DETROIT'S VACANT PROPERTY DILEMMA: THE ILLUSORY POWER OF DEMOLITION STATUTES IN A POST-"GREAT RECESSION" WORLD

PATRICK GUNTON†

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I. INTRODUCTION

The problems that the city of Detroit must confront in the new millennium are multifarious and well-documented. Home to nearly two million people at its peak, the 2010 census indicated that the population of Detroit is now approximately 713,000.[1] Although the population of

† Associate, Warner Norcross & Judd. B.A., 2003, University of Michigan; J.D., 2013, *magna cum laude*, order of the coif, Wayne State University Law School.

1. Kate Linebaugh, *Detroit's Population Crashes*, WALL ST. J., Mar. 23, 2011, at A3.

Detroit has inexorably declined since its peak during the automotive heyday of the 1950s and 1960s, the population drop in the last decade has been particularly acute.[2] Detroit's expansive area of nearly 140 square miles only compounds the problem of its precipitous population decline.[3] In comparative terms, Detroit is roughly one-and-a-half times the size of San Francisco and Boston combined, although it is home to only half the number of people.[4] These bleak numbers indicate a host of apparent and ostensible problems to which there is no expeditious or easy solution.

The city and Mayor Dave Bing have attempted to solve the issue of population decline by implementing a restructuring plan.[5] The proposed plan seeks to allow the city to better serve the needs of its citizens and provide opportunity for growth.[6] Commensurate with population decline the deterioration of the tax base, which threatens Detroit's ability to provide basic municipal services for its citizens.[7] One facet of the mayor's plan is to restructure the city by establishing population centers in the most viable neighborhoods, thereby allowing the city to concentrate its depleted resources.[8]

Inextricably linked with the population decline and potential relocation to "healthy" areas is the ubiquitous problem of blight and vacant property.[9] Currently, the city of Detroit has roughly 30,000 vacant structures, despite continuous municipal and private combative efforts.[10] Blight and vacant property have obvious deleterious effects on property

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2. *State and County QuickFacts, Detroit (city), Michigan,* U.S. CENSUS BUREAU (2010), http://quickfacts.census.gov/qfd/states/26/2622000.html. The population decreased by twenty percent from 2000 to 2010. *Id.*

3. *Id.*

4. 2010 census data states that the area of Boston is 48.28 square miles and the area of San Francisco is 46.87 square miles; the populations are 617,594 and 805,235, respectively. *State and County QuickFacts, Boston, Massachusetts,* U.S. CENSUS BUREAU (2010), http://quickfacts.census.gov/qfd/states/25/2507000.html; *State and County QuickFacts, San Francisco, California,* U.S. CENSUS BUREAU (2010), http://quickfacts.census.gov/ qfd/states/06/0667000.html.

5. *See* DETROIT WORKS PROJECT, http://detroitworksproject.com/ (last visited May 19, 2013).

6. *Id.*

7. Matthew Dolan, *Less than a Full-Service City,* WALL ST. J. (Dec. 11, 2010), http://online.wsj.com/article/SB10001424052748703727804576011761173192434.html?mod=WSJ_WSJ_US_News_5.

8. *Id.*

9. *Neighborhood Action Strategy: Results in the Short-term Will Help to Inform the Long-term,* DETROIT WORKS PROJECT, http://detroitworksproject.com/building-from-strength/short-term-strategy/ (last visited Oct. 11, 2013).

10. Christine MacDonald, *Detroit Mayor Not Close to Demolition Goal,* DETROIT NEWS, Feb. 5, 2011, at A3.

values, as well as threatening neighborhood safety and stability.[11] National studies indicate, for instance, that vacant property causes nearby properties to lose, on average, $7,627 in value and $73 million annually in property damage due to fires.[12] These costs not only burden the affected homes and neighborhoods but are often unfairly externalized to the city's detriment—a city whose resources are already severely strained.[13] Accordingly, the Bing administration targeted eradication of existing blight in under-populated areas and prevention of "blight creep" into the designated "healthy neighborhoods."[14] Specifically, the administration has the stated goal of demolishing 10,000 structures during the mayor's term, although early numbers indicate that this goal may be unattainable.[15]

Adding to the existing vacant building problem are the effects of the recent housing crash and foreclosure crisis.[16] Foreclosures and owner walkaways have created a burgeoning number of vacancies, leaving the already beleaguered city to battle a rising tide of vacant property.[17]

Although the vacant property problem in Detroit is exacerbated due to unique local circumstances, the recession of 2008 and accompanying housing market crash left other cities across the country facing the same dilemma.[18] Detroit and many other cities are in an untenable situation; they must demolish blighted structures in order to protect the remaining

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11. *See, e.g.*, Joseph Schilling, *Code Enforcement and Community Stabilization: The Forgotten First Responders to Vacant and Foreclosed Homes*, 2 ALB. GOV'T L. REV. 101, 110-12 (2009) (providing a quantitative list of the costs of vacant properties to communities).

12. *Id. See also* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-93, REPORT TO THE CHAIRMAN, SUBCOMMITTEE ON ECONOMIC POLICY, COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS, U.S. SENATE, MORTGAGE FORECLOSURES 32 (2010) (indicating that abandoned properties result in unsafe conditions, "contribute to neighborhood decline," and increase the potential for crimes ranging from vandalism and theft to rape and murder).

13. U.S. G.A.O., *supra* note 12, at 34 ("Abandoned foreclosures also increase costs for local governments because they must expend resources to inspect properties and mitigate their unsafe conditions.").

14. *Detroit Targets Services to Healthy Neighborhoods*, DETROIT WORKS PROJECT (Sept. 29, 2011), http://detroitworksproject.com/2011/09/29/detroit-targets-services-to-healthy-neighborhoods/.

15. MacDonald, *supra* note 10, at A3.

16. *See* Schilling, *supra* note 11, at 103.

17. Naomi R. Patton, *Law to Track Detroit Blight*, DETROIT FREE PRESS, July 26, 2010, at A3 (indicating that within six months nearly 6,500 homes were foreclosed upon, bringing the total in Detroit to nearly 19,000).

18. *See, e.g.*, Creola Johnson, *Fight Blight: Cities Sue to Hold Lenders Responsible for the Rise in Foreclosures and Abandoned Properties*, 2008 UTAH L. REV. 1169, 1180 (2008).

citizens and their property and promote socioeconomic stability while simultaneously facing increasing budget shortfalls.[19] Although cities have various legal means via their delegated municipal powers to abate blighted property, the expanse and contours of these powers are often unclear.[20]

This Note will argue that Detroit's current power to demolish vacant structures and recover the related costs is inadequate, particularly given the city's fiscal position. Part II will begin with an overview of a municipality's power to abate nuisances and recover costs (as enacted by state statute and city ordinance) in Michigan as well as other states. Although the power to abate nuisances is well-settled in most jurisdictions, a municipality's ability to recover the abatement costs from various parties is not. This Note will then turn to the potential conflicts that the city might encounter exercising this power vis-à-vis the property owner's constitutional rights. Part III of this Note will discuss and balance the competing policy arguments for and against extending the scope of liability for demolition costs (1) to property owners personally and (2) to other parties such as lenders. Subsequently, this Note will analyze the current state of the law in Michigan and propose the necessary changes needed to accommodate the change in policy.

II. BACKGROUND

A. Nuisance and Blight Abatement Generally

Municipalities may demolish private structures pursuant to their police powers in furtherance of the public safety, health, morals, and welfare.[21] Absent statutory dictates, when a city exercises this common law power it does not need to compensate the property owner.[22] The property owner, in creating a nuisance, has endangered fellow citizens and their property, thus obviating the need for the city to pay the owner.[23]

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19. *Id.*

20. *See infra* Part II.

21. *See generally* 62 C.J.S. *Municipal Corporations* § 229 (2011); 7A MCQUILLIN MUN. CORP. § 24:557 (3d ed. 2012). Although this Note focuses on demolition actions in Michigan, the laws of many jurisdictions are similar in their language and scope. *See generally* 65 ILL. COMP. STAT. 5/11-31-1 (2010) (providing that a municipality "may demolish, repair, or enclose or cause the demolition, repair, or enclosure of dangerous and unsafe buildings or uncompleted and abandoned buildings"); CONN. GEN. STAT. § 7-148 (2010) (granting municipalities the power to demolish structures that are nuisances); COLO. REV. STAT. § 31-15-401(c) (2010) (stating that a municipality may "declare what is a nuisance and abate the same").

22. 62 C.J.S. *Municipal Corporations* § 229.

23. *Id.*

More importantly, the municipality may recover the abatement costs from the property owner if a statute or city charter grants such a power.[24] The typical recovery mechanism for nuisance abatement costs is a lien against the property, rather than a form of personal judgment against the property owner.[25]

B. Constitutional and Statutory Authority for Nuisance Abatement in Michigan

Michigan delegated certain legislative powers to municipalities, and municipalities accordingly must act within the proscribed limits of the Michigan Constitution and statutes.[26] Michigan, as a "Home Rule" state,[27] granted via its constitution broad authority to cities to govern "municipal concerns, property, and government."[28] The constitution also provides that cities' municipal powers are not limited by any "enumeration of powers" contained in the constitution.[29] Furthermore, the constitution states that provisions governing municipal powers "shall be liberally construed" and municipalities may act according to certain implied powers, which the constitution does not expressly prohibit.[30] As the Michigan Supreme Court has provided, courts must read these two provisions in conjunction with each other as a framework for judicial review.[31]

In addition to these broad constitutional grants, the Michigan Legislature has granted cities specific enumerated powers.[32] Under the

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24. *See generally* 6A MCQUILLIN MUN. CORP. § 24:81 (3rd ed. 2012); Robert A. Shapiro, Annotation, *Validity and Construction of Statute or Ordinance Providing for Repair of Residential Building by Public Authorities at Owner's Expense*, 43 A.L.R.3d 916 (1972).

25. Shapiro, *supra* note 24. *See, e.g.*, Cheboygan Cnty. Constr. Code Dep't v. Burke, 384 N.W.2d 77, 78 (Mich. Ct. App. 1985); Howard v. City of Lincoln, 497 N.W.2d 53, 57 (Neb. 1993) (stating that a municipality may assess abatement costs against the offending property); City of Nashville v. Weakley, 95 S.W.2d 37, 39 (Tenn. 1936) (finding a lien for city's expense of abating nuisances proper).

26. *See generally* MICH. CONST. art. 7, § 22.

27. *See* 62 C.J.S. *Municipal Corporations* § 239 (2011).

