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Collateral Matters: Housing Code Compliance in the Mortgage Crisis

by

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I.	INTRODUCTION.....	446
II.	MORTGAGE INDUSTRY CHALLENGES TO NEIGHBORHOOD HEALTH, SAFETY AND STABILITY	446
	A. THE DISCONNECTION OF MORTGAGE SERVICING FROM THE CONDITION OF THE COLLATERAL	446
	B. THE NATURE AND RISE OF ABANDONMENT AND VACANCY	449
	C. WHEN HELPING MAKES THINGS WORSE	451
	D. DISCARDING THE WASTE LEFT BEHIND	453
III.	CHALLENGES TO CONVENTIONAL PROPERTY MAINTENANCE ENFORCEMENT	454
	A. CARE OF LOAN COLLATERAL	454
	B. TIMES HAVE CHANGED FOR COMPLIANCE ENFORCEMENT	455
	C. FRAGMENTATION OF FUNCTIONS AND RESPONSIBILITIES	456
	D. OVERWHELMING NUMBERS.....	457
IV.	POSSIBLE MUNICIPAL RESPONSES TO THE CHALLENGE.....	458
	A. THINK AND ACT STRATEGICALLY	459
	B. THINK BEYOND PROGRAMS TO A COMPREHENSIVE SYSTEM.....	459
	C. THINK BEYOND INDIVIDUAL HOUSES TO HEALTH, SAFETY AND SECURITY OF NEIGHBORHOODS.....	461
	D. DESIGNING AND IMPLEMENTING EFFECTIVE LOCAL POLICIES AND PRACTICES	462
	1. <i>Vacant Property Registration</i>	463
	2. <i>Sustained Coordination of Enforcement Leaders</i>	464
	3. <i>A Comprehensive Parcel-Based Information System</i>	465
	4. <i>Targeting Inspections and Enforcement Actions</i>	467
	5. <i>Litigate for Maximum Compliance</i>	468
V.	CONCLUSION	470

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I. INTRODUCTION

The invitation to participate in this symposium came as I was concluding sixteen years at a teaching law practice at Cleveland State University. The past nine months have been a time for reflection, consultation, and writing about problems and issues encountered in my public interest law practice over the past two decades. The Northern Illinois University Law Review's Symposium on Mortgage Foreclosure is an opportunity to comment on what I believe to be a relatively neglected subject. My observations and experience of the mortgage crisis have focused primarily on what is happening at the ground level, in the neighborhoods where people are living. That is where bad mortgage financing, bad debt servicing, and neglect by some, or all, of those with a legal interest in the mortgage collateral has resulted in harm and loss to millions of people.

This article begins by describing the paradigm shift in mortgage loan servicing produced over the past two decades. Securitization of mortgages as commodities and exotic financing products, along with deregulation of banking and financial services, were crucial. New and unregulated mortgage servicing and debt collection practices are insulated from mortgage ownership. Mortgagees, but not servicers, are listed in public records. This change renders conventional housing code compliance procedures obsolete. The article then suggests that new strategic thinking is needed to redesign and retool code compliance processes. Residential neighborhoods and communities need to protect themselves against the abandonment by owners in default and servicers of the maintenance and repair of mortgage collateral. There is still imminent disaster not only from the inadequate and improper servicing practices but also from some of the policies and programs initiated at the national level to protect big financial institutions from the consequences of their mortgage madness.

II. MORTGAGE INDUSTRY CHALLENGES TO NEIGHBORHOOD HEALTH, SAFETY AND STABILITY

A. THE DISCONNECTION OF MORTGAGE SERVICING FROM THE CONDITION OF THE COLLATERAL

Securitization changed the relationship between lenders and the collateral securing the debt.¹ The iconic movie, *It's A Wonderful Life*, provides a

1. See KATHLEEN C. ENGEL & PATRICIA A. MCCOY, THE SUBPRIME VIRUS: RECKLESS CREDIT, REGULATORY FAILURE, AND NEXT STEPS 43-68 (2011) for an excellent explanation of securitization. I must gratefully acknowledge the benefit of collegial relation-

simplified view of the traditional relationship.² The lender, played by Jimmy Stewart, is conscientious George Bailey who, having inherited the Bailey family savings and loan, lends money to customers he knows personally to purchase newly constructed houses. The savings and loan financed the construction and maintained not only an attachment to houses but also an economic stake in their condition because it retains ownership of the mortgage the borrower granted to secure payment of the loan.

In this arrangement, the borrower who pledged the property and the lender who holds that pledge until payment is complete are bound together in a mutual interest in the condition and value of the house. Both the borrower and the lender have a palpable mutual economic interest in the maintenance and condition of all the surrounding houses in the neighborhood. This mutuality of interest is not abstract; it is personal. These people know each other. They see each other and each other's houses every day. The lender knows the borrowers' business as banking customers seen regularly. Transactions related to the mortgage are conducted face-to-face or at least between human beings who know each other personally.

The securitization of loans has changed the servicing of mortgages and unhinged the lenders' connection with the collateral.³ Very few lenders who originate loans keep them or collect payments on them. In fact, lenders don't normally even meet their borrowers; they work through brokers. Once the loan is made and the mortgage paperwork is signed, ownership of the mortgage and loan is transferred to a stranger. That unknown entity, exercising rights asserted in the mortgage contract, separates the ownership of the mortgage from the task of collecting payments and enforcing the terms of the mortgage agreement. Separated from the mortgage, the servicing rights and responsibilities can be assigned in whole or in part to other

ships with these friends and scholars. We were all faculty members at Cleveland-Marshall College of Law in the late 1990s and early 2000s where they taught banking and consumer law. See also Kurt Eggert, *The Great Collapse: How Securitization Caused the Subprime Meltdown*, 41 CONN. L. REV. 1257, 1263 (2009); Kermit Lind, *Can Nuisance Law Save Your Neighborhood From Big Banks?*, 44 SUFFOLK U. L. REV. 89 (2011). A trove of detail about the role of Wall Street financial institutions in the mortgage crisis is the 650 page report by the STAFF OF S. COMM. ON HOMELAND SEC. AND GOV'T AFFAIRS, PERMANENT SUBCOMM. ON INVESTIGATIONS, 112TH CONG., REP. ON WALL STREET AND THE FINANCIAL CRISIS: ANATOMY OF A FINANCIAL COLLAPSE (2011), available at http://www.hsgac.senate.gov/imo/media/doc/Financial_Crisis/FinancialCrisisReport.pdf?att=2.

2. Kathleen C. Engel & Thomas James Fitzpatrick IV, *False Security: How Securitization Failed to Protect Arrangers and Investors From Borrower Claims* 4-5 (Suffolk Univ. Law Sch. Research Legal Studies Research Paper Series, Working Paper No. 11-17, 2011). My own experience purchasing a house was in 1974 with a loan from a savings and loan upon referral by a neighbor whose mortgage was held and serviced by that lender.

