt at direct contact was insufficient), with *Md. R. 2-121*, and *Md. R. 2-122* (the latter of which requires only an affidavit that whereabouts of the defendant is unknown, allowing court to order service by mailing notice to defendant's last known address and posting a notice on the owner's land).

98. Kelly, *supra* note 84, at 224.

99. *Id.* at 223.

100. *Id.* at 220 (noting the owner does have an opportunity to pay the receiver's lien and stave off the sale).

test under *Mugler v. Kansas*.<sup>101</sup> The test first asks if the action's public policy objective involves a legitimate state interest within the scope of the police power, and second, if the action has some legal means-end connection to the permissible policy goal.<sup>102</sup> Over a century later, in *Lucas v. South Carolina Coastal Commission*,<sup>103</sup> the Court put tighter bounds around permissible public policy objectives that would relieve the government of the obligation to pay compensation for the taking.<sup>104</sup> The Court held that the key question, if the state seeks the absolute deprivation from the owner of all economic interests in her land,<sup>105</sup> is whether the state had a cause of action at common law to defend the same interests it is pursuing with its present action.<sup>106</sup> As fire hazards and havens for illegal activity, vacant Baltimore row homes, Kelly argues, go to the very heart of nuisance law, which sounds within the common law.<sup>107</sup> Therefore, receivership forfeiture sales offer a means of facilitating restoration of blight without burdening the local government with expenses for abatement and owner compensation.

Another tool available to cities is tax foreclosure proceedings, provided the property is tax delinquent.<sup>108</sup> As with in rem code enforcement proceedings, judicial in rem tax sales can be a more efficient means of returning property to productive use while allowing the city to recoup funds expended on code enforcement and abatement.<sup>109</sup> Perhaps most critically, judicial in rem tax sales satisfy notice requirements to ensure marketable title, while also extinguishing tax debt, allowing the property to be sold to the highest bidder.<sup>110</sup>

#### iv. Land Banks

A number of cities faced with vacancy blight have turned to land banks as part of their abatement tool kit.<sup>111</sup> Land banks are essentially publicly chartered entities which can buy, sell, and hold properties with the aim of helping the community return them to productive use.<sup>112</sup> The structure and powers of land banks vary, given differences in state constitutional law, grants of authority to local and county

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101. *Mugler v. Kansas*, 123 U.S. 623, 662 (1887).

102. Kelly, *supra* note 84, at 220.

103. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1031–32 (1992).

104. *Id.* at 1004.

105. *Cf. City of Chicago v. Birnbaum*, 274 N.E.2d 22, 24 (1971) (demolition of unsafe structures on property without seizure of land was a permissible taking to address a public nuisance and did not require the paying of compensation to the owner).

106. Kelly, *supra* note 84, at 221 (quoting *Lucas*, 505 U.S. at 1029, "Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the state's laws of property and nuisance already place upon land ownership.").

107. Kelly, *supra* note 84, at 221.

108. ALEXANDER & TOERING, *supra* note 58, at 25.

109. *Id.*

110. *Id.*

111. Diana A. Silva, *Land Banking as a Tool for the Economic Redevelopment of Older Industrial Cities*, 3 DREXEL L. REV. 607, 608 (2011).

112. *Id.*

governments, and tax foreclosure proceedings.<sup>113</sup> However, programs that enable land banks to acquire, manage (and abate), and dispose of property,<sup>114</sup> and operate in a judicial process that can extinguish tax delinquencies and quiet title,<sup>115</sup> have been very successful in some communities.<sup>116</sup>

### C. Private Actions

Finally, where a local government does not act, what remedies exist for neighbors? Private nuisance actions may be successful against vacant and abandoned properties, but such suits face several hurdles.<sup>117</sup> A claim for private nuisance is actionable when a defendant's unreasonable, unwarrantable, or unlawful use of her property causes a non-trespassory interference with the plaintiff's own enjoyment of her property.<sup>118</sup> In *Puritan Holding Co.*, the Supreme Court of New York County was persuaded that the presence of a derelict, vacant building which had substantially lowered the value of the plaintiff's building located across the street, constituted a nuisance and thus awarded the plaintiff the difference in the market value price before and after the vacancy and dereliction.<sup>119</sup> However, while a private nuisance suit may be possible, a potential plaintiff would need to show that the defendant's conduct had been unreasonable such that the "gravity and probability of the harm" experienced by the plaintiff outweighs the "utility" of the defendant's conduct.<sup>120</sup> The character and context of the property's location may heavily influence such findings.<sup>121</sup> Perhaps a greater challenge to successful private nuisance suits is that many abandoning owners likely lack resources to satisfy judgments, or even if the judgments are enforceable, damages may be difficult to measure.<sup>122</sup> And finally, the costs associated with private litigation may be too heavy a burden for many potential litigants.<sup>123</sup>

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113. Frank S. Alexander, *Land Bank Strategies for Renewing Urban Land*, 14 J. AFFORDABLE HOUS. & COMTY. DEV. L. 140, 147 (2005).

