

Introduction

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Problem properties, whether vacant or occupied, that are visibly neglected or that are being used inappropriately can have a devastating effect on their surroundings. They undermine their neighbors' quality of life, diminish the value of nearby properties, reduce revenues, and impose fiscal burdens on local governments. Problem properties are not solely a concern of struggling older cities such as Detroit, Michigan, or Gary, Indiana. Rural areas and small towns taken as a whole have a vacancy rate nearly double that of metropolitan areas, with vacant properties particularly widespread in the deep South, much of Appalachia, and the western plains states. Problem properties, both vacant and occupied rental properties, are also pervasive in many inner-ring suburbs such as those in South Cook County, Illinois, or North St. Louis County, Missouri, which were victimized by extensive subprime lending during the early years of the new millennium.

For many different reasons, the number of vacant properties in the United States has increased dramatically since the Great Recession and the end of the housing bubble.² The number of "other vacant" units—a term used by the U.S. Census Bureau to define those units that are not on the market, held for future occupancy, or used only seasonally—has risen from 3.7 million

1. My co-editors and I would like to gratefully acknowledge Pace Law JD candidate Maximillian Mahalek, MUP, who provided assistance with notes and citations in this Introduction and throughout the text.

2. While a detailed discussion of the reasons is well beyond the scope of this introduction, it is worth noting a few: they include the effects of the foreclosure crisis, which have lingered in many low-income and low-demand areas; overbuilding during the years prior to 2007, which created an overhang of units only now being absorbed by the market; and the Great Recession, which depressed housing demand for many years.

in 2005 to 5.8 million in 2016.³ While there is no national tally for vacant lots, a 2015 survey in Gary, Indiana, found 25,000 vacant lots, or over 40 percent of the city's parcels.⁴ According to a 2017 estimate, Detroit has at least 114,000 vacant lots.⁵

Problem vacant properties are sometimes referred to as "abandoned" properties, implying that the owners have walked away from them and allowed them to fall into disrepair. The term "abandoned" may raise questions. If an owner is not maintaining his or her property but continues, say, to pay the taxes on it, is it truly *abandoned*? Such a property may be deemed to be abandoned under the laws of at least one state⁶ but not in all. We would suggest that there are two forms of abandonment: abandonment in the literal sense, where the owner has walked away from the property in all respects, and *constructive* abandonment, where the owner may be nominally present and paying taxes but has ceased to maintain the property and allowed it to deteriorate or become a nuisance. Dealing with properties that have been abandoned, literally or constructively, raises many thorny legal issues not only for lawyers but also for all those trying to put those properties back into productive use.

Occupied properties can also be problem properties where they are not being properly maintained, have been allowed to fall into disrepair, or are being used in ways that may constitute a nuisance or do harm to residents or neighbors. These are most often absentee-owned rental properties but can include

3. See 2005 and 2016 data from the U.S. Census Bureau's American Community Survey. *American Fact Finder*, U.S. CENSUS BUREAU, <https://factfinder.census.gov/faces/nav/jsf/pages/index.xhtml> (last visited Aug. 7, 2018).

4. *Gary survey results*, GARY COUNTS, <http://garycounts.org/reports/> (last visited Aug. 7, 2018) (reporting vacant property survey results for the city of Gary, Indiana).

5. 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-blight-cleanup-will-cost-850-million.html> (quoting Detroit Blighted Property Task Force).

6. N.J. STAT. ANN. § 55:19-81 explicitly provides that a vacant property can be deemed abandoned for legal purposes even if the owner is paying taxes as long as it meets other criteria set forth in the law.

owner-occupied properties as well, particularly in cases where impoverished, often elderly homeowners are unable to maintain their homes and live in potentially dangerous or unhealthy conditions. While only a small percentage of absentee-owned properties are problem properties, those properties tend to be a serious concern, particularly in lower-income communities and those ravaged by the foreclosure crisis of the last decade. That crisis led to millions of formerly owner-occupied properties going into foreclosure and subsequently being bought by absentee owners, who then rented out the properties. While some of these new owners were large corporate entities, the vast majority were small “mom and pop” landlords. Most of those buyers were responsible landlords, but many were not, whether because of not knowing or understanding what was involved in being a good landlord, living or working too far away from their properties to properly manage them, or in some cases deliberate intent. While the loss of homeowners itself can have a destabilizing effect on an area,⁷ the activities of ill-equipped, remote, or malicious landlords compound the problem.

