


10-30-2017

## Freeing the City to Compete

James J. Kelly Jr.  
*Notre Dame Law School*

Follow this and additional works at: <https://scholarship.kentlaw.iit.edu/cklawreview>

 Part of the [Land Use Law Commons](#), [Law and Society Commons](#), [Property Law and Real Estate Commons](#), [Public Law and Legal Theory Commons](#), and the [State and Local Government Law Commons](#)

---

### Recommended Citation

James J. Kelly Jr., *Freeing the City to Compete*, 92 Chi.-Kent L. Rev. 569 (2017).  
Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol92/iss2/9>

This Article is brought to you for free and open access by Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in Chicago-Kent Law Review by an authorized editor of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact [dginsberg@kentlaw.iit.edu](mailto:dginsberg@kentlaw.iit.edu).

## FREEING THE CITY TO COMPETE

JAMES J. KELLY, JR.\*

### I. INTRODUCTION

The struggles of America's older inner cities to sustain economic viability have drawn the concern of urban development experts certainly, but also that of environmentalists, historic preservationists, civil rights activists, anti-poverty advocates and education innovators. Inner-city neighborhoods are home to the overwhelming majority of poor persons living in metropolitan areas.<sup>1</sup> Likewise, communities of color in the U.S. have been and continue to be primarily communities inside or adjacent to city boundaries.<sup>2</sup> Even as fair housing advocates work to open up the suburbs to affordable housing for residents seeking educational and employment opportunities outside the urban core, the viability of inner-city neighborhoods continue to play a crucial role in the lives of poor and minority households across the nation. From an environmental perspective, new private investment in the urban areas can reclaim older industrial sites and curb growth pressures on the metropolitan fringe.

As the economy of the United States becomes increasingly identified with creativity and innovation, its metropolitan areas must bring together different minds for exchange of ideas and inspiration.<sup>3</sup> Exurban development, like that in Silicon Valley, has stepped into the breach to provide transit-oriented, walkable streetscapes. To truly contribute, America's older cities must compete not only with one another and with newer cities but also with their own suburbs. In competing, these cities face challenges all but unknown to their rivals. Some of the urban core's disadvantages are either inherent to city living or generated by bad local policy decisions. Others, however, have resulted from burdens imposed by outside forces.

\* Clinical Professor of Law, Notre Dame Law School.

1. See infra notes 4–7 and accompanying text.

2. *Where Race Lives—Go Deeper*, PBS, available at [http://www.pbs.org/race/000\\_About/002\\_04-background-03-08.htm](http://www.pbs.org/race/000_About/002_04-background-03-08.htm) (last visited Dec. 19, 2016) (noting that 70% of African-Americans and Latinos live in inner-city or inner-ring suburban neighborhoods).

3. Glenn Ellison et. al., *What Causes Industry Agglomeration? Evidence from Coagglomeration Patterns*, 100 AM. ECON. REV. 1195, 1195 (June 2010), available at <http://economics.mit.edu/files/7597>.

Of these obstacles to economic viability, few compare to overconcentration of poverty in the urban core. Many of America's older cities contain upwards of 85% of the poor people in their metropolitan areas and virtually all of the census tracts in which poor people are heavily concentrated.<sup>4</sup> Approximately 39% of the households in Detroit and Cleveland live at or below poverty.<sup>5</sup> Although lower-income households are drawn to the city center by lower transportation costs, an array of past and present exclusionary practices have prevented them from pursuing local public goods opportunities elsewhere in the metropolitan area.<sup>6</sup> The exclusionary zoning of affluent suburbs has aggravated sprawl by driving new development to the metropolitan fringe.<sup>7</sup>

Advocates and scholars have analyzed the past and present of metropolitan residential socioeconomic segregation and called for judicial and legislative action to mandate affordable housing opportunities in suburban areas.<sup>8</sup> More recently, the Department of Housing and Urban Development has revised its process for evaluating how state and local recipients of federal funding are fulfilling their affirmative obligation under the Fair Housing Act to break down existing patterns of residential racial segregation and increase access to economic and educational opportunities for protected groups.<sup>9</sup>

4. PAUL A. JARGOWSKY, CENTURY FOUNDATION, CONCENTRATION OF POVERTY IN THE NEW MILLENNIUM: CHANGES IN THE PREVALENCE, COMPOSITION, AND LOCATION OF HIGH-POVERTY NEIGHBORHOODS, THE CENTURY FOUNDATION 15, available at [https://tcf.org/assets/downloads/Concentration\\_of\\_Poverty\\_in\\_the\\_New\\_Millennium.pdf](https://tcf.org/assets/downloads/Concentration_of_Poverty_in_the_New_Millennium.pdf) (last visited Dec. 26, 2016) ("The pattern [of concentrated poverty in the largest cities in the United States] is repeated in many metropolitan areas . . . . In Chicago–Joliet–Naperville, 97 of the 115 tracts and 88 percent of the high-poverty population are in the city of Chicago . . . . Minneapolis and St. Paul together account for 99.6 percent of the Twin Cities metropolitan area's high-poverty population. Baltimore (99 percent), Philadelphia (96 percent), and Washington (92 percent) are other examples of cities with a vastly disproportionate of their metropolitan areas' concentrated poverty problem.").

5. Karen Bouffard, *Census Bureau: Detroit is Poorest Big City in U.S.*, DETROIT NEWS (Sept. 17, 2015), available at <http://www.detroitnews.com/story/news/local/michigan/2015/09/16/census-us-uninsured-drops-income-stagnates/32499231/>. Six other cities with populations over 300,000—Fresno, Memphis, Milwaukee, St. Louis, Stockton, and New Orleans—have poverty rates of between 28% and 30%.

6. Richard Briffault, *Our Localism: Part I—The Structure of Local Government*, 90 COLUM. L. REV. 1, 21–22 (1990); Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 GEO. L.J. 1985, 1987, 1993 (2000); Stacy E. Seicshnaydre, *How Government Housing Perpetuates Racial Segregation: Lessons from Post-Katrina New Orleans*, 60 CATH. U. L. REV. 661, 688–89 (2011).

7. See generally Nicole Stelle Garnett, *Suburbs as Exit, Suburbs as Entrance*, 106 MICH. L. REV. 277 (2007).

8. DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 217–18 (1993).

9. Affirmatively Furthering Fair Housing, 24 C.F.R. §§ 5, 91, 92 (2015).

Of the burdens that urban centers must overcome, the one most relevant to ongoing economic vitality is their disconnection from functioning real estate markets. If low- and moderate-income households truly had the freedom to become members of any local community in their metropolitan area, the ability of cities to attract new residents would be tremendously enhanced. But, the cities would still have to compete for taxpayers, albeit on a more level playing field. If current low- and moderate-income residents were to have greater choice of where they can live in the metropolitan area, the urban core would need to give them reason to stay. More to the point though, if suburban residents began to see more socioeconomic diversity in their own communities, then the comparative advantages of living in the city may become more prominent in their choice of where to reside. But the cities would need to be able to make their underutilized lands available for this more open competition among jurisdictions.

When many older urban neighborhoods contend with the scourge of vacant properties, it is difficult to see how a more balanced competition between city and suburb will lead to a decisively more robust tax base for the latter. In this paper, I will examine how the rights of owners, lenders and residents threaten the functioning of real markets in distressed neighborhoods, perpetuating the pall that vacant and abandoned houses cast over their future. Even a single abandoned house can present an example of how the rights of several stakeholders create a form of gridlock known as anti-commons, which isolates that property from a potentially transformative transfer of title.<sup>10</sup> In addition to this legal anticommunity, some neighborhoods are so beset by vacant property problems that they require coordination of investment that is frustrated by both the multiplicity of private ownership interests and the rights of the residents to be protected against forced relocation.<sup>11</sup> Ultimately, these costs of moving communities forward to a more viable future can prevent them from going anywhere. In confronting transaction costs through title assembly, land assembly, and occupancy consolidation, cities are acting to confront historic burdens that make development and provision of public goods more challenging on urban land.