3. Adam J. Levitin & Tara Twomey, *Mortgage Servicing*, 28 YALE J. ON REG. 1, 23 (2011).

servicers. Borrowers then may find themselves in a business relationship with one or more computerized avatars, digitally engineered voices, with no prospect of a face-to-face encounter with anyone responsible for receiving their payments or capable of solving problems. Indeed, the misfeasance, malfeasance, and nonfeasance in the mortgage servicing industry has made headlines for years and continues to be the subject of both study and criminal investigations.⁴

Borrowers typically do not encounter anyone associated with their residential mortgage who is concerned about the condition of the collateral. Loan originators and brokers have plans to sell the mortgage loan and remove themselves from any concerns about the future of the collateral. Investors holding securities backed by loan pools are insulated from responsibility for liabilities derived from collateral. Mortgage insurance and other guarantees are more important than collateral for protecting investors in mortgage-backed securities. No subsequent holder of the mortgage need be concerned about the collateral. Municipal officials charged with policing neighborhood and residential housing conditions go to great lengths to engage mortgagees and their servicers in communication about the condition of houses that are safety hazards or that have been condemned for demolition.⁵ With few exceptions, mortgage servicers do not respond to notices,

4. BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, THE U.S. HOUSING MARKET: CURRENT CONDITIONS AND POLICY CONSIDERATIONS 22 (2012), available at <http://federalreserve.gov/publications/other-reports/files/housing-white-paper-20120104.pdf> (white paper attached to the testimony of Federal Reserve Governor Elizabeth A. Duke to the U.S. Senate Committee on Banking, Housing and Urban Affairs) (“A 2010 interagency investigation of the foreclosure processes at servicers, collectively accounting for more than two-thirds of the nation’s servicing activity, uncovered critical weaknesses at all institutions examined, resulting in unsafe and unsound practices and violations of federal and state laws.”); see also Katherine M. Porter, *Misbehavior and Mistake in Bankruptcy Mortgage Claims*, 87 TEX. L. REV. 121 (2008) (describing various types of illegal conduct and some of the lawsuits brought against servicers); see, e.g., Complaint and Demand for Jury Trial, *United States v. Deutsche Bank AG*, No. 11-CIV-2976 (S.D.N.Y. May 3, 2011), available at <http://api.ning.com/files/lgDSPUrP18nPvjLaplmsQovUUaOF03bD9aM4m373iasq1mFXGFIfdbxkDmoKVB-DRUNtrdCOB3RzuysVXiNgmzZvG2p77wU/USvDeutscheBankandMortgageITComplaintCaseNoNo.1102976.pdf> (claiming Deutsche Bank, via subsidiary Mortgage IT, filed false information with HUD to secure federal loan insurance on unqualified loans in order to make them marketable).

5. Letter from Marty J. Braccio, Code Enforcement Supervisor, Village of Crete, IL to Property Preservation Servicers (Feb. 15, 2012) (on file with author).

Local code enforcement officials are the individuals dealing directly at the front line of the nation’s problems with foreclosed homes and vacant property in our communities. Nothing makes our job more difficult than not having accurate answers to provide to our residents and neighbors of these properties. It shouldn’t take over a dozen emails to as many different contacts to get answers to our questions about these properties.

warnings, or other communication, indicating that the collateral securing payment owed them is being wasted or has become a threat to the value of other collateralized housing in the neighborhood securing loan payments.⁶

The securitization process only requires the identification and appraisal of houses serving as mortgage collateral by the originating lender or broker. There is no documentation on the mortgage itself nor recorded in the public real property records for individual properties indicating who the current mortgage servicers are. Although servicers complain about failure to get prompt notice of adverse municipal actions against harmful properties, the servicers, who were delegated responsibility, do not record the assignment of their legal authority in the public records. In fact, all who benefit from mortgage payments or the asset value accorded the loan held in trust to secure commercial paper sold to investors are shielded from any knowledge, burden, or responsibility arising in connection with the condition of the collateral until they are tracked down by some diligent investigator.⁷

B. THE NATURE AND RISE OF ABANDONMENT AND VACANCY

The residue of abandoned vacant dwellings is the great emblem of the current mortgage crisis.⁸ Natural disasters like Hurricane Katrina suddenly turned whole neighborhoods into solid waste; but that disaster, like most natural disasters, was confined to one fairly contiguous area of the country. The mortgage disaster is man-made and spreading out of control in regions all over the country. While it proceeds at a slower pace than a natural disaster, it also is nevertheless turning whole neighborhoods into solid waste.⁹

Keeping an accurate, current count of abandoned vacant dwellings is not within the capacity of housing officials.¹⁰ Postal vacancy records, public

Id.

6. Lind, *supra* note 1, at 101-03; Frank Ford, *Cleaning Up After the Foreclosure Tsunami: Tackling Bank Walk-Aways and Vulture Investors*, SHELTERFORCE 54ff (Fall/Winter 2009), available at http://www.shelterforce.org/article/1864/cleaning_up_after_the_foreclosure_tsunami_tackling_bank_walk-aways_and_vult/.

7. Braccio, *supra* note 5.

8. Ford, *supra* note 6.

9. Sabrina Tavernise, *Trying to Overcome the Stubborn Blight of Vacancies*, N.Y. TIMES, Dec. 20, 2010, at A14, available at http://www.nytimes.com/2010/12/20/us/20youngstown.html?_r=1&src=t; Brian Louis, *Rust Belt Cities Demolish Homes as Defaults Blight Neighborhoods*, BLOOMBERG.COM (Nov. 18, 2010, 12:01 AM), <http://mobile.bloomberg.com/news/2010-11-18/rust-belt-cities-demolish-homes-as-foreclosures-blight-cleveland-detroit?category>.

10. REPORT TO THE SUBCOMMITTEE ON REGULATORY AFFAIRS, STIMULUS OVERSIGHT, AND GOVERNMENT SPENDING, COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM, HOUSE OF REPRESENTATIVES, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-34,

utility records, code enforcement citations, and counting by community volunteers walking their neighborhoods are the types of counting tools used, but none of them are precise or reliable. Moreover, the count is not constant for even one day. Residents and owners are walking away from housing every day for various reasons. Foreclosure encourages borrower abandonment and tenant move-outs, while evictions vacate houses when the foreclosure sale is completed. For a growing number of municipalities, demolition of abandoned houses is a daily activity. Urban localities in the Midwest, where the scourge of abandoned vacant housing has been an issue for more than ten years, cite vacancy numbers that range above fifteen percent of the total housing stock.¹¹ Cities like Detroit, Cleveland, Toledo, Youngstown, Cincinnati, and St. Louis are spending as much federal money as they can get and as much local tax money as they can spare to demolish by the tens of thousands an inventory of unusable, unmarketable housing with no certainty of what the total will be or when they will be able to ease up.¹²

Abandonment not only destroys the physical integrity of structures, long-term damage is also inflicted on the housing market. Weak market conditions reduce housing prices so much that useable houses cannot be sold for a price that would pay for their rehabilitation.¹³ Worse yet, weak market conditions give owners a reason to abandon their house when the amount owed on their loan exceeds their reduced home value. They see they could purchase another house of equal quality or one whose present value they can more easily afford in a more stable neighborhood for less than the balance owed on their current loan. Mortgage modifications encouraged and subsidized by tax dollars have not yet stemmed the tide of

VACANT PROPERTIES: GROWING NUMBER INCREASES COMMUNITIES' COSTS AND CHALLENGES 8 (2011), available at <http://www.gao.gov/assets/590/586089.pdf> [hereinafter U.S. GOV'T ACCOUNTABILITY OFFICE]. Attempts by community organizations and the City of Cleveland for more than ten years to develop accurate and reliable ways to count abandoned vacant houses have been only partially successful.

11. *Id.* at 15-16.

12. Ben Beckman, Note, *The Wholesale Decommissioning of Vacant Urban Neighborhoods: Smart Decline, Public-Purpose Takings, and the Legality of Shrinking Cities*, 58 CLEV. ST. L. REV. 387 (2010) (arguing that the massive amount of abandonment requires new legal methods to move land into the public domain); see Brent Larkin, *The Rot of Decomposing Housing Stock Threatens Cleveland and Its Neighbors*, CLEVELAND.COM (Dec. 17, 2011, 2:33 PM), http://www.cleveland.com/opinion/index.ssf/2011/12/the_rot_of_decomposing_housing.html.

13. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-93, MORTGAGE FORECLOSURES: ADDITIONAL MORTGAGE SERVICER ACTIONS COULD HELP REDUCE THE FREQUENCY AND IMPACT OF ABANDONED FORECLOSURES 29-34 (2010).

defaults by borrowers who are underwater, meaning their loan balance exceeds the current value of their house.¹⁴

The scope of abandonment has escalated from house to house up to the neighborhood level. Cities with huge population losses cannot repopulate neighborhoods with new or rehabilitated houses. In the Midwest, many cities are re-envisioning their landscape with half or more of the former housing stock removed. The current agenda for urban community development includes agriculture at a commercial level, vineyards, reclaimed wetlands and streams, and large parks and recreation facilities.¹⁵ Local land use regulations are being challenged by some of these new uses.¹⁶

C. WHEN HELPING MAKES THINGS WORSE

Since 2007, Wall Street moneymakers and Washington policymakers have dominated the public analysis of the mortgage crisis and the schemes advanced for tax-supported bailouts.¹⁷ Bailout plans focus primarily on the interests of those who invest in mortgage-backed debt. The billions paid to banks for bailouts in the Troubled Asset Relief Program (TARP) had the immediate effect of preventing the failures of many large banks too big to be allowed to fail. The biggest banks got even bigger by buying smaller, weaker banks stuck with large quantities of unproductive mortgages. In fact, some economists believe that if financial institutions had to suddenly acknowledge the true value of real estate collateral behind their mortgage-backed securities, the entire global banking system would instantly collapse.¹⁸

14. An excellent analysis of the irrationality of mortgage servicer behavior is found in Alan M. White, *Deleveraging the American Homeowner: The Failure of 2008 Voluntary Mortgage Contract Modifications*, 41 CONN. L. REV. 1107 (2009). See also BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, *supra* note 4.

15. Catherine J. LaCroix, *Urban Green Uses: The New Renewal*, PLAN. & ENVTL. L., May 2011, at 3 (discussing new visions for cities, especially referencing Cleveland's land use regulations embracing production of honey, eggs, vegetables, orchards, and vineyards along with use of wind turbines, swales, geothermal facilities, and solar panels).

16. Few scholar-practitioners have written as well, or as much, about the process of turning abandoned urban neighborhoods into useful community assets as Alan Mallach. He is research director of the National Housing Institute, and he is also a fellow at the Center for Community Progress and the Brookings Institution. For a very useful guide on this topic directed at policymakers and practitioners, see ALAN MALLACH, *BRINGING BUILDINGS BACK: FROM ABANDONED PROPERTIES TO COMMUNITY ASSETS* (2006).

17. See ENGEL & MCCOY, *supra* note 1, at 99-148 (detailing bailout measures and their failure to stem the crisis at the neighborhood level).

18. Prof. Michael Hudson stated as much in a recent critique of the current banking system and its subordination of governments and the public good to continuation of an unsustainable banking system. Michael Hudson, *Banking Wasn't Meant to Be Like This*, MICHAEL HUDSON (Jan. 27, 2012), <http://michael-hudson.com/2012/01/banking-wasnt-meant-to-be-like-this>.

In contrast to the bank bailouts, the programs for relief to borrowers and neighborhoods did not produce the expected success. The design and implementation of those programs has been roundly criticized for both bad design and inept execution. Home Affordable Refinance Plan (HARP), Hope for Homeowners, Home Affordable Modification Plan (HAMP), and the Neighborhood Stabilization Program grants were all relief to those who benefited, but benefits did not go far enough.¹⁹ People familiar and engaged with what was happening in residential neighborhoods had little involvement in the design of the investor-protecting relief programs and found the results were not very helpful and, to some extent, even harmful.²⁰ This same criticism greeted the large-scale settlement reached in the suits against mortgage services by state attorneys general in February 2012.²¹

One example of a controversial new bailout is the idea of putting empty single-family houses into the rental market on a massive scale by investors taking foreclosed and bank-owned properties off the housing market. Municipal officials and housing advocates have strong reservations about the benefits this will have at the neighborhood level. Management of rental housing, especially of single-family housing, is very difficult. Compliance with federal, state, and local fair housing laws and landlord-tenant laws is a major challenge for landlords. Absentee landlords and large-scale management operations are often in constant conflict over compliance issues. It is usually the case that housing used for commercial purposes is held to a higher standard of maintenance and regulation than owner-occupied housing. It may turn out that conversion to rental property will be practical only in large-scale, multi-family structures where uniformity and density will make economic sense. Zoning regulation may also inhibit the conversion to rental use in some locations. But when the concept involves millions of dwellings across the United States being managed as rental units by investors new to the business and unwilling to subsidize repair, maintenance, and management like successful nonprofit landlords are doing, it is

19. ENGEL & MCCOY, *supra* note 1, at 127, 142-146.

20. White, *supra* note 14, at 1114-16; Karen Weise, *The Government's Incredible Shrinking Mortgage Mod Program*, PROPUBLICA (Oct. 27, 2010, 12:10 PM), <http://www.propublica.org/article/the-governments-incredible-shrinking-mortgage-mod-program> (detailing failure of the program's operation).

21. See Barry Ritholtz, *Foreclosure Settlement a Failure of Law, a Triumph for Bank Attorneys*, WASH. POST (Feb. 25, 2012), http://www.washingtonpost.com/foreclosure-settlement-a-failure-of-law-a-triumph-for-bank-attorneys/2012/02/23/gIQAe7feaR_story.html; Paul Kiel, *Will Mortgage Settlement Avoid Repeating Obama's Foreclosure Failures*, PROPUBLICA (Feb. 10, 2012, 11:55 AM), <http://www.propublica.org/article/will-mortgage-settlement-learn-from-obamas-foreclosure-failures>.

little wonder that this concept is getting little applause from those currently surviving the crisis surrounded by high foreclosure rates.²²

D. DISCARDING THE WASTE LEFT BEHIND

The business model developed for securitizing residential mortgages by reconstituting them as a commodity to be sliced, diced, and reconstituted as securities to be sold in mass quantities, then, is at the heart of the mortgage crisis. The process of disconnecting the collateral from the ownership and debt-collecting servicing of the mortgage ignores the reality that the collateral consists of unique immovable objects in a particular place subject to climate, weather, and other contingencies, and that it is in the custody of occupants mortgage owners cannot identify. The care or neglect of the collateral by its custodian has substantial consequences, not only for the mortgaged real estate and its neighboring properties but also for the mortgagee and its investors. When the collateral dissipates, someone is left holding an empty bag and there is a physical mess to clean up.²³

22. See Thomas Fitzpatrick IV, *Three Reasons Why Converting Vacant Homes to Rentals Will Be a Challenge in Some Places . . . and Three Ways It Can Succeed*, FOREFRONT (Jan. 19, 2012), http://www.clevelandfed.org/forefront/2012/winter/ff_2012_winter_04.cfm; see also Board of Governors of the Federal Reserve System, *supra* note 4, at 8-10.

23. Ford, *supra* note 6 (describing the damage made and perpetuated in Cleveland by business practices of servicers, some bank-owned, who fail or refuse to comply with local law enforcement).

III. CHALLENGES TO CONVENTIONAL PROPERTY MAINTENANCE ENFORCEMENT²⁴

A. CARE OF LOAN COLLATERAL

Residential dwellings require constant investment for maintenance and repair. Things break, accidents happen, parts wear out. Even ordinary wear and tear takes its toll. Deferral of maintenance, use of poor quality materials, poor workmanship and other cost-cutting measures ultimately reduce the value and life of a house. It is not reasonable to expect borrowers in mortgage default to pay for maintenance and repairs on the house when they cannot afford to make mortgage payments when the value of their house and those around them have sunk below the amount owed on their mortgage, or when the conduct of the servicer on their loan aggravates their crisis. The process of borrower default actually starts with the abandonment of repair and maintenance necessary for the care of the collateral. Collateral waste is perpetuated, rather than discouraged, by the business and economics of mortgage securitization and servicing.²⁵ So far, then, the strategies

24. In the following two sections, I draw primarily on my experiences and observations as a practitioner in Cleveland, Ohio, and as a consultant in other cities, including Buffalo, N.Y.; Atlanta and Macon, Ga.; Toledo and Dayton, Ohio; Flint, Mich.; and Philadelphia, Pa.; and also on visits to Chula Vista, Cal.; Baltimore, Md.; and Washington, DC. In more than twelve years, there have been countless meetings, conferences, continuing legal education, and personal conversations with code enforcement officers, prosecutors, private lawyers, legislators, lobbyists, judges, magistrates, bankruptcy trustees, borrowers, servicers, defendants, and persons convicted of code violations as well as felony mortgage fraud. I find in the literature on code compliance enforcement very few examples that adequately convey the frustration, cynicism, and despair I have found in many of those who are seriously committed to code compliance and safe, secure neighborhoods. However, it should be noted that housing codes and enforcement have been criticized much earlier. *See, e.g.*, Elizabeth Howe, *Housing Code Enforcement in Eleven Cities*, 60 U. DET. J. URB. L. 373 (1983); Richard J. Marco & James P. Mancino, *Housing Code Enforcement—A New Approach*, 18 CLEV.-MARSHALL L. REV. 368 (1969) (advocating civil actions for appointment of receivers to abate chronic nuisance conditions); Richard E. Carlton et al., Note, *Enforcement of Municipal Housing Codes*, 78 HARV. L. REV. 801 (1965) (giving a thorough critique of codes and enforcement in east coast cities with suggestions for improvement). I also acknowledge the influence of a close colleague of twelve years, Joseph M. Schilling, Research Assistant Professor, Virginia Tech School of Public and International Affairs. We have worked together on numerous studies and consulting projects over the years. This article builds on his article. *See* Joseph Schilling, *Code Enforcement and Community Stabilization: The Forgotten First Responders to Vacant and Foreclosed Homes*, 2 ALB. GOV'T L. REV. 101 (2009).