114. Alexander, *supra* note 111, at 150–53.

115. Silva, *supra* note 111, at 617 (noting needed reforms for successful land bank programs).

116. See, e.g., Schilling, *supra* note 24, 117–18 ("Since 2003, the [Genesee County Land Bank in Michigan] demolished nearly 1,000 unsafe buildings, rehabilitated 90 affordable rental units and 80 single-family homes, and sold 700 side yard lots to adjacent property owners," leveraging \$3.5 million in expenditures to create \$112 million in benefits to the city of Flint.).

117. Kenneth Canfield, *A Nuisance Law Approach to the Problem of Housing Abatement*, 85 YALE L. J. 1130, 1138–42 (1976).

118. See, e.g., *Puritan Holding Co. v. Holloschitz*, 372 N.Y.S.2d 500 (1975); see also E.E. Woods, Annotation, *Electric Generating Plant or Transformer Station as Nuisance*, 4 A.L.R. 3d 902 (1965) (explaining the nuisance doctrine); RESTATEMENT (SECOND) TORTS § 822 (AM. L. INST. 1979).

119. *Puritan Holding Co.*, 372 N.Y.S.2d at 501–02.

120. RESTATEMENT (SECOND) TORTS § 826(a) (AM. L. INST. 1979).

121. *Id.*; RESTATEMENT (SECOND) OF TORTS § 827(d) (AM. L. INST. 1979) ("[T]he suitability of the particular use of enjoyment invaded to the character of the locality . . ."); RESTATEMENT (SECOND) OF TORTS § 828(b) (AM. L. INST. 1979) ("[T]he suitability of the conduct to the character of the locality . . ."). See also *Puritan Holding Co.*, 372 N.Y.S.2d at 502 ("Some buildings abandoned and left in disrepair in certain deteriorating neighborhoods . . . may not constitute a nuisance. However, here a building has been abandoned in a location where property owners are trying to maintain and upgrade the housing standards.").

122. Canfield, *supra* note 117, at 1138.

123. *Id.*

## IV. APPLYING LESSONS FROM THE URBAN CONTEXT TO THE WUI

Vacant and abandoned property in urban settings draw most of the attention, but rural and suburban areas struggle with these types of property as well.<sup>124</sup> Where blight occurs in those communities, it contributes to many of the same ills as its urban counterparts—crime, fires, tax delinquency, added expense to local government, and depressive effects on the value of surrounding property.<sup>125</sup> In addition, where those communities are in the WUI, vacant and abandoned properties also contribute to the overall risk of wildfire.<sup>126</sup> Any property left unmaintained and untreated in a manner to minimize the risk of structure ignition from a wildfire poses a significant risk to neighboring properties and any emergency responders that attempt to suppress a fire.<sup>127</sup> The frequent mention of vacant residential structures and vacant residential lots in Community Wildfire Protection Plans (CWPP)<sup>128</sup> reveals this issue to be a worry in many wildfire vulnerable communities. Florida’s Seminole County serves as one notable example. The County’s 2010 CWPP highlighted the \$285 million worth of vacant, unmaintained residential properties left in the wake of the financial crisis as a growing risk to the community.<sup>129</sup> As experience from administering the NFPA Firewise USA recognition program has revealed,<sup>130</sup> communities grappling with absentee and vacant landowners often face the following general challenges: 1) how to reach and engage seasonal or part-time

124. Ann M. Eisenberg, *Addressing Rural Blight: Lessons from West Virginia and WV LEAP*, 24 J. AFFORDABLE HOUS. 513, 513–14 (2016).

125. *Id.* at 533–35.

126. *See generally* Cohen, *supra* note 7.

127. *Id.* at 20–21.

128. *See generally*, CMTY. PLANNING ASSISTANCE FOR WILDFIRE, COMMUNITY WILDLIFE PROTECTION PLAN, MISSOULA COUNTY, MONTANA (2018), <https://www.missoulacounty.us/home/showdocument?id=30120>; FIRESAFE MARIN ET AL., MARIN COUNTY COMMUNITY WILDFIRE PROTECTION PLAN (2016), [http://marin.granicus.com/MetaViewer.php?view\\_id=33&clip\\_id=8302&meta\\_id=872159](http://marin.granicus.com/MetaViewer.php?view_id=33&clip_id=8302&meta_id=872159); PALMER LAKE VOLUNTEER FIRE DEP’T & KEITH WORLEY, COMMUNITY WILDFIRE PROTECTION PLAN (2008), [https://static.colostate.edu/client-files/csfs/documents/PalmerLakeCWPP\\_000.pdf](https://static.colostate.edu/client-files/csfs/documents/PalmerLakeCWPP_000.pdf); NYC PARKS, COMMUNITY WILDFIRE PROTECTION PLAN FOR THE EAST SHORE OF STATEN ISLAND (2012), <https://www.nycgovparks.org/pagefiles/54/EAS-appendix-1-draft-community-wildfire-plan-for-the-eastern-shore-of-SI.pdf>.

