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Citation:
Thomas Gunton, Coping with the Specter of Urban Malaise in a Postmodern Landscape: The Need for a Detroit Land Bank Authority, 84 U. Det. Mercy L. Rev. 521 (2007)

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COMMENTS

Coping with the Specter of Urban Malaise in a Postmodern Landscape: The Need for a Detroit Land Bank Authority

INTRODUCTION

Beginning in the middle of the last century, U.S. cities, once the resplendent centers of American industrial might and haute couture, have endured a slow, enervating decay from within. The creeping eclipse of the American metropolis is revelatory of a number of systemic, national weaknesses and is attributable to a bevy of underlying causes. The principal causes of this atrophy are predicated upon cataclysmic demographic shifts reflecting the socioeconomic fault lines hewn by racial antagonism, the strategic closing of industrial facilities and pervasive job losses and the internal impetus of suburban sprawl induced by the haphazard developmental planning of land hungry private developers. The principal manifestation of this urban malaise is the phenomenon of so-called "vacant properties," a phenomenon which is increasingly prevalent in our nation's urban centers.[1] In this context, the term "vacant property" is primarily utilized to identify those properties in which the owner(s) or manager(s) "neglect[s] the fundamental duties of property ownership," by for instance, failing to pay property taxes or utility bills, carrying encumbrances such as liens against the property and defaulting on their mortgages.[2] To a lesser extent, the term is also used to refer to those properties which pose a significant threat to public safety (a usage that is roughly synonymous to the common law definition of a "public nuisance").[3] In general, the concept of a "vacant property" encompasses a

1. According to the Brookings Institution, vacant properties occupy 15.4% of the area of the typical large city, or more than 12,000 acres on average. MICHAEL A. PAGANO & ANN O'M. BOWMAN, THE BROOKINGS INSTIT. CTR. ON URBAN AND METRO. POLICY: WASHINGTON, D.C., VACANT LAND IN CITIES: AN URBAN RESOURCE 3 (2001), *available at* http://www.brookings.edu/es/urban/pagano/paganofinal.pdf.

2. NAT'L VACANT PROPERTIES CAMPAIGN, VACANT PROPERTIES: THE TRUE COSTS TO COMMUNITIES 2 (2005), *available at* http://www.vacantproperties.org/latestreports/True%20Costs_Aug05.pdf.

3. *Id.*

broad array of properties, such as abandoned buildings,[4] vacant or under-performing commercial properties,[5] single-family residences and apartments bearing significant housing code violations, and environmentally contaminated industrial properties.[6]

As the population of certain U.S. cities continues to hemorrhage into outlying suburban areas and commercial interests and business investments soon to follow, the number of vacant properties dotting the urban landscape has become legion. Along with this proliferation in the occurrence of vacant properties comes a host of public policy problems in regard to the negative economic consequences, public safety concerns, environmental risks and diminished aesthetic qualities ensuing from the incidence of abandonment. The economic aspect of this decline subsists in the fact that vacant properties generally cause depreciation in property values in the surrounding neighborhood,[7] occasioning a concomitant decrease in the local tax base.[8] As a result of this reduction in the tax base, the municipality's stream of tax revenue begins to run dry, while at the same time the correlative municipal costs pertaining to such properties burgeons, hampering the municipal government's fiscal capacity to monitor such properties and safeguard against the multitude of public health and environmental safety risks presented by their continuing state of abandonment.[9] The higher costs associated with this category of tax-reverted, "distressed" properties are in large part incurred after the properties gradually degrade into public safety hazards requiring increased public expenditures on such things as firefighting and law enforcement services,[10] or into environmental or public health risks, which are often equally costly to deal with.[11] In addition, vacant properties visit

4. *Id.* As defined by relevant state laws and uniform building codes. *Id.* Often the structures must have been "unoccupied for over a year, are beyond repair, and pose serious danger to public safety." *Id.*

5. *Id.* Commonly referred to as "greyfields." *See id.*

6. *Id.* Commonly referred to as "brownfields." *See id.*

7. RESEARCH FOR DEMOCRACY, BLIGHT FREE PHILADELPHIA: A PUBLIC-PRIVATE STRATEGY TO CREATE AND ENHANCE NEIGHBORHOOD VALUE 5 (2001), http://www.temple.edu/rfd/content/BlightFreePhiladelphia.pdf. For example, a 2001 study by Temple University researchers found that houses within 150 feet of abandoned property experienced a loss of $7,627.00 in net value, properties within 150 to 300 feet experienced a loss of $6,819.00 and those within 300 to 450 feet lost $3,542.00 in value. *Id.* at 21-22. Moreover, the researchers also concluded that *ceteris paribus* "houses on blocks with abandonment sold for $6,715 less than houses on blocks with no abandonment." *Id.* at 22.

8. *See* NAT'L VACANT PROPERTIES CAMPAIGN, *supra* note 2, at 7-9.

9. *Id.*

10. *Id.* at 3; *see also generally* NAT'L VACANT PROPERTIES CAMPAIGN, http://www.vacantproperties.org/ (last visited Jan. 27, 2006).

11. One authority has asserted that the "failure of cities to collect even two to four percent of property taxes because of delinquencies and abandonment translates into $3 billion to $6 billion in lost revenues to local governments and school districts annually." NAT'L VACANT PROPERTIES CAMPAIGN, *supra* note 2, at 7.

multifarious economic hardships on private homeowners living in blighted neighborhoods. Not only are their homes devalued by the presence of vacant properties, but the fact that these properties do not produce tax revenue for the city government means that a smaller number of residents bear a relatively greater proportion of the city's tax burden. Moreover, the propinquity of their homes to such vacant properties results in significantly higher homeowner's insurance premiums and makes mortgages and home improvement equity loans exceedingly difficult to obtain.[12]

As noted, in addition to the aforementioned economic consequences, the presence of vacant properties produce a number of significant public safety considerations relating to nuisance abatement, crime and fire prevention and environmental remediation. Vacant properties have been demonstrated to be breeding grounds for crime,[13] as well as favored targets for arsonists,[14] and raise numerous environmental concerns given that such properties are often used as dumping grounds by residents or are industrial properties containing toxic waste that has not yet been properly disposed of.[15] Finally, the presence of vacant properties manifests a transcendental condition that can only be properly described as an *aesthetic of urban malaise* in that such properties contribute to a perception of the community—from both outside and within—as intrinsically dysfunctional and beset by an overbearing sense of communal ennui. For instance, the scourge of vacant properties has been documented as engendering a detrimental psychological effect that detracts from the community's quality of life by producing social fragmentation and creates a disincentive to future investment necessary for economic rehabilitation.[16] These intangible effects, coupled with the aforementioned economic and social consequences, create what has been incisively characterized as a downward "spiral of blight."[17]

All of which dramatically illustrates the necessity for the introduction of land use reform that will work to eradicate the incidence of vacant, tax-reverted property by rehabilitating these properties and putting them to

12. *Id.* at 11.

13. *Id.* at 3. A recent study conducted by the City of Richmond, VA analyzed citywide crime data from the mid-90s and noted that of all the economic and demographic variables incorporated into their analysis, the vacant properties factor demonstrated the highest correlation to the incidence of crime. *Id.* Additionally, the study noted that eighty-three percent of abandoned buildings exhibited evidence of illegal use by prostitutes, drug dealers, property criminals and others. *Id.*

14. *Id.* at 4. The U.S. Fire Administration has reported that over 12,000 fires in abandoned structures are reported nationally each year, resulting in $73 million in property damage annually. *Id.* In addition to arson, such fires are often attributable to poor maintenance, faulty wiring and debris and the negligent conduct of indigent people occupying the structures who burn candles and the like for light and heat. *Id.*

15. *See id.* at 5.