25. *See REO & Vacant Properties: Strategies for Neighborhood Stabilization*, FED. RESERVE BANKS OF WA. & CLEV. & THE FED. RESERVE BD. 77, 79-80 & 84-85 n.15, http://www.federalreserve.gov/newsevents/conferences/reo_20100901.pdf (explaining that

from Wall Street and Washington are imposing on local taxpayers and mortgage payers the greatest burden of the care of abandoned collateral and the restoration of damaged communities.²⁶

It is ironic that the primary protectors of the collateral for the mortgages on which the world economy depends for economic stability are housing inspectors, the “first responders” to the early signs of abandonment.²⁷ As noted above, the mortgage industry as it now operates has no coherent program to monitor or assure the integrity of its collateral. In fact, the mortgage industry’s lobbyists have opposed state and local legislative proposals to protect neighborhoods from damaged collateral.²⁸ Yet, it is code compliance enforcers, using public laws and public resources, who end up taking care of the property interests mortgagees and investors have in their mortgage collateral when care and code compliance is abandoned by owners and mortgagees. The business structures and practices described above have made that task vastly more difficult and expensive for code enforcers. These new challenges to property maintenance code compliance in the mortgage crisis demand new approaches to the task of protecting housing and neighborhood health, safety, and security.

B. TIMES HAVE CHANGED FOR COMPLIANCE ENFORCEMENT

Conventional housing maintenance codes and compliance enforcement procedures are not effectively meeting the challenges of neighborhoods affected by mortgage defaults and foreclosures. Laws and the policing methods for real property maintenance were developed decades ago in conditions far different from those in contemporary housing markets.²⁹ Code

servicers are obliged by their contractual obligations to avoid costs of maintenance and repairs if they deem it would not benefit mortgage investors).

26. See Schilling, *supra* note 24, at 109-11.

27. See *id.* at 103-04.

28. See, e.g., Arthur E. Wilmarth, Jr., *The Dark Side of Universal Banking: Financial Conglomerates and the Origins of the Subprime Financial Crisis*, 41 CONN. L. REV. 963, 1012-15 (describing how big banks lobbied federal regulators and legislators for preemptive law undermining state regulation to the detriment of consumers); Suzanna Andrews, *The Woman Who Knew Too Much*, VANITY FAIR (Nov. 2011), <http://www.vanityfair.com/politics/features/2011/11/elizabeth-warren-201111> (reporting on the campaign by financial institutions against Elizabeth Warren and the Consumer Finance Protection Bureau); Glenn R. Simpson, *Lender Lobbying Blitz Abetted Mortgage Mess*, WALL ST. J., Dec. 31, 2007, at A1.

29. See generally Elizabeth Howe, *Housing Code Enforcement in Eleven Cities*, 60 U. DET. J. URB. L. 373 (1983); Richard J. Marco & James P. Mancino, *Housing Code Enforcement—A New Approach*, 18 CLEV.-MARSHALL L. REV. 368 (1969) (advocating civil actions for appointment of receivers to abate chronic nuisances to augment existing programs). Richard E. Carlton, et al., Note, *Enforcement of Municipal Housing Codes*, 78 HARV. L. REV. 801 (1965) (surveying housing code enforcement programs and procedures

enforcement provisions then could assume maintenance and repairs would be done by housing consumers rather than absentee investors. Housing consumers using dwellings as homes, not as commodities for wealth accumulation or for speculation, were generally inclined to comply with codes.

Old assumptions about occupancy, ownership, property values, and neighborhood stability no longer work in changed conditions. Many neighborhoods are now plagued with predatory and high-risk loans, loan defaults, foreclosures, vacancy, distress sales, speculative investing, neglect of responsible maintenance, promotion of get-rich-quick housing ownership, rehabilitation, and flipping schemes. In an era when those families who depend on steady employment to sustain homeownership have seen declining incomes, and now, massive job insecurity, the capacity to pay for the maintenance of a dream house has been lost.³⁰

C. FRAGMENTATION OF FUNCTIONS AND RESPONSIBILITIES

The obsolescence of conventional code enforcement is further evident in the isolation of the component parts, or departments of government, that play a role in achieving compliance. In most instances, the inspection of housing after construction is the responsibility of professional officers specifically trained and certified to go to one house after another in response to complaints of a specific type of violation. Frequently, the inspecting is divided into subject areas—health, fire, structure, environmental, interiors, rental, owner-occupied—with virtually no coordination or contact between these operations. There may or may not be post-inspection investigations of ownership history, the current owner's situation, property tax records, unpaid assessments, or pending legal actions affecting the title-holder or other parties with legal interests in the property. It is rare to find inspectors and prosecutors working closely together, even on problem cases of repeat violators. One finds in private conversations that each group complains about the lack of professionalism of the other. Moreover, inspectors and prosecutors are prone to think that the administrative body, or the court into which they bring offenders, is working to a different purpose than they are.

Code compliance cannot be effective when those who are enforcing it operate in separate silos with separate objectives. The various program

drawn from selected east coast cities in the U.S. with suggestions for improvements). These and other older studies suggest that enforcement of *use and maintenance* regulations of residential property has never been without criticism.

30. See, e.g., Francis Fukuyama, *The Future of History: Can Liberal Democracy Survive the Decline of the Middle Class*, FOREIGN AFF., Jan.–Feb. 2012, at 53 (warning of dire consequences world-wide of a declining middle-class); Don Peck, *Can the Middle Class Be Saved?* ATLANTIC, Sept. 2011, at 60; Robert B. Reich, *The Limping Middle Class*, N.Y. TIMES, Sept. 9, 2011, at SR6.

elements and agencies involved in code compliance must operate as a system in which each does its part to achieve a goal common to all parts. Merely processing and disposing of complaints, or cases, is not a true measure of success or failure. It is very unusual to find code enforcers who are convinced that their work is leading to more compliance.

D. OVERWHELMING NUMBERS

Another factor now confronting conventional code compliance programs and agencies is the sheer volume of violations. Statistics marking the rise of failed mortgages are mirrored in the statistics on code violations and court dockets with defendants who fail to comply with the law and with administrative orders to comply.³¹ Not only have the numbers of failed mortgages multiplied, but the seriousness and complexity of cases is increasing. Defendant owners have title defects making them ineligible for special assistance available for essential repairs. Some defendant owners claim bankruptcy, or a foreclosure judgment, which take away a house even though neither of these procedures removes changes the legal ownership. The housing dockets and special purpose housing courts are seeing the same defendants charged repeatedly for the same offenses, especially when the consequences of noncompliance are minimal. It is no longer unusual to find abandoned houses with no owner, nor any other persons with a legal interest, willing and able to take responsibility for the harm the blighting houses cause.³²

Absentee ownership and speculation in distressed houses increases the difficulty, time, and expense of getting blighted housing into compliance. Remote business owners generally see compliance with local housing codes to be an avoidable liability. They are adept at manipulating antique and arthritic code compliance programs. Global banks and their corporate servicing agents are prepared to spend large sums to preempt or dilute local legislation that would secure their compliance. Big bank mortgagees are prone to off-load repossessed houses with high repair costs in bulk sales to unscrupulous speculators who want to flip homes in distressed condition for quick profits. The large scale resistance of the mortgage debt collecting industry to lawful compliance with state and local laws protecting residen-

31. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 10, at 26-48 (describing reasons for rising abandonment and vacancies along with the costs to cities of getting the mortgage industry's discarded collateral into compliance with local health, safety, and security codes).