28. MICH. CONST. art. 7, § 22.

29. *Id.*

30. MICH. CONST. art. 7, § 34. *Compare* City of Detroit v. Walker, 520 N.W.2d 135, 139 (Mich. 1994) (stating that under the Michigan Constitution, home rule cities "enjoy not only those powers specifically granted, but they may also exercise all powers not expressly denied"), *with* Kasparek v. Johnson Cnty. Bd. of Health, 288 N.W.2d 511, 514 (Iowa 1980) (explaining that in non-home rule states, municipalities only have powers that the legislature expressly grants).

31. City of Lansing v. Edward Rose Realty, Inc., 502 N.W.2d 638, 642 (Mich. 1993).

32. *See, e.g.*, Home Rule City Act, MICH. COMP. LAWS ANN. § 117 (West 2012).

Michigan Zoning Enabling Act, local governing bodies have broad authority to promulgate ordinances and regulate land use and structures.[33] Generally, a municipality may declare any structure (such as a blighted or vacant building) that does not comply with local ordinances a nuisance per se and institute court proceedings to abate the nuisance.[34] Specifically, a city has the power to act against any building or structure it deems unsafe by requiring either repairs or demolition.[35]

The notice and due process requirements of the statute are express,[36] and a city's authority to abate structural nuisances is plenary.[37] If a code enforcement agent determines that a structure is a "dangerous building,"[38] the municipality will issue an order to the "owner, agent, or lessee" of the property to either repair or demolish the structure.[39] If the owner fails to comply with the order, the city must provide notice and opportunity for a hearing prior to the city taking abatement action against the structure.[40] The local city council or zoning board of appeals will then determine whether action is warranted, and if so, whether the city will repair the structure or demolish it.[41] Finally, subsequent to the repair or demolition, the city may bring an action against the property "owner or party in interest" to recover its demolition or repair costs, and the owner's failure to pay will result in a lien against the property.[42] Alternatively, instead of a lien against the property, the city may pursue a judgment "against [the] assets of the owner other than the building or structure."[43]

Michigan and federal courts have routinely upheld a city's authority to demolish dangerous buildings pursuant to statutory and constitutional

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33. MICH. COMP. LAWS ANN. §§ 125.3201-.3202 (West 2010).

34. *Id.* § 125.3407; *see also id.* §§ 125.538-.539 (West 2010) (making it unlawful to maintain a "dangerous building" as defined to include vacant structures).

35. *Id.* §§ 125.540-.541 (West 2010); *see also* § 125.486 (declaring a building that is "dangerous or detrimental to life or health" to be a public nuisance, and the local government may order it removed).

36. *Id.* § 125.541(4).

37. *See, e.g.*, Masszonia v. Washington, 315 F. Supp. 529, 531 (D.D.C. 1970) (citations omitted) ("[A] municipality has the inherent power to abate public nuisances.").

38. MICH. COMP. LAWS ANN. § 125.539. The definition of "dangerous building" is expansive and includes buildings that are vacant under MCLA section 125.539(i) or abandoned under MCLA section 125.539(j). *Id.*

39. *Id.* § 125.541(2).

40. *Id.* § 125.541(4).

41. *Id.*

42. *Id.* § 125.541(5)-(7); *see also* Hendrix v. City of Detroit, 811 N.W.2d 491 (Mich. 2012).

43. MICH. COMP. LAWS ANN. § 125.541a (West 2010); *Hendrix*, 811 N.W.2d at 491 (noting that a city may recover demolition costs either by a lien on the property or a money judgment against the owner's other assets).

delegations.[44] In *Rental Property Owners Association of Kent County v. City of Grand Rapids*, the Michigan Supreme Court stated that a city's general power to abate nuisances "is well established . . . as a means to promote public health, safety, and welfare, [and] is a valid goal of municipal police power."[45] In *Sachs v. City of Detroit*, the court of appeals found that in demolishing the plaintiff's building, the City of Detroit was acting within its general police powers, and a lien against the property was a valid form of judgment.[46] There, the plaintiff argued that, *inter alia*, the City of Detroit failed to act according to the mandates of the state statute and city ordinance.[47] The court disagreed, finding that the city followed the applicable laws and that although a personal judgment against the plaintiff for demolition costs was unauthorized,[48] the lien was a proper recovery mechanism.[49] A municipality, however, may not impose a lien against property for general nuisance abatement, but instead only under "explicit statutory authorization" such as MCLA section 125.541.[50]

In addition to the abatement power, the Michigan Legislature has enacted a statutory mechanism for larger cities to combat blight.[51] A municipality may create an administrative body for the purpose of determining blight violations and levying the applicable fines (less than $10,000).[52] The requirements of notice and opportunity to be heard, as well as the general procedures, are similar to that of the nuisance abatement statute, MCLA section 125.541.[53] Similarly, the city may impose a lien against the violating property to collect unpaid civil fines.[54]

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44. *See, e.g.*, Franken Invs., Inc. v. City of Flint, 218 F. Supp. 2d 876, 890 (E.D. Mich. 2002). *But see* City of Saginaw v. Budd, 160 N.W.2d 906, 908 (Mich. 1968) (finding the city's actions unconstitutional as the applicable ordinance was an "improper delegation of authority without definable standards").

45. Rental Prop. Owners Ass'n of Kent Cnty. v. City of Grand Rapids, 566 N.W.2d 514, 518 (Mich. 1997).

46. Sachs v. City of Detroit, No. 280859, 2009 WL 416844, at *1, *3 (Mich. Ct. App. Feb. 19, 2009). *See also* Northfield Twp. v. Kircher, No. 212260, 2000 WL 33409146, at *1, *3 (Mich. Ct. App. Aug. 11, 2000) (holding that an apartment building was a public nuisance and the township could take steps "reasonably necessary to suppress the nuisance").

47. *Sachs*, 2009 WL 416844, at *2.

48. *But see* MICH. COMP. LAWS ANN. § 125.541a (authorizing recovery of costs against personal property).

49. *Sachs*, 2009 WL 416844, at *2.

50. Ypsilanti Fire Marshal v. Kircher, 730 N.W.2d 481, 507-08 (Mich. Ct. App. 2007).

51. MICH. COMP. LAWS ANN. § 117.4q (West 2008).

52. *Id.*

53. *Id.*

54. MICH. COMP. LAWS ANN. § 117.4r (West 2010).

C. Applicable Detroit Ordinances

The City of Detroit has enacted several ordinances effectuating the nuisance abatement powers that the state statute granted.[55] The city may declare a property "abandoned" if it is "vacant, dilapidated, and open" or if its owner owes property taxes.[56] The city may then demolish the offending structure or quiet title in the property.[57] The basic procedural requirements of notice to the owner,[58] opportunity to contest the demolition order,[59] and ability to cure the condition[60] are similar to those set out in the Michigan statutory procedures.[61]

D. Constitutional Restraints on Municipal Demolition Power

Although courts have routinely upheld a city's use of the police power to demolish dangerous structures, a city must act within the confines of several constitutional limitations.[62] Even though a municipality may have a substantial governmental interest in abating nuisances, the courts must necessarily balance that interest against the

55. *See* DETROIT, MICH., CODE part. III, § 37-2 (2010). Detroit appears to be exercising its municipal power under a combination of its implied Home Rule authority and statutory authority. Part III Section 8.5-1-1, for example, indicates that the City enforces blight violations pursuant to MCLA sections 117.4*l* and 117.4q. DETROIT, MICH., CODE part. III, § 8.5-1-1. The City's vacant property ordinances, on the other hand, do not expressly refer to Michigan statutory authority. DETROIT, MICH., CODE part. III, § 37-2. However the language in the ordinances and statutes is similar, suggesting that the City is relying on the statutes for authority, with the Home Rule power covering any deficiencies. *Compare* MICH. COMP. LAWS ANN. §§ 125.538-.539 (West 2010) (sanctioning dangerous buildings), *and* MICH. COMP. LAWS ANN. § 333.2455 (West 2010) (granting power to health officials to declare that a building is a public nuisance due to unsafe conditions), *with* DETROIT, MICH., CODE part. III, § 37-2-1 (noting the problem with dangerous and vacant buildings), *and* DETROIT, MICH., CODE part. III, § 37-1-3 (stating, "the public health director may declare" that a structure "is dangerous or detrimental to public health [and] . . . a public nuisance and may order the same to be remedied, removed, [and] abated").

56. DETROIT, MICH., CODE part. III, § 37-2-2(b).

57. *Id.* § 37-2-3 and §37-2-6.

58. *Id.* § 37-2-4.

59. *Id.* § 37-2-3(f).

60. *Id.* § 37-2-3(j).

61. *Compare* MICH. COMP. LAWS ANN. § 125.541a, *with* DETROIT, MICH., CODE part. III, § 37-2-4 (2010).

62. Rental Prop. Owners Ass'n of Kent Cnty. v. City of Grand Rapids, 566 N.W.2d 514, 518 (Mich. 1997).

constitutional rights of the affected property owner.[63] Property owners will often argue that in demolishing a structure (or abating a nuisance generally) the city has (1) violated their procedural or substantive due process rights,[64] (2) taken their property for a public purpose without just compensation,[65] and/or (3) denied them equal protection under the law.[66]

1. Due Process Requirements

Generally, procedural due process mandates that prior to demolishing a vacant structure, a municipality must provide the owner with notice and opportunity to be heard.[67] The United States Supreme Court has defined the contours of procedural due process requirements in a somewhat nebulous manner, stating that the requisite notice and opportunity to be heard will depend on "the nature of the case."[68] In the nuisance-abatement context, states attempt to comply with the Court's dictates by including notice and hearing requirements in statutes.[69] So long as the administrative body follows the notice and hearing provisions

63. 5 MCQUILLAN MUN. CORP. § 19:9 (3d ed. 2012) ("Stated in broad outline in its simplest form, the problem of the constitutionality of ordinances in respect of common or fundamental rights is to reconcile the liberty of the individual with the public welfare.").

64. U.S. CONST. amend. XIV, § 1; MICH. CONST. art. I, § 17; *see infra* Part II.D.1.

65. U.S. CONST. amend. V; MICH. CONST. art. 10, § 2; *see infra* Part II.D.2.

66. U.S. CONST. amend. XIV, § 1; MICH. CONST. art. I, § 2; *see infra* Part II.D.3.

67. Thomas v. City of Detroit, 299 F. App'x 473, 476 (6th Cir. 2008) (explaining that the plaintiff property owner received adequate due process when the city sent letters indicating the pending demolition and opportunity to dispute the city's action). *But see* Noroian v. City of Port Jervis, 791 N.Y.S.2d 147, 147 (N.Y. App. Div. 2005) (explaining that post-deprivation process may suffice in situations when the demolished structure posed an immediate danger to the public).