16. *Id.* at 11.

17. *Id.* at 12.

constructive use. One such reformative device is known as a "land bank," a legal policy instrument that is principally oriented towards acquiring, holding and retransferring tax-reverted and other distressed properties with the aim of facilitating their redevelopment. The thesis of my article is that the creation of such a land bank program in Detroit is in certain ways vitally important to the city's hopes for effective revitalization of its distressed property market.

With this in mind, in Part I of this article, I will examine a number of legal and structural barriers to efficient land distribution in Detroit with the intention of identifying the specific obstacles that an effective Detroit land bank program would have to address. In Part II, I will provide an overview of recent state legislation, which paves the way for the introduction of a land bank program in Detroit, with particular focus being paid to the state's land bank authority enabling legislation, the Michigan Land Bank Fast Track Act of 2004. In Part III, I will then proceed to analyze the primary policy objectives, in tandem with the principal structural components, of a land bank program. In the process of doing so, I will adumbrate the varying fundamental planning approaches adopted by contemporary land bank programs, as well as the essential powers bequeathed to land banks in order to properly effectuate their articulated purposes. Finally, in Part IV, I will set forth a collection of foundational normative considerations, reflective of the developmental aspirations of ordinary Detroit residents, which I will relate to the foregoing analysis so as to provide a framework within which a truly effective Detroit land bank program may be formulated.

I. BACKGROUND: LEGAL & STRUCTURAL IMPEDIMENTS TO EFFECTIVE PROPERTY DISPOSITION IN DETROIT

Before addressing the issue of remedying the deterioration of Detroit's urban property substructure, it is first necessary to assess the underlying symptoms of its desiccation in order to be able to properly contextualize and, thus, conceptualize the appropriate remedy. The City of Detroit is currently facing a land disposition crisis of nearly epidemic proportions. The phenomenon of vacant lands, abandoned residential and commercial building structures and tax-delinquent properties is endemic, with the City owning approximately 38,000 parcels of land, eighty percent of which are tax-reverted.[18] The staggering magnitude of this scourge is lent a particularly tragic air when one considers the fact that the majority of these

18. AMY BROOKS ET AL., TAUBMAN COLL. OF ARCHITECTURE & URBAN PLANNING, UNIV. OF MICH., HARNESSING COMMUNITY ASSETS: A DETROIT LAND BANK AUTHORITY 3 (2004), http://sitemaker.umich.edu/urpoutreachreports/capacity_building__b_/da.data/89052/ReportFile/a_detroit_land_bank_authority.pdf; *see also* Nancy Kaffer, *Blight Buster: Detroit Seeks Land Bank to Deal With Vacant Property*, METRO TIMES, Apr. 13, 2005, http://www.metrotimes.com/editorial/printstory.asp?id=7553.

properties consist of vacant residential lots.[19] The nexus of this decay is traceable to a number of salient factors, including: the abandonment of residential properties due to rapid suburban migration and predatory lending practices, the wide-scale closing of factories as a result of downsizing trends in the industrial sector and the relocation of retail centers to suburban locales.[20]

Whatever the root causes of this "malaise" its effects on Detroit have been catastrophic. The immense inventory of tax-reverted properties held by the City creates a veritable administrative nightmare for the Detroit Planning and Development Department ("DPDD").[21] In particular, the sheer volume of properties makes it difficult, if not impossible, for the DPDD to maintain accurate records of each and every property it owns.[22] Additionally, this overburdened inventory system impairs the department's ability to provide clear and marketable title to prospective buyers,[23] and it militates against the department's efforts to ensure that abandoned structures on such property are properly secured, maintained or demolished.[24]

Furthermore, as alluded to earlier, the sheer presence of vacant, tax-delinquent land and abandoned structures induces certain deleterious systemic consequences. Taken *in toto* the heightened municipal costs generated by vacant, tax-reverted properties place a severe strain on the budget of a city such as Detroit, which has already been undercut by a diminishing tax base induced by a decline in the City's general economic conditions and which has been exacerbated by bureaucratic inefficiency. In many ways, the fulcrum of Detroit's vacant property dilemma can be located in the prodigious loss of property tax revenue from city coffers. This is primarily attributable to the fact that despite a steady decline in relative significance in the post-WWII era, property taxes remain "the backbone of local government finance."[25] In particular, the property tax

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19. BROOKS ET AL., *supra* note 18, at 3.

20. *See* NAT'L VACANT PROPERTIES CAMPAIGN, http://www.vacantproperties.org/ (last visited Jan. 27, 2006).

21. The DPDD is a subunit of the Detroit municipal government, which was constituted in order to "strengthen and revitalize the City of Detroit's neighborhoods and communities and to stabilize and transform the City's physical, social, and economic environment." The department's policy goals are implemented through six divisions: Planning, Development, Real Estate, Housing Services, Neighborhood Development and Administrative Services. Detroit Planning and Development Department, City Planning FAQ, http://www.ci.detroit.mi.us/legislative/BoardsCommissions/CityPlanningCommission/plan_FAQ.htm.

22. BROOKS ET AL., *supra* note 18, at 3.

23. *Id.*

24. *Id.*

25. Thomas R. Swartz, *Rethinking Urban Finance in America*, *in* URBAN FINANCE UNDER SIEGE 10 (Thomas R. Swartz & Frank J. Bonello eds., 1993). Ad valorem (i.e.,

system remains the primary source of revenues controllable by a municipal entity and is imposable by the entity upon its own initiative in order to finance necessary governmental services.[26] Needless to say, given the importance of property taxes to municipal financing schemes, a shrinking tax base is generally ruinous to a city's financial health. Consequently, in order for Detroit to be able to rehabilitate its economic fortunes it is imperative that city leaders ameliorate the current vacant property crisis by engaging in a little proverbial "house cleaning." This necessarily entails sweeping aside certain structural and legal barriers to the efficacious disposition of land, thereby, enabling needed redevelopment and revitalization of the City's property resources.

A. Legal Barriers to Efficient Land Disposition

A number of aspects of Detroit's contemporary legal milieu pose salient barriers to the efficient distribution and rehabilitation of the City's vacant properties. First, the vast majority of these properties are encumbered by what is known as "clouded title"; a condition which substantially impairs their alienability and, thus, their capacity for redevelopment.[27] Second, prior to 1999, the Michigan tax law regime was structurally inadequate to effectively cope with the problem of tax delinquency characteristic of such properties.[28] Third, the handling and disposition of tax-reverted properties confronts the perennial issue of the constitutionality of notice afforded to previous owners whose interest in the property at issue was extinguished by means of a foreclosure proceeding.[29] Fourth, a number of legal restrictions on the transfer of public property to private individuals have been set in place, which impede the disposition of vacant property.[30]

Though, taken individually, each of these barriers significantly detracts from the market value and transferability of such properties, the

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property tax) revenues comprise 8.8% of the City of Detroit's annual budget for FY 2005-2006. City of Detroit, 2005-2006 Budget, Chart: Revenue by Major Sources XI, *available at* http://www.ci.detroit.mi.us/budget/2005-06_Redbook/FinancialOverview&Summary/Charts/Xi_Major%20Revenue%20Pie%20Chart.pdf (last visited Mar. 28, 2006).