32. Kermit Lind, *The People's Court*, SHELTERFORCE 26, 27-28 (Fall 2011), available at http://www.shelterforce.org/article/2484/the_peoples_court2/ (describing how the Cleveland Housing Court deals with defendant corporate owners who refuse or fail to appear in court).

tial and neighborhood health, safety, and security is prompting large scale nuisance abatement litigation. Getting global financial institutions to be law-abiding homeowners in the markets destabilized by their disregard for mortgage collateral is one of the greatest challenges facing communities and municipal governments.³³

One of the most distressing scenes facing prosecutors and judges now are abandoned vacant houses whose individual occupant-owners are financially incapable of taking responsibility for the unlawful condition of their houses. They are unable even to donate the title to a charity or municipality because the title is encumbered with liens in amounts greater than the value of the house. Lienholders will not release their liens or take a deed in lieu of the debt from the owner because lienholders are not required to exercise their contractual rights to ownership of a liability. Mortgagees may write off the loan, but loans off the books are usually sold for pennies-on-the-dollar to debt collecting firms who can demand payment while the collateral deteriorates to the detriment of the neighborhood. Neither fines nor jail sentences will obtain compliance. The legal system as currently constituted simply has no effective way to deal with abandoned, worthless housing. There is far too little public money available to demolish the vast majority of houses with no future and tax foreclosure is a slow solution for unmarketable properties that, in the end, become wards of the public.

IV. POSSIBLE MUNICIPAL RESPONSES TO THE CHALLENGE³⁴

If conventional code enforcement is not adequately protecting neighborhoods from the wasting of mortgage collateral, we are left with the question of what can be done about it? This section advances some suggestions for strengthening code compliance and mitigating neighborhood destabilization resulting from the lawless neglect of collateral. These suggestions are derived from direct experience with development or observation of the work of others. It should be acknowledged up front that the proposals offered here are not all applicable in every circumstance. I have found little

33. See *id.*; see also Lind, *supra* note 1, at 101-03.

34. As this article was being finished, the death of James Q. Wilson has brought fresh acknowledgement to his famous article coauthored with George L. Kelling. James Q. Wilson & George L. Kelling, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC (Mar. 1982), available at <http://www.theatlantic.com/magazine/archive/1982/03/broken-windows/4465/>. The theory outlined in the article remains alive and struggling for implementation; accordingly, homage is due. For this section of the article, I am indebted to the following colleagues in the code enforcement study group of the Vacant Abandoned Property Action Council in Cleveland: Councilmen Jay Westbrook and Tony Brancatelli; code officials Ron O'Leary (Cleveland), Kamla Lewis (Shaker Heights), and Sally Martin (South Euclid); Frank Ford; Neighborhood Progress, Inc.; and our consultant Joe Schilling.

success with applying a blueprint from one place directly to another. Differences of timing, institutional structure, existing law, personalities, and politics are variables that play a critical role. Rather, we offer here a tool chest of ideas and practices that may be of use to policymakers and program managers who face the challenges outlined in the preceding section of this article.

A. THINK AND ACT STRATEGICALLY

The various components to achieve code compliance need to work together toward a common objective. Getting all components to recognize common priorities and goals is a critical issue. Success must be defined the same for all. Avoiding controversy or keeping staff from grumbling is not strategic. If the strategy is to stabilize and improve the quality of life and property interests in neighborhoods at risk, all departments, programs, budgets, evaluations, decisions, and legislative work need to be oriented to getting that done and evaluated for contributions to overall success.

For instance, complaint-driven code enforcement often fails to deploy efforts to where they have a strategically significant impact.³⁵ Work and resources are organized around the volume and source of the complaining that is done. Neighborhoods with strong political representation, active civic groups, or influential residents can generate complaints; while poor, marginalized, or unpopular neighborhoods may fail to generate complaints or get responses to their complaints. Getting many easy complaints resolved gives the impression of departmental success, while dealing with abandoned buildings and houses requiring more effort may have a greater benefit for neighborhoods. Prosecuting for convenience rather than for compliance and a faster docket is another defective strategy. Closing easy cases with small penalties does not result in increased compliance benefiting many residents. The strategic priority of code enforcement should be increasing compliance with the laws that protect people from harm where they live.

B. THINK BEYOND PROGRAMS TO A COMPREHENSIVE SYSTEM

Thinking beyond individual programs to comprehensive system follows from being focused on the most important priority. In order to imple-

35. See Olivera Perkins, *Inspectors Refuse to Use Their Computers*, PLAIN DEALER (Cleveland), Jan. 30, 2007, at A1, A1-A2 (discussing failure of inspect complaints and other dysfunction in the department). For critiques of complaint-driven inspection programs, see Carlton et al., *supra* note 29; Howe, *supra* note 29.

ment a goal-oriented strategy, it is necessary to look beyond individual programs or departments to the larger picture that includes all of the functions, programs, departments, and institutions that touch the code enforcement process. This may include some who do not recognize their relationship to housing or neighborhood environmental law.

For instance, code enforcers are likely to find few foreclosure or bankruptcy judges willing to discuss with them how the legal proceedings over which they preside relate to the harmful condition of residential debt collateral.³⁶ Generally, their purview is confined to unworthy borrowers and worthy creditors. Collateral conditions, the harm to neighbors of public nuisances, costs imposed on public coffers to abate nuisances by police power, or any other consequence of their case management are not part of their world. Yet, mortgage foreclosure, tax foreclosure, bankruptcy, sheriff sales, and probate and divorce proceedings all have an impact on the enforcement of the most critical code compliance cases. Any proceeding where a court has jurisdiction over property, even if the property is not the subject matter of the case, is likely costing extra time and money to municipalities working to get the property into compliance with nuisance abatement laws.³⁷

How well the various components of code enforcement procedures are connected with the keepers of title records, tax assessors, clerks of courts, and all the offices performing legal functions related to data on real property interests is important. All of those who process enforcement procedures—such as getting search warrants, serving notices, serving summons, hearing cases, or hearing appeals—must struggle to obtain the same data in a timely way. Looking up the information at its source for each and every procedure is a poor use of time. If service of process is incomplete, untimely, or incorrect, critical procedures must be repeated and compliance is delayed or denied. Inefficiency, clerical errors, and duplication of back of-

36. I have assisted several judges in trying to get their judicial colleagues to look at how to manage cases to mitigate the harm done by properties over which they had jurisdiction. Their efforts were not enthusiastically received by their colleagues.

37. A graphic example would be felony mortgage fraud cases against mortgage brokers and their accomplices whose criminal indictments identified hundreds of houses now empty, vandalized, and with corrupted unmarketable titles. While the perpetrators may languish in jail, the public pays for the physical and legal mess left in their wake. See Richard Exner, *453 Cuyahoga County Houses Said to be Involved in Mortgage Fraud Scheme*, CLEVELAND.COM, (Aug. 27, 2009, 10:31 AM), http://www.cleveland.com/datacentral/index.ssf/2009/08/453_cuyahoga_county_homes_said.html (noting that so far about 80% of the total were in foreclosure cases); Mark Gillispie, *Former Employees of Subprime Mortgage Lender Indicted by Cuyahoga County Grand Jury*, CLEVELAND.COM, (June 23, 2011, 5:15AM), http://blog.cleveland.com/metro/2009/08/cuyahoga_county_investigators.html (reporting indictment of Argent agents who trained brokers on loan origination fraud techniques involving more than 100 houses).

office functions are severe problems for most large-scale code enforcement operations.³⁸ A single accurate database accessible to all in the system can save time and reduce errors.