68. Morrissey v. Brewer, 408 U.S. 471, 481 (1972); Mathews v. Eldridge, 424 U.S. 319 (1976). Specifically, a court will look to:

> (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) [finally,] the Government's interest, including [the function involved and] the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 321. *See also* 1 ROSALIE LEVINSON & IVAN BODENSTEINER, STATE AND LOCAL GOVERNMENT CIVIL RIGHTS LIABILITY § 1.18 (2d ed. 2011) (explaining procedural due process requirements in respect to various municipal actions).

69. *See, e.g.*, MICH. COMP. LAWS. ANN. § 125.541 (West 2010); *see also* Am. Home Mortg. Acceptance v. City of Detroit, No. 279377, 2008 WL 4182047, at *2 (Mich. Ct. App. Sept. 11, 2008) (finding no notice was due under the demolition statute to a holder of a sheriff's deed); *see also supra* Parts II.C and II.D.

of the governing statute,[70] or the owner has adequate notice and opportunity to be heard through other means,[71] procedural due process is satisfied.[72]

A landowner might also argue that the demolition ordinance or statute violates his substantive due process rights.[73] The substantive due process requirement, however, largely collapses into or coincides with the court's determination of the validity of the laws as an exercise of the police power.[74] That is, courts have found that a municipality has a substantial governmental interest in removing unsafe structures, and the municipality's chosen means of rectifying the problem—demolishing the structure—is not irrational.[75] Therefore, a substantive due process argument is often a losing one.[76]

2. Takings Requirements

The U.S. and Michigan Constitutions circumscribe a city's authority to "take" an individual's property either directly via eminent domain or indirectly (through regulation pursuant to an inverse condemnation

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70. *See, e.g.*, Geftos v. City of Lincoln Park, 198 N.W.2d 169, 172 (Mich. Ct. App. 1972) (discussing the baseline requirements of due process in a demolition action); Wray v. City of Lansing, No. 272868, 2007 WL 778563, at *3-6 (Mich. Ct. App. Mar. 15, 2007) (finding that the city complied with statutory due process requirements).

71. Orion Charter Twp. v. Burnac Corp., 431 N.W.2d 225, 231 (Mich. Ct. App. 1988) (finding no due process violation when the township failed to provide the statutorily mandated administrative hearing, but the property owner had the opportunity to contest the demolition order in state and federal court); *see also* 5 MICH. CIV. JUR. CONST. LAW § 161 (2012) (citing *Orion Charter Twp.*, 431 N.W.2d 225, in discussing the nature of notice and hearing required under Michigan constitutional law).

72. *See* Gillie v. Genesee Cnty. Treasurer, 745 N.W.2d 137, 148 (Mich. Ct. App. 2007) (citing *In re* Treasurer of Wayne Cnty. for Foreclosure, 732 N.W.2d 458 (Mich. 2007)).

73. Freeman v. City of Dallas, 242 F.3d 642, 652-53 (5th Cir. 2001) (explaining that maintaining structural standards is within the city's police power, and abating such structures is a reasonable exercise of that power).

74. Franken Invs. v. City of Flint, 218 F. Supp. 2d 876, 887-88 (E.D. Mich. 2002).

75. Cummins v. Robinson Twp., 770 N.W.2d 421, 438 (Mich. Ct. App. 2009); *see also* Fifth Urban, Inc. v. Bd. of Bldg. Standards, 320 N.E.2d 727, 733 (Ohio Ct. App. 1974) (citations omitted) (explaining that demolition ordinances are within the state's police power and "preservation of property values" are within the "constitutional limitations imposed upon the exercise of the police power").

76. *See, e.g.*, Rental Prop. Owners Ass'n of Kent Cnty. v. City of Grand Rapids, 566 N.W.2d 514, 518 (Mich. 1997); Catanzaro v. Weiden, 128 F.3d 56, 64 (2d Cir. 1999) (denying substantive due process claim); Vill. of Lake Villa v. Stokovich, 810 N.E.2d 13, 27 (Ill. 2004) (finding a demolition statute valid under a rational basis review).

action).[77] A city may demolish unsafe structures under its police power without "taking" the owner's property requiring commensurate just compensation.[78] Under the "nuisance exception" to the Fifth Amendment Takings Clause, "no individual has a right to use his property so as to create a nuisance";[79] thus, when a city abates the nuisance, it has not condemned any compensable interest.[80] In other words, when a municipality is acting pursuant to its police powers to protect the public health, safety, and welfare by eliminating nuisances, it is not acting under its "power of eminent domain."[81]

3. Equal Protection Requirements

A municipality must exercise its delegated powers in the same manner as the state, guaranteeing "all persons similarly situated should

77. Kelo v. City of New London, 545 U.S. 469, 490 (2005); Cnty. of Wayne v. Hathcock, 648 N.W.2d 765 (Mich. 2004). In *Kelo*, the Supreme Court upheld a city's use of eminent domain under the U.S. Constitution when the city transferred property from private individuals to another private entity for purposes of eliminating blight and promoting economic development. *Kelo*, 545 U.S. at 489-90. The Court found that economic development was a "public use" under the Fifth Amendment, but stated this was a federal baseline, leaving states free to interpret the "public use" requirement under their own constitutions. *Id.* at 489. Michigan, among other states, subsequently amended its constitution to provide that transferring property between private parties for the purpose of economic development is not a "public use." MICH. CONST. art. X, § 2; *see also* John E. Mogk, *Eminent Domain and the "Public Use": Michigan Supreme Court Legislates an Unprecedented Overruling of* Poletown *in* County of Wayne v. Hathcock, 51 WAYNE L. REV. 1331 (2005) (discussing the development of the "public use" requirement and takings jurisprudence in Michigan).

78. Roosevelt v. City of Detroit, No. 299166, 2011 WL 4862439, at *3 (Mich. Ct. App. Oct. 13, 2011), *rev'd sub nom.* Hendrix v. City of Detroit, 811 N.W.2d 491 (Mich. 2012).

79. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 491 n.20 (1987); City of Dallas v. Stewart, 361 S.W.3d 562, 569 (Tex. 2012) (citations omitted) ("[W]e have long held that the government commits no taking when it abates what is, in fact, a public nuisance.").

80. *See, e.g.*, Sterling Bank & Trust, F.S.B. v. City of Pontiac, No. 249689, 2005 WL 2016584, at *1 (Mich. Ct. App. Aug. 23, 2005) (finding no taking occurred when the city demolished owner's dangerous structure).

81. Bennis v. Michigan, 516 U.S. 442, 452-53 (1996); *see also* Ypsilanti Charter Twp. v. Kircher, 761 N.W.2d 761, 775 (Mich. Ct. App. 2008) ("Because [the township] was exercising its legitimate police power to abate the public nuisance on defendant's property, no unconstitutional taking occurred."); Fifth Urban, Inc. v. Bd. of Bldg. Standards, 320 N.E.2d 727, 733-34 (Ohio Ct. App. 1974) ("A taking of property by ordering it demolished under the police power is not a taking of property without compensation.").

be treated alike."[82] Generally, courts will find the governing state abatement statute or related municipal ordinance presumptively valid under the Equal Protection Clause, unless the law in question fails a "rational basis test."[83] A court will grant even wider latitude to a municipality in economic or social matters, but it will subject the statute or ordinance to strict scrutiny when the law differentiates based upon a suspect class.[84]

Although an ordinance may be facially valid, the affected property owner might argue that the city applied the ordinance in a discriminatory manner.[85] A "selective enforcement" challenge requires the claimant to show the state action had a "discriminatory effect" and was "motivated by a discriminatory purpose."[86] Discriminatory effect means that the challenged state action disproportionately impacted other similarly situated parties.[87] Discriminatory purpose requires the claimant to establish that the state "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group"[88] as well as that the state had no

82. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985). As Part III will explore, equal protection concerns will become particularly salient if the scope of liability for demolition actions is expanded.

83. *Id.* at 440; Crego v. Coleman, 615 N.W.2d 218, 223-24 (Mich. 2000) (explaining that the Michigan Constitution offers the same protection and the courts will apply the same (i.e., federal) standards to equal protection claims); *see also* 5 MCQUILLIN MUN. CORP. § 19.22 (3d ed. 2011) (explaining the standards of review for equal protection claims).

84. *City of Cleburne*, 473 U.S. at 440; *see also* Northville Downs v. Granholm, 622 F.3d 579, 587 (6th Cir. 2010) (finding no equal protection violation under MICH. CONST. art. IV, § 41, which requires one class of gaming establishments to obtain voter approval prior to expansion and exempts others, as the section is an "economic regulation" and the state has a "rational basis for the classification").

85. 5 MCQUILLIN MUN. CORP. § 19:17.

86. Wayte v. United States, 470 U.S. 598, 608 (1985); *see also* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264-65 (1977).

87. United States v. Armstrong, 517 U.S. 456, 465 (1996); *Arlington Heights*, 429 U.S. at 264-65.

88. *Wayte*, 470 U.S. at 610; Boone v. Spurgess, 385 F.3d 923, 932 (6th Cir. 2004). *See also* Hillside Prods., Inc. v. Duchane, 249 F. Supp. 2d 880, 897 (E.D. Mich. 2003). The *Duchane* court explained the forms of selective enforcement claims:

> (1) those brought by members of a protected class alleging the government arbitrarily discriminated against them based on class membership; (2) those brought by individuals who claim they were punished for exercising a constitutionally protected right; and (3) those brought by individuals who are not members of a protected class and are not alleging an infringement of a constitutionally protected right but rather claim to be a "class of one" and allege that the government intentionally treated them "differently from others similarly situated and that there [was] no rational basis for the difference in treatment."

rational basis for distinguishing between the claimant and other similarly situated individuals.[89] Often the "identifiable group" is a particular protected class,[90] such as race or religion, but an "intent to inhibit or punish the exercise of constitutional rights" is impermissible as well.[91]

Finally, the Supreme Court has indicated that affected property owners may bring a claim as a "class-of-one."[92] Effectively, a "class-of-one" plaintiff must prove the elements of a selective enforcement claim, i.e., "discriminatory effect" and "discriminatory purpose" with no rational basis.[93] However, the plaintiff need not demonstrate that he is a member of a suspect class or protected group.[94] "Class-of-one" selective enforcement provides affected property owners another avenue for challenging a city's demolition orders and imposition of recovery costs.

In sum, a city such as Detroit must act within statutory and constitutional parameters when demolishing vacant structures. Although property owners often challenge a municipality's authority to demolish their property, the courts have routinely ruled in favor of the municipality.[95] Even though a city may combat blight and abandoned

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Id. (citations omitted).