26. Frank S. Alexander, *Tax Liens, Tax Sales and Due Process*, 75 IND. L.J. 747, 755 (2000). This is not to say that other forms of revenue procurement, such as intergovernmental transfers and revenue sharing programs, do not play a significant role in local government financing. *Id.*

27. *See* BROOKS ET AL., *supra* note 18, at 3-4. *See also* CMTY. LEGAL RES., TRUE COSTS OF ACQUIRING TAX REVERTED PROP. 1 (2004), http://www.clronline.org/resources/legal-lines/property/True_CostsRev.pdf.

28. *See* BROOKS ET AL., *supra* note 18, at 3-4; *see also* Catharine B. Lamont, *A Road Map Through the Tax Sale Mine Field: A Title Insurer's Perspective*, 23 MICH. REAL PROP. REV. 149 (1996).

29. BROOKS ET AL., *supra* note 18, at 4.

30. *Id.*

convergence of these systemic impediments engenders an aberrational system of land disposition that is—for all intents and purposes—functionally defunct. In effect, the four aforementioned barriers are interrelated in a way which operates to preclude the transformation of Detroit's tax-reverted properties to productive, tax-generating properties.

1. Clouded Title to Vacant and Tax-Reverted Properties.

A preponderant share of the vacant properties held by both the City and private owners are plagued by what is known as "clouded title."[31] In essence, a "cloud" on title (or the legal right to control and dispose of property) consists of an actual or apparent claim on the title representing a putative interest in the property which is at odds with the current owner's rights in the property.[32] This condition may arise in a variety of circumstances in which a preexisting claim to the property in question creates a "weak link" in the chain of title. For instance, "clouds" can include outstanding secured debts, such as mortgages and deeds of trust, which used the property as collateral on the debt.[33] "Clouds" may also include other forms of preexisting secured debts, such as property tax liens, federal tax liens, demolition liens and *lis pendens*, construction or mechanic's liens, judgment liens and the like, as well as defective deeds or other instruments of conveyance, which failed to transfer the relevant property because of a technical deficiency in the execution of the instrument.[34]

Generally speaking, the phenomenon of "clouded title" to Detroit properties can be traced back to several root causes. The principle cause of uncertainty in the title status of real property is attributable to improper notice procedures in foreclosure proceedings.[35] Historically, notice requirements in Michigan foreclosure proceedings were far from stringent. However, in the wake of a seminal Michigan Supreme Court case,[36] the system of notice procedures had to be radically recast, and the status of title

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31. CMTY. LEGAL RES., CLEARING CLOUDED TITLE FOR THE REDEVELOPMENT OF URBAN LAND: A GUIDE FOR NONPROFIT ORGANIZATIONS 2 (2003), http://clronline.org/resources/legal-lines/property/CLR_Title.pdf.

32. Michigan Pleading & Practice describes "clouded title" as:

> [A]n instrument, record, claim or encumbrance which is actually invalid or inoperative, but which may nevertheless impair or injuriously affect the title to property. It is something which constitutes an apparent defect or encumbrance, or shows a prima facie right of another to some interest in the property. For example, the cloud may be a deed, lease, mortgage, deed of trust, or judgment, or the like.

11 MICH. PLEADING AND PRAC. § 82:24 (2d ed. 2003) (footnotes omitted).

33. CMTY. LEGAL RES., *supra* note 31, at 3-4.

34. *Id.*

35. BROOKS ET AL., *supra* note 18, at 3.

36. Dow v. State, 240 N.W.2d 450 (Mich. 1976), to be discussed in more detail, *infra* Part I.A.3.b.

to tax-reverted property which had been presumed to have safely vested in the hands of subsequent transferees was now cast in doubt. In addition, a number of tax sales have resulted from non-judicial foreclosures, and as such, lack the formidable authority of a judicial decree to ensure the legal sufficiency of notice was provided to delinquent owners.[37] Furthermore, a sizeable number of current tax-reverted properties constitute assets of defunct corporations that cannot be effectively notified of a foreclosure action, which again implicates notice concerns.[38] Finally, ownership of residential properties in Detroit frequently consists of so-called "heir property," which is received via intra-familial, unrecorded conveyances, leading to both the fractionation of property interests and to claims that are not clearly established on the public record.[39]

While the issue of conflicting claims to a property can often be resolved by means of a quiet title action,[40] this is not always the case, as evidenced by the prevalence of Detroit properties possessing clouded title. Given the tenuous ownership status of properties with "clouded title," title companies are generally reticent to insure title to these properties, or will insure around the "clouds" (i.e., insert exemptions into the policy excepting certain clouds from coverage). As such, Detroit's vacant properties are virtually unmarketable and prospective buyers are few.[41] Moreover, the cost of clearing title to such properties often exceeds their fair market value.[42] As a consequence, these properties are prone to lay fallow—failing to realize their innate economic value.

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37. *See* BROOKS ET AL., *supra* note 18, at 3. Under Michigan law, a mortgagee may initiate a private, non-judicial foreclosure on real property, known as a "foreclosure of mortgage by advertisement," provided the pertinent mortgage instrument contains a "power of sale" provision. MICH. COMP. LAWS ANN. § 600.3201 (West 2000). However, it is important to note that circuit courts are also provided with the jurisdiction to foreclose upon real property mortgages and land contracts by statute. *Id.* § 600.3101. This has the effect of forcing an election of remedies upon the mortgagor. United States. v. Leslie, 421 F.2d 763, 766 (6th Cir. 1970).

38. *See* BROOKS ET AL., *supra* note 18, at 3.

39. *See id.* at 3.

40. In Michigan, all common law forms of action relating to real property have been abolished and the quiet title action has been absorbed into a broader category of actions governed by court rule entitled "[a]ction to determine interests in land." MICH. COMP. LAWS ANN. § 600.2932 (West 2000). The procedure for this action is outlined by court rule. MICH. CT. R. 3.411. Such actions are often inadequate in that they are not self-executing (i.e., they require an interested party to step forward and initiate a proceeding), and do not invariably cure notice defects. *See* MICH. CT. R. 3.411(H).

41. "Marketability" refers to the situation in which a reasonable buyer would not object to condition(s) on title, and would purchase property despite the presence of the condition(s). 92 C.J.S. *Vendor & Purchaser* § 326 (2000).

42. CMTY. LEGAL RES., FACT SHEET: TITLE PROBLEMS 1-2 (2005), http://www.clronline.org/resources/legal-lines/property/TitleProblems.pdf/view.

2. *The Historical Impact of Inadequate Property Tax Foreclosure Law.*

Michigan's tax foreclosure system is situated within the framework of the General Property Tax Act of 1893 ("GPTA"), which addresses the taxation of real and personal property, including tax assessment, collection, and foreclosure and the sale of property that has not been redeemed.[43] Prior to 1999, the tax foreclosure system created by the GPTA was intricately convoluted and led to an inefficient system of property disposition.[44] The law provided only for a very cursory title search, which failed to identify *all* persons with a legal interest in the property, and under many circumstances, failed to adequately notify taxpayers of record.[45] The constitutionality of notice under the previous tax regime was a particularly problematic issue, leaving many properties with clouded title.[46] Consequently, potential purchasers were forced to contract with costly title clearance companies to "clear" their titles, a procedure that does not ineluctably produce insurable title.[47] Furthermore, the process itself was exorbitantly expensive and time-consuming.[48]

Given these considerations, it became apparent that a necessary antecedent to any truly successful land use reform initiative in Detroit was an effective tax foreclosure system providing for the unfettered transferability of tax-delinquent properties. The transferability provided by tax foreclosure laws is of central importance, because these laws comprise a primary mode of acquisition for land use devices. Paying heed to these social exigencies, in 1999, the Michigan Legislature enacted Public Acts 123, 132 and 133, which reformed the state tax foreclosure system by streamlining and expediting the process of foreclosure and subsequent sale of tax delinquent properties.[49]

Though the changes wrought by these recent amendments go a long way towards ensuring a more expeditious system of tax foreclosure and include heightened procedural safeguards for the provision of proper notice to owners of tax delinquent properties, they at most provide the

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43. MICH. COMP. LAWS ANN. §§ 211.1-211.157 (West 2003 & Supp. 2006).