129. SEMINOLE CTY. OFF. EMERGENCY MGMT., SEMINOLE COUNTY COMMUNITY WILDFIRE PROTECTION PLAN 15 (2014), <https://www.seminolecountyfl.gov/core/fileparse.php/3333/urllt/cwpp-final-revised.pdf>.

130. NFPA has administered the Firewise USA® program since 2002. The national recognition program has engaged well over 2,000 neighborhoods in its formal, yet voluntary, wildfire mitigation process, with more than 1,500 communities as currently active participants in 42 states. Cathy Prudhomme, *Firewise USA™ Welcomed 170 New Sites to the Program in 2017*, NAT’L FIRE PROT. ASS’N XCHANGE: FIREBREAK BLOG (Jan. 12, 2018), <https://community.nfpa.org/community/fire-break/blog/2018/01/11/firewise-usa-welcomed-170-new-sites-to-the-program-in-2017>; *see also State Listing of Participants*, NAT’L FIRE PROT. ASS’N, <https://www.nfpa.org/Public-Education/By-topic/Wildfire/Firewise-USA/Firewise-USA-Resources/Firewise-USA-sites/State-listing-of-participants> (last visited Mar. 14, 2019) (provides a real-time updated list of participating communities in good standing). Experience over nearly twenty years has emerged from on-site visits by NFPA staff with state staff, numerous presentations at professional conferences by state and local authorities describing the challenges of coping with seasonal or part-time residents, and experience with major wildfires and the challenges in recovery for communities with major home destruction. *See generally Backyards and Beyond*, NAT’L FIRE PROT. ASS’N, <https://www.nfpa.org/Public-Education/By-topic/Wildfire/Wildfire-safety-training-and-conferences/Backyards-and-Beyond> (last visited Mar. 14, 2019) (presentation files available from three conferences (2011, 2013, 2015), with several that address local challenges in community-wide mitigation, including reaching and motivating absentee landowners).

occupants in voluntary risk reduction activities,<sup>131</sup> 2) how to cope with widespread vacancies due to the foreclosure crisis beginning around 2008,<sup>132</sup> 3) how to cope with potential widespread default on properties that have been destroyed during a wildland-urban disaster,<sup>133</sup> and 4) how to enforce safety standards and codes (where present) on absentee landowners.<sup>134</sup>

This section will look at the applicability of the strategies discussed in Sec. III for vacant properties in the WUI and suggests ways that local governments could adapt and adopt them to reduce risks in their communities.

#### A. Community Characteristics

Many communities at greater risk from wildfires are rural. Rural communities are not simply smaller, less densely populated versions of their urban counterparts, nor are they copies of one another.<sup>135</sup> However, rural areas often share certain generalizable characteristics that can impede efforts to address vacant and abandoned properties.<sup>136</sup> These include limited economic activity and fewer resources, particular cultural norms, and a more limited legal and planning framework.<sup>137</sup> A lower population density often creates a smaller tax base, and thus, these areas have fewer resources to draw on, and fewer staff available to fix community problems.<sup>138</sup> While inhabitants of rural communities are diverse, they often share a value of relying more heavily on informal services and dispute resolution rather than more legalistic remedies.<sup>139</sup> Many rural residents also place a high value on private property rights and are wary of attempts to interfere with them.<sup>140</sup> At the same time, rural populations often show high levels of social accountability.<sup>141</sup> Lastly, rural communities often lack, or have outdated versions of, building codes and related ordinances, and many may be unincorporated, further limiting their legal resources to address vacant properties.<sup>142</sup>

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131. KIM SCOTT & DAN SCHRODER, NURTURING FIREWISE® COMMUNITIES: CONVEYING A NEW AESTHETIC THROUGH EDUCATION (2011), <https://www.nfpa.org/-/media/Files/Training/ARCHIVED-presentations/2011-Backyards/NuturingFirewiseCommunitiesSchroderScott.ashx?la=en>.

132. Ted Cushman, *In Florida, Wildfire Risk Looms*, J. LIGHT CONSTR. (Feb. 1, 2009), [https://www.jlconline.com/how-to/in-florida-wildfire-risk-looms\\_o](https://www.jlconline.com/how-to/in-florida-wildfire-risk-looms_o).

133. See Robert Digitale, *Hundreds of Vacant Wildfire-Burned Lots Placed on the Market in Sonoma County*, NORTH BAY BUS. J. (March 19, 2018), <https://www.northbaybusinessjournal.com/northbay/sonomacounty/8129624-181/sonoma-santa-rosa-wildfire-lots-sale>.

134. RYAN DEPEW, NAT'L FIRE PROT. ASS'N, NATIONAL WILDLAND SAFETY STANDARDS (2011), <https://www.nfpa.org/Public-Education/By-topic/Wildfire/Wildfire-safety-training-and-conferences/Backyards-and-Beyond/2011-Backyards-and-Beyond-presentations>.