## II. GRIDLOCK ON THE BLOCK: THE URBAN ANTICOMMONS

All three types of fragmentation involve numerous, overlapping rights claims in land of potential value—among stakeholders in a single parcel,

10. See *infra* notes 12–32 and accompanying text.

11. See *infra* notes 45–52 and accompanying text.

among landowners in a single neighborhood, and among residents in a neighborhood slated for redevelopment. Independently, each of them represents a type of anticommons, a form of property gridlock that prevents an asset from being used or exchanged in a manner that the market would reward.<sup>12</sup> When a property transfer or use requires the unanimous approval of many independent stakeholders, the transaction costs involved in making a deal can be so high as to impact severely its profitability for one or both sides. For an especially lucrative arrangement, even high transaction costs can be overcome. The parties will put the time and money into the effort of concluding the transaction because there will still be a net gain for those involved. But, if the asset has marginal value, then the underlying benefit of a potential deal will also likely be low. If that asset is subject to any of the anticommons described above, then high transaction costs may keep that property off the market indefinitely.<sup>13</sup> When all three types of anticommons simultaneously disable an urban neighborhood's real estate market, traditional modes of voluntary investment may never return, at least not without intervention.

Bargaining invariably involves information and communication costs. Negotiation takes time and effort. Lack of good information about the market value of an asset can prolong negotiations. Having multiple parties involved in a negotiation increases the work involved in communication and, potentially, the amount of time spent estimating the most effective offers to be made. These complications appear even when one party to the transaction, usually the would-be buyer, is a lone individual or entity. Regardless of whether that interested party deals with the current asset stakeholders individually or collectively, the costs of pursuing the purchase can be higher than they would normally be in negotiations with a single owner of an unencumbered property. Even when the potential gain is great enough to offset these everyday costs, the large number of indispensable contract participants raises the specter of the ultimate deal-killer: the strategic hold-out.

Whenever a transaction hinges on the consent of many different participants, the parties face the risk that one or more involved may insist on being paid a premium for her assent. If an infill development project of a new government office building requires the acquisition of every one of

12. Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 668–69 (1998). Although the term was first used in property scholarship by Frank Michelman, its theoretical development has come largely from the work of Michael Heller.

13. James J. Kelly, Jr., *A Continuum in Remedies: Reconnecting Vacant Houses to the Market*, 33 ST. LOUIS PUB. L. REV. 109, 127 (2013).

seven adjacent parcels, then the commitment of five of the parcel owners to accept market value for their properties empowers the other two to insist on higher purchase prices for their properties.<sup>14</sup> If the purchaser is limited to consensual bargaining for setting the price, then this holdout behavior may succeed and be encouraged elsewhere. The ubiquity of holdout risk in any public land assembly project provides one of the main justifications for acquisition through eminent domain and an adjudicated transfer price.<sup>15</sup>

Strong protection for individual rights makes sense in thriving markets, which can overcome the high transaction costs that attend such protections.<sup>16</sup> But, when the values of the entitlements begin to fall, the costs of bargaining to pull the pieces together outstrip the value of the comprised whole. In the context of declining urban neighborhoods, this anticommons phenomenon occurs at both the parcel and neighborhood levels. At both levels, the land is subdivided deliberately, and for good reason. Likewise, the strong property entitlement protections that support each stakeholder's claim are also justified. The label of fragmentation does not attach until this strongly defined division of interests has outlasted its usefulness.

When a co-owned, mortgaged parcel of real property has substantial value, its title is not fragmented; it is merely complex. That is, the multiplicity of stakeholders is problematic only when the attendant transaction costs frustrate efficiency-enhancing transfers. To secure an investment from a lender, the owner offers the asset as collateral and mortgages her interest in a property, perhaps more than once. If the owner has unpaid debts, creditors can place liens against the property. Even if the owner is insolvent, buyers may still be able to acquire the parcel through a conventional bargain-and-sale process, just as they would a property with no liens of any kind. As long as the sale price is sufficient to pay off all the creditors' claims in full, the transaction costs involved in buying the parcel with multiple lienholders need not be significantly higher than buying the parcel with no lienholders.

If, on the other hand, the parcel does not have enough market value to produce payoffs for all the lienholders, then the prospects for voluntary transfer become doubtful. Lienholders' claims are generally sorted by a

14. Daniel B. Kelly, *Acquiring Land Through Eminent Domain: Justifications, Limitations and Alternatives*, in RESEARCH HANDBOOK ON THE ECONOMICS OF PROPERTY LAW 344, 346 (2011, Kenneth Ayotte & Henry E. Smith, eds.).

15. Gideon Parchomovsky & Peter Siegelman, *Cities, Property, and Positive Externalities*, 54 WM. & MARY L. REV. 213, 250 (2012).

16. THOMAS J. MICELI, THE ECONOMIC THEORY OF EMINENT DOMAIN: PRIVATE PROPERTY, PUBLIC USE 10 (2011).

rule of absolute priority.<sup>17</sup> A lienholder in second position can lay claim only to the value that remains after the first lienholder's claim is fully satisfied.<sup>18</sup> Likewise, the third lienholder seeks satisfaction from any residual value if and when the second lienholder is paid in full, and so on.<sup>19</sup> The seller of the property receives only what is left over after all her secured creditors have been paid in full.<sup>20</sup>

An unsatisfied lienholder, even a mortgagee, does not generally have the right to block the transfer of title.<sup>21</sup> So, in that sense, each secured creditor does not have an actual veto on the sale of the parcel. But, if the purchaser, with full knowledge of the properly recorded liens, were to take title from the seller, the unsatisfied liens would attach to his title, notwithstanding the fact that they secure repayment of someone else's debts. Since taking title subject to prior liens offers no appeal to the prudent purchaser, the deal will not go through without an actual or planned payoff of outstanding liens.

An "underwater" property—that is, a parcel with a market value insufficient to pay off all outstanding liens—can still be transferred voluntarily. But, the impediments to a successful closing increase with the number of unsatisfied lienholders. Assuming that a purchaser will only take a title that is free and clear of preexisting liens, each and every lienholder will have to release his lien before the deal can go through. A lienholder who receives absolutely nothing for his waiver does not have much incentive to clear the way for the deal. Distributing proceeds by relative, rather than absolute, priority would give every lienholder a share of the purchase price in proportion to the amount of each claim. This approach would give every lienholder some incentive to agree to the transfer, but the high-priority lienholders would almost certainly oppose the proposal as they would get less than that to which the law entitles them.

A more promising possibility involves the purchaser offering minimal compensation to the unsatisfied lienholders, as well as to the seller as the last in line, in order to see the transaction through. Since the senior lienholders would want to claim all or nearly all of the property's value for

17. GRANT S. NELSON ET AL., *REAL ESTATE TRANSFER, FINANCE, AND DEVELOPMENT: CASES AND MATERIALS* 700 (8th ed. 2009).

18. *Id.*

19. *Id.*

20. *Id.*

21. Mortgage instruments generally do not impose disabling restraints on the alienability of the collateral. Lenders instead rely on "due on sale" clauses which accelerate repayment of the loan balance if the property is transferred without the lender's prior written consent. See GRANT S. NELSON & DALE A. WHITMAN, *REAL ESTATE FINANCE LAW*, §5.1, §§5.21–5.26 (5th ed. 2007).



themselves, these payments may be made over and above the property's market price. This scenario requires a buyer willing to pay more than market price for a property and junior lienholders who are willing to take minimal compensation for releasing liens of little or no value. The number of such lienholders raises the premium expected of the purchaser but also increases the possibility of a strategic holdout. The fact that a junior lienholder recognizes the negligible value of her lien may actually increase the likelihood that she will hold out for more than what the purchaser initially offers. The senior lienholders have more to lose than the junior lienholders if the short sale does not close. One or more of the junior lienholders may recognize this reality and insist on contributions from them as well. If the strategy fails and the deal falls through, the holdout has probably not lost much.