Problem properties are, above all, *properties*, meaning that they are subject to the manifold body of laws, customs, and beliefs associated with property in the United States from its beginning. As historian Stuart Bruchey has written, “Perhaps the most important value of the Founding Fathers of the American constitutional period was their belief in the necessity of securing property rights.”⁸ Since then, the body of law, principally at the state level, dealing with property rights—and to a lesser extent with property responsibilities—has grown into a vast and sprawling edifice. The New York State Real Properties Actions

7. For a discussion of the role of homeownership in neighborhood stability, see Alan Mallach, *Homeownership and the Stability of Middle Neighborhoods*, in *ON THE EDGE: AMERICA'S MIDDLE NEIGHBORHOODS* (Paul Brophy ed., 2016).

8. Stuart Bruchey, *The Impact of Concern for the Security of Property Rights on the Legal System of the Early American Republic*, 1980 *Wis. L. Rev.* 1135, 1136 (1980).

and Proceedings Law (RPAPL) contains 24 separate articles covering hundreds of pages of fine print.⁹

While general laws governing real property apply to problem properties, whether vacant or occupied, a growing body of law specific to those properties has been superimposed on the general body of property law in recent decades. Thus, article 19-A of the New York RPAPL deals directly with special proceedings to convey title to abandoned properties to local governments, while states such as Pennsylvania and Ohio have authorized court-appointed receivership (known as conservatorship in Pennsylvania) for vacant properties, and still other states have modified their tax foreclosure¹⁰ and eminent domain¹¹ statutes to create special or expedited procedures for vacant properties.

In still other states, courts have crafted creative remedies for abandoned properties that arguably go beyond explicit statutory language,¹² while in California¹³ and elsewhere, local jurisdictions

9. It is worth noting that at least in New York, one can find the great majority of state laws governing real property in one place; this is far from the case in many other states.

10. N.J. STAT. ANN. 55:19-101 authorizes municipalities to hold “Special Tax Sales” of properties meeting the statutory criteria for abandonment, under which provisions the municipality may follow procedures that deviate significantly from the procedures specified in the state Tax Sale Act, N.J. STAT. ANN. 54:5-1 *et seq.*

11. A number of states, including New Jersey, Ohio, Pennsylvania, Tennessee, and Virginia, and the District of Columbia have adopted what are referred to as “spot blight” eminent domain statutes, which permit municipalities to use their eminent domain powers to take individual blighted or problem properties and subsequently reconvey them to third parties without recourse to the often-cumbersome urban renewal statutes.

12. An example is the nuisance abatement procedure used by courts in Wayne County, Michigan, under which title is conveyed to the county or the city of Detroit because of a vacant property owner’s failure to contest a motion brought by the city or county. *See Nuisance Abatement*, DETROIT LAND BANK AUTHORITY, <https://buildingdetroit.org/nuisance-abatement/> (last visited Aug. 6, 2018).

13. A good example is the Chula Vista Abandoned Resident Property Program, which imposes on mortgage lenders the responsibility to maintain properties during the foreclosure process; *see Abandoned Residential Property Program*, CITY OF CHULA VISTA, CAL., <http://www.chulavistaca.gov/departments/development-services/code-enforcement/abandoned-residential-property-program> (last visited Aug. 6, 2018).

have used the home rule powers granted them by state constitutions or statutes to come up with new approaches to solve the problems created by vacant properties in their midst. At the same time, an extensive body of state and federal law has emerged to address the specific issues associated with abandoned properties suffering from environmental contamination, known as brownfields, as discussed in Chapter 8. Still other laws, such as receivership and licensing laws, have been enacted to address issues associated with problem rental properties, as discussed in Chapter 4.