135. See, e.g., Eisenberg, *supra* note 124, at 515–16, 518.

136. *Id.* at 517–18.

137. *Id.* at 518.

138. *Id.* at 520–21.

139. *Id.* at 523 (citing ROBERT C. ELLICKSON, ORDER WITHOUT LAWS: HOW NEIGHBORS SETTLE DISPUTES 1 (1991) (finding that often “neighbors applied informal norms, rather than formal legal rules, to resolve most of the issues that arose among them”)); see also Lisa R. Pruitt & Bradley E. Showman, *Law Stretched Thin: Access to Justice in Rural America*, 59 S.D.L. Rev. 466, 489 (2014) (“This ethos of independence and self-reliance associated with rural places is reflected in residents’ reluctance to seek government assistance.”).

140. Eisenberg, *supra* note 124, at 524.

141. *Id.* at 525.

142. *Id.* at 526–27.

Of course, not all WUI communities are rural. Florida, for instance, is among the most densely populated states with a significant wildfire risk, both from forests and grasslands.<sup>143</sup> These denser areas can be at significant risk for the type of urban conflagration described above in Sec. II(b). The impact of these urban conflagrations can be seen in the 2017 Tubbs Fire, which destroyed 4,658 homes in Santa Clara, California.<sup>144</sup> In some places, where entire neighborhoods burned down, many owners are unlikely to return, leaving vacant properties that will make preparing for the next fire even more challenging.<sup>145</sup>

#### B. Applying Urban Vacant Property Strategies to Vacant & Abandoned Properties in the WUI

##### i. Data

Many WUI communities, particularly the more rural ones, may lack the resources to build sophisticated vacant property tracking systems, combining information on property conditions, ownership and title status, general market conditions, and other data.<sup>146</sup> However, while some of this information may be burdensome to collect, smaller communities are likely well aware of the problem properties in their midst. Some other places, particularly those hit by widespread foreclosures, may be able to take advantage of tools coming online from the mortgage servicing industry. “Compliance Connection” is one such example, where the lender-client of the mortgage servicing company can input information on its foreclosed and vacant properties, which local code officials can then access.<sup>147</sup> Through leveraging local knowledge, or taking advantage of other tools, WUI communities can draw information on vacant and abandoned properties into regular risk assessment exercises.<sup>148</sup> These exercises are an integral part of the Firewise program and CWPP

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143. Florida is the 8<sup>th</sup> most densely populated state in the country. *Florida Population 2018*, WORLD POPULATION REV., <http://worldpopulationreview.com/states/florida-population/> (last visited Mar. 14, 2019). In the government report, *The 2010 Wildland-Urban Interface of the Conterminous United States* Florida is listed as the state with the 3<sup>rd</sup> most homes and population “in the WUI” after California and Texas, and the largest number of seasonal homes of any state. SEBASTIÁN MARTINUZZI ET AL., *THE 2010 WILDLAND-URBAN INTERFACE OF THE CONTERMINOUS UNITED STATES 14* (2010), [https://www.fs.fed.us/nrs/pubs/rmap/rmap\\_nrs8.pdf](https://www.fs.fed.us/nrs/pubs/rmap/rmap_nrs8.pdf).

144. Randi Rossmann, *Cal Fire: 4658 Homes Destroyed in Tubbs Fire*, PRESS DEMOCRAT (Nov. 1, 2017), <https://www.pressdemocrat.com/news/7588914-181/cal-fire-4658-homes-destroyed?gallery=7597510&sba=AAS>.

145. See Kevin McCallum, *Fire-Scorched Fountaingrove in Santa Rosa Focal Point of Debate Over Rebuilding*, PRESS DEMOCRAT (Oct. 28, 2017), <http://www.pressdemocrat.com/news/7572376-181/fire-scorched-fountaingrove-in-santa-rosa>.

146. See Schilling, *supra* 24, at 114–15.

147. Interview by Michele Steinberg, NFPA with Tim Rath, Safeguard Properties, Inc. (July 31, 2018) (Some of these companies also provide FEMA with information on the level of need when a Presidential disaster declaration for individual financial assistance is being contemplated, and thus have significant on-the-ground intelligence about the state of properties after natural disasters.).

148. Eisenberg, *supra* note 124, at 545 (in terms of available resources in rural communities, “[c]ommunities can utilize aspects of small-town life as an asset”).

development. Combining information on community risk and the location and status of vacant properties can help communities prioritize their efforts to mitigate their risk.