Thinking of code enforcement as a system rather than a single program, or set of programs, within a municipal department is critical to making things work better. Perfecting the operations of one program element may be necessary but it is rarely sufficient. The parts of a system may in fact be moving parts, and those operating within the system need to have an informed vision of the whole in order to make good judgments about the operation of their specific part and know the consequences of their action on other parts.

C. THINK BEYOND INDIVIDUAL HOUSES TO HEALTH, SAFETY AND SECURITY OF NEIGHBORHOODS

Throughout this article houses and neighborhoods are linked. That is because the array of compliance standards and requirements for homeowners includes not only protection of the occupants but also protection of neighbors and the public. Housing maintenance ordinances declare serious conditions to be a public nuisance harmful to the public health, safety, and welfare. A chronically vacant house neglected or abandoned is almost always considered a significant nuisance, as are abandoned, stripped or illegally stored automobiles, boats, refrigerators and other things that get used for crime and harmful mischief. As stated by Cleveland's Housing Court Judge, Raymond L. Pianka, "a house that's indefinitely vacant—even if otherwise secure and not open to casual entry—is inherently dangerous to surrounding neighbors."³⁹ As the volume of abandoned houses increases,

38. See, e.g., Carlton et al., *supra* note 29 (describing problems of duplicating inaccuracies in multiple departments of the enforcement process for every city included in the study); Alan Mallach, et al., *Cleveland at the Crossroad: Turning Abandonment into Opportunity*, NEIGHBORHOOD PROGRESS, INC. (2005), http://www.clevelandhousingcourt.org/pdf/at_the_crossroads.pdf; Raymond L. Pianka, *Abandoned Properties: Facing the Challenge*, CLEVELAND HOUS. CT., http://www.clevelandhousingcourt.org/hc_rd_a.html (Last visited Mar. 30, 2012) (accompanying the *Crossroads* report underscoring the need for a better organized code enforcement system to deal with vacant houses).

39. Mallach et al., *supra* note 38, at 8 (quoting Judge Raymond L. Pianka). A look at any city's housing code will provide a list of specified dangers to the health, safety, and welfare of neighborhoods and the public. Most dangers are either conduct of persons or movable personal property. Houses are all the more dangerous because they cannot be easily removed, due to the legal protections afforded real property interests. The legal processes for protecting the property interests and the right to the protection of public laws on behalf of those subjected to nuisance conditions are cumbersome, time-consuming, and expensive. The result is that the property rights of non-complying owners of nuisances trump the rights of law-abiding persons.

the incidents of vandalism, arson, theft, gang activity and other major crimes that bring neighborhoods down also increases.⁴⁰

The range of policing for neighborhood health, safety, and security extends beyond the house as a structure. It includes its illegal abuse, conduct of those who abuse it, abuse of related property and the maintenance of hazardous conditions. Some jurisdictions demonstrate this reality by allowing or directing police patrolling neighborhoods and firefighters to write tickets and bring offenders into court.⁴¹ In other instances, multi-disciplinary teams of officers combine to deal with infractions ordinarily policed in a piecemeal fashion.⁴²

As noted above, the mortgage crisis is affecting collateral in a concentrated fashion moving from one neighborhood to the next. If public laws are going to be successfully enforced to protect the public from the harm resulting from this phenomenon, they must go beyond house-to-house enforcement to take entire neighborhoods as the object for law enforcement. It is not only a matter for housing code professionals; it is a matter for fire prevention, public health, traffic, and felony crime prevention professionals. The fact is, no perfectly maintained house in a blighted, crime-ridden neighborhood is safe or secure and neither are its occupants.

D. DESIGNING AND IMPLEMENTING EFFECTIVE LOCAL POLICIES AND PRACTICES

Innovative policies and creative practices are becoming evident all over the country. A few examples are described here. First, a cautionary note. Experience suggests that the success rate of transplanting code compliance and enforcement measures from one place to another is not encouraging. Policies and practices that are successful in one place often fail when imitated elsewhere. Success or failure of a program may be because of local

40. See Dan Immergluck & Geoff Smith, *The Impact of Single-Family Mortgage Foreclosures on Neighborhood Crime*, 21 HOUSING STUD. 851, 855-66 (2006). See generally, Symposium, Geography & Pub. Safety (Oct. 2008) (a symposium discussing crime in relation to neighborhood conditions, especially high foreclosure rates).

41. Kelling & Wilson, *supra* note 34. A highly visible police patrolman in Cleveland, Jim Simone, wrote more citations for violations involving exterior conditions on residential properties than any other officer, including housing inspectors. In his talks with community groups in Cleveland, he expresses the importance of the "Broken Window" doctrine in the famous Wilson and Kelling ATLANTIC article. *Id.*

42. An example of a team inspecting for neighborhood safety was reported from Columbia, Mo. See Anne Taylor, *Columbia Neighborhood Response Team's Inspections Draw Ire, Appreciation: Columbia Group Tries to Improve Living Conditions by Flagging Code Violations*, MISSOURIAN (Mar. 23, 2011), <http://www.columbiamissourian.com/stories/2011/03/23/nrt-inspects-first-neighborhood-year/>.

circumstances, timing, gifted leadership or resources. This is a great frustration for the mortgage servicing industry which is resistant to local laws tailored to local conditions. They want the convenience of uniformity. However, housing, neighborhoods, and communities are not interchangeable parts. This inconvenient reality generally escapes the consideration of those looking for national and financial interchangeable solutions to local and unique circumstances. Therefore, reading the successful examples of others should include questions about what really makes the example successful, not merely the fact that it is successful.

1. *Vacant Property Registration*

Take, for instance, the development of vacant property registration policies and programs. Municipalities have been reacting to the frustrations of dealing with absent and obscure owners of housing who flout both local laws and law enforcement with vacant property registration ordinances. Essentially, vacant property registration is intended to give municipalities accurate, contact information for a live human person or persons legally responsible for compliance with applicable local laws affecting the condition and title to chronically vacant properties.

The variations of the criteria, procedures, requirements for compliance and penalties for noncompliance are infinite. The lack of consistency between hundreds of vacant property registration ordinances creates a significant problem for servicers of mortgaged or bank-owned housing. Led by a Cleveland-based property preservation servicer, Safeguard Properties,⁴³ servicers and mortgage bankers⁴⁴ mounted a nation-wide campaign to block

43. *Vacant Property Registration Ordinances*, SAFEGUARD PROPERTIES, http://www.safeguardproperties.com/Resources/Vacant_Property_Registration.aspx (last visited Mar. 29, 2012). Safeguard's website describes the effort and provides a listing of ordinances collected from around the country. *Id.*

44. *Vacant Property Registration*, MORT. BANKERS ASS'N, <http://www.mbaa.org/VacantPropertyRegistration.htm> (last visited Mar. 29, 2012). The Mortgage Bankers Association wants the information on the identity of servicers to be under the control of the Mortgage Electronic Services Corporation (MERS), a special purpose members-only nonprofit corporation created by the mortgage banking industry. *Id.*; MERS, <http://www.mersinc.org/index.aspx> (last visited Mar. 29, 2012). As of 2012, MERS was rapidly falling into disrepute. Its efficacy as a provider of information to municipalities was never realized. Safeguard is promoting a new service, "Compliance Connections," to connect code compliance officials to a servicer for one dwelling at a time. *Compliance Connections*, SAFEGUARD PROPERTIES, http://www.safeguardproperties.com/Services/Compliance_Connections.aspx (last visited Mar. 29, 2012). The reviews of it I have received from code enforcers are mixed, but so far better than MERS. Both of these systems bypass the local government public record offices, which may leave room for doubt about the legal sufficiency of notices using either one.

or to standardize all vacant property registration ordinances across the country to meet their criteria. There is little to no possibility that all municipal jurisdictions within a single state, much less municipalities across the country, can accept a single model ordinance as a fitting solution to identify those to hold responsible for their vacant buildings.⁴⁵ It is a case of an irresistible force meeting immovable objects.