Overlapping vetoes of the owner and multiple secured creditors can block a short sale that is beneficial to those on each side. For underwater properties, foreclosure may be the only way to clear the property's title. A foreclosure proceeding, usually brought by the first lienholder, sorts out all the interests involved. The owner is given one last chance to redeem the property by satisfying the foreclosing lender.<sup>22</sup> After that chance has come and gone, the property is usually sold at auction with the proceeds distributed according to the aforementioned absolute priority method.<sup>23</sup> All interests junior to the lien being foreclosed are eliminated by the foreclosure.<sup>24</sup> Thus, the auction purchaser in a foreclosure on a first lien takes free and clear of all the other liens, as well as of the previous owner's claim. Foreclosure breaks through the anticommons.

The credible threat of a foreclosure proceeding, however, can also reduce or eliminate the obstacles that might threaten a short sale. When a junior lienholder knows he faces liquidation without compensation in foreclosure, the most he can expect to receive from a negotiated release of his interest is the cost of the foreclosure proceedings saved as a result. Because most mortgage notes include the foreclosures costs in the first lien amount, these junior lienholders realize that they cannot expect anything more than the value that comes from the expediency of a short sale.<sup>25</sup>

22. NELSON & WHITMAN, *supra* note 21, at §1.3.

23. *See supra* note 17.

24. NELSON, ET AL., *supra* note 17, at 700.

25. Or often they don't recognize that fact and they frustrate the attempted short sale. *See* Prashant Gopal & John Gittelsohn, *Home Sales Held Hostage by Junior Lien Holders: Mortgages*, BLOOMBERG (July 23, 2012), available at [http://www.crainsnewyork.com/article/20120723/REAL\\_ESTATE/120729972/home-sales-held-hostage-by-junior-lien-holders](http://www.crainsnewyork.com/article/20120723/REAL_ESTATE/120729972/home-sales-held-hostage-by-junior-lien-holders) (last visited Apr. 27, 2017).



If, on the other hand, foreclosure proceedings are not effectual, then both the direct and indirect responses to anticommons are compromised. If, as has been the case in many jurisdictions during the last decade, courts must work through a large backlog of pending foreclosure proceedings, then neither foreclosure nor the threat of it may serve to clear title.<sup>26</sup> If the first mortgagee lacks information about the net value of and the possible liabilities associated with the property, this may delay any attempt to bring it to an auction where it, as the prime lienholder, is also likely to be the winning bidder.

Finally, the securitization of mortgage finance has created fragmentation in the mortgage itself. The traditional mortgage transaction had a single financial institution acting as mortgagee.<sup>27</sup> But, the packaging and sale of mortgage-backed securities leads to a division of responsibilities and decision-making authority.<sup>28</sup> Each securitized mortgage is part of a large pool of mortgages held in trust.<sup>29</sup> The trustee for that bundle of mortgages is generally a large national bank even though a different large national bank is brought on to act as servicer for the individual loans.<sup>30</sup> Although the servicer makes many important decisions about how to proceed when a mortgage is delinquent, both the authority of it and the trustee are limited by the pool servicing agreement with the investors who are the beneficiaries of the trust.<sup>31</sup> Although this arrangement is not properly thought of as a series of overlapping vetoes, its complexity has contributed significantly to the dysfunction of the foreclosure process over the last decade.<sup>32</sup> Ultimately, mortgage foreclosure cannot be relied on to clear title to vacant and abandoned houses in the inner city. To explore alternatives, we require a better understanding of how mechanisms like mortgage foreclosure can be deployed to respond to property fragmentation.

Ownership of land receives the strongest type of property rule protection available. As with other types of property interests, transfer of an in-

26. Joe Light, *Foreclosure Backlog Slows Housing Recovery*, WALL ST. J. (Nov. 18, 2014), available at <https://www.wsj.com/articles/foreclosure-backlog-slows-recovery-in-some-states-1415989098> (last accessed April 25, 2017).

27. Adam Levitin & Tara Twomey, *Mortgage Servicing*, 28 YALE J. REG. 1, 11 (2011).

28. Roy D. Oppenheim & Jacquelyn K. Trask-Rahn, *Deconstructing the Black Magic of Securitized Trusts: How the Mortgage-Backed Securitization Process is Hurting the Banking Industry's Ability to Foreclose and Proving the Best Offense for a Foreclosure Defense*, 41 STETSON L. REV. 745, 756–57 (2012).

29. Levitin & Twomey, *supra* note 27, at 6.

30. *Id.* at 16.

31. *Id.* at 30–37.

32. *Id.*; Robert Hockett, *Six Years On and Still Counting: Sifting Through the Mortgage Mess*, 9 HASTINGS BUS. L. J. 373, 388 (2012). See generally Patricia McCoy, *Barriers to Foreclosure Prevention During the Financial Crisis*, 55 ARIZ. L. REV. 723 (2013).

terest in real property normally happens only with the consent of the grantor. Unlike personal property, real property generally cannot be lost by owner abandonment.<sup>33</sup> The holder of an equitable interest in land threatened with its loss need not be satisfied with a money judgment for damages but can seek a court order to protect her continued ownership.<sup>34</sup> But even the strongest of property rule protections have limits.

Rather than being bounded by rules that provide no protection, property rule entitlements frequently give way to liability rule protections.<sup>35</sup> Under a property rule, the holder of an interest cannot lose that interest without her consent.<sup>36</sup> If the property owner's stake is protected only by a liability rule, the owner may be forced to give up the actual piece of property but is entitled to full compensation for its value.<sup>37</sup> This clear delineation seems to admit no intermediate category, but property rules and liability rules can complement one another.

The transition from property rule to liability rule protection has been described as a “pliability rule” structure.<sup>38</sup> Foreclosure proceedings allow for a continuous gradation from protection against involuntary transfer to liquidation, like the pliability structures described by Gideon Parchomovsky and Abraham Bell in a recent law review article.<sup>39</sup> Eminent domain proceedings, when restricted only by the Public Use Clause, provide for a very abrupt jump from property rule protection to liability rule protection.<sup>40</sup> Like the foreclosure auction process, eminent domain proceedings assure property owners that they will receive fair market value for their interests.<sup>41</sup> Unlike foreclosure, however, condemnation offers no possibility for preservation of in-kind entitlement through redemption.<sup>42</sup>

As seen above, foreclosure on a first mortgage does not offer a reliable means of reconnecting derelict properties to the market. The incentive of

33. Eduardo M. Peñalver, *The Illusory Right to Abandon*, 109 MICH. L. REV. 191, 196 (2010).

34. 42 AM. JUR. 2D *Injunctions* § 54 (2017).

35. The distinction between property rules and liability rules was first articulated in Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092 (1972).

36. *Id.*

37. *Id.*

38. Abraham Bell & Gideon Parchomovsky, *Pliability Rules*, 101 MICH. L. REV. 1, 4 (2002).

39. *Id.* The foreclosure processes described in this article, *see infra* notes and accompanying text, serve as pliability rule structures that navigate, what Michael Heller has described, as the boundary between a robust, yet functional, system of private property and anticommons. Michael A. Heller, *The Boundaries of Private Property*, 108 YALE L.J. 1163, 1197 (1999).