## ii. Vacant Property Registration Ordinances

Just as code officials in urban areas site the difficulty of locating absentee owners as a major hurdle to their vacancy abatement activities,<sup>149</sup> rural officials also struggle with this task.<sup>150</sup> The task for WUI communities is often compounded by the need to contact owners of woodland properties who do not live in the community.<sup>151</sup> Given the difficulty in locating absentee owners, WUI communities might benefit from vacant property registration ordinances. As discussed above in Sec. III(b), some of these ordinances serve as a disincentive to continued vacancy or as tools to support code enforcement. At their simplest, these ordinances make it easier for officials to contact owners. A vacant property ordinance could even be adapted to require registration for seasonal vacancies. While registration fees (and penalties for failure to register) would need to be well considered, vacant property registration ordinances could be a helpful tool to enable engagement with absentee owners about wildfire mitigation efforts in the community and the importance of bringing their own properties in line.

A case study of the Loess Hills in Iowa highlights the potential for concerted engagement efforts with absentee owners.<sup>152</sup> In that case, land management officials actually sought to use prescribed fire to restore a sensitive landscape, 97% of which was held by private owners, many absentee.<sup>153</sup> The study found that by far the most effective way to engage these owners was a personal phone call in addition to direct mail and opportunities for in person meetings.<sup>154</sup> As a result of the campaign to raise the prescribed fire issue with owners and provide information to

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149. See *e.g.*, Schilling, *supra* note 24, at 124 (“The number one complaint from code officials is the tremendous difficulty they have tracking down and then holding lenders and mortgage services responsible for maintaining their properties.”).

150. Eisenberg, *supra* note 124, at 533 (reporting interviews with local government officials from rural West Virginia towns, “[a]bsentee landowners were reported to be a significant obstacle. They were perceived as being less knowledgeable of buildings falling into disrepair and less accountable in the local community. Respondents believed that substantial time and resources were devoted to figuring out who landowners were and finding them—with no guarantee of results due to the lack of enforcement tools available for out-of-state owners.”).

151. KATIE BEECHEM, OUT OF SIGHT, OUT OF MIND?: A STUDY OF ABSENTEE WOODLAND OWNERS IN PENNSYLVANIA, COLORADO, AND NORTH CAROLINA, 2–4 (2015) (A survey of absentee owners in Pennsylvania, Colorado, and North Carolina, who own around 44% of all family/individually held woodlands in those areas, revealed a population that tended to underestimate the risk of fire on their lands and had low motivation to seek help and resources to lower their risk. The study concluded that it may be harder for county agencies or extension services to provide information to absentee owners using traditional methods, and that a strategy for reaching these owners is extremely important.)

152. See CONSERVATION CONNECT, CASE STUDY: FIRE IN THE LOESS HILLS (2008), <https://conservationconnect.files.wordpress.com/2016/06/casestudiesbinder.pdf>; see also Tom Buman, *Reaching Out to Absentee Landowners*, 62 J. SOIL WATER CONSERVATION, 36A (2007), <http://www.jswconline.org/content/62/2/36A.full.pdf>.

153. *Id.*

154. *Id.*

help them understand the need, 60% reported intent to conduct prescribed burns on their land.<sup>155</sup>

Thus, while vacant property ordinances may serve as a jumping-off point for other regulatory enforcement activities, they may also facilitate engagement that encourages voluntary action. And, in those rural communities where norms dictate informal dispute resolution over formal legal proceedings,<sup>156</sup> such ordinances may facilitate opportunities for negotiations and persuasion.

### iii. Building Codes and Property Maintenance Ordinances: Enactment & Enforcement

Where owners may be unresponsive or where the ultimate goal is timely compliance with wildfire mitigation measures, local leaders may need more tools than a desire to educate and engage. Codes and code enforcement are some of the best tools jurisdictions have at their disposal, but only if these codes have been enacted. In fact though, many rural communities lack building codes and related ordinances.<sup>157</sup> Comprehensive land use planning tools, codes, and standards exist to help communities mitigate wildfire risks, covering siting, property maintenance, and building materials and techniques to reduce the ignition potential of any structures in wildfire hazard zones.<sup>158</sup> However, in many at-risk communities, these standards have either not been adopted, or have been made less effective through the selective adoption of some provisions, and the discard of others.<sup>159</sup> If these ordinances are not in place, local authorities have little leverage against property owners who do not take voluntary action. Rapid City, South Dakota provides an excellent example of this frustration. The city's fire department has had great success with voluntary mitigation programs, but it has no tools to address nuisance properties increasing the wildfire risk to the community, including any vacant properties.<sup>160</sup>

Despite the potential for these codes to reduce risk and make it easier for local officials to protect their communities, many WUI communities are resistant to their adoption. In Payson, Arizona, a growing community in an area of high wildfire risk, a battle about adopting even the simplest of requirements for wildfire protection

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155. *Id.*

156. Eisenberg, *supra* note 124, at 540 (recounting report from city attorney of a small town where mayor personally contacts owners of blighted property to persuade them that their buildings are a hazard and liability and that title should be transferred to the town. Legal proceedings are a last resort and the mayor has had success paying for demolition and code abatement by neighboring property owners to purchase the land).

157. *Id.* at 526.

158. See NAT'L FIRE PROT. ASS'N, COMMUNITY WILDFIRE SAFETY THROUGH REGULATION: A BEST PRACTICES GUIDE FOR PLANNERS AND REGULATORS 6 (2013).