As a result, the legal issues that arise when addressing problem properties not only have become complex but also often deviate in important respects from general property law. No responsible lawyer, whether representing a local government, a property owner, or a body of concerned citizens, can assume any more that the traditional provisions of property law that he or she first learned in law school necessarily apply to problem properties. Moreover, as with more general property law, the body of law dealing specifically with problem properties is, within the framework of constitutional principles, largely a body of *state* law, supplemented—particularly in home rule states—by local ordinances enacted under the municipal police power. Since no book can hope to cover the intricacies of 51 (50 states and the District of Columbia) separate and often widely disparate legal systems, the authors have concentrated on elucidating the critical principles behind this body of law while offering examples of individual state laws and practices, often from their own personal experience, to illustrate those principles.

But the complexities of legal practice involving problem properties go beyond the *legal* complexities. There are few areas of the law where the legal issues are as thoroughly interwoven with social and economic issues as in the area of problem properties. Exceptions, such as cases where an estate or title dispute leads to a property being neglected and perhaps abandoned, are rare by comparison, while the great majority of problem-property issues that become matters of concern for lawyers or anyone else arise from underlying social and particularly economic conditions. If we assume that the principal purpose of

legal proceedings involving problem properties is usually likely to be the resolution or amelioration of the problems associated with those properties, then it is essential that those engaged in those proceedings have a solid understanding of the underlying issues causing the problem, not merely the symptom represented by the condition of the property itself.

The roots of property problems are, with rare exceptions, economic in nature. In essence, properties are abandoned when an owner no longer finds it worth his or her while to maintain the property or where no buyer can be found for a property the owner has left. Rental properties are allowed to fall into disrepair where the owner either cannot earn enough rental income to maintain the property or finds it more financially appealing to pursue a short-term, exploitative, or “milking” business model rather than be a responsible steward of the property. Thus, for any legal action to be effective in eliminating the problem and lead to productive reuse or improvement of the property in question, it must be grounded in a realistic assessment of the economic conditions affecting that property.

While economic conditions, as well as the different ways in which different people respond to their understanding of those conditions, drive property problems, it would be a mistake to assume that those problems are simply a function of market conditions. In addition to such idiosyncratic matters as title disputes or bankruptcies, problem-property conditions are often exacerbated by dysfunctional or poorly managed legal or administrative practices. Property tax lien sales and foreclosures, as well as mortgage foreclosure laws and practices, often consign properties to a form of legal limbo leading to abandonment and ultimate destruction of whatever value the property may once have had. Similarly, the proliferation of problem rental housing is often encouraged by the widespread presence of inefficient and ineffective code enforcement practices, as well as understaffed or poorly trained municipal code enforcement agencies.

Yet another critical dimension is the relationship between problem properties and the planning process. While it would

be a reach to implicate local planning too deeply in the process by which properties become problems, it is a critical element in any process to address the problem. Vacant properties do not exist in a vacuum. They affect, and are affected by, the physical, environmental, and economic conditions of their surroundings. Thus, if a vacant property reuse strategy is to lead to a stronger and healthier neighborhood—rather than result in no more than scattered, one-off actions—it needs to be embedded in a careful consideration of the characteristics of its surroundings and, to the extent feasible, linked to other strategies—market-building, infrastructure improvement, transportation, and human capital development—that are designed to address other critical challenges affecting the same neighborhood or community.

This can begin at a small scale, with an examination of the properties adjacent to—or on the same block or two—as the property in question. There is compelling evidence not only that vacant properties on a block undermine the property values of adjacent houses and the confidence of their owners but also that most of the damage is done by the *first* vacant property.¹⁴ Thus, on a hypothetical city block with five vacant houses, if four are rehabbed and one remains vacant and abandoned, there is little reason to expect significant improvement in overall neighborhood conditions. Thus, an analysis of surrounding properties and a comprehensive approach are critically important elements of vacant property reuse. One of the principal goals of the parcel inventories or surveys being conducted by many municipalities is to generate a comprehensive picture of the community's vacant properties—both buildings and lots—as well as occupied buildings in poor condition to provide a solid basis for comprehensive planning around problem-property issues.