89. *See also* 5 MCQUILLIN MUN. CORP. § 19:17 (discussing the nature and requirements of selective enforcement claims under equal protection jurisprudence).

90. City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (indicating that suspect classes include "race, religion, or alienage").

91. Cine SK8, Inc. v. Town of Henrietta, 507 F.3d 778, 790 (2d Cir. 2007).

92. Vill. of Willowbrook v. Olech, 528 U.S. 562, 564 (2000) (citations omitted) ("Our cases have recognized successful equal protection claims brought by a 'class of one,' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment."); *cf.* Engquist v. Or. Dept. of Agric., 553 U.S. 591, 603 (2008). In *Engquist*, the Court subsequently clarified and restricted "class-of-one" claims, stating:

> There are some forms of state action, however, which by their nature involve discretionary decision making based on a vast array of subjective, individualized assessments. In such cases the rule that people should be "treated alike, under like circumstances and conditions" is not violated when one person is treated differently from others, because treating like individuals differently is an accepted consequence of the discretion granted. In such situations, allowing a challenge based on the arbitrary singling out of a particular person would undermine the very discretion that such state officials are entrusted to exercise.

Id.

93. Systematic Recycling, LLC v. City of Detroit, 685 F. Supp. 2d 663, 675-76 (E.D. Mich. 2010).

94. Boone v. Spurgess, 385 F.3d 923, 932 (6th Cir. 2004) (explaining the requirement that a plaintiff must show membership in a class was "completely undercut by . . . *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000)").

95. *See, e.g.*, Roosevelt v. City of Detroit, No. 299166, 2011 WL 4862439, at *2 (Mich. Ct. App. Oct. 13, 2011).

structures via its nuisance abatement power, the question remains whether such action is viable given the existing extra-legal constraints. In other words, the city may have the de jure authority to act pursuant to its abatement powers yet lack the financial means to do so.

III. ANALYSIS

The current state of the law in Michigan (and other states) and municipal processes to combat urban blight is inadequate. Although urban blight may be a small broken cog in an otherwise only partially functional municipal machine, it is nonetheless a vital and salient issue. Any legal solutions to the issue will involve a variety of competing interests that the state must address and balance. That is, although the end—elimination of urban blight—seems clear and agreeable to all involved, the means are contentious. As the law currently exists in Michigan, cities like Detroit are effectively unable to use their nuisance abatement powers due to the prohibitive costs of demolition.[96] Owners of vacant or blighted property are often judgment-proof,[97] and recovering costs from the property itself via a lien is problematic for several reasons.[98] The two most viable solutions are to (1) expand the scope of liability to include parties such as lenders and (2) make parties personally liable for demolition costs, rather than relying on real property liens.

A. Policy Considerations in Favor of Expanding Liability

In response to the growing problem of blighted properties, cities across the country have adopted new measures to combat blight.[99] Boston expanded the definition of "owner" to encompass "mortgagees" in possession.[100] The ordinance recites the numerous problems with

96. *See infra* Part III.3.

97. The average residential homeowner in Detroit is likely judgment proof due to low income and high rates of poverty. *See, e.g.*, *State & Country QuickFacts: Detroit (city), Michigan*, *supra* note 2 (listing a median household income of $28,357 and indicating that 34.5% of the populace lives below the poverty level). In the vacant property context, the owner has likely abandoned the home, as he is unable to make mortgage payments or otherwise maintain the building. In contrast, owners of commercial or rental properties (non-owner occupied properties) may have sufficient assets to pay for demolition of vacant structures.

98. *See infra* Part III.3.

99. *See, e.g.*, CITY OF L.A., CAL., ORDINANCE § 181185 (2010) (requiring owners (including lenders) to notify the city of foreclosures and register vacant property, and to maintain property or face civil liability).

100. BOS., MASS., CODE ch. XVI § 16-52 (2008), *available at* http://www.cityofboston.gov/isd/foreclosure/.

vacant properties, due in large part to the real estate collapse of 2008 combined with the long delay in ownership transfer (and attendant liability) under the current mortgage foreclosure process.[101]

1. Community and Municipal Costs

By expanding liability for vacant property maintenance, cities such as Boston and Chicago have made implicit and explicit statements about the costs of urban blight.[102] Under the well-known "Broken Windows Theory," commentators have argued that vacant property breeds crime and further neighborhood deterioration.[103] The theory posits that neglected property increases the rates of vandalism and theft and creates a general apathy towards the community and property.[104] In turn, residents will begin to suspect that all crime (including violent crime) is on the rise, thereby decreasing residents' willingness to be involved in neighborhood safety and participate in informal "controls."[105] However, the adverse impact of vacant property on cities such as Detroit is not purely theoretical.

There is an abundance of evidence indicating the extensive costs of vacant property to communities.[106] One commentator has noted that vacant property reduces a city's tax base, decreases proximate property values while increasing home insurance costs, and increases the costs of municipal services such as police and fire.[107] According to a property management company, vacant structure fires account for an estimated forty-five deaths and $900 million in property damage nationwide annually.[108] In addition to these ancillary costs (or because of them),

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101. *Id.*

102. *See, e.g., id.* (stating that vacant property is a public nuisance by creating litter, increasing vandalism, and permitting unsafe structures).

103. George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC MONTHLY (Mar. 1982), http://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/. *See also* Corey Williams, *Detroit Trying "Broken Windows" Community Policing*, DETROIT FREE PRESS (Feb. 12, 2012), http://www.manhattan-institute.org/pdf/broken_windows_associated_press-02-2012.pdf.

104. Kelling & Wilson, *supra* note 103.

105. *Id.*

106. *See, e.g.*, John P. Harding, Eric Rosenblatt, & Vincent W. Yao, *The Contagion Effects of Foreclosed Property*, FED. HOUSING FIN. AGENCY 1 (July 13, 2009), http://www.fhfa.gov/webfiles/15046/website_rosenblatt.pdf (indicating that owners often abandon foreclosed property, which leads to "negative visual externality" and causes remaining owners to decline to "invest in socially desirable individual and community activities").

107. Schilling, *supra* note 11, at 110-11.

108. John O'Leary, *The True Costs and Consequences of Vacant Properties for Communities: Part 1 – The Contributing Factors*, VACANT PROPERTY SPECIALISTS 3,

cities expend large sums on either maintaining or demolishing vacant structures.[109] Detroit spends $800,000 annually on maintaining vacant property compared to Philadelphia, which spends $1.8 million, or St. Louis, which spent $15.5 million over a five-year period.[110]

Cities like Detroit, then, are facing surmounting municipal costs of dealing with vacant structures as judgment-proof owners walk away from their property.[111] Facing the attendant problems of vacant property, the city has two options: either obtain and maintain the property (usually through a tax foreclosure) or demolish the dilapidated structures.[112] Detroit inarguably cannot afford the former with already an estimated 14,000 tax foreclosed properties sold in a recent auction.[113] In order for the city to take possession and dispose of the property, it must be able to recoup its costs in some fashion; the ability to recover costs is nonexistent when the property (as in the case of abandoned property) has little or no value.[114] The diminution of property value is not only problematic for the city, but it also creates a disincentive for the lender to take possession or maintain the collateral.[115]

Similarly, the city cannot afford to demolish structures at its own expense.[116] As Part III.A.3 discusses, the demolition costs of vacant property in Detroit often exceed the property value.[117]

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http://www.vpspecialists.com/ddme_cms/userfiles/files/vps_whitepaper%20-%20part 1.pdf (last visited Sept. 30, 2013).

109. *Id.*

110. *Id.*; Johnson, *supra* note 18, at 1181.

111. O'Leary, *supra* note 108.

112. As indicated in Part I and will be expounded upon in Part II.A.3, the costs of demolishing vacant structures are also prohibitive.

113. Nancy Kaffer, *First Round of Foreclosed-Property Auctions Nets Wayne County $9.8 Million,* CRAIN'S DETROIT BUS. (Sept. 29, 2011), http://www.crainsdetroit.com/ article/20110929/FREE/110929832/first-round-of-foreclosed-property-auctions-nets-wayne-county-9-8-million; *see also* John Gallagher, *With So Much Space, So Few Options – Detroit's Vacant Lots Are a Burden,* DETROIT FREE PRESS (April 1, 2012), http://www.freep.com/article/20120401/NEWS01/204010467/With-so-much-space-so-few-options-Detroit-s-vast-vacant-lots-are-a-burden.

114. Johnson, *supra* note 18, at 1235-36. In fact, the property may have negative value depending on other potential costs such as environmental liability.

115. *Id.* at 1234-35 (arguing that lenders avoid taking possession or maintaining vacant property in the hope that the borrower will cure the delinquency, the city will care for the property, or the lender can sell the property (either through a foreclosure sale or sale of the mortgage to another lender)).

116. *See infra* Part III.A.3.

117. *Id.*

2. Lender Liability

The city should have the means to attach liability to lenders prior to foreclosure in order to better recoup costs and encourage the lenders to assume responsibility for their collateral once the resident abandons it.[118] Since the housing crash, the problem of "bank walkaways" has become problematic in many urban centers.[119] Due to the decrease in property values, lenders may decline to take possession (i.e., walk-away from the property during or after the foreclosure process) or fail to record their interest under foreclosure actions.[120] The costs of the foreclosure process are high, and the benefits are minimal; the lender has little economic incentive to obtain a piece of property in a distressed area, often with negligible resale value and high upkeep costs.[121]

Although the lender may be making what it believes to be a rational economic decision, the failure to foreclose and take possession creates uncertainty as to ownership and the associated responsibilities for both the mortgagor in default and the city.[122] For instance, the mortgagor is liable for maintenance or demolition costs despite having relinquished control voluntarily or through eviction.[123] Additionally, it is unfair to shift pecuniary responsibility to the city due to private parties' inability to ascertain or assert property rights and responsibilities.[124] In sum, the current state of the law creates a situation where the lender may avoid liability for the nuisance costs while, after owner abandonment, holding de facto ownership of the land.[125]

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118. *See, e.g.*, CHI., ILL., MUNICIPAL CODE § 13-12-125. Under the current nuisance abatement statute and city ordinance, the City of Chicago may only hold owners liable for demolition costs. *Id.* § 13-12-130. Lenders will not become owners until the foreclosure process is complete. The exact required changes to the law in Michigan are relatively simple and will be discussed in Part III.D.

119. *See, e.g.*, Susan Saluny, *Banks Starting to Walk Away on Foreclosures*, N.Y. TIMES, March 30, 2009, at A20.

120. *Id.*; Benton C. Martin, *Vacant Property Registration Ordinances*, 39 REAL EST. L.J. 7, 8 (2010).