159. DUERKSEN, *supra* note 9, at 29.

160. Interview by Michele Steinberg, NFPA with Tim Weaver, Deputy Fire Chief, Rapid City Fire & Rescue (May 13-14, 2014) (regarding the tabling of a proposed wildfire safety code for Rapid City, a measure that would have helped address enforcement on vacant lots and nuisance property. Presentation titled "Regulations in the WUI: Challenges and Lessons Learned in Code, Ordinance and Standards Adoption at International Association of Fire Chiefs' WUI Conference in March 2015 by Steinberg, Weaver, and NFPA's Lucian Deaton included discussion on this topic.)

has dragged on for years.<sup>161</sup> Where ordinances have been enacted, enforcement may be weak.<sup>162</sup> Even where communities have experienced wildfires, local officials may be reluctant to adopt ordinances designed to reduce future risks. For instance, where homeowners must rebuild after a disaster, their insurance may not cover upgrades required to meet current codes. If property owners do not have insurance coverage for building code upgrades (known as law or ordinance coverage), this potentially makes rebuilding unaffordable. Following the Tubbs Fire, officials with the City of Santa Rosa struggled with whether and how to enforce rebuilding requirements, fearing that many owners would walk away from the property, affecting tax rolls as well as community cohesion.<sup>163</sup> El Paso County, Colorado reacted to the Black Forest Fire of 2013 by eliminating requirements for residential fire sprinkler systems and rejecting attempts to create a code for wildfire zones.<sup>164</sup> In both instances, municipal officials and residents feared the financial impacts of code enforcement that may have led to abandoned property.

While not politically palatable in some locations or perceived as in opposition to recovery goals in others, wildfire mitigation building codes and property maintenance ordinances are indispensable tools for lowering the levels of risk wildfires pose to communities, and thus, they cannot be neglected without consequence.

Even where codes and ordinances are in place, local governments may lack the resources to engage in code enforcement activities. Where that is the case, local governments could consider sharing code enforcement resources among neighboring jurisdictions.<sup>165</sup> However, even if the “boots on the ground” challenge is easily solved, rural, suburban, and urban officials alike face the challenge of compelling owners to address code violations in a timely manner and at limited expense to the local taxpayers. But, if the jurisdiction has enacted building codes and property maintenance ordinances to reduce wildfire risk, in rem code enforcement might offer the best approach for their enforcement on vacant or abandoned property. Just as in an urban environment, in rem code enforcement would require code officials to seek court ordered abatement with less rigorous notice requirements and

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161. See Alexis Bechman, *Catastrophe: A Forest in Flames*, PAYSON ROUNDUP (Aug. 21, 2018), [https://www.paysonroundup.com/catastrophe\\_a\\_forest\\_in\\_flames/](https://www.paysonroundup.com/catastrophe_a_forest_in_flames/); see also Miranda H. Mockrin et al., *Does Wildfire Open a Policy Window? Local Government and Community Adaptation After Fire in the United States*, ENVTL. MGMT. (May 15, 2018) <https://www.ncbi.nlm.nih.gov/pubmed/29766223> (“I don’t think that the lake community is receptive to regulation because they had very onerous regulations, you know, very recently [when land was leased from Brazos River Authority]. I mean, it’s in our recent memories, and that’s one of the attractions, moving out here, is the lack of rules. —Possum Kingdom TX”).

162. Mockrin, *supra* note 161 (“We don’t do enforcement right now. What we’re doing is, we adopted it, and . . . we’re using it as an educational piece for everybody. If enforcement ever happens, at that point [people will need to comply to get a building permit from us]. Right now, we’re not at that level yet.—Monument AZ.”).

163. Doug Smith & Nina Agrawal, *Despite Clear Risks, Santa Rosa Neighborhood That Burned Down was Exempt from State Fire Regulation*, L.A. TIMES (Oct. 15, 2017), <http://www.latimes.com/local/lanow/la-me-ln-coffee-park-explainer-20171011-story.html>.

164. Ryan Maye Handy, *El Paso County Weakened Some Fire Codes After Destructive Black Forest Fire*, GAZETTE (Oct. 30, 2015), [https://gazette.com/news/el-paso-county-weakened-some-fire-codes-after-destructive-black/article\\_685ab095-2d0a-5bea-9014-ab70d9331954.html](https://gazette.com/news/el-paso-county-weakened-some-fire-codes-after-destructive-black/article_685ab095-2d0a-5bea-9014-ab70d9331954.html).