2. *Sustained Coordination of Enforcement Leaders*

A critical 2005 analysis of the growing abandoned vacant house problem in Cleveland⁴⁶ found that the response to the problem was fragmented and that actions and programs were sometimes working at cross purposes, competing for resources, duplicating efforts, and otherwise making it easy for noncompliance and evasion of enforcement to continue unchecked. A leading nonprofit development corporation, Neighborhood Progress, Inc., established a coordinating council of public, public interest policy, and program managers and experts from municipal, suburban, county and coalitions of nonprofit developers. This group of people has been meeting monthly since the summer of 2005. It has grown gradually to a coalition of about thirty willing members who use the council as a forum to exchange information, to collaborate on solving problems, and for developing plans. It has organized support for new institutions, including a very successful county-wide land bank;⁴⁷ it has helped to avoid clashes and unproductive competition over public resources; it upgrades the level of knowledge by key managers; it organizes study groups and conferences, and it often invites guest experts who, in one stop, can address the core of the Cleveland area effort on abandoned vacant housing. It is not institutionalized formally, has no legal authority, and makes no public policy. Its key strength is the energizing and empowering of local housing and neighborhood advocates by providing a clearinghouse for shared ideas, problem-solving discussion,

45. A favored example of an ordinance and implementation procedures that work well in its situation is that of South Euclid, Ohio. See *Housing Department News*, CITY OF SOUTH EUCLID, <http://www.cityofsoutheuclid.com/building-housing/housing-news.html> (last visited Mar. 29, 2012), for the ordinance and forms of compliance.

46. See Alan Mallach et al., *supra* note 38.

47. The Cuyahoga County Land Reutilization Corporation (CCLRC) is the first of a growing number of large-scale land banks in Ohio with capacity to deal more effectively with the high volume of abandoned and blighted houses. *About Us*, CUYAHOGA CNTY. LAND REUTILIZATION CORP., <http://www.cuyahogalandbank.org/aboutUs.php> (last visited Mar. 29, 2012). The CCLRC is seen as an example of how a high-performing land bank can do many of the things now necessary to stabilize neighborhoods, communities and regions damaged by the mortgage crisis. See *id.* Its published information can be found at its web site, <http://www.cuyahogalandbank.org/>.

constructive criticism, and mutual aid by those who operate with public and charitable funds.⁴⁸

Much the same results can be achieved in smaller-scale situations where key people regularly meet to collaborate. Where there are fewer involved, coordination among the willing can be easier to organize. Some coordinating groups may have profit-makers involved; for example, local bankers, lenders, developers or realtors. That arrangement may be unworkable in other places. Other instances of coordinating councils may be limited to all branches of a single governmental jurisdiction. The key to coordinating is willingness to share and willingness to be exposed to the scrutiny by others committed to the same goals. Overcoming the fragmentation that characterizes the operations and failures of housing and neighborhood code compliance is the purpose. The exact means is secondary.

3. *A Comprehensive Parcel-Based Information System*

A comprehensive parcel-based information system is one of the most important tools for any work involving real property. Property records are in the custody of public offices and are now usually available online. However, the complete record is not found in any one source or site. Records relating to the use and physical condition of real property are produced and held by municipal offices. Examples of these are building permits, zoning variances, violation notices, public nuisance findings and condemnation, environmental conditions, health department, and police and fire department actions. Within the municipality, different offices may keep records in different systems using software that does not interact automatically with the systems used by other municipal departments.

Similarly, the records relating to the ownership of real property, such as the name of the title holders, the identity of those with a legal interest or lien on the title, property tax assessments and tax payment status, pending bankruptcy proceedings, or trial court judgments affecting title, are all in offices that may be in a variety of other government agencies. In some jurisdictions, there are more than one property tax assessing and collection authorities. This fragmentation of real property data makes it expensive and time consuming for code compliance officials to do their work. It also makes it possible for mistakes or deception to go undetected. Everyday thousands of foreclosure actions and bankruptcies are proceeding where the

48. A brief description of the Vacant Abandoned Property Action Council is included in a report created for the Federal Reserve Bank of Cleveland by Kathryn Wertheim & Claudia Coulton, *Facing the Foreclosure Crisis in Greater Cleveland: What Happened and How Communities Are Responding* 6 (June 2010), available at http://blog.case.edu/msass/2010/06/30/Facing_the_Foreclosure_Crisis_June_2010.pdf.

subject property is abandoned, vacant, condemned as unfit for lawful use, or subject to police power jurisdiction without any recognition of that condition by parties before the court.

Besides fully illuminating public information related to real properties, the assembly of property information in a single accessible digital source provides an important means of coordination among the various actors whose work is, or should be, cognizant of current records. A common access point for all available information provides a common interest in cooperation among both users and providers of the data. The assembly of data with software applications for analysis and mapping also allows for study and research that could not otherwise be done. Mapping foreclosures, sheriff sales, post-foreclosure transactions, noncompliance with citations, age of housing stock, price fluctuations and much more can provide new help for working strategically and making the right policy choices to achieve a desired objective.

Establishing a database is a formidable task and a very local task. There are no blueprints for how one should be constructed. Home-grown ones seem to work better in the long run than commercial products. The very process of getting public custodians of public records to provide their data on a regular, real-time basis is itself an important governmental reform.⁴⁹ Control of information, even public information, is a source of power. For some public officers the power derived from controlling access to information may outweigh the benefits derived from transparency and illumination. Elected officials fear, sometimes with good reason, that if the records in their custody were made public it would be used to disparage their performance.

The mortgage crisis has created an environment that is encouraging more cooperation and collaboration among local public offices on matters related to housing and neighborhood conditions. Crisis deniers are losing ground as the pressure of declining public resources is forcing more public officials to reevaluate the benefits of collaborating with other officials and with public interest organizations doing neighborhood recovery and redevelopment. Simple and inexpensive technology is gradually making its way into the public work force. Making more and better use of land and land

49. My long-term engagement with the managers of the Cleveland regional real property database located at Case Western Reserve University has diluted my earlier enthusiasm for manufactured systems that sprang into being quickly at a high cost. This database can be examined and used at <http://neocando.case.edu/cando/index.jsp?page=p>. Its principal developers, Dr. Claudia Coulton and Michael Schramm, agree that this facility is built around the specific features and political realities of public information providers. For example, some offices would not participate until an election or other circumstances changed hearts and minds.

ownership information is so important and so possible that its benefits cannot be ignored.

4. *Targeting Inspections and Enforcement Actions*

Targeting inspections and enforcement actions for maximum results is one of the actions that comes from thinking strategically about code compliance enforcement. Virtually all police activities deploy resources to reduce unsafe conditions. For example, DUI checkpoints show up on key holidays; speed traps and radar guns are deployed to reduce accidents where they frequently happen; and crime patrols are targeted to areas of high-risk. Similarly, the deployment of inspections for housing, health and neighborhood safety is needed most where people and property are most at risk of harm from conditions created by noncompliance. Houses and neighborhoods surrounded by deteriorating and abandoned structures are at high risk of harm.⁵⁰ Targeting inspection and code compliance enforcement is good public policy both to preserve security and stability and to exercise stewardship of limited public resources.

Targeting may also be useful at the point where blighted houses come under a foreclosure court's jurisdiction, where a bankruptcy is filed, where notice is published of foreclosure proceedings, or where a sheriff sale is advertised. Dealing with abandoned vacant houses early has many benefits. Early intervention makes it more likely that the structure can be saved for productive use before it deteriorates from neglect or is subjected to vandalism. Where all parties with a legal interest have been identified and publicly summoned to a legal proceeding—such as foreclosure, bankruptcy, probate—their mutual and collective engagement with code compliance is easier and more timely than after the debt collection process when a new owner must be pursued.

Targeting for maximum benefit would also include inspection of properties of commercial homeowners who are frequently cited for noncompliance or own neglected properties that must be secured or maintained by public resources. The mortgage crisis has given rise to whole new markets for “flippers” who buy large quantities of bank-owned houses for quick resale. These absentee “vultures,” as they have been called, do not comply with housing codes. Their business model, at most, calls for cosmetic treatment of their property to obscure defects. They operate in stealth with highly disposable business entities and are nearly impossible to prosecute.