121. *Id.*

122. *Id.*; Kristin M. Pinkston, *In the Weeds: Homeowners Falling Behind on Their Mortgages, Lenders Playing the Foreclosure Game, and Cities Left Paying the Price*, 34 S. ILL. U. L.J. 621, 626 (2010).

123. Pinkston, *supra* note 122, at 621, 626.

124. *Id.* (arguing that municipalities have four choices once the owner abandons the property: "(i) leave the property to deteriorate and blight the neighborhood, (ii) perform maintenance and repairs to the property, (iii) demolish the property with little chance of recovering its costs, or (iv) expend limited resources fighting with an impoverished homeowner or a stubborn lender").

125. *Id.* at 632-33.

Changing the current nuisance abatement law will serve two purposes: (1) reducing the probability that the city unfairly assumes the costs of demolition and (2) clarifying property rights and forcing lenders to take responsibility for their collateral.[126] As one government report has indicated, cities incur significant losses in terms of increased municipal costs and decreased property tax—due to both unpaid property tax and the decrease in property values resulting from the vacant property.[127] The municipal costs of maintaining or demolishing an abandoned foreclosure in Chicago, for instance, ranged from $19,227 to $34,199.[128] Detroit, moreover, ranked as the urban center with the highest concentration of abandoned foreclosures.[129]

Additionally, expanding lender liability should reduce the period during which the property remains in "legal limbo," which in turn reduces municipal costs.[130] When lenders decline to pursue foreclosure, the local government is often unaware of the property status and which party is responsible for maintenance for months or years.[131] If, instead, lenders were liable prior to foreclosure, the city could pursue more expedient corrective action and return the property to productive use.[132] Extending liability should encourage lenders to pursue foreclosures when the owner abandons the property, which will therefore make the property more transferable.[133] When the lender declines to foreclose, not only the city but also third party buyers and lien holders will have difficulty in determining where title lies.[134]

Finally, expanding the scope of lender liability is not patently unfair to the lender so long as the law makes clear when liability attaches.[135] The lender will ultimately be liable for demolition or maintenance costs once it forecloses on the property.[136] Therefore, revising the law to make

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126. *Id.*

127. U.S. G.A.O., *supra* note 12, at 42 .

128. *Id.* at 40.

129. *Id.* at 22.

130. *See, e.g.*, 24 C.F.R. § 203.355(b) (2011) (requiring HUD lenders to commence foreclosure within 120 days of abandonment).

131. *Id.* at 39; *see also* U.S. G.A.O., *supra* note 12, at 68 (indicating that lenders are not required to notify local governments if they decline to foreclose; therefore, local officials "often are unaware of properties that are at greater risk of damage and create potential problems for the surrounding neighborhood").

132. U.S. G.A.O., *supra* note 12, at 68.

133. *Id.* at 42.

134. *Id.*

135. *See infra* Part III.D. Presumably, any expanded liability scheme would be prospective and not retroactive, so that lenders would be cognizant of the liability prior to taking the mortgage.

136. *Id.*

the lender liable for costs once the owner abandons the property merely shifts the point of liability; lender liability is not a matter of *if*, but instead a matter of *when* (upon abandonment, rather than upon completion of foreclosure).[137]

3. Personal Liability

Instead of relying on the lien as a method of recovery, the city should pursue personal liability, which serves as an effective means of recovering demolition costs and incentivizes responsible upkeep.[138] Alone, a lien against the property is an inadequate recovery mechanism for several reasons. First, the property value of vacant or blighted property is often highly depressed, particularly in Detroit.[139] A recent Federal Housing Authority (FHA) report indicated that even though the average sale price of a home in Michigan rose slightly from May 2010 to May 2011, home sales overall dropped by twelve percent.[140] Overall, the FHA stated that the housing market in the Midwest region remains soft.[141] Similarly, the Federal Housing Finance Agency indicated that the housing price index in the Metro Detroit area declined by three to four percent in each quarter of 2011.[142] Property prices in Detroit, especially for vacant or blighted property, are unsurprisingly miniscule; often vacant properties sell for hundreds or several thousand dollars, at most.[143]

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137. *Id.*

138. See, for example, *Paterson v. Fargo Realty Inc.*, 415 A.2d 1210, 1215 (Passaic Cnty. Dist. Ct. 1980), stating:

> The threat of personal liability could serve as a formidable deterrent to property owners who would merely collect insurance proceeds after a fire and then abandon their property for the city to take over. The value of the land on which a structure is demolished, particularly in the urban core areas, is often so low that restricting the right to recover the demolition costs to foreclosure sales would be unrealistic.

139. *See, e.g.*, Daniel Duggan, *S&P Index: Metro Detroit's Home Prices Drop to 1994 Levels*, CRAIN'S DETROIT BUS. (May 25, 2010), http://www.crainsdetroit.com/article/20100525/FREE/100529921/s-p-index-metro-detroit-home-prices-drop-to-1994-levels# (indicating that Metro Detroit's home prices are the lowest in the country and that the non-foreclosure median sale price of a home in Detroit is $15,000).

140. *Regional Activity*, DEP'T OF HOUSING AND URB. DEV. 39 (2011), http://www.huduser.org/portal/periodicals/ushmc/summer11/USHMC_2q11_regional.pdf.

141. *Id.*

142. *MSA HPI Comparisons, Detroit – Livonia – Dearborn, MI*, FED. HOUSING FIN. AGENCY, http://www.fhfa.gov/Default.aspx?Page=216&Type=compare&Area1=19804&Area2=&Area3 (last visited Sept. 23, 2013).

143. Chris McGreal, *Detroit Homes Sell for $1 Amid Mortgage and Car Industry Crisis*, GUARDIAN (March 2, 2010), http://www.guardian.co.uk/business/2010/mar/02/detroit-homes-mortgage-foreclosures-80.

The cost of demolishing vacant structures varies greatly according to several variables, but rough estimates are available.[144] On average, a residential demolition will cost $4 to $15 per square foot; if the home contains environmental hazards such as lead paint or asbestos, the cost is even greater.[145] Thus, conservatively it will cost the city anywhere from $4,000 to $22,500 (excluding complicating expenses) to demolish modest homes ranging from 1000 to 1500 square feet. In Chicago, for example, the city only recovered an estimated forty cents per dollar spent to demolish vacant structures.[146] Viewing these costs in conjunction with the property values above, it is clear that the city will often find the property value too low to remunerate the expense.[147]

Even if there is residual value in the property—the property value is greater than the demolition costs—the demolition lien is typically subordinate to other liens.[148] The demolition lien in Michigan, as noted above, "does not have priority over prior filed or recorded liens and encumbrances."[149] Thus, other encumbrances such as tax liens or the mortgagee's lien will enjoy priority over the demolition lien.[150] Therefore, after the resolution of any prior liens against the vacant

144. *See, e.g., Demolition Costs – Estimating Demolition Costs & Prices,* HOMETOWN DEMOLITION CONTRACTORS, http://www.hometowndemolitioncontractors.com/demolition-cost.html (last visited Sept. 23, 2013) (indicating that residential demolition of a 1000-1500 square foot home roughly costs $4000-7000 but may not include additional expenses such as landfill fees and excavation fees).

145. *Id.*; *see also Detroit River-Western Lake Erie Basin Indicator Project: Lead Poisoning in Detroit, Michigan,* U.S. ENVLT. PROTECTION AGENCY (Aug. 26, 2009), http://www.epa.gov/med/grosseile_site/indicators/lead.html (finding significant problems with lead paint contamination due to the older age of housing stock in the city).

146. U.S. G.A.O., *supra* note 12, at 41.

147. City of Chicago v. Nielsen, 349 N.E.2d 532, 538 (Ill. App. Ct. 1976) (explaining that without the ability to assign personal liability, the city would be forced to cease demolishing many vacant structures due to the inability to recoup costs).

148. *Id.*; First of Am. Bank-W. Mich. v. Alt, 848 F. Supp. 1343, 1347 (W.D. Mich. 1993) (explaining recorded interests in real property have priority over subsequent interests); MICH. COMP. LAWS ANN. § 125.541(6) (West 2013) ("A lien provided for in this subsection does not have priority over previously filed or recorded liens and encumbrances."). *But see* 65 ILL. COMP. STAT. ANN. 5/11-31-1 (West 2010) (stating that demolition liens are superior to all liens except tax liens).

149. MICH. COMP. LAWS ANN. § 125.541(6); *In re* Gregory, 316 B.R. 82, 99 (Bankr. W.D. Mich. 2004).

150. *See, e.g.*, Cheboygan Cnty. Constr. Code Dep't v. Burke, 384 N.W.2d 77, 80 (Mich. Ct. App. 1985) (holding that a bank's mortgage lien was superior to the county construction code department's subsequent demolition lien); *see also Alt*, 848 F. Supp. at 1347.

property, it is even more unlikely that the city will be able to recoup its loss via a property lien.[151]

Personal liability will further incentivize landlords to responsibly maintain their rental properties.[152] Lower income areas, such as many sections of Detroit, attract a higher number of absentee landlords,[153] as opposed to stabile, middle-class areas.[154] Although "absentee landlordism"[155] does not per se guarantee poor upkeep of the rental property, there is less economic incentive to maintain the property (1) because the owner does not live there, and (2) because low availability of housing guarantees a certain demand.[156] As a consequence, landlords in lower-income areas frequently engage in "milking" of the rental property.[157] "Milking" occurs when a landlord under-maintains property with the expectation that eventually all tenants will leave or the local government will condemn the building.[158] In effect, the landlord "treats his property as a wasting rather than renewable asset."[159]

A major premise of this form of management is that the "milked" property will eventually be worthless or have a significantly diminished value.[160] Thus, the landlord seeks to maximize his net return by reducing maintenance costs so that rents will more than offset the loss of his capital outlay in the property.[161] "Milking" not only reduces tenants' living conditions but also increases blight as buildings deteriorate and are eventually abandoned.[162] Extending liability to landlords personally

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151. The mortgagee's lien, for example, will likely exceed the home value due to the housing market collapse, leaving no residual value for the city.

152. In Michigan, a landlord is under a statutory duty to keep premises in habitable condition. MICH. COMP. LAWS ANN. § 554.139(1) (West 2010).

153. Absentee landlords are owners who do not live in their rental properties. Although the term is sometimes pejorative, it is not necessarily synonymous with "slumlord." Jorge O. Elorza, *Absentee Landlords, Rent Control and Healthy Gentrification: A Policy Proposal to Deconcentrate the Poor in Urban America,* 17 CORNELL J.L. & PUB. POL'Y 1, 19-20 (2007).