165. Eisenberg, *supra* note 124, at 544.

return to court to attach a super-priority lien in an effort to recoup any public expenses that went toward the code abatement activities.<sup>166</sup> Unfortunately, while the attachment of super-priority liens on non-compliant property is ideal for code enforcement, the status of such liens depends on the state. In Georgia, for example, state law expressly permits that “[t]he lien shall be superior to all other liens on the property, except liens for taxes to which the lien shall be inferior, and shall continue in force until paid.”<sup>167</sup> In neighboring Florida though, a 2013 decision by the state’s Supreme Court struck down a local ordinance granting super-priority status to code enforcement loans, finding it to be in contradiction of state law which provided that liens are prioritized in order of their recording dates.<sup>168</sup> Given the urgent need for community-wide mitigation in the WUI, those states which restrict the priority of code abatement loans are depriving local governments of a potentially useful tool.

One added hurdle for code enforcement officials trying to enforce WUI building codes and property maintenance standards on vacant properties is the need to seek permission or obtain a warrant before making an entrance onto the property.<sup>169</sup> The more closely the environment resembles a typical urban environment—the smaller the lots and the closer the homes—the code official may be able to make a reasonable inspection from the street without venturing onto the property to determine if the property or exterior of any structure on the property fails to comply with code requirements. Where the property is set back from the road though, or if the view is greatly obscured, the code official may need to venture onto the property to assess its compliance. If the community has enacted some type of vacant property registration, or has other means of contacting the property owner, the code official could, perhaps, send the owner a letter seeking permission, with a reply expected in a reasonable period of time (for instance, thirty days). If the owner fails to reply in a reasonable amount of time, the code official could then seek a warrant to enter and inspect the property. Again though, such a search would have to be predicated on a “reasonable legislative or administrative standard” and thus dependent on local government leaders to enact the requisite codes and ordinances.<sup>170</sup>

#### iv. Property Seizure

While the city of Baltimore and a community abutting wildfire-prone wilderness seemingly have little in common, Baltimore’s abandoned row homes pose a fire hazard to their neighbors just like untreated properties in the WUI. The potential for an urban conflagration type event set off by a wildfire justifies an aggressive approach to seizing vacant properties in an at-risk environment, clearing them of hazards, and returning them to some type of productive, risk-minimizing use in their community. One feature of Baltimore’s process that aids its efficiency is its statutory definition of a vacant building—“an unoccupied structure that is unsafe or unfit

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166. Alexander & Toering, *supra* note 58, at 25.

167. GA. CODE ANN. § 41-2-9(b)(1) (West 2005).

168. See *City of Palm Bay v. Wells Fargo Bank, N.A.*, 114 So.3d 924 (Fla. 2013).

169. See, e.g., *Camara v. Municipal Court*, 387 U.S. 523 (1967).

170. *Id.* at 538.

for human habitation”—as a “fire hazard and nuisance per se.”<sup>171</sup> Other states with receivership procedures can be less categorical and require additional findings before a court will rule that a vacant property is a nuisance and a threat to public safety.<sup>172</sup> Communities in the WUI could follow Baltimore’s lead, enacting ordinances which would find any vacant property that is unsafe, unfit for human habitation, or poorly maintained to be a dangerous ignition risk and a nuisance per se, lowering the burden on local officials to show the court that the property is indeed a nuisance. The Baltimore approach also relies on a powerful grant of authority to the local level that allows the government there to pursue receivership and pre-rehabilitation sales.<sup>173</sup> Not all states match Maryland’s more permissive approach, allowing some local government units to “. . . enact local laws to provide for appropriate administrative and *judicial proceedings*, remedies, and sanctions to administer and enforce local laws enacted [to protect and promote public safety<sup>174</sup>. . . [in] the erection, construction, repair, and use of buildings and other structures.”<sup>175</sup> Other local governments may be limited in the types of procedures they can establish. However, states should seek mechanisms that enable local governments to act to protect public safety while minimizing the burden they face, either through costly and time-consuming litigation or the expense of paying just compensation.

The in rem procedures used in Baltimore may serve to minimize the former, but there is no judicial record on the City’s receivership forfeiture sale to conclusively know whether a court would favor denying compensation and, thus, that it would minimize the latter. However, when presented with a similar case, the Iowa Supreme Court found in the City’s favor.<sup>176</sup> In that case, the city of Eagle Grove had petitioned the court to be awarded title of two abandoned properties as part of an effort to address blight in the community.<sup>177</sup> The properties’ owner sued, alleging a taking without proper just compensation.<sup>178</sup> The Iowa Supreme Court noted that “[i]n order for there to be a taking requiring compensation, there must be a constitutionally protected private property right,” and held that there was no protected property interest in abandoned property.<sup>179</sup> The court further applied the Supreme Court’s ruling in *Lucas*,<sup>180</sup> finding that even though one of the properties had been acquired after the statute at issue here was enacted, “. . . at the time [the appellee]

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171. Kelly, *supra* note 84, at 219.

172. *Id.*

173. *Id.*

174. MD. CODE ANN., LOCAL GOV’T § 10-317(b) (West 2018) (emphasis added).

175. *Id.* at § 10-317(a).