40. James J. Kelly, Jr., “*We Shall Not Be Moved*”: *Urban Communities, Eminent Domain and the Socioeconomics of Just Compensation*, 80 ST. JOHN'S L. REV. 923, 965 (2006).

41. *See generally* Miceli, *supra* note 16 (also discussing concerns about under-compensation).

42. Kelly, *supra* note 13, at 121–22.

the mortgagee to clear title disappears when the costs outstrip the resale value of the property. Some other form of foreclosure or eminent domain may provide the needed alternative.

Foreclosure involves the liquidation of collateral that secures performance of an obligation, usually a monetary obligation.<sup>43</sup> It makes sense that any use of foreclosure to cut through the anticommons associated with derelict properties would relate to the property owner's failure to meet a public duty. The two most likely obligations are the requirement to comply with basic building code and the need to pay property tax.<sup>44</sup> Such an approach to title assembly would allow stakeholders to avoid liquidation by fulfilling their public obligations but also allows them to cash out if they do not. But eminent domain may yet have a role to play because title assembly responds to only the first type of urban land fragmentation.

In relatively healthy neighborhoods, title assembly may be sufficient to reconnect a vacant house to the market. If the costs of acquiring clear title to and then renovating a derelict property can be fully recaptured upon resale, then properties in that neighborhood real estate market can be brought back one at a time. But, neighborhoods more severely impacted by vacant properties as well as other urban challenges such as higher crime rates require a more coordinated approach to rehabilitation investment. In these situations, the fragmented investment that must be re-assembled is not a single parcel but the neighborhood itself, or at least some portion of it.

Derelict, vacant houses can have tremendous negative impacts on the surrounding neighborhood.<sup>45</sup> If a person interested in rehabbing derelict properties faces a choice between two vacant houses—one surrounded by occupied properties and the other in a neighborhood with several other derelict houses—he will usually prefer to invest on the block that will soon have no vacant properties on it. Because the quality of an urban neighborhood real estate market plays such a strong role in determining resale values, investment in one property depends upon the good condition of the houses nearby. This strong interdependence makes a distressed neighborhood an anticommons, albeit not a legal anticommons like a fragmented title. The fragmented neighborhood is a spatial anticommons.<sup>46</sup>

43. NELSON & WHITMAN, *supra* note 21, at §§ 2.1-2.2.

44. *See infra* notes 80-95 and accompanying text.

45. *See Kelly, supra* note 13, at 112-14 (discussing hazards created and signals of disorder sent by vacant, derelict houses).

46. MICHAEL HELLER, *THE GRIDLOCK ECONOMY* 160 (2008).

As with the twice-mortgaged parcel, an intensely subdivided neighborhood is not considered fragmented until basic function requires coordination among many different independent actors. If the would-be rehabber had confidence that the other derelict properties in the immediate vicinity would be renovated contemporaneously with his repairs, she might think the investment opportunity as attractive as if the vacant property had been in a healthy neighborhood. But, it is just this confidence he quite understandably lacks. If the investment in one vacant house does not improve a distressed neighborhood enough to provide an adequate return, there seems little reason to think that many investors will independently move forward anyway. Just as the fragmented title must be consolidated to allow investment to move forward, the fragmented neighborhood requires a degree of investment coordination that is best achieved through common ownership.

Assuming the most significant barrier to neighborhood viability is the presence of derelict houses, then the only properties that would need to come under unified ownership would be those problem properties. This “soft” kind of land assembly may be possible using the same type of public-obligation foreclosure methods suggested above for title assembly of derelict properties. Unlike title clearing for properties that can be rehabbed one at a time, the acquisition of these interdependent properties might be better handled by a single entity that can pool them together and make them available for disposition as a bundle. The acquisition of vacant property to return it to productive use is the defining activity of land banks.<sup>47</sup> Unified ownership of all the derelict properties in a distressed neighborhood can make a difference, especially if other quality-of-life problems do not weaken a strong regional demand for housing.

Distressed neighborhoods in older cities, however, face an array of problems that deter new residents. Crime rates, both for low-level offenses and violent acts, are higher.<sup>48</sup> The public schools also have safety problems and underperform their counterparts elsewhere inside and outside the city.<sup>49</sup> Moreover, many, although not all, of these neighborhoods are in metropolitan regions that are themselves underpopulated and not growing. For these communities, land banking may not lead to a return to the neighborhood as

47. FRANK ALEXANDER, *LAND BANKS AND LAND BANKING* 23 (2d ed. 2015), available at <http://www.communityprogress.net/download-land-banks-and-land-banking-pages-432.php?key=60134549>.

48. MARGERY AUSTIN TURNER, *TACKLING PERSISTENT POVERTY IN DISTRESSED URBAN NEIGHBORHOODS* 4–5 (2014), available at <http://www.urban.org/sites/default/files/publication/22761/413179-tackling-persistent-poverty-in-distressed-urban-neighborhoods.pdf>.

49. *Id.*

it used to be. Instead, the public response frequently focuses on widespread demolition of derelict houses.<sup>50</sup> Considerable public efforts support re-use of the resulting vacant lots for agricultural and recreational uses, if only to encourage care for the property and displace disorderly activities.<sup>51</sup> But, for others, there could be a more intensive redevelopment—one that requires not the derelict properties or even just the unoccupied ones, but a redevelopment of every parcel in the neighborhood.

When this “hard” form of land assembly is required, the anticommons aspect of individual parcel ownership is apparent. Voluntary purchase of all properties is a very remote prospect. In a distressed neighborhood, there may be many willing sellers, but there will also inevitably be holdouts, both genuine and strategic.<sup>52</sup> Someone who not only owns but also occupies a home in the community may genuinely not want to sell at any price. Even if she is not happy with the current state of the neighborhood, she may strongly oppose its wholesale transformation. No amount of money may convince such a person to sell. Strategic holdouts may not even own property in the neighborhood until they learn of the new plan to buy up parcels. They may find it easier to pick up a few lots cheaply with the hope of extracting premiums from a buyer that needs everything to move forward.

Unlike the consensual title assembly scenario explored above,<sup>53</sup> land assembly allows for the possibility of pursuing acquisitions in secret. Stakeholders in a single parcel know that their interests matter only as part of an entire title. But, an individual property owner in a distressed neighborhood would not assume anyone approaching him or her with a purchase offer must want every parcel on the block, much less in the entire neighborhood. If the sellers do not know that they are contributing to a broader land assembly, then holdouts, at least the strategic kind, will not be able to frustrate the design. An ardent opponent of eminent domain for the purpose of economic development has pointed out that no less a project than Walt

50. Corey Williams, *Detroit Razes 10,000th Vacant Structure under Blight Plan*, AP (July 19, 2016), available at <http://bigstory.ap.org/article/5c8e6d01098b4dcc88a60a79c3599670/detroit-razes-10000th-vacant-house-under-duggan-blight-plan>; Yvonne Wenger, *City to Raze Hundreds of Vacant Houses in Stepped-up Plan*, BALTIMORE SUN (Aug. 16, 2013), available at [http://articles.baltimoresun.com/2013-08-16/news/bs-md-ci-vacants-demolition-20130816\\_1\\_vacant-houses-east-baltimore-rowhouses](http://articles.baltimoresun.com/2013-08-16/news/bs-md-ci-vacants-demolition-20130816_1_vacant-houses-east-baltimore-rowhouses). For an analysis of the social equity and civil rights implications of this public response, see James J. Kelly, Jr., *Affirmatively Furthering Neighborhood Choice: Vacant Property Strategies and Fair Housing*, 46 U. MEMPHIS L. REV. 1009, 1026–38 (2016).