44. *See, e.g.*, Kevin T. Smith, *Foreclosure of Real Property Tax Liens*, 75 MICH. B.J. 953 (1996) (stating that title insurers were wary of insuring property under the previous tax foreclosure system due to its exceedingly convoluted character and offering a number of suggestions on streamlining the process).

45. This procedural deficiency is of constitutional dimensions in that it implicates due process *notice* considerations. These so-called "notice defects" are discussed in greater detail, *infra* Part I.3.

46. BROOKS ET AL., *supra* note 18, at 4.

47. *See* CMTY. LEGAL RES., *supra* note 31, at 6.

48. Many of these problems were also compounded by the fact that state and local governmental units were beset by ineffective procedures for the collection of delinquent taxes and enforcement of building code violations.

49. 1999 Mich. Pub. Acts 732, 860, 862. Public Act 123 is discussed in more extensive detail, *infra* Part II.A.

groundwork for urban renewal. Serious notice concerns remain in respect to property foreclosed upon prior to 1999. Furthermore, under Michigan law, municipalities are provided with the power to establish tax collection and foreclosure procedures that are disparate from those specifically prescribed in the state statute, a power which has been upheld in court.[50] The City of Detroit is one such municipality, which has opted to develop its own tax enforcement procedures under its charter, and thus, does not enjoy the benefits of the heightened notice provisions afforded in the recent state legislation.[51] Consequently, title companies are still reluctant to insure many vacant properties without incorporating certain exemptions into policy coverage or requiring that a risk premium be paid by policyholders.[52] Given the uninsurability of title to vacant properties, private developers are discouraged from assembling contiguous blocks of property for strategic redevelopment purposes.[53] This is especially the case in distressed urban areas, such as Detroit, where the rate of tax foreclosure is at its highest and where redevelopment is needed the most. In addition, the effective disposition and rehabilitation of such properties remains impeded by the fissiparous nature of the governmental entities handling Detroit's urban planning efforts, and the concordant lack of centralized control over and administration of urban land use strategies.[54]

3. *The Mennonite-Dow Standard and the Constitutional Adequacy of Foreclosure Notice*

One of the most significant issues pertaining to vacant properties in Detroit is a constitutional one in that a majority of such properties suffer from notice defects.[55] The concept of "notice" is a constitutional imperative stemming from both the federal[56] and state Due Process clauses.[57]

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50. Fink v. City of Detroit, 333 N.W.2d 376, 381 (Mich. Ct. App. 1983).

51. The City of Detroit's tax collection and foreclosure procedures are set forth in section 8-403 of the Detroit Charter. DETROIT, MICH., HOME RULE CHARTER § 8-403 (Jan. 1, 1997).

52. BROOKS ET AL., *supra* note 18, at 4.

53. *See* Smith, *supra* note 44, at 953. This is particularly harmful to redevelopment aspirations in economically distressed communities, such as Detroit, because the "bundling" of properties for acquisition and resale is one of the principal strategies for redevelopment in communities of this type.

54. *See* BROOKS ET AL., *supra* note 18, at 4.

55. "Notice defects" consist of a failure to properly notify an interested party of a tax foreclosure action, which amounts to a deprivation of that party's rights in that property in a manner that violates the state and/or federal Due Process clauses. *See, e.g.*, *In re* Treasurer of Wayne County for Foreclosue, 732 N.W.2d 458 (Mich. 2007). It is important to also note that constitutionally sufficient notice must be calculated to notify potential interest holders of the foreclosure proceeding itself, and a party's mere knowledge of tax *delinquency* does not comprise such notice. Ligon v. City of Detroit, 739 N.W.2d 900, 904 (Mich. App. 2007) (citing City of Detroit v. John J. Blake Realty Co., 376 N.W.2d 114 , 116 (Mich. App. 1984)).

56. U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

Essentially, the notice doctrine requires that before a governmental entity may deprive an individual or business of a legally cognizable "property" interest (as defined by state law) it must notify the individual or business of the impending deprivation.[58] When a notice defect has in fact occurred, a person or business entity may "appear *at any time* to prove (i) they had a claim to the property, (ii) they were not properly notified, and (iii) they are willing to pay back taxes to reclaim the property."[59] This issue is particularly problematic in the context of the tax foreclosure process due to the fact that the concept of notice has been delineated in a fairly ambiguous manner in both federal and state courts.

a. The Federal Due Process Standard

The contours of the federal due process right to notice in the foreclosure environment can be vaguely discerned in the seminal case of *Mennonite Board of Missions v. Adams*.[60] In *Mennonite*, the United States Supreme Court, relying on an earlier Supreme Court case,[61] held that notice *by publication* to parties with significant interests in contested property in a tax foreclosure proceeding is constitutionally insufficient when the identity and address of these parties is easily accessible in the public records.[62] In elaborating upon this holding, the Court articulated the proper federal due process standard for property tax foreclosures, declaring that notice had to be "reasonably calculated" to inform those parties who hold "legally protected property interest[s]" whose names and addresses are "reasonably ascertainable" by "reasonably diligent efforts."[63] The Court further opined that under this test, notice of foreclosure had to be mailed to the addresses of interest holders (including both property owners and mortgagees) in order for that notice to minimally comport with the strictures of the federal Due Process Clause.[64]

The fundamental problem with the *Mennonite* standard within the context of the tax foreclosure process is one of uncertainty. The concept of "reasonableness," which is of central importance in measuring the

57. MICH. CONST. art. I, § 17.

58. In order to comport with due process procedural requirements, the state actor must also provide a property holder with an "opportunity to be heard" (i.e., due process requires an adequate forum in which the property holder may contest the forfeiture of the disputed property interest). 72 AM. JUR. 2D *State & Local Taxation* § 698 (2001). This requirement is particularly significant, insofar as the general rule under Michigan law is that an individual's property rights cannot be affected or impaired by a tax foreclosure judgment unless he or she is a party to the proceeding. *Id.* § 805; 85 C.J.S. *Taxation* § 1278 (2001).

59. *See* CMTY. LEGAL RES., *supra* note 42, at 1 (emphasis added).

60. 462 U.S. 791 (1983).

61. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306 (1950).

62. *Mennonite*, 462 U.S. at 799-800.

63. *Id.* at 798-800.