176. City of Eagle Grove v. Calahan Invs, LLC., 904 N.W.2d 552, 566 (Iowa 2017).

177. *Id.* at 554–56 (“In recent years, small communities across Iowa have seen an increase in the number of unoccupied, dilapidated, and run-down properties . . . . It is difficult for the communities to address this problem effectively because of the increased proliferation of such properties and the proportionally increased costs of abatement.”).

178. *Id.* at 557.

179. *Id.* at 560 (“Through section 657A.10A, [the statute under which the local government was petitioning the court for title of the property], the general assembly has established conditions for retaining one’s property interest in buildings or structures . . . calculated to promote public safety by discouraging owners from abandoning their properties in a deteriorated and dangerous condition.”).

180. *Id.* at 564 (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992)) (“Whether or not the property owners’ ‘bundle of rights’ included the right to use the land in the way the regulation forbids is to be determined under state nuisance and property law.”).

acquired title . . . under existing general nuisance and property forfeiture law, [it] could have lost title.”<sup>181</sup> Therefore, the city’s actions did not constitute a taking for which compensation was required.

It would be in keeping with the *Eagle Grove* decision for a local government to seek title to abandoned properties that threaten their neighbors in the WUI setting. The statute relied on in that case identified a number of factors the court could use in determining abandonment, including whether “the building meets the city’s housing code for being fit for human habitation, occupancy, or use . . .” or based on “[t]he presence of vermin, accumulation of debris, and uncut vegetation,” or “[a]ny other evidence the court deems relevant.”<sup>182</sup> Presumably, states with communities located in wildfire prone areas could include criteria to cover abandoned properties that increase ignition risk (even if those criteria are more stringent than they would be for a traditional nuisance) in their grants of authority to local governments to acquire and abate nuisance properties. As demonstrated in the *Eagle Grove* case, where local governments are acting in the public good and to protect public safety, courts would likely be inclined to not find that compensation is warranted.<sup>183</sup> If local governments do successfully gain title to an abandoned property though, they next need to consider the disposition of that land. Particularly in rural areas, there may be few potential bidders, and some who are interested may be speculators who have little incentive to maintain the land, creating a cycle of abandonment and condemnation for the town.<sup>184</sup> While it may not serve the city’s interest in recouping funds expended on abating a nuisance property, the local government could consider land trust arrangements that leave the property undeveloped but productive for natural or land management uses (i.e., maintaining a fire break, watershed management, etc).

### C. Private Actions in the WUI

Neighbors surrounding a vacant property that increases the risk of ignition on their own properties during a wildfire event could consider bringing a private nuisance action against the property’s owner. In addition to the challenge of locating the owner, though, the plaintiffs would need to demonstrate to the court that the absentee owner’s conduct is unreasonable.<sup>185</sup> A seasonal occupier, for instance, may diligently keep up the property while occupying it, but neglect it while absent. This type of behavior, while dangerous in the WUI, may seem suitable to the area, making it hard to meet the burden of showing that it is unreasonable.<sup>186</sup> The plaintiffs here would also want to seek injunctive relief to abate the hazard, not simply the change in market value associated with the vacant property’s presence, and

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181. *Eagle Grove*, 904 N.W.2d at 566.

182. *Id.* at 558–59 (citing IOWA CODE ANN. § 657A.10A(d), (h), (k) (West 2015)).

183. *Cf. Town of Front Royal v. Cogil Corp.*, 56 Va. Cir. 9 (2001) (whereas the defendant’s property was a nuisance and a fire hazard, less drastic measures than razing the property could be undertaken to abate the nuisance, like fencing the property and making weekly inspections).

184. Eisenberg, *supra* note 124, at n.152.

185. RESTATEMENT (SECOND) OF TORTS § 822 (AM. L. INST. 1979).

186. *Id.* at § 827(d) (“The suitability of the particular use of enjoyment invaded to the character of the locality. . .”).

thus would also need to demonstrate that the property poses not simply some increased risk of future harm, but an actual imminent one.

#### V. CONCLUSION

Vacant and abandoned properties present an additional hurdle to community efforts to reduce ignition risk from wildfires in their communities. While dealing with them may be cumbersome and time consuming, local governments should develop assertive strategies to deal with the properties rather than ignore them. Central to any strategy is communication. Local governments should take advantage of ideas like vacant property ordinances to create channels of communication to property owners to strongly encourage them to take voluntary action. However, as any urban community fighting blight can attest, waiting for voluntary action, particularly where the owner simply cannot be located, may be simply too slow to address the growing danger to the community. In the WUI, a community may need to take action before a vacant property is so overgrown and dilapidated and its character as a nuisance is beyond debate. Therefore, building codes and ordinances must reflect the conditions in those areas, which increase ignition risks to the whole community, and local governments should consider defining vacant properties with those characteristics as a *per se* nuisance. With the proper ordinances enforced through in rem jurisdiction communities have powerful tools to address problem properties and support risk reduction. Without improved building codes and property maintenance ordinances though, communities may simply have to wait for the property to become much more blighted before being able to convince a court to support its action.