51. DANIELLE LEWINSKI, ET AL., OPEN SPACE IN DETROIT: KEY OWNERSHIP AND FUNDING CONSIDERATIONS TO INFORM A COMPREHENSIVE OPEN SPACE PLANNING PROCESS (2015), available at [http://www.communityprogress.net/filebin/151022\\_CommunityProgress\\_TASP\\_DFC\\_Report.pdf](http://www.communityprogress.net/filebin/151022_CommunityProgress_TASP_DFC_Report.pdf).

52. See *supra* notes 14–15 and accompanying text.

53. See *supra* notes 17–21 and accompanying text.

Disney World was built on land that was acquired through secret assembly.<sup>54</sup> But public redevelopment projects do not allow for this kind of secrecy.<sup>55</sup> The need for public deliberation before public resources are committed effectively eliminates the use of secret assembly by an agency of a transparent, democratic government.<sup>56</sup>

Voluntary acquisition and property tax foreclosure may yield a great number of properties in a severely distressed neighborhood, but only eminent domain, or at least the credible threat of condemnation, will allow the acquisition of every contiguous parcel. Even in the most disinvested neighborhoods, there will be properties owned by people that keep them up to code and pay property taxes as they come due. These cannot be acquired through the public foreclosure methods that will be explored in the title assembly section below.<sup>57</sup>

Moreover, any residential neighborhood slated for intensive redevelopment will still have people living in it. Detroit is so famously underpopulated that it is portrayed as having blocks and blocks of desolation.<sup>58</sup> But, even the most severely distressed neighborhoods in Detroit are about 40% occupied.<sup>59</sup> This scattering of residents creates the third type of anticommons, one caused not by the legal rights of individual owners but by the legal and moral claims of those who call the neighborhood home.

Strictly speaking, the rights of residents to remain in their neighborhood rarely find sufficient legal protection to amount to the kind of overlapping vetoes that characterize the typical anticommons. But, any redevelopment project using federal funds is subject to the Uniform Relocation Assistance and Real Properties Acquisition Policies Act of 1970 (“Uniform Relocation Act” or “URA”).<sup>60</sup> In it, Congress provides for monetary and service assurances of proper relocation to victims of federally

54. ILYA SOMIN, *THE GRASPING HAND: KELO V. CITY OF NEW LONDON AND THE LIMITS OF EMINENT DOMAIN* 94 (2015).

55. Daniel B. Kelly, *The ‘Public Use’ Requirement in Eminent Domain Law: A Rationale Based on Secret Purchases and Private Influence*, 92 CORNELL L. REV. 1, 31 (2006).

56. *Id.*

57. See *infra* notes and accompanying text.

58. See e.g., *Derelict Detroit: Gloomy pictures chart the 25-year decline of America’s Motor City*, THE DAILY MAIL, Oct. 3, 2012, available at <http://www.dailymail.co.uk/news/article-2211498/Detroits-amazing-transformation-captured-camera-loses-ONE-MILLION-residents-60-years.html>.

59. Kate Abbey-Lambertz, *These are the American Cities with the Most Abandoned Houses*, THE HUFFINGTON POST, Feb. 13, 2016, available at [http://www.huffingtonpost.com/entry/cities-with-most-abandoned-houses-flint\\_us\\_56be4e9ae4b0c3c5505171e7](http://www.huffingtonpost.com/entry/cities-with-most-abandoned-houses-flint_us_56be4e9ae4b0c3c5505171e7).

60. 42 U.S.C.A. §§ 4601-4655 (2017).



financed eminent domain condemnation.<sup>61</sup> If the condemning authority is unable to show the availability of comparable replacement housing<sup>62</sup> that relocatees can afford, even with the monetary relocation assistance provided, then the agency itself will be called upon to provide “housing of last resort.”<sup>63</sup> Some persons entitled to relocation assistance as a result of federally funded intensive redevelopment of a residential neighborhood are homeowners, with property interests that also entitle them to fair market compensation. Others, however, are tenants with no compensable interest in land. Yet, these residents will be entitled to relocation assistance also under URA.<sup>64</sup> The claims of residents facing forcible relocation do not create an entirely separate level of anticommons for the neighborhood in need of intensive redevelopment, but they add a distinct layer of transaction costs to “hard” land assembly in the distressed neighborhood context.

The URA was enacted after decades of urban renewal in America’s inner cities.<sup>65</sup> Rather than bring forcible relocation of low- and moderate-income households to an end, it provided a means of facilitating it. The URA’s protection of residents confronting the prospect of federally funded forced relocation is meager compared to the rhetorical power of organized protest. The universal feeling of vulnerability that eminent domain induces in all homeowners greatly increases the potential political and public relations costs of any intensive urban redevelopment project. By offering money above and beyond the fair market value of the condemned properties, redevelopment officials can erode the base for any organized discontent. Robert Ellickson has identified the URA system as a conduit for making bonus payments to soften opposition to major capital projects.<sup>66</sup> Baltimore offers a contemporary example of an urban redevelopment project that went above and beyond the URA to induce resident cooperation.<sup>67</sup>

61. 42 U.S.C.A. § 4622(a)(West, Westlaw through Pub. L. No. 114-244); 42 U.S.C.A. § 4625(a)(West, Westlaw through Pub. L. No. 114-244).

62. The term ‘comparable replacement dwelling’ means any dwelling that is (A) decent, safe, and sanitary; (B) adequate in size to accommodate the occupants; (C) within the financial means of the displaced person; (D) functionally equivalent; (E) in an area not subject to unreasonable adverse environmental conditions; and (F) in a location generally not less desirable than the location of the displaced person’s dwelling with respect to public utilities, facilities, services, and the displaced person’s place of employment. *Dean v. Martinez*, 336 F.Supp.2d 477, 490 (2004) (citing 42 U.S.C.A. §4601(10)).

63. 42 U.S.C.A. § 4626 (West, Westlaw through Pub. L. No. 114-244). *See* 49 C.F.R. §24.404 (2009).

64. 42 U.S.C.A. §4601(6)(A)(i)(II) (West, Westlaw through Pub. L. No. 115-22).

65. Chester W. Hartman, *Relocation: Illusory Promises and No Relief*, 57 VA. L. REV. 745, 769–71 (1970).

66. Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 736–37 (1973).

67. In 2002, Baltimore’s City Council amended East Baltimore’s urban renewal to authorize the condemnation of thirty acres of land in a neighborhood known as Middle East to make way for a



Having identified the rights of parcel owners and those of residents as potential obstacles to the total acquisition and relocation that is the core of “hard” land assembly, we should now consider whether there is a pliability rule structure that can break the gridlock without undermining the rights themselves. Title and “soft” land assembly found their balancing solutions in public foreclosure processes that gave stakeholders in vacant properties final opportunities to preserve their interests by complying with public obligations. Neighborhoods that lack sufficient market strength to support adequate property investment to maintain code compliance present a public policy problem that is not completely different than that caused by individual properties that are vacant and uninhabitable. Sometimes, these areas are called or, even, officially designated as “blighted.”<sup>68</sup> Frequently, labeling of an area as “blighted” by a local governmental agency or authority is critical to that body’s ability to exercise its delegated eminent domain powers.<sup>69</sup>