64. *Id.* at 799-800.

constitutional sufficiency of notice, is a decidedly amorphous one.[65] For instance, the *Mennonite* Court did not clearly specify whether adequate notice is required at each stage of the process (e.g., at the initial tax sale, before the end of the applicable redemption period, etc.).[66] Due to this residual ambiguity, an underlying confusion as to the precise scope of the federal notice requirement undermines the confidence of potential buyers in the security of the title they acquire. It also provides an incentive for the states to overcompensate by establishing needlessly stringent notice procedures that produce an excessively long, costly and labyrinthine foreclosure system.

b. The State Due Process Standard

The applicable due process requirement for tax foreclosure notice under the Michigan Constitution was enunciated by the Michigan Supreme Court in *Dow v. State of Michigan*,[67] the repercussions of which reverberated throughout Michigan's foreclosure system. The *Dow* court, taking its cue from the *Mullane* rule and in a sense presaging *Mennonite*, held that notice *by publication* in a tax foreclosure proceeding violated the previous owners' *state* due process rights.[68] In so holding, the court asserted that *either* actual service of notice *or* notice which is reasonably likely to apprise the property owner of the impending deprivation of his or her property interest is the standard by which state due process claims are to be adjudged. Furthermore, the court noted that "'[n]otice by publication is a poor and sometimes a hopeless substitute for actual service of notice.'"[69] In an oft-quoted phrase, the court elaborated upon these propositions by declaring that a state must employ "such means 'as one desirous of actually informing [the property owner].'" Applying this standard, the court opined that prior to the tax sale "ordinary mail notice"

65. Though Michigan's foreclosure system *apparently* complies with the federal due process requirement, this is not settled law. The only reported cases to consider this question were by the U.S. District Court for the Western District of Michigan, which held as much, but only after twice reversing itself on motions for reconsideration. Anna M. Wickstra Trust v. Roossinck, No. 1:91-CV-580, 1993 U.S. Dist. LEXIS 6847, at *10 (W.D. Mich. Apr. 2, 1993) (amended opinion).

66. *Mennonite* only explicitly required *presale* notice to interested mortgagees. *Mennonite*, 462 U.S. at 798.

67. 240 N.W.2d 450 (Mich. 1976).

68. *Id.* at 458 (citing Schroeder v. City of New York, 371 U.S. 208, 212-13 (1962)). The previous law required private tax sale purchasers to provide notice by registered mail to all persons having a significant interest in lands subject to foreclosure, but there was no such requirement with respect to the state. In holding the state's notice provisions to be constitutionally defective the Michigan Supreme Court was at odds with the U.S. Supreme Court, which in *Longyear v. Toolan*, 209 U.S. 414, 418 (1908), affirmed the constitutional validity of Michigan's notice provision. However, the legitimacy of the *Longyear* holding had been cast into profound doubt in the wake of *Mullane* and its progeny.

69. *Dow*, 240 N.W.2d at 453 n.12 (quoting City of New York v. New York, New Haven & Hartford R.R. Co., 344 U.S. 293, 296 (1953)).

would be sufficient, but following the sale (i.e., during the redemption period) "formal notice" would be required.[70] As a corollary proposition, it is evident that under the *Dow* rule state due process requires that notice must be provided to *every* interested person.[71]

The tax foreclosure problems presented by *Dow*, in many ways echo those arising from the *Mennonite* rule. Specifically, the standard set forth in *Dow* retains a certain amount of residual ambiguity in terms of what exactly constitutes tax foreclosure notice that is "reasonably calculated" to appraise putative interest holders of the impending deprivation of their rights. In addition, the *Dow* court did not specifically correlate its notions of adequate notice to discrete stages in the tax foreclosure process. Thus, in much the same way as *Mennonite*, the *Dow* rule does not delimit the notice requirements for each applicable redemption period mandated by state law.

In the wake of *Dow* and its progeny, the Michigan Supreme Court has struggled to come to terms with the decidedly amorphous constitutional standard articulated in *Dow*. Plagued over the years by a lingering sense of referential opacity, the court seized the opportunity in *Smith v. Cliffs on the Bay Condominium Ass'n*[72] to render more precise the contours of the due process analysis in the hope of lending predictability to the tax foreclosure process and correlative stability to the government's taxing power. In *Smith*, the Michigan Supreme Court held that, in enacting Public Act 292 of 1976,[73] the Michigan Legislature had promulgated a "constitutionally sound procedure" for providing notice of tax foreclosure to putative interest holders.[74] Specifically, the court rejected the former property owners' argument that the return of a post-redemption period Notice of Hearing as "Not Deliverable As Addressed" by the postal service, after this notice was mailed pursuant to the statutory requirement to the owners' last known address, imposed a duty upon the foreclosing authority to reasonably inquire as to the owners' new address.[75]

Reversing the court of appeals ruling in favor of the former property owners, the court declared that mere compliance with the state's statutory

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70. *Id.* at 460. The question of what exactly constitutes "formal notice" was left unanswered by the court. However, elsewhere in the opinion the court claimed that "[p]ersonal service is not required" and that a notice mailed by certified or registered mail, with a return receipt requested would suffice. *Id.* at 459.

71. *Id.* at 453 n.10 (The court holding that this was the case despite the fact that the state had properly notified one of the parties and the other parties in the dispute were the husband and the business partner of the person who had been notified).

72 617 N.W.2d 536 (Mich. 2000).

73. 1976 Mich. Pub. Acts 262 (codified as amended at MICH. COMP. LAWS ANN. § 211.61b, 211.73c, 211.131c(1), 211.131e(1)).

74. *Smith*, 617 N.W.2d at 541.

75. *Id.* (stating that "[t]he fact that one of the mailings was returned by the post office as undeliverable does not impose on the state the obligation to undertaking an investigation to see if a new address . . . could be located.").

notice procedures was constitutionally adequate.[76] Taking particular exception with the court of appeals decision that the county's failure to take additional, extra-statutory steps to effectuate notice was "not characteristic of 'one desirous of actually informing another,'" the *Smith* court argued that the appellate court's ruling constituted "an improper intrusion into the Legislature's authority to regulate tax sale proceedings."[77]

In support of this reasoning, the court opined that:

> Not only does the Court of Appeals decision infringe the authority of the Legislature, but it would also undermine the tax sale process. The principle underlying the Court of Appeals decision is that in some circumstances it is not enough to comply with the requirements of the General Property Tax Act, but that more must be done. However, exactly what that is will be different in every case. No matter what efforts are made to give notice the owner who has not, in fact, been provided notice will always, contend that something more could have been done. This will make the process of tax sales completely unpredictable, destroying the government's ability to recoup unpaid taxes by foreclosing and reselling. *For due process purposes, the focus must be on the constitutional adequacy of the statutory procedure and not on whether some additional effort in a particular case would have in fact led to a more certain means of notice.*[78]

This conception of the notice doctrine has found support in the recent case of *In re Petition of Wayne County Treasurer (Wayne County Treasurer, et al. v. Perfecting Church).*[79] In *Perfecting Church*, the Michigan Supreme Court tangentially addressed the constitutional sufficiency of the state's tax foreclosure notice system, and in doing so, seemingly confirmed the *Smith* court's approach to due process notice analysis. Writing for the majority, Justice Young noted in dicta that a foreclosing entity's compliance with the strictures set forth in the Michigan General Property Tax Act ("GPTA") furnishes constitutionally adequate notice to putative interest holders of the impending deprivation of their proprietary interests.[80] According to this rendering, strict compliance with the statutory procedures is unnecessary, for the protections afforded by the statutory schema outstrips the minimum level mandated by the state and

76. *Id.*

77. *Id.* (holding that the appellate court had arrogated legislative authority to itself and engaged in *de facto* lawmaking, the *Smith* court conflated the issue of statutory construction with that of the constitutional dimensions of the notice concept).