154. *Id.*

155. *Id.*

156. *Id.* at 21.

157. Duncan Kennedy, *The Effect of the Warranty of Habitability on Low-Income Housing: "Milking" and Class Violence*, 486 FLA. ST. U. L. REV. 485, 489 (1987), *available at* http://duncankennedy.net/documents/Photo%20articles/The%20Effect%20of%20the%20Warranty%20of%20Habitability%20on%20Low%20Income%20Housing_Milking%20and%20Class%20Violence.pdf.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

should disincentive "milking" behavior.[163] When the city demolishes a "milked" structure and recovers its costs via a real property lien, the landlord is unaffected—the "milking" landlord premised his investment decision on the fact that he will lose his initial investment in the property (the purchase price).[164] If the landlord was personally liable, however, his economic strategy should change.[165] No longer will his losses be limited to his initial outlay on the property; any benefit the landlord accrues from forgoing maintenance will be offset by demolition liability.[166] Therefore, an economically rational landlord should be more inclined to maintain the property and view it as a "renewable asset" (effectively undermining the main premise of "milking").[167]

Similarly, holding owners personally liable for demolition costs should deter injurious land speculation in Detroit.[168] Speculators, like absentee landlords, operate on the presumption that their losses will be limited to the value of the property (which is often minimal, as speculators often purchase the property at tax foreclosures for several hundred dollars).[169] If, however, speculators are faced with personal

163. Kennedy, *supra* note 157.

164. *Id.*

165. *Id.*

166. In a sense, the property no longer has zero residual value, but instead a sort of potential "negative value." This negative value or potential liability for demolition costs should factor into a landlord's bottom line. *Id.* at 490-92.

167. This rationale should apply equally to owners who may decline to repair a building after it is destroyed in a fire. Assuming the owner has insurance, he can retain the insurance proceeds, decline to repair or demolish the structure, and foist the burden upon the city. Holding the owner personally liable will effectively require the owner to use the proceeds either to repair or to demolish the building. *See, e.g.*, Thomas v. City of Detroit, 299 F. App'x. 473, 475 (6th Cir. 2008). In *Thomas*, the owner of a building destroyed by fire contested the city's claim to recover $485,351.50 in demolition costs. *Id.*

168. *See, e.g.*, Nancy Kaffer, *Speculators May Use Auctions to Tie Up Land Essential to Bing Plan,* CRAIN'S DETROIT BUS. (Sept. 4, 2011), http://www.crainsdetroit.com/article/20110904/SUB01/309049971/speculators-may-use-auctions-to-tie-up-land-essential-to-bing-plan# (indicating that eleven bulk buyers have purchased twenty-four percent of all properties sold from 2002 through 2010). Although buying land for the purpose of making a profit is not per se egregious, speculation in Detroit is harming recovery and land assembly and development. *Id.* Speculators drive up the price of redevelopment in an environment where development is an already high-risk proposition. *Id.* Additionally, during the interim, the land is vacant and contributes to blight. *Id.*

169. Christine MacDonald, *Wayne Co. Plan Targets Real Estate Speculation*, DETROIT NEWS (Feb. 8, 2011), http://www.detroitnews.com/article/20110208/METRO01/102080362 (finding many real estate buyers of Detroit property live outside the city and leave the property as-is, contributing to blight).

liability for demolition costs, buying vacant land and subsequently neglecting it will be significantly less viable.[170]

For the above reasons, the city should be able to obtain recovery against the owner of the vacant property either by lien or by assigning liability against the personal assets of the owner. In personam liability is not an innovation; property owners are, for example, liable in tort for premises liability actions[171] and for various civil municipal infractions under Michigan statute.[172] Additionally, a city may collect costs for emergency police or fire services against an owner's personal property.[173] Although there is currently no case law interpreting the applicable statute, MCLA section 125.541a, the plain language indicates that a city may indeed proceed against the personal property of the owner, as well as the offending real property.[174]

B. Policy Considerations Against Expanding Liability

Expanding liability for demolition costs to lenders (and pursuing recovery against personal property rather than pursuant to a real property lien) is not without costs and complications.[175] If the state were to increase a lender's potential liability, this would have an adverse effect

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170. *Id.* Note, however, that speculative owners, "milking" landlords, and commercial owners in general may only indirectly own the property via a single purpose entity (i.e., a corporation or LLC). If the entity's only asset is the vacant property, personal liability becomes ineffectual; the city could only pursue the personal assets of the entity, and not the assets of the owner individually. The city could attempt to "pierce the corporate veil" in order to attach to the individual owner's assets, but the doctrine is largely impotent unless the entity exists to perpetrate fraud. *See* Dole Food Co. v. Patrickson, 538 U.S. 468, 475 (2003) (citations omitted) ("The doctrine of piercing the corporate veil, however, is the rare exception, applied in the case of fraud or certain other exceptional circumstances, . . . and usually determined on a case-by-case basis."); *see also* 6 MICH. CIV. JUR. CORPS. § 11 (2012). Instead, the Legislature should carve out a very limited exception to business entity limited liability to allow for personal liability against the owner when the owner organizes a single-purpose "shell" company that directly owns the vacant property.

171. *See, e.g.*, Merritt v. Nickelson, 287 N.W.2d 178, 180 (Mich. 1980) (stating that an individual with possession and control over land may be personally liable under premises liability).

172. MICH. COMP. LAWS ANN. § 42.21 (West 2010).

173. MICH. COMP. LAWS ANN. § 41.806a (West 2010); *see also* Howell Twp. v. Rooto Corp., 670 N.W.2d 713, 717 (Mich. Ct. App. 2003).

174. MICH. COMP. LAWS ANN. § 125.541a(1) (West 2010) ("A judgment in an action brought pursuant to section 141(7) may be enforced against assets of the owner *other than the building or structure.*" (emphasis added)).

175. *See* Editorial, *Rahm's Home Improvement*, WALL ST. J., August 24, 2011, at A12, *available at* http://online.wsj.com/article/SB10001424053111903596904576514264056889284.html.

on an already depressed mortgage market.[176] A lender, presented with costs for demolishing its vacant mortgage properties (or the looming specter of liability) will likely either reduce lending in the area or increase rates.[177] In effect, a law exposing lenders to additional liability could actually be counter-productive—potential residents might find financing more difficult to obtain or more costly, thereby increasing the probability of further vacancies.[178] Finally, lenders might externalize demolition costs by increasing mortgage rates in the metropolitan market in general (rather than only in distressed areas). This would unjustly increase mortgage costs for otherwise responsible mortgagors who are not contributing to the vacant property problem.[179]

Additionally, holding lenders liable for demolition costs prior to foreclosure would create uncertainty in the balance of rights and obligations between the mortgagee and mortgagor.[180] If there is overlapping liability for maintenance and demolition prior to foreclosure, a lender might be unsure as to when it may assert control over the property.[181] A lender would, for instance, have difficulty determining when the mortgagor has abandoned the property, and thus when it should begin accounting for maintenance.[182] If the lender enters the property

176. *Id.*

177. *Id.*

178. *But see* Dennis Rodkin, *Will Chicago's New Vacant Building Ordinance Scare Off Lenders?*, CHI. MAG. (Aug. 3, 2011, 9:30 AM), http://www.chicagomag.com/Radar/Deal-Estate/August-2011/Will-Chicagos-New-Vacant-Building-Ordinance-Scare-Off-Mortgage-Lenders/ (indicating that similar expanded liability ordinances in other cities have not led to reduced lenders and that such ordinances will "level the playing field" by requiring all mortgagees to maintain property). Also, incentivizing mortgagees to maintain property will have the beneficial effect of maintaining property values. Stabile property values should reduce the amount of defaults and, in general, maintain the value of the mortgagee's collateral. *See* U.S. G.A.O., *supra* note 12, at 31 (indicating that the highest concentration of abandoned foreclosures are in regions with falling property values due to borrowers being "underwater").

179. However, the metropolitan citizens have a vested interest in Detroit's economic well-being and revitalization. A resurgent Detroit should provide a collateral economic boon to the suburbs (both in terms of employment and property values).

180. *See* 59 C.J.S. *Mortgages* § 335-46 (2011) (surveying the rights and liabilities between mortgagor and mortgagee). In the abandoned property setting, although the mortgagee may have abandoned the property, he retains the right to resume ownership under his "equitable right of redemption." *Id.* In other words, there is a period until the redemption period has lapsed during which the eventual "owner" of the property is unknown. *Id.* If the city instituted a demolition action during this period, it would be difficult to determine which party is responsible.

181. *Id.*; Kerri Ann Panchuk, *Chicago Lender Liability Ordinance May Hamper RMBS Investment*, HOUSINGWIRE (Aug. 17, 2011, 6:29 PM), http://www.housingwire.com/2011/08/17/chicago-lender-liability-ordinance-may-hamper-rmbs-investment.

182. Panchuk, *supra* note 181.

prior to obtaining legal possession, it will be violating the mortgagor's property rights and exposing itself to liability for trespass and potential damage to the property.[183]

In many states, the mortgagee retains the right of possession and attendant liabilities, even after default and abandonment.[184] In *Kubczak v. Chemical Bank & Trust Company*, the Michigan Supreme Court stated the general principle in Michigan is that a mortgagee cannot obtain possession of the premises under foreclosure unless the mortgagee gives consideration and the mortgagor explicitly waives its right to possession.[185] The court found, for purposes of premises liability, the lender was not a "possessor" during the statutory right of redemption period and thus could not be liable for a negligence claim.[186] Similarly, in Illinois, case law indicates that a mortgagee is not responsible for property maintenance until it has obtained actual possession and control of the property.[187] Thus, in addition to potential confusion with expanding lender liability, lenders will argue that there is a certain inherent inequity; a lender typically has no possessory right or interest in the property prior to foreclosure, yet it is exposed to liability as if it held all the rights and interests of a title owner.[188] It is important to note that under Michigan law, the mortgagee is *not the legal title-holder* until the foreclosure process is complete, but instead merely has a security interest in the property.[189]

In short, there are valid policy arguments and concerns that lawmakers must prudently balance. Given the inadequacy of the current statutory scheme and the need for an expedient solution to a growing problem, the balance should tip in the favor of expanded liability. A

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183. *Id.*; *see, e.g.*, Prince v. Brown, 856 P.2d 589 (Okla. Civ. App. 1993); 59 C.J.S. *Mortgages* § 387 (2011) ("A mortgagee is liable for acts of waste, mismanagement, or other wrongful or tortious acts which injure the mortgaged property.").

184. *See, e.g.*, *Prince*, 856 P.2d 589; Kubczak v. Chem. Bank & Trust Co., 575 N.W.2d 745 (Mich. 1998).