Upon initial examination, eminent domain authorizations grounded in blight determinations seem to share common theoretical ground with the receivership foreclosure mechanisms discussed above. But, two critical differences present themselves immediately. A foreclosure proceeding provides a final forum for an owner or junior lienholder to assert her equity of redemption before losing that right to the liquidation of the property.<sup>70</sup> The procedures for blight determinations provide affected communities no such opportunities to fix the blight within a certain period of time. Second, the potential for coordination among property stakeholders is far greater than that among people who own property in the same neighborhood. Mortgages frequently provide mortgagees with the power to compel bor-

mixed-use project featuring a biotechnology industrial park in the area adjacent to Johns Hopkins Hospital. Eric Siegel, *City Acquiring 70 Houses in Step Towards Biotech Park*, BALT. SUN (Dec. 26, 2002), available at [http://articles.baltimoresun.com/2002-12-26/news/0212260021\\_1\\_abandoned-properties-east-baltimore-development-madison-square](http://articles.baltimoresun.com/2002-12-26/news/0212260021_1_abandoned-properties-east-baltimore-development-madison-square). In addition to replacement housing assistance payments required by the URA, both homeowners and renters were eligible for “supplemental benefits.” *Forest City New East Baltimore Partnership: 2011 Recommendations*, E. BALT. DEV. INC., available at <http://www.ebdi.org/uploads/pdfs/2011-7-28CommunityPresentationFINAL08012011.pdf> (last visited Dec. 16, 2016). Funds for these extra payments were provided by the Annie E. Casey Foundation and Johns Hopkins University, the latter of which was the anchor tenant for the biotech park. *Id.* Given that a homeowner has far stronger standing to obstruct a condemnation proceeding than a month-to-month tenant would, it is not surprising that the additional benefits for homeowners greatly exceeded those going to the tenants. Although the Uniform Relocation Act is the most substantial governmental reform brought about by the backlash against urban renewal, its orientation remains focused on assuring the feasibility of redevelopment projects.

68. For a critical review of the expansive approaches that local redevelopment agencies have taken in applying the concept of “blight,” see SOMIN, *supra* note 54, at 84–87.

69. Martin E. Gold and Lynne B. Sagalyn, *The Use and Abuse of Blight in Eminent Domain*, 38 *FORDHAM URB. L.J.* 1119 (2011).

70. NELSON & WHITMAN, *supra* note 21, at §1.3.

rowing owners to make stabilizing investments in the collateral.<sup>71</sup> Neighbors depend on the local government to enforce building code.

Even if the collective action of a blighted community could be analogized to the coordinated efforts of title holders, however, the rights of residents to be protected from involuntary displacement present issues that do not arise in the context of vacant property receivership or tax foreclosure on vacant houses and lots. The attachments that many long-time residents of neighborhood feel to their homes and their communities not only provide the basis for an effective rhetorical strategy but also raise fundamental concerns about just compensation in the context of forced relocation.<sup>72</sup> The possibility, or even likelihood, of such irreplaceable loss may not warrant halting the acquisition of property for vital governmental functions, but a blight designation alone cannot provide the rationale for permanently severing someone's relationship with their community.

Any pliability rule structure that would facilitate "hard" land assembly must take an innovative approach to consent. Foreclosure proceedings based on failure to meet public obligations, such as payment of real property taxes or basic building code compliance, already involve acquiescence after notice of a final opportunity to redeem. In one sense, owners and mortgagees are allowing their properties to be taken because the alternative involves investments that they prefer not to make. If the properties in an area targeted for "hard" land assembly were all unoccupied and owned by persons who valued them only as investments, then an eminent domain proceeding based on a blight declaration, albeit a reversible one, could be justified through the same arguments supporting vacant building receivership sales and vacant property tax foreclosure. Such a justification, however, depends on the liquidation of the interests in those properties being able to justly compensate. Realistically, in the world of actual urban neighborhoods, the inevitable prospect of forced relocation raises issues of losses that not only go uncompensated but, in certain cases, may not even be amenable to adequate compensation.

Legal scholars have articulated several different ways of introducing condemnee consent into "hard" land assembly without destroying its ability to overcome the anticommons. Lee Fennell has proposed allowing property owners to voluntarily increase their property tax assessments to reflect the

71. *Id.* at §4.11

72. See Kelly, *supra* note 40, at 949–62 (arguing that such condemnees face thin markets for using condemnation awards to replace that which they have lost). *But see* Stephanie M. Stern, *Residential Protectionism and the Legal Mythology of Home*, 107 MICH. L. REV. 1093 (2009) (arguing that the emphasis on protection of residency rights is grounded in an unsupported psychological view of normal attachment to home and community).

minimum prices they would accept as part of a condemnation proceeding.<sup>73</sup> Barbara Bezdek has advocated for awarding condemnees equity stakes in the resulting redevelopment project.<sup>74</sup> Michael Heller and Rick Hills cut right to the core of the anticommons/rights-protection dilemma with their proposal for Land Assembly Districts, which represent a collective bargaining approach to “hard” land assembly.<sup>75</sup>

My own proposed solution calls for supermajority, rather than unanimous, consent to the transfer of property interests as well.<sup>76</sup> But, it also requires that ongoing community membership be preserved for all those residents that do not freely waive their rights to return to their neighborhood after the redevelopment has been completed.<sup>77</sup> Each of these approaches allows for the social value of the land assembly to be shared with those negatively affected by it. To varying degrees, the extent to which the condemnees share in those benefits is set by the condemnees themselves. The bargaining that happens at the collective level in my proposed approach to urban redevelopment achieves general internalization of land assembly benefits through collective supermajority approach to consent found in the Land Assembly Districts scheme. But the relocation of residents that makes this type of land assembly truly “hard” requires a commitment to resident autonomy in choosing a residential neighborhood. This choice, in turn, must include the right to return to their existing community. Only by looking at how these theoretical takes on title and land assembly play in actual policy and practice can we get a sense of their merit.

### III. BREAKING THE GRIDLOCK WITHOUT BREAKING THE CITY

#### A. Title Assembly

The two principal means of assembling title through foreclosure connect to the primary public obligations that property owners have: to prevent their properties from becoming a nuisance, and to pay property taxes as

73. Lee A. Fennell, *Taking Eminent Domain Apart*, 2004 MICH. ST. L. REV. 957, 995–1002 (2004)

74. Barbara L. Bezdek, *To Attain “The Just Rewards of So Much Struggle”: Local-Resident Equity Participation in Urban Revitalization*, 35 HOFSTRA L. REV. 37, 97–104 (2006)

75. Michael Heller & Rick Hills, *Land Assembly Districts*, 121 HARV. L. REV. 1465, 1488–1511 (2008)

76. Kelly, *supra* note 40, at 980–82 (articulating the author’s proposal that economic development condemnations be subject to a Homestead Community Consent, in which the redevelopment plan would need the approval of a supermajority of target area homeowners).

77. *Id.* at 982–85 (articulating the author’s proposal for a Community Residency Entitlement mandating that any publicly funded redevelopment displacing community residents provide an alienable right to return to the community after project completion).

they come due. Foreclosure is a common method for collecting on tax debts in all fifty states and the District of Columbia.<sup>78</sup> Because, by statute, tax liens generally have a super-priority status, foreclosing tax lien holders acquire title free and clear of all preexisting ownership and lien interests.<sup>79</sup> But a mechanism for clearing out property owners, together with all lienholders, from the title to a derelict house merely because they did not abate a nuisance is not nearly as prevalent. Because tax foreclosure works particularly well as a method of “soft” land assembly, this title assembly section will focus on the foreclosure methods associated with lack of building code compliance. In neighborhood real estate markets strong enough to support vacant building renovations one at a time, it is common for derelict buildings to have no tax delinquencies.<sup>80</sup> Thus, foreclosure for failure to abate a nuisance is well-suited to areas where fragmented title is the only form of anticommons that must be confronted.