78. *Id.* at 542 (emphasis added).

79. 732 N.W.2d 458 (2007).

80. *Id.* at 463 n.19.

federal due process clauses.[81] Moreover, Justice Young appeared to construe Michigan due process guarantees to be coterminous with—or at the very least not to exceed—those provided under the federal Due Process Clause.[82]

What is interesting to note in both of these opinions, is the manner in which they implicitly underscore significant background issues at play in Michigan's tax foreclosure process, particularly as this process relates to the peculiar situation faced by the City of Detroit. Significantly, the aforementioned foreclosure processes are persistently afflicted by systemic weaknesses and periodic procedural irregularities.[83] As such, the title status of tax-reverted properties remain subject to innumerable opportunities for "as applied" challenges to the divestiture of aggrieved owners' property interests.[84] For example, in *Perfecting Church*, the Wayne County Treasurer instituted foreclosure proceedings against a parcel of real property owned by the Respondent-Appellee, *Perfecting Church*, despite the fact that the church had paid off property taxes owed on a related parcel covered by the same deed.[85] What is particularly telling in *Perfecting Church* was that the county treasurer's office had—through its own negligent administration—effectively ensured that the parcel in question would be subjected to foreclosure in that the treasurer's office had affirmatively mislead the church by instituting proceedings despite making assurances to church representatives that taxes were current on both parcels.[86] Furthermore, these irregularities were compounded by the fact that the treasurer had failed to comply with the detailed statutory notice requirements in initiating the foreclosure process.[87] Instead of providing the statutorily prescribed notice to the church, the treasurer mailed the

81. *Id.* (opining that "the notice provisions provide *more* notice than is required to satisfy due process, the constitution does not require strict compliance with all the statutory notice requirements.") (emphasis added).

82. *Id.* In analyzing the issue of the constitutional sufficiency of the Michigan tax foreclosure process, Justice Young failed to distinguish between state and federal guarantees, suggesting that there is no variance between the two according to the court's current majority. This issue is, however, often conceptually confused in that the courts rarely make a well-defined, substantive differentiation between the state and federal standards.

83. Discussed in greater detail, *infra*, Section II.B.4.

84. *See, e.g.*, HOUSE LEGISLATIVE ANALYSIS, H.R. 4480-84, 4488, at 1 (Mich. 2003) (postulating that the tax foreclosure "process afforded inadequate protection to property owners and often resulted in title of questionable legal value."). It is telling to note that, as a practical matter, title insurers systematically refuse to issue title insurance commitments on tax-reverted properties. *Id.* at 6. Moreover, title companies have estimated that 65 percent of tax-reverted property lacked marketable title as of 2003. *Id.* at 1.

85. *Id.* at 460.

86. *Id.*

87. *Id.*

requisite notice of foreclosure to the *previous* owner of the parcel and did not post a notice on either of the parcels at issue.[88]

To complicate matters further, the City's planning and development department is burdened with a prodigious inventory backlog of tax reverted properties.[89] It is a quandary that is only exacerbated by the abounding level of administrative inefficiency that has plagued the City's land use systems, and which is occasioned by the structural fractionation in Detroit's municipal government.[90] This degraded operational structure has engendered a discernible lack of inter-departmental coordination and an attendant inefficiency in the inter-governmental exchange of property-related information.[91] In light of the foregoing considerations, it is readily apparent that the sufficiency of Michigan's tax foreclosure process remains a salient policy concern.

4. Legal Restrictions on the Transfer of Public Property to Private Actors

The final legal barrier tc efficient land disposition in Detroit consists of a qualified prohibition on the provision of public credit. This restriction is derived from a provision in the Michigan Constitution, which forbids local governments from proffering credit, unless such lending is expressly authorized in the constitution itself.[92] Though on its face this restriction does not appear to directly conflict with the City's aspirations to facilitate the redevelopment of blighted regions, the City's legal department has chosen to construe this provision in a way that substantially impedes such endeavors. The City's legal representatives have decided that this prohibition compels the conclusion that city-owned properties (such as tax-reverted properties that have not been purchased by private individuals at a tax sale) be sold for a "fair price" or roughly equivalent to market value.[93] The City has predicated this interpretation on the notion that selling property for substantially less than market value is in all relevant aspects a

88. *Id.*

89. HOUSE LEGISLATIVE ANALYSIS, *supra* note 84, at 1 ("estimating that in 1998 Detroit had a backlog of approximately 50,000 tax reverted properties."). The majority of these properties are comprised of three principal categories: (1) state-owned property that was not sold at public auction or conveyed to a local governmental unit;(2) property deeded by the state to the City of Detroit per the City's request; and (3) properties which was held by the City due to foreclosure upon taxes arising under the city charter. *Id.* at 6.

90. BROOKS ET AL., *supra* note 18, at 5. This issue is discussed in greater detail, *infra*, Section II.B.4.

91. *Id.*

92. MICH. CONST. art. VII, § 26 ("Except as otherwise provided in this constitution, no city or village shall have the power to loan its credit for any private purpose or, except as provided by law, for any public purpose.").

93. BROOKS ET AL., *supra* note 18, at 4.

form of public credit, which the City is extending to the private agencies or developers who are willing to purchase and develop the property.[94]

The radical deficiency in this interpretation hinges not only on the fact that it is premised upon a dubious conception of the "local government credit" prohibition,[95] but also that the construction it adopts stridently belies the underlying socioeconomic reality of Detroit's current land use crisis. Oftentimes, Detroit properties are consigned to perpetual vacancy, because the amount of delinquent taxes in combination with associated fees far outstrip the value of the property on the open market.[96] Given this fact, it is relatively easy to appreciate the importance of a nominal pricing scheme for the effective disposition and redevelopment of such properties.

B. Structural Barriers to Efficient Land Disposition.

In addition to the aforementioned legal impediments, the City of Detroit also faces a host of structural barriers to the efficient disposition of land. These barriers include: (1) the City's significant inventory of tax-reverted properties; (2) prohibitively high market prices for tax-reverted properties; (3) the protracted length of sales transactions for these properties; (4) the City's institutionally fragmented land disposition process; and (5) the exposure of such properties to excessive land speculation.

1. Detroit's Significant Inventory of Tax-Reverted Properties

As previously noted, it is estimated that the City of Detroit currently holds title to somewhere between 38,000 and 40,000 vacant properties, an immense inventory by nearly any standard.[97] The sheer magnitude of the City's property holdings poses salient problems for city administrators attempting to formulate a rational property transfer scheme, especially in light of the fact that there is currently no comprehensive, centralized property database sufficient to coordinate such a plan.[98] Consequently, while city planners can vaguely intuit the general nature of the problem on

94. An ancillary argument which city officials often raise is that transfer for less than the market value estimation made by city council can result in inconsistent pricing in similar transactions and give rise to the appearance of favoritism. *Id.*

95. In an analogous context, the courts have held that the purpose of the constitutional prohibition against *state lending*, MICH. CONST. art. IX, § 18, is to ensure that the state "does not accumulate unauthorized debts by indorsing or guaranteeing the obligations of others." Advisory Opinion re Constitutionality of PA 1966, No 346, 158 N.W.2d 416, 416 (Mich. 1967) (holding that the purpose of article IX, section 18 is to make certain that the state does not incur unauthorized debts by virtue of indorsing or guaranteeing obligations of others). A similar rationale would seem to be applicable in the case of lending on the part of local governments.

96. *See* BROOKS ET AL., *supra* note 18, at 4.