185. *Kubczak*, 575 N.W.2d at 747-48.

186. *Id.* at 745-46.

187. *See, e.g.*, Marcon v. First Fed. Sav. & Loan Ass'n, 374 N.E.2d 1028, 1030 (Ill. 1978); *see also In re* Leavell, 141 B.R. 393, 400-01 (Bankr. S.D. Ill. 1992) ("Once a mortgagee has exercised its statutory right to be placed in possession of mortgaged property, the mortgagee obtains actual possession and control of the premises and thus becomes responsible for maintenance of the property.").

188. *See, e.g.*, Hausman v. Dayton, 653 N.E.2d 1190, 1196 (Ohio 1995) ("[A lender with no right to possession] has no ability to create or prevent a nuisance from arising on the mortgaged property, and to hold such a mortgagee liable for abatement would be arbitrary and thus unconstitutional.").

189. McKeighan v. Citizens Commercial & Sav. Bank of Flint, 5 N.W.2d 524, 526 (Mich. 1942).

careful and clear restructuring of when and to whom liability attaches will allow affected parties to plan accordingly.[190]

C. Constitutional Rights Revisited

Even though the balance of policy considerations favors an expansion of demolition liability, the question remains whether such an action is legally tenable.[191] A city's power to act in furtherance of a public purpose is expansive and presumptively valid, particularly in "Home Rule" states such as Michigan.[192] Thus, although expanding liability may be within the liberal outer limits of municipal authority, the owner or lender's constitutional rights concurrently restrict this authority.[193] Specifically, a lender's constitutional rights will be the preeminent impediment to the expanded liability scheme; personal liability should not raise any further constitutional issues.[194]

1. Due Process

The city must comply with the constitutional dictates of procedural due process as required in the Michigan demolition statute.[195] The process of informing the affected party becomes more convoluted, however, once the state extends liability to lenders. That is, under the existing regime, the "owner" is typically the owner of record (a party either in possession of the property or listed in the county registry of

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190. *See, e.g.*, Panchuk, *supra* note 181.

191. *See, e.g.*, Adams Outdoor Adver., Inc. v. City of Holland, 600 N.W.2d 339 (Mich. Ct. App. 1999).

192. MICH. CONST. art. VII, § 22; MICH. COMP. LAWS ANN. § 125.541a (West 2010) (giving specific authority for assessing demolition costs against personal property); Rental Prop. Owners Ass'n of Kent Cnty. v. City of Grand Rapids, 566 N.W.2d 514, 518 (Mich. 1997).

193. *Adams Outdoor Adver.*, 600 N.W.2d at 344-45 (citations omitted) (stating that the city's action is "clothed with every presumption of validity" and that "[t]he policy and philosophical decisions of the legislative branch must be respected unless unconstitutional or contrary to law").

194. *See, e.g.*, *Paterson v. Fargo Realty Inc.*, 415 A.2d 1210, 1214 (Passaic Cnty. Dist. Ct. 1980) ("[There is] no constitutional impediment to making a landowner personally responsible for the reasonable cost of abating hazardous conditions existing on his property."); City of Buffalo v. Dankner, 370 N.Y.S.2d 266, 267 (N.Y. App. Div. 1975) (upholding city's action to recover demolition costs against owner's personalty); Young v. Engelstein, 414 N.Y.S.2d 654, 657 (N.Y. App. Div. 1979).

195. MICH. COMP. LAWS ANN. § 125.541 (West 2010); Harris v. City of Akron, 20 F.3d 1396, 1401 (6th Cir. 1994) ("[T]he process that is due before the state may deprive an owner of property includes notice to the owner prior to the deprivation and an opportunity for a pre deprivation hearing.").

deeds).[196] It is relatively easy for the city to determine where and to whom the legal notice of impending demolition and costs is to go.[197] However, determining the legal holder of the mortgage, and thus the potentially liable party, is difficult due to the complexities of the mortgage industry.[198] As the real estate collapse of 2008 has made clear, the mortgagor-mortgagee relationship is no longer a simple two-party system.[199] Instead, as institutional investors buy and sell mortgages, it has become increasingly difficult to identify who is the "lender" that would fall under the ambit of a demolition action.[200]

The city's difficulty with providing legal notice to lenders, however, is not fatal to the proposed liability scheme. First, mortgage companies often employ property management companies to ensure that the property is maintained and in compliance with city ordinances.[201] Although the process is not universal, property management services provide the city with one method of identifying the correct party with which to provide notice.[202] The advantages of this system should be mutual; mortgagees would likely prefer to become informed of ordinance violations subsequent to abandonment and prior to demolition proceedings.[203] Second, mortgage companies often record properties with Mortgage Electronic Registration Systems, Inc. (MERS).[204] MERS is a national database that "tracks a property's mortgage history" throughout its potentially numerous transfers.[205] Thus, a system like MERS would provide the city with another means of ascertaining the correct "lender" and serving it with proper notice.[206] Finally, several cities, such as Chula Vista, California and Chicago, have utilized vacant property registration ordinances for several years to locate responsible parties and impose

196. MICH. COMP. LAWS ANN. § 125.541(6) ("The owner or party in interest in whose name the property appears upon the last local tax assessment records shall be notified by the assessor of the amount of the cost of the demolition.").

197. *Id;* DETROIT, MICH., CODE § 9-1-17 (2010).

198. *See* Schilling, *supra* note 11, at 121-22.

199. U.S. G.A.O, *supra* note 12, at 4-7.

200. *Id.* at 122, 126 (indicating that lenders may not even know that they own a particular mortgage or may be foreign parties that are outside of the city's jurisdiction).

201. *Id.* at 126.

202. *See* Schilling, *supra* note 11, at 126-27.

203. *Id.*

204. *Id.* at 127.

205. *Id.*

206. Relying on a system like MERS, however, is not costless or perfect. MERS does not include all mortgages and acclimating city officials to its use comes with administrative and training costs. *See, e.g.*, Martin, *supra* note 120, at 32-38 (explaining that MERS focuses on the needs of servicers, not local governments, and "does not have a good record of keeping clear contact information for responsible parties").

fines.[207] Detroit recently adopted a vacant property registration ordinance that closely mirrors the above ordinances.[208] At a basic level, these ordinances require owners to register the vacant property with the city and provide an agent or contact information.[209] The details and associated challenges of these ordinances are well beyond the scope of this Note, but the ordinance should provide Detroit with a direct solution to the notification problem.[210]

In addition to claims of insufficient notice and process, lenders would argue that extending liability is itself arbitrary and unreasonable, i.e., a violation of substantive due process.[211] In *Hausman v. Dayton*, the Supreme Court of Ohio found that a nuisance abatement ordinance that allowed the city to hold mortgagees liable for costs was "arbitrary and thus unconstitutional."[212] The Court reasoned that in order for a party to be liable for nuisance abatement costs, it must have some form of possession or control of the property (such as the legal status of a mortgagee in possession).[213]

As Michigan courts have not addressed lender liability under a substantive due process argument, it is uncertain whether Michigan law will require the same measure of possession or control.[214] First, Michigan

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207. Schilling, *supra* note 11, at 142-48. See also Martin, *supra* note 120, for a thorough analysis of vacant property registration ordinances. *But see* Ira Gonzalez & Keith H. Hirokawa, *Regulating Vacant Property*, 42 URB. LAW. 627 (2010) (arguing that vacant property ordinances are problematic and potentially unconstitutional).

208. Naomi R. Patton, *Law to Track Detroit Blight*, DETROIT NEWS, July 26, 2010, at A3. *Compare* DETROIT, MICH., CODE § 9-1-50 (2010), *with* CHIC., ILL., MUNICIPAL CODE § 13-12-125 (2011).

209. DETROIT, MICH., CODE § 9-1-50(a)(2)-(3) (requiring owners to provide contact information for all owners as well as mortgage and lien holders); CHULA VISTA, CAL., MUNICIPAL CODE § 15.60.040 (2012). The Chula Vista ordinance also requires lenders to exercise abandonment clauses in the loan agreements. This simplifies the problem of parties having to determine which rights the mortgagor in default has during the foreclosure process. Shilling, *supra* note 11, at 143.

210. *See generally* Martin, *supra* note 120 (surveying the various forms of vacant property registration ordinances).

211. *See* Hausman v. Dayton, 653 N.E.2d 1190 (Ohio 1995).

212. *Id.* at 1196.

213. *Id. But see* RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 4.6 (1997). When the mortgagor "fails to maintain and repair the [property] in a reasonable manner," he has committed waste. *Id.* When the mortgagor engages in waste, the mortgagee may foreclose on the property. *Id.* Therefore, although the mortgagee may not have physical control, it may foreclose and take possession if the mortgagor is allowing the property to deteriorate. *Id.*

214. The State of Michigan or City of Detroit could limit lender liability to situations in which the mortgagee is in possession, thereby avoiding substantive due process issues. This, however, could result in the same issues with bank walkaways noted above—if a lender is aware that obtaining possession will increase its scope of liability, it may

courts should find that once the mortgagor has abandoned the property, the mortgagee has sufficient control over the premises.[215] Many mortgage contracts in fact allow the lender to assume control in order to protect their collateral under "abandonment clauses"; alternatively the lender may foreclose on the property under the theory of waste.[216] Either exercising abandonment clauses or foreclosing for waste should avoid a possession vacuum, wherein both parties avoid liability, and the city is left covering the cost. Second, the city should have wide leeway in determining that expanding liability for demolition costs is a proper public purpose.[217] Reallocation of property rights and liabilities "involves considerations of economic and social philosophies and principles of political science and government . . . [and] [s]uch determinations should be made by the elected representatives of the people."[218]

2. *Equal Protection*

Opponents may also argue that a statute or ordinance which holds lenders liable for demolition costs is an equal protection violation.[219] The lenders may either posit that a law which distinguishes between owners and lenders is impermissible per se or that, as applied, such a law effectuates a discriminatory purpose.[220]

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decline to do so, leaving the vacant property abandoned by both parties. *See supra* Part III.A.2.

215. Johnson, *supra* note 18, at 1223.

216. RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 4.6; Nusbaum v. Shapero, 228 N.W. 785, 788-89 (Mich. 1930).

217. Hess v. Cannon Twp., 696 N.W.2d 742, 750 (Mich. Ct. App. 2005) ("The courts are especially deferential toward legislative determinations of public purpose[.]"); *see also* City of Bay City v. Bay Cnty. Treasurer, 807 N.W.2d 892, 899 (Mich. Ct. App. 2011). The court stated,

> [T]he determination of what constitutes a public purpose is primarily the responsibility of the Legislature, and . . . the concept of public purpose has been construed quite broadly in Michigan. Accordingly, it is not for the courts to read into [a statute] restrictions or conditions on what constitutes a public purpose that are not within the language of the statute itself and that essentially usurp the Legislature's authority to determine what constitutes a public purpose.