Judicially ordered transfer of derelict, vacant structures has developed as a remedy to vacant property receiverships. Receivership of real property is commonly sought by lenders foreclosing on commercial properties that require active management. A receiver takes possession, but not title, away from the owner because the court may be concerned that the owner is not properly maintaining the collateral. Code enforcement receiverships were introduced as remedies in New York and other large cities in the middle of the twentieth century to protect tenants in apartment buildings owned by derelict landlords.<sup>81</sup> Vacant property receivership statutes in most states were modeled after these laws that created receivership remedies for occupied properties.<sup>82</sup> But, where receivers of occupied properties could look to rents paid by tenants to make everyday repairs, the vacant property receiver faced the monumental task of rehabilitating a property that offered no income. Receivership approaches that allow the property to be transferred to a new owner prior to renovation provide a more promising opportunity for abating the nuisance. Owners with clear title will be able to secure financing for economically feasible rehabilitations.

78. Kelly, *supra* note 13, at 135 n. 228 (citing the statutes for tax foreclosures in all fifty states and the District of Columbia).

79. *Id.* at 135–36.

80. 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 HOUSING & COMMUNITY DEV. L. 210, 214–15 (2004).

81. *Id.* at 216.

82. *Id.* at 217. See generally Melanie B. Lacey, *A National Perspective on Vacant Property Receivership*, 25 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 133, 140–44 (2016).

Court-supervised sales of receivership properties have generally resulted from either a foreclosure on the receiver's super-priority lien or from a finding of property neglect or abandonment by the owners and lienholders.<sup>83</sup> Of the two, the receiver's lien foreclosure is far more common.<sup>84</sup> As with tax foreclosure and mortgage foreclosure, the owner and the lienholders are provided notice of their opportunity to redeem the property.<sup>85</sup>

Indiana and Iowa each provide for receivership liens that can be foreclosed on prior to full rehabilitation of the structure. A recently added provision to Indiana's Unsafe Building Law ("UBL") provides for the appointment of a receiver for any unsafe building that has been determined by a judge or a hearing officer to be "abandoned" as defined by a statute that is separate from the UBL.<sup>86</sup> The issuance of an order pursuant to Indiana Code Section 36-7-36-9 to clean and secure an unsafe building is one of the factors in judging a property "abandoned."<sup>87</sup> Others strongly overlap with the elements of the Unsafe Building Law's definition of "unsafe building" itself.<sup>88</sup> These include having boarded-up windows and/or doors, having broken windows and/or doors, being open to casual entry, and having serious code violations.<sup>89</sup>

While most properties that qualify for the appointment of a receiver under the UBL would also meet these building condition aspects of the definition of "abandoned," there are other factors in the definition that are also key. These include shut-off utilities, owner locked out, without prompt objection, by the mortgagee, and written or other evidence of intent to abandon the property.<sup>90</sup> Given the importance of intent to abandon, just about any belated attempt by the owner to engage with the property's problems or even just with the abandonment proceeding might preclude the possibility of an abandonment declaration.

The same chapter of the Iowa Code that authorizes foreclosure of a receiver's lien outlines an alternative method of transfer.<sup>91</sup> Cities that can show that a property has been "abandoned" can petition the court to transfer ownership of the property to the city.<sup>92</sup> The statute offers a list of factors

83. Lacey, *supra* note 82, at 154.

84. *Id.*

85. Kelly, *supra* note 80, at 217-18; Lacey, *supra* note 80 at 145.

86. IND. CODE ANN. § 36-7-9-20.5 (West, Westlaw through First Reg. Sess. of 120th General Assemb.).

87. *Id.*

88. *Id.* § 36-7-9-4.

89. *Id.* § 36-7-9-20.5.

90. *Id.*

91. IOWA CODE ANN. § 657A.10A (1) (West, Westlaw through 2017 Reg. Sess.).

92. *Id.*

for the court to consider in making a finding of abandonment, including its habitability, the extent of its physical deterioration, tax delinquency, and compliance history, as well as the readiness and willingness of stakeholders to make needed repairs.<sup>93</sup>

### *B. Land Assembly*

Soft land assembly, in which only abandoned and derelict properties are put into common ownership, does not require either eminent domain or forced relocation. It does depend very strongly, however, on a tax foreclosure system that functions generally, but also one that has been adapted to liquidate nuisance properties in a manner that facilitates their return to productive use. Frank Alexander has outlined in his scholarly work the steps necessary to make tax foreclosure work for land banking.<sup>94</sup> He has also co-founded, with Rep. Dan Kildee—the former treasurer for the county that is home to Flint, Michigan—the Center for Community Progress, the leading organization dedicated to improving America’s response to vacant property problems.<sup>95</sup>

To clear title to vacant properties effectively, tax foreclosure laws need specialized approaches to the sale of tax liens as well as to the time for redemption afforded the owners and other stakeholders. Local governments’ need to collect on receivables must be balanced with the gains to be had from returning derelict properties to productive use. Similarly, the opportunity afforded delinquent owners to redeem their properties must be tailored to expedite title clearing in situations where redemption is known to be unlikely.

Neighborhoods with insufficient market strength to incentivize privately funded renovations depend on investment coordination. When costs of rehabilitation work exceed post-renovation resale prices, then the way forward is to try to increase resale prices. Allowing a single purchaser or a coordinated group of buyers to acquire all the vacant houses in a neighborhood offers a way to recast the market.<sup>96</sup> The recognition of neighborhood weakness by the current owners makes tax delinquency widespread in these neighborhoods that require such investment coordination. Unfortunately,

93. *Id.*

94. Frank S. Alexander, *Tax Liens, Tax Sales, and Due Process*, 75 IND. L.J. 747, 777–78, 801–06 (2000); Frank S. Alexander, *Land Bank Strategies for Renewing Urban Land*, 14 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 140, 146–51. *See generally* ALEXANDER, *supra* note 47.

95. Ctr. For Community Progress, *Frank Alexander*, available at <http://www.communityprogress.net/frank-s—alexander-page-105.php> (last accessed April 30, 2017).

96. James J. Kelly, Jr., *Sustaining Neighborhoods of Choice: From Land Bank(ing) to Land Trust(ing)*, 54 WASHBURN L. J. 613, 621 (2015).

the magnitude of tax arrearages prevents the properties from moving to new owners, because statutory tax sale procedures require a minimum bid no less than the total amount of taxes, interest and penalties due.<sup>97</sup> While minimum bid provisions may ensure fair tax sales of habitable properties, they significantly hamper efforts to get tax-delinquent vacant properties back on the rolls of contributing properties. Vacant and abandoned properties with large tax arrearages invariably remain unsold at the end of tax sales with such minimum bid requirements.<sup>98</sup>

Land banks across the country are making vacant and abandoned properties available to developers capable of returning them to productive use in those states where a conventional auction mechanism does not prevent them from acquiring the properties. To be able to offer clear title to multiple neighboring properties, land banks must be authorized to acquire the rights to foreclose on vacant properties without being required to pay the full lien value. Under the restraints appropriate to publicly accountable entities, they need to be able to identify developers ready, willing and able to return the properties to productive and transfer them at prices that reflect the market realities. To facilitate an approach to property disposition that accomplishes these goals more effectively than any auction would, minimum bid requirements must be abandoned to allow transfers of qualifying tax certificates to land banks.