97. *See* Kaffer, *supra* note 18.

98. BROOKS ET AL., *supra* note 18, at 5.

the basis of a disjunctive mass of data and anecdotal evidence, they are unable to quickly and precisely discern the identity, status and geographical location of city-owned, tax-reverted properties.

Fortunately, the city has taken recent steps to ameliorate these difficulties by beginning to update its database and consolidate the records in this database with information from various other sources. Recent improvements in the City's informational resources are particularly significant for the prospect of instituting a successful Detroit land bank, because it allows city officials to identify and track properties targeted for potential acquisition by a future land bank via a systematic analysis of certain indicia of abandonment.[99]

2. Prohibitively High Market Prices for Tax-Reverted Properties

Community development advocates have articulated a concern that vacant, tax reverted properties in Detroit are priced too high for either for-profit or non-profit acquisition and development.[100] This phenomenon is in large part attributable to artificial price inflation with respect to such properties; an occurrence that is produced by a construction of the Michigan Constitution by the City's legal department, which posits that the state constitution mandates that city property sales must be for a "fair value."[101] In many cases, the City's establishment of a price floor comprises an unjustifiable political contrivance that fatally distorts the underlying market realities. Many of such properties, if marketable at all, merit a purchase price that is far below other apparently comparable properties within the community. Frequently, these properties contain dilapidated structures, which are in a progressive state of deterioration, are inflicted with environmental contamination and are burdened by tax liens that far exceed the property's tentative market value.[102] In effect, the City's establishment of price floors for tax-reverted properties results in a vast assemblage of unmarketable properties, which city development planners are hard pressed to dispose of.

3. Protracted Length of Sales Transactions for Tax-Reverted Properties

The process of purchasing tax-reverted properties from DPDD can take up to several years under the current system of tax foreclosure.[103] The

99. *Id.* at 9. Thankfully, the DPDD, in conjunction with the Detroit Local Initiatives Support Corporation ("LISC"), has taken significant steps in the past few years to updating and improving the municipal property database.

100. *See* CMTY. DEV. ADVOCATES OF DETROIT (CDAD), PUBLICLY OWNED LAND FOR COMMUNITY DEVELOPMENT: A POSITION PAPER ON TAX REVERTED PROPERTY DISPOSITION POLICIES IN DETROIT (2003).

101. BROOKS ET AL., *supra* note 18, at 4.

102. *See* CMTY. LEGAL RES., *supra* note 27, at 2.

103. BROOKS ET AL., *supra* note 18, at 5.

egregious delays experienced by prospective purchasers who must endure a litany of redemption stages, among other steps in the foreclosure process is particularly difficult on non-profit development organizations. These organizations are often among the most proactive and vital entities in the local property arena but lack the overall financial resources to successfully see a multi-year land acquisition process through to its consummation.[104] Additionally, the lengthy periods of time between the initial delinquency, the subsequent foreclosure and the eventual resale of the property tends to facilitate the further desiccation of this property.

4. Detroit's Fragmented Land Disposition Process

The City of Detroit's fissiparous institutional structure, coupled with the lack of concentrated coordination between the pertinent city divisions and Wayne County governmental agencies, presents an additional impediment to the efficacious transfer of distressed properties.[105] For instance, two distinct divisions in the DPDD—the Development Division and the Real Estate Division—sell city-owned properties. However, there is little in the way of strategic interdepartmental communication or coordination between these two branches with respect to prospective property dispositions.[106] Furthermore, there are no regularized and systematic lines of communication that have been established by either the Real Estate Division or the Development Division and the Wayne county treasurer (who now forecloses on all tax-delinquent properties in Detroit).[107] In the final analysis, much of institutional fragmentation can be ascribed to the fact that the state and local taxing authorities are traditionally engineered around procuring revenues, not strategically acquiring and reselling distressed properties.

5. Exposure of Tax-Reverted Properties to Excessive Land Speculation

According to the Wayne County Corporation Counsel, approximately eighty percent of properties foreclosed upon by the Wayne County Treasurer are located within the City of Detroit.[108] Following the instatement of county foreclosure proceedings, these properties are sold biannually at public tax sale auctions, between the third Tuesday of July and the first Tuesday of November.[109] In the first round of auctions, tax-reverted properties are sold for a minimum bid equivalent to the amount of

104. *Id.*
105. *Id.*
106. *See id.*
107. *Id.*
108. *Tax Man Cometh*, METRO TIMES, Jan. 21, 2004, *available at* http://www.metrotimes.com/editorial/story.asp?id=5867.
109. MICH. COMP. LAWS ANN. § 211.78m(2) (West 2005).

tax arrearages and miscellaneous administrative fees.[110] In the second round, there is no minimum bid, however, the foreclosing governmental unit is authorized to establish a price floor that approximates the administrative expenses of the sale.[111] At these auctions, the aforementioned properties are often purchased at the minimum bid by land speculators, who purchase the property with the hope that, over the course of time, it will passively appreciate in value.[112] Rarely do these speculators contribute to the redevelopment of the property they have purchased by cultivating new development on the property or by exploring other potentially productive uses.[113] Instead, they are often content to sit on the property and wait for an upturn in its market value, at which time they attempt to resell it in order to realize a profit.[114]

Given that these properties are, for the most part, passively held, they do not generate present income for their owners and require prodigious outlays in regard to their continuing maintenance. Consequently, many speculators who own such properties neglect to maintain them, allowing them to deteriorate further and exacerbate the problem of urban blight.[115] Moreover, many speculator-owners refuse to pay the property taxes for these properties, due to the fact that they do not receive income from the property from which they can pay the taxes. As such, their property holdings often end up back in the foreclosure process, with title to the property being tied up for a correspondingly extended period of time, which compounds the already significant strain on county and city budgetary resources and ultimately serves as a further impediment to property redevelopment.[116]

II. MICHIGAN'S PROGRESSIVE LEGISLATIVE RESPONSE TO LAND USE PROBLEMS AND URBAN DECAY

Confronted with the forbidding specter of urban malaise, a cancerous byproduct of economic stagnation, racial antagonism and systemic market failure, the City of Detroit has been compelled, along with other Michigan cities, to endure a decades long struggle with property abandonment, tax delinquency, environmental degradation and the like. In the wake of this "malaise," a clarion call was sounded to the Michigan Legislature to extirpate many of the aforementioned legal and structural barriers to efficient land disposition. Fortunately, the Legislature was listening and legislative solutions were forthcoming. Since 1996, the Michigan

110. *Id.* § 211.78m(11)(a)-(b).
111. *Id.* § 211.78m(5).
112. BROOKS ET AL., *supra* note 18, at 5.
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.* at 5-6.

Legislature has attempted to proactively counteract the deepening shadow of urban blight by enacting a progressive array of tax and land use legislation by which it is hoped that the barriers to efficient land disposition may be overcome.