14. The most compelling research evidence in support of this proposition comes from a Philadelphia study; see G.T. Whitman, A.B. Shlay, S. Honey, & R. Diamond, *BLIGHT FREE PHILADELPHIA: A PUBLIC-PRIVATE STRATEGY TO CREATE AND ENHANCE NEIGHBORHOOD VALUE* (2001), <https://astro.temple.edu/~ashlay/blight.pdf>.

In many cases, the planning issues are much broader. While a vacant single-family house, if rehabilitated, will in almost all cases be reused as a single-family house,¹⁵ the same is unlikely to be true of a vacant industrial building, where the historic use of a building constructed for late 19th- or early 20th-century manufacturing or warehouse use is clearly no longer viable. Where concentrations of such buildings exist, as in many former industrial cities, an areawide plan grounded in careful market analysis becomes an important element in a reuse strategy. Many such buildings have been successfully converted into residential and commercial use, as with the mills of Lowell, Massachusetts, or Cleveland, Ohio's, Warehouse District.

Planning considerations will determine not only what use to make of a building but also whether a building should be reused or demolished in the first place, whether the reuse should be market- or socially driven, whether the developer should be given tax abatement, and many other issues. While lawyers—at least in their capacity as lawyers—will not be making the final decision about such matters as a rule, they will often be asked to weigh in on the decision; a lawyer who is not familiar with the planning and economic context or with the state laws and local ordinances governing planning, redevelopment, tax abatement, and the like and as a result offers the client an uninformed or narrowly legal interpretation may be doing his or her client a disservice.

The other side of the coin is that planners and others working on revitalization plans, or making reuse decisions, need to understand the laws governing problem properties so that their plans can be grounded in what is legally realistic and defensible and so that they can communicate productively with the city's attorneys.

This volume has been crafted to introduce lawyers, as well as planners and others dealing with problem properties, to the range of legal and related issues raised by those properties. In Chapter 1, University of North Carolina legal scholar C. Tyler Mulligan

15. Or at most, if it is a particularly large house, it might be converted into a two- or three-family house.

offers a broad discussion of the principles underlying the power of local government to address problem-property issues, while Chapter 2 by Philadelphia attorney and housing consultant Karen Black places these powers in context by describing how local governments exercise these powers and the tools that they apply to that end.

Chapter 3 by Wade Beltramo, general counsel to the New York Conference of Mayors, zooms in on code enforcement, the central regulatory process through which local governments address problem properties. Chapters 4 and 5 by Alan Mallach, Senior Fellow with the Center for Community Progress, look at the specific issues associated with problem rental properties and problem vacant properties, respectively, while Chapter 6 by Notre Dame legal scholar James J. Kelly, Jr., explores the process by which local governments can gain control over and dispose of problem properties when incentives or regulatory strategies fail to achieve local objectives.

The remaining chapters deal with the most important remedial tools that have emerged to address problem-property issues. In Chapter 7, Emory legal scholar and Community Progress Senior Advisor Frank S. Alexander discusses how land banks have become a valuable tool to address public sector inventories of vacant properties, while in Chapter 8, environmental consultant Leah Yasenchak describes the laws and policies governing the remediation and reuse of brownfields sites. Chapter 9 by Alan Mallach looks at one of the thorniest issues associated with problem properties, when and how to decide to demolish them. Finally, in Chapter 10, Amber Knee and Bob Grossman of the Pennsylvania Horticultural Society discuss a variety of what are known as green reuse options and how greening can create value from vacant properties in the many situations where conventional redevelopment is not a realistic option.

The authors and editors of this book are hopeful that it will provide a valuable resource for many different people in many different fields. First and foremost are practicing attorneys, including those working for local governments, attorneys representing property owners and developers, and those involved in

property transactions or redevelopment. In addition, we believe that this book will be of value to city planners in the public and private sector; other public officials; and people working with housing developers, community development corporations, and other neighborhood-based organizations to rid their neighborhoods, towns, and cities of the scourge of problem properties and make them better places for everyone.