State law reforms are needed in this area not only because state statute governs tax sale procedures, but also because the sometimes-diverging interests of city and county must balance. Counties are generally responsible for the collection of property taxes, including taxes on properties located within the boundaries of incorporated municipalities.<sup>99</sup> A city or town struggling with concentrated abandoned houses and vacant lots would never be able to return them to productive use under a conventional tax sale system, which requires that all liens be paid in full. Even if the municipality had enough cash on hand to “pay” off its own code enforcement liens, it would not have enough to pay the back taxes due the county. When the property was eventually sold, there would be no guarantee that the city or town would recoup its purchase price. The county, meanwhile, would get the double benefit of having been overpaid for the property and seeing it

97. ALEXANDER, *supra* note 47, at 30.

98. *Id.*

99. Kansas provides for a two-year post-sale redemption period during which counties must postpone foreclosure to allow owners to save their property interests by paying off any delinquencies. KAN. STAT. ANN. § 79-2401a(a)(1) (West, Westlaw through 2016 Reg. Sess.). For homestead properties, owners have three years to redeem. *id.* § 79-2401a(b)(1), while owners of derelict, vacant properties receive only one year. *Id.* § 79-2401(a)(2).



return to the tax rolls. Indiana allows cities to purchase qualifying properties for as little as the costs involved in conducting the sale.

States, such as Kansas, have recognized the need to set post-tax-sale redemption periods at different lengths to protect different kinds of property ownership.<sup>100</sup> Those states facing significant concentrations of vacant properties in their urban neighborhoods must shorten the minimum time for completion of the foreclosure. For instance, Maryland requires most tax-sale purchasers to wait six months before commencing judicial foreclosure proceedings, but properties that have been certified as in need of substantial repair can be foreclosed upon after sixty days.<sup>101</sup> The waiting period is eliminated altogether for tax sale certificates sold at special bulk sales designed to facilitate land banking efforts.<sup>102</sup> Likewise, Indiana requires a delinquent owner to redeem a property within one year of a conventional tax sale,<sup>103</sup> but it shortens that redemption period to 120 days for properties sold at a special sale without the standard minimum bid requirement.<sup>104</sup> These clear and reasonable differences in redemption periods follow from the fact that foreclosure of vacant properties, by definition, do not result in the displacement of legal occupants. Moreover, the community need for investment in these properties requires a quicker transition than that allowed to tax-foreclosed properties generally.

A little over a decade ago, it seemed that the U.S. Supreme Court might provide the nation with resolution on controversies as to when and how state and local governments can use eminent domain to achieve “hard” assembly of land. In *Kelo v. City of New London*, a sharply divided U.S. Supreme Court declined to impose substantive limits on the scope of ends justifying a compensated taking in a situation where the legislative ratification of those ends involved a “well-considered plan” and no untoward control by a particular private beneficiary.<sup>105</sup> The political backlash against that decision, however, spawned a swarm of federal and state legislative initiatives to curtail condemnation for transfer to private parties.<sup>106</sup> As the *Kelo* opinion itself implied, protection of condemnees against undue hardship should come from the states’ enactment and application of their own

100. MD. CODE ANN., TAX-PROP. § 14-833 (e) (West, Westlaw through 2017 Reg. Sess.).

101. *Id.* § 14-833(a), (e) (West, Westlaw through 2017 Reg. Sess.).

102. *Id.* § 14-833(f).

103. IND. CODE ANN. § 6-1.1-25-4 (a)(1) (West, Westlaw through First Reg. Sess. 120th Gen. Assembl.).

104. *Id.* § 6-1.1-25-4 (c).

105. *Kelo v. City of New London*, 545 U.S. 469, 489–90 (2005).

106. See generally CASTLE COALITION, 50 STATE REPORT CARD: TRACKING EMINENT DOMAIN REFORM LEGISLATION SINCE *KELO* (2007), available at [http://ij.org/wp-content/uploads/2015/03/50\\_State\\_Report.pdf](http://ij.org/wp-content/uploads/2015/03/50_State_Report.pdf).

statutes and constitutions.<sup>107</sup> Unfortunately, the various state high court decisions, legislative enactments, and ballot initiatives have—with one notable exception—produced very little in the way of thoughtful balancing of private property rights and anticommons response.

Most meaningful attempts at curbing the use of eminent domain for urban redevelopment have focused on the vagueness of “blight” as a prerequisite.<sup>108</sup> Rather than trying to create objective criteria by which the deterioration of a contiguous geographic area might be judged so severe as to require intervention, nearly all such reforms narrowed the focus of the blight determination from the neighborhood to the individual property subject to condemnation.<sup>109</sup> By approving one of the few ballot initiatives to transform blight takings, Louisiana voters restricted such condemnations to “the removal of a threat to public health or safety caused by the existing use or disuse of *the property*.”<sup>110</sup> Likewise, when the Supreme Court of Ohio confronted the question under its state constitution, it held that “[a] fundamental determination that must be made before permitting the appropriation of a slum or a blighted or deteriorated property for redevelopment is that *the property*, because of its existing state of disrepair or dangerousness, poses a threat to the public’s health, safety, or general welfare.”<sup>111</sup> “Hard” assembly that is limited to the ability to take only severely dilapidated properties is just “soft” assembly using a peculiarly anemic form of blight condemnation.

Utah, prior to the *Kelo* decision, had enacted similarly restrictive constraints on the use of eminent domain in redevelopment.<sup>112</sup> In 2008, however, the legislature approved a condemnee supermajority consent approach to such takings.<sup>113</sup> As amended, Utah’s urban renewal agencies may not use blighted-area condemnation against

residential owner occupied property unless . . . a written petition requesting the agency to use eminent domain to acquire the property is submitted by the owners of at least 80% of the owner occupied property within the relevant area representing at least 70% of the value of owner occupied property within the relevant area . . . .<sup>114</sup>

107. *Kelo*, 545 U.S. at 489–90.

108. See SOMIN, *supra* note 54, 154–60, 185–87.

109. *Id.*

110. LA. CONST. art. 4(B)(2)(c) [emphasis added].

111. *Norwood v. Horney*, 853 N.E.2d 1115, 1145 (Ohio 2006) [emphasis added].

112. James J. Kelly, Jr., *Taming Eminent Domain*, SHELTERFORCE, Mar. 2008, available at [www.shelterforce.org/article/214/taming\\_eminent\\_domain/](http://www.shelterforce.org/article/214/taming_eminent_domain/).

113. *Utah Guts Eminent Domain Reform; First State to Reduce Protection for Property Owners Since Kelo*, CASTLE COALITION (Jan. 17, 2008), available at <http://castlecoalition.org/2289>.

114. UTAH CODE ANN. § 17C-1-904 (2) (West, Westlaw through 2017 Reg. Sess.).

This high supermajority threshold targets this reform at obstruction by strategic and genuine, albeit idiosyncratic, holdouts. A subsequent amendment allowed condemnation to occur upon approval of “90% of the owners of real property, including property owned by the agency or a public entity within the project area.”<sup>115</sup> This additional basis closes the gap between “soft” assembly and “hard” assembly. If the overwhelming majority of properties in the area have already been acquired—through tax foreclosure—by a public land bank, then the 90% threshold actually be easier to achieve than the 80% homeowner approval requirement.

#### IV. CONCLUSION

Gridlock is not a new problem for cities. But, the intense congestion that can bring city street traffic to a halt is not the kind of gridlock this article has attempted to address. The three types of anticommons addressed here are caused by three different aspects of urban abandonment. Owners and lienholders walk away from their interests in an urban property when they are no longer profitable. Capital flees neighborhoods that can no longer reward investment. But, lack of uniformity in this general pattern of desertion leaves even the most severely distressed neighborhoods with property owners and residents committed to staying. As we have seen, the coordination needed for title assembly and “soft” land assembly can be accomplished by innovative reforms of existing public foreclosure methods. However, the significant challenges involved in connecting abandoned properties to functioning markets are dwarfed by the difficulties in devising just and effective ways of conducting intensive redevelopment of urban neighborhoods.

115. *Id.*