Id. (citations omitted) (internal quotation marks omitted).

218. *Hess*, 696 N.W.2d at 750 (citations omitted) (quoting another source).

219. Kerri A. Panchuk, *Chicago's Vacant Property Ordinance Likely to Face Constitutional Challenge*, HOUSINGWIRE (Apr. 8, 2011, 3:34 PM), http://www.housingwire.com/2011/08/08/chicagos-vacant-property-ordinance-likely-to-face-constitutional-challenge.

220. Hernandez v. Texas, 347 U.S. 475, 478 (1954) ("When the existence of a distinct class is demonstrated, and it is further shown that the laws, as written or as applied, single

An equal protection challenge under the former formulation is likely to fail for several reasons. Unless the affected party is a constituent of a protected class, the court will assume a deferential stance under a rational basis review.[221] Lending institutions or mortgagees are, without more, clearly not members of any protected class.[222] Moreover, the state or city's policies of eliminating blighted property to promote stabilization and regrowth are by their nature economic and thus entitled to a higher standard of judicial deference.[223] The remaining question of whether expanding liability is arbitrary or "rationally related to a legitimate state interest" is largely subsumed into a substantive due process analysis.[224] That is, the city may argue that (1) regulating and eliminating vacant property is a proper state interest and that (2) owners and lenders (subsequent to abandonment) have a sufficient property interest to require responsible upkeep, or instead, demolition.

Alternatively, opponents may claim that the law, although facially valid, has a discriminatory purpose and discriminatory effect.[225] The grounds for this form of equal protection claim would be that the city was actively targeting lenders to recover demolition costs while declining to pursue similar claims against the often judgment-proof title owner. Assuming the city took this course of action, there would be a form of discriminatory effect—the law would disproportionately affect lenders when compared to record owners.[226] If, for example, a claimant could show that the city was purposely targeting lending institutions to recover costs, there might be a cognizable "class of one" equal protection

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out that class for different treatment not based on some reasonable classification, the guarantees of the Constitution have been violated.").

221. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439-40 (1985) (citations omitted) ("The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.").

222. *Id.* (stating that laws classifying on the basis of race, alienage, national origin, and gender do not receive a presumption of validity).

223. *See, e.g.*, City of New Orleans v. Dukes, 427 U.S. 297, 303-04 (1976) ("[I]n the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment.").

224. *Id.* In other words, a court will have to determine if the state is targeting a group (lenders) and whether that classification's "relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne*, 473 U.S. at 446. However, this determination of whether the distinction (or inclusion of lenders) is "arbitrary" should require much of the same analysis of the substantive due process claim, i.e., whether it is arbitrary and capricious to expand liability to include lenders.

225. *See, e.g.*, S.S. Kresge Co. v. Davis, 178 S.E.2d 382 (N.C. 1971).

226. *But see id.* at 386 ("Mere laxity . . . in the enforcement of a statute or ordinance, otherwise valid, does not destroy the law or render it invalid and unenforceable.").

claim.[227] However, it would be difficult for a claimant to prove the requisite purpose or intent; the lender would have to allege that the city acted under some "bad reason" or "malicious or bad faith intent to injure."[228] Effectively (and unlikely), the city will have to have acted with a measure of ill-intent towards the lending industry in general or specific mortgagees. If, for instance, city officials believed the industry was responsible for the growing flood of vacant property and acted in a punitive manner accordingly (demolishing vacant structures and assessing costs), there would be the basis for an equal protection claim. This hypothetical vindictive action or ill-will is the *sine qua non* of "class-of-one" claims that Justice Breyer noted in *Village of Willowbrook v. Olech*.[229] If, however, the city merely assesses demolition costs in the typical property abandonment situation, there is no basis for finding malicious intent to injure; the city is merely abating a public hazard and attempting to recover its costs in a realistic and expedient manner. Moreover, the city must have latitude to determine the most efficient method of removing vacant structures and recovering its costs.[230] As the Supreme Court explained in *Engquist v. Oregon Department of Agriculture*, when a government action by its nature involves a discretionary action "based on a vast array of subjective, individualized assessments, . . . treating like individuals differently is an accepted consequence of the discretion granted."[231]

227. *But see, e.g.*, Como v. City of Beaumont, 345 S.W.2d 786, 795 (Tex. Ct. App. 2011), *rev'd on other grounds*, 381 S.W.3d 538 (Tex. 2012) ("[U]nder-inclusivity alone is not sufficient to state an equal protection claim. In this case, the classification—a structure the City determined to be a public nuisance—is a classification that is rationally related to a legitimate state objective: public safety."). The Texas Supreme Court reversed because the plaintiff did not avail herself of available administrative remedies before filing suit. *Como*, 381 S.W.3d 538, 540.

228. Systematic Recycling, LLC v. City of Detroit, 685 F. Supp. 2d 663, 675-76 (E.D. Mich. 2010).

229. Vill. of Willowbrook v. Olech, 528 U.S. 562, 565-66 (2000) (Breyer, J., concurring). *But see* 2 PATRICIA SALKIN, AM. LAW. ZONING § 15:5 (5th ed. 2011) (explaining that after *Olech*, many lower courts have not found equal protection violations even when there is evidence of animus when the city's action passes the rational basis test).

230. *See, e.g.*, Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 71 (1976).

231. Engquist v. Or. Dept. of Agric., 553 U.S. 591, 603 (2008).

D. Proposed Changes in the Law Needed to Effectuate the Policy

The legislature should accordingly modify the applicable nuisance abatement statutes to include lenders as "owners."[232] Specifically, the legislature should provide that lender liability arises at the point the owner abandons the property.[233] In effect, the owner's abandonment should amount to an implicit waiver of his right to possession, subject to his equitable and statutory right of redemption.[234] Concurrently, the statute should provide that the mortgagee has a right to possession (during the foreclosure process, prior to the sheriff's sale) upon abandonment, so that the mortgagee may legally enter the premises in order to bring the property back into code compliance.[235] The law should not, of course, eliminate the mortgagor's right of redemption;[236] it should, however, limit the mortgagee's liability to the mortgagor for any good faith efforts that the mortgagee undertook to maintain the premises.[237] Moreover, if the mortgagor were to assert his right of redemption, the law should reduce his equity in the property by the lender's reasonable maintenance expenditures, i.e., the mortgagor should not obtain a windfall by passing the cost and responsibility of property upkeep onto the lender. As indicated above, Michigan law already

232. The current demolition statute would have to be changed to expand the definition of "owner." The language could, for example, state, "For the purposes of Chapter 125, 'owner' means any person or entity that has legal or equitable title to the real property, regardless of whether the person or entity has possession. An 'owner' includes a mortgagee who holds a mortgage on the property; however, a mortgagee is not an 'owner' until the mortgagor has abandoned the property (as provided in X). 'Mortgagee' means any creditor or secured party, including service companies and any assignee of the mortgagee's interest under the mortgage. (Joint and several liability for all owners)."

233. This should incentivize the lender to begin foreclosure and take possession. If this is insufficient, the state could enact a statute requiring lenders to foreclose within a certain period after abandonment, similar to the regulation that the Department of Housing and Urban Development has promulgated. *See* 24 C.F.R. § 203.355(b) (2011).

234. Kubczak v. Chem. Bank & Trust Co., 575 N.W.2d 745, 747-48; MICH. COMP. LAWS ANN. § 600.324 (West 2011).

235. Alternatively, the statute could provide that the mortgagee has the right to enter the property upon abandonment to protect its collateral without incurring liability from the mortgagor. This would avoid confusion during the foreclosure process as to which party has a legal possessory interest.

236. MICH. COMP. LAWS ANN. § 600.3240(8). The statutory period of redemption for most residential properties is six months after the sheriff's sale. *See, e.g.*, Ruby & Assocs., P.C. v. Shore Fin. Servs., 741 N.W.2d 72, 78 (Mich. Ct. App. 2007) ("During the redemption period, mortgagors retain possession and the benefits of ownership of the property, in addition to the statutory right of redemption.").

237. *See, e.g.*, Kiley v. Chase Manhattan Mortg. Co., No. 277783, 2008 WL 2744590, at *4 (Mich. Ct. App. July 15, 2008) (finding mortgagee was authorized under the terms of the mortgage to enter vacant property and protect against deterioration).

provides for demolition cost recovery against the offender's personal assets;[238] municipalities should make use of this provision when the real property value is insufficient, and the courts should recognize this recovery mechanism.[239] Statutory reform at the state level (rather than by individual city ordinance) (1) allows for a thorough and more balanced discussion of affected interests and the law's implications, and (2) prevents ad hoc implementation at the local level, which in turn promotes inconsistency and ensnares the unwary lender.[240]

IV. CONCLUSION

"[T]he city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect. Moreover, the city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems."[241] Justice Stevens's words are perhaps more poignant today than when he first wrote them almost forty years ago. The problem of vacant property is but one of many challenges that the city faces. Admittedly, revising demolition statutes and providing viable recovery mechanisms will not eliminate the problem of blight with a single swipe of the proverbial pen. Nor will the elimination of blight cure all the city's economic troubles. Changes in Michigan's municipal laws are needed to help beleaguered cities like Detroit; these changes are a small part of a macro-solution. As the city attempts to rebuild itself anew, it needs functional implements—in this case, the statutory power to hold parties responsible for irresponsible ownership. Some may posit that certain "owners"—such as lenders—should not be responsible for upkeep or demolition of vacant property. However owners should not enjoy the benefits of holding an interest in property while foregoing the same interest when it becomes onerous. Regardless of where the responsibility falls in this complex arrangement, there is one party—the city—that is inarguably blameless yet bears a disproportionate burden.

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238. MICH. COMP. LAWS ANN. § 125.541a (1) (West 2010).

239. *See, e.g.*, Hendrix v. City of Detroit, 811 N.W.2d 491 (Mich. 2012) (granting a judgment for demolition costs against an owner's personal property).

240. Although this Note focuses on vacant property in Detroit, the analysis and proposed solution should apply similarly to other distressed areas in Michigan such as Flint or Pontiac.

241. Young v. Am. Mini Theaters, Inc., 427 U.S. 50, 70 (1976); Rental Prop. Owners Ass'n of Kent Cnty. v. City of Grand Rapids, 566 N.W.2d 514, 522 (Mich. 1997) (approving Justice Stevens's statement in *Young*).