50. Immergluck & Smith, *supra* note 40; MALLACH, *supra* note 16, at 40-48 (discussing the use of targeted code enforcement as an intervention in a process of property neglect and deterioration).

Targeting their properties for inspections and them for investigation is important police work.⁵¹

Another type of targeting would be to offer owner-occupants information prior to inspection for violations to aid in voluntary compliance. Housing consumers are not exempt from compliance obligations; but in stable neighborhoods, housing consumers are more prone to comply voluntarily than absentee and commercial owners. Voluntary compliance is far more economical and beneficial than coerced compliance. Neighborhood and civic organizations are assets able to support consumer compliance and partnerships in public programs are working successfully in places where social capital is high.

5. *Litigate for Maximum Compliance*

Much of the prosecution for failure to comply with housing and neighborhood safety codes or with administrative orders to comply is routine and does not result in an offender putting the property into compliance. Punishment of those responsible is too often insufficient to promote lawful conduct; municipal courts usually lack the authority to get large or absentee businesses to comply when fines only amount to a slight increase in the cost of unlawful business practices. Code enforcing prosecutors are increasingly finding new ways to use existing laws and procedures to improve the level of compliance, especially from those abusing debt collateral to make profit.⁵²

When it became evident that Deutsche Bank, Wells Fargo and other mega-banks were not maintaining or repairing houses after they purchased them at sheriff sales, prosecutors in Cincinnati and Los Angeles filed civil actions seeking injunctive relief and reimbursement of the public funds spent to abate nuisance conditions the bank owners or trustee title holders failed to correct. In both Cleveland and Cincinnati, nonprofit community organizations filed nuisance abatement suits against megabank owners of housing stock that was harming the neighbors and the public. In targeting large-scale owners of trash houses, these types of cases tend to get more expeditious nuisance abatement done at the owners' cost instead of taxpayers' cost. Getting the bank-owners and their servicers to formally agree to comply routinely with local laws in these cases has been far more difficult. While there is some sporadic improvement in the servicing of bank-owned houses, the improvement appears to depend on the availability and capacity of new land banking entities to which low-value housing can be given along

51. Ford, *supra* note 6 (using the term "vultures" to characterize post-foreclosure speculation in blighted properties).

52. Lind, *supra* note 32.

with payment for demolition costs. Civil litigation using statutory and common law nuisance claims has potential to engage bank homeowners productively in the abatement of nuisance conditions on their properties. However, plaintiffs need to be prepared for years of procedural battles and settlement talks before getting an opportunity to present their case to a court.⁵³

Other prosecution innovations have involved special task forces or outside counsel to prosecute major offenders whose deep pockets require highly specialized prosecutorial capabilities. Only very large municipal law departments have staff attorneys with the experience and back-office resources to sustain complex case management. However, using civil litigation and doing innovative litigation are not normally hallmarks of municipal law departments. An infusion of special counsel—such as legal aid attorneys, law school clinics, and progressive lawyers disturbed by the injustice they perceive in the mortgage crisis—is often an important stimulant for effective litigation.⁵⁴

In courtrooms, prosecutors seeking maximum compliance from those found guilty may face a challenge where judges are not accustomed to plea bargaining in code violation or nuisance abatement cases. Plea agreements can be used, however, to reduce charges and get lower recommended sentences in return for pre-sentence compliance extending to all of the defendant's properties. Similarly, expenditures by defendants to get properties cited into full compliance may be used to persuade a court to mitigate fines or reduce jail time. The logic of having convicted defendants' spend money to repair houses or abate nuisance conditions instead of paying fines is very compelling public policy. Compliance should trump punishment as a goal for both prosecutors and judges in housing courts.⁵⁵

53. Lind, *supra* note 1, at *passim* (discussing nuisance abatement cases against bank-owners in their capacity as titled owners, or trustees in title, to houses and the application of statutory and common law nuisance to eliminate both the nuisance conditions and the nuisance business practice of refusing to comply with laws and administrative orders to comply).

54. In Memphis, Tennessee, Mayor A.C. Wharton, Jr. formed a task force using a local private attorney, Steve Barlow, to bring 224 civil suits within two years against targeted offenders whose properties are contaminating neighborhoods. *The Campaign to End Blight, Office of the Mayor*, CITY OF MEMPHIS, <http://memphistn.gov/blight.html> (last visited Mar. 30, 2012). Defendants were summoned to the Shelby County Environmental Court to appear before Judge Larry Potter. *Id.* This action has resulted in increased rehabs and demolitions by private owners rather than taxpayers. *Id.* The Center for Community Progress published a report on a workshop held in Baltimore in which this project was highlighted. Steve Barlow, *Bringing Sexy Back: Code Enforcement Baltimore Style*, CTR. FOR CMTY. PROGRESS BLOG (Sept. 25, 2011), <http://www.communityprogress.net/blog/bringing-sexy-code-enforcement-baltimore-style>.

55. Lind, *supra* note 32, at 27-28.

V. CONCLUSION

I hope putting residential mortgage collateral into the spotlight will make it more visible and less ignored as a critical factor for ending the current financial crisis. It must be recognized at the national level of business and government that valuable collateral is being severely damaged by the way the mortgage financing and debt collection system now operates. The loss in residential equity is measured in trillions of dollars and is still climbing.⁵⁶ That loss of asset value is not only the destruction of personal wealth; it is also the destruction of important sources of tax revenue for education and other public services essential to neighborhood and community civilization as we know it or envision it.

The archaic and arthritic nature of the local government housing code compliance systems are a substantial part of what keeps the current crisis going. Conventional municipal code compliance enforcement, foreclosure, bankruptcy, sheriff sales, and the fragmented record-keeping systems they depend on are simply no match for the new-age, digitally driven economy doing real property transactions using algorithms working at the speed of light. It is easy and cheap for remote and obscure global enterprises to avoid local law enforcement compliance burdens when the compliance systems are so dysfunctional and fragmented.

There are no cheap blueprints to fix things in each city, town, or village. Those who own the problems of local public law enforcement are the ones who must design and implement the solutions for those problems. Outside help and advice can certainly deliver valuable assistance, but it is not the first or most important determinant of a successful response. First there must be a realization in affected communities that conventional methods have to be redesigned and rebuilt to deal with unconventional new realities.

There is reason to expect the mortgage crisis to continue and metastasize in new ways and places before it ends. In fact, that is already apparent in many cities. The clean-up of the physical mess in hardest hit neighborhoods is being followed by a crisis of real property title records corrupted by false documents, fraudulent transfers, unverifiable or unidentifiable

56. Governor Elizabeth A. Duke, in her recent testimony before the U.S. Senate, Committee on Banking, Housing and Urban Affairs, reported that research by the Federal Reserve Bank set the loss of household wealth at more than seven trillion dollars since 2006. BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, THE U.S. HOUSING MARKET: CURRENT CONDITIONS AND POLICY CONSIDERATIONS 22 (2012), available at <http://www.federalreserve.gov/publications/other-reports/files/housing-white-paper-20120104.pdf> (white paper attached to the testimony of Federal Reserve Governor Elizabeth A. Duke to the U.S. Senate Committee on Banking, Housing and Urban Affairs). That is an average of 33%. *See id.*

robo-signed signatures—all problems for which the legal system has an inadequate tool chest. Homeownership, however beneficial it is, is becoming more risky, more burdensome, and more often a millstone rather than a secure anchor.

Going forward, efforts to quell the mortgage crisis must include improving the handling of collateral as something the condition of which necessarily affects all the adjacent property and the rights of people attached to that collateral property. The public and public interest responders charged with keeping collateral from spreading blight must recover their expenses if mortgage financing business practices ignore residential collateral or discard it as trash to be cleaned up at public expense.

Rethinking legal codes and code enforcement strategically can provide guiding principles and bring the necessary institutional parts into an improved working relationship—a system. Redesigning a system of related, collaborative elements for stable, safe, and marketable housing and neighborhood welfare is the prescription for making sure that collateral matters to all those who use it.