A. *Tax Foreclosure Reform (Public Acts 123 & 132)*

As previously noted, in 1999, the State Legislature passed Public Acts 123 and 132,[117] which substantially reformed the previous system of tax foreclosure. In general, the 1999 amendments to the GPTA streamlined and shortened the administrative processes surrounding delinquent real estate taxes and the tax foreclosure process.[118] For instance, before the enactment of these amendments the foreclosure process typically took five to seven years to complete, but now the process takes only two-and-a-half years from the time of delinquency.[119] In addition, the process was further expedited by a mechanism instituted by the amendments, which has considerable value for the alleviation of urban blight in that it enables local governments to single out abandoned and tax delinquent properties and certify these properties for accelerated foreclosure proceedings.[120]

The 1999 amendments have also contributed towards securing the marketability of title to tax delinquent properties. Specifically, the amendments established a Foreclosing Governmental Unit ("FGU"),[121] which conducts a thorough title search of the properties subject to foreclosure,[122] including a physical inspection of the premises.[123] Moreover, the amendments augmented the marketability of title by providing heightened notice procedures in order to protect against due process violations. The new law mandates that three delinquency notices be sent to the taxpayer of record within an eight-month time span near the

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117. 1999 Mich. Pub. Acts 732, 860. Michigan Public Act 123 added Michigan Compiled Laws sections 211.78, 78a, 78b, 78c, 78d, 78e, 78f, 78g, 78h, 78i, 78j, 78k, 78l, 78m, 78n, 78o, and 78p, along with amendments to other sections of the GPTA. Michigan Public Act 123 was ordered to take effect immediately, approved July 22, 1999, and filed July 23, 1999.

118. See Robert F. Rhoades, *Enforcement of Property Tax Liens*, 26 MICH. REAL PROP. REV. 131 (1999), for a comprehensive and trenchant analysis of the reforms wrought by Michigan Public Act 123.

119. *See* CMTY. DEV. ADVOCATES OF DETROIT (CDAD), *supra* note 100, at 4. The shortened process is largely attributable to a shorter delinquency period, more expedient provision of notice and the elimination of certain additional redemption periods.

120. MICH. COMP. LAWS ANN. § 211.78g (West 2005).

121. *Id.* § 211.78(6)(a)(i)-(ii). The default rule under this provision is that the FGU is the *county treasurer.* This, however, is subject to the caveat that each county may elect to have the *state* serve as the FGU for that county. Furthermore, a county may enter into an agreement with a local government permitting the local government to collect and foreclose upon property taxes within the local government's boundaries. *Id.* § 211.78(5).

122. *Id.* § 211.78i.

123. *Id.* § 211.78i(3).

beginning of the delinquency period,[124] with the final notice to be sent via certified mail.[125] The amendments also establish a further procedural safeguard in requiring the FGU to hold an administrative show cause hearing at least one week prior to the foreclosure proceeding, entitling interested parties to demonstrate why absolute title to the foreclosure property should not vest in the FGU.[126]

Finally, the new law also provides a significant impetus for urban redevelopment by specifically targeting the phenomenon of "upside down" properties.[127] Under the previous system, a prospective buyer at a tax lien sale had to place a minimum bid equivalent to the amount of delinquent taxes owed, plus any interest, penalties and fees. However, under the new system, the price floor for tax sales has been abolished in the second round of tax sale auctions and buyers may now purchase the tax reverted property for a price that is lower than the outstanding taxes and related fees.[128]

B. Tax Reverted Property Emergency Disposal Act (Public Act 133)

Within the same year that Public Act 123 was enacted, the Michigan Legislature again formulated a progressive legislative strategy for reforming the extant land disposition system when it enacted the Tax Reverted Property Emergency Disposal Act ("TRPEDA").[129] Essentially, this Act provided local governments with the authority to obtain quiet title to tax-reverted property by means of judicial procedure in order to facilitate the conversion of moribund tax delinquent properties to productive use.[130] In particular, the Act specified a four-step process by which a local government could obtain clear title. First, the local government was required to "'declare an emergency backlog' of tax-reverted properties."[131] Second, it had to contract with a title company to conduct a title search, enabling the government to identify all persons with a significant interest in the property for notice purposes.[132] Third, it was required to properly notify persons identified as holding an interest in the property and "file an affidavit of compliance with the Registrar of Deeds."[133] Fourth, it had to bring a civil action to quiet title in the circuit court in which the property

124. *Id.* §§ 211.78b, 211.78c, 211.78f.

125. *Id.* § 211.78f.

126. MICH. COMP. LAWS ANN. § 211.78j (West 2006).

127. *Id.* § 211.78m(5). The term "upside down properties" refers to those properties in which the amount of delinquent taxes and associated fees owed on the property exceed its fair market value.

128. *Id.*

129. *Id.* §§ 211.971-211.976 (repealed 2004). TRPEDA was effectively repealed by the Michigan Land Bank Fast Track Act discussed *supra*, Part II.C.

130. *Id.*

131. *See* BROOKS ET AL., *supra* note 18, app. c at 86.

132. *Id.*

133. *Id.*

was located.[134] It is also important to note that the Act provided local governments with a crucial acquisition tool for property redevelopment in that it enabled them to "bundle" tax-reverted properties and foreclose on large numbers on these properties in a single proceeding.

C. *The Land Bank Fast Track Act ("LBFTA")*

On January 5th, 2004, the Michigan Legislature took an even greater step towards ameliorating inefficient land use and disposition by repealing and supplanting TRPEDA with the Michigan Land Bank Fast Track Act ("LBFTA"),[135] which created a state land bank authority and enabled the creation of land bank programs in "qualified" cities or counties.[136] The passage of this law, which garnered widespread public support,[137] heralded the advent of a revolution in Michigan land use regimes by reorienting the legislative focus on creative land use strategies to facilitate the redevelopment of distressed properties. It is the hope of the Legislature that in providing for this paradigm shift, local governmental units, which are the principal *ad valorem* taxing authorities and are intrinsically ordered towards the regulation of the economic and social character of a specific community, may be provided with the *means* to alleviate the persistent symptoms of urban blight that have plagued a number of Michigan cities.[138] The attempt to provide the means is effectuated in specific statutory provisions, which authorize land bank authorities to expedite quiet title

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134. *Id.*

135. MICH. COMP. LAWS ANN. §§ 124.751-124.774 (West 2006).

136. A "qualified city" is defined as "a city that contains a first class school district and includes any department or agency of the city." *Id.* § 124.753(n). In effect, this means that the city or county must have a population of 100,000 or more. *See* MICH. COMP. LAWS ANN. § 380.402 (West 2005) ("A school district that has a pupil membership of at least 100,000 enrolled on the most recent pupil membership count day is a first class school district. . . .").

137. The land bank fast track legislation enjoyed strong support in both the House and Senate, Charlene Crowell, *In Lansing, A Legislative Breakthrough*, MICH. LAND USE INST., Jan. 8, 2004, http://www.mlui.org/growthmanagement/fullarticle.asp?fileid=16606, as well as from the Michigan Department of Consumer and Industry Services, Michigan Association of Homebuilders, Michigan Chamber of Commerce, Michigan Environmental Council, Michigan Municipal League, the Association of Affordable Housing Professionals and the Michigan Department of Treasury. HOUSE LEGISLATIVE ANALYSIS, *supra* note 84, at 8.

138. The Michigan Legislature set out its express purpose for enacting the Land Bank Fast Track Act in its legislative findings, which state:

> The legislature finds that there exists in this state a continuing need to strengthen and revitalize the economy of this state and local units of government in this state and that it is in the best interests of this state and local units of government in this state to assemble or dispose of public property, including tax reverted property, in a coordinated manner to foster the development of that property and to promote economic growth in this state and local units of government in this state.

MICH. COMP. LAWS ANN. § 124.752 (West 2006).

procedures on tax-reverted properties,[139] acquire, manage and hold such properties,[140] and sell these properties at nominal prices.[141] Additionally, the Act addresses the perennial question of financing by enumerating potential sources of revenue for land bank authorities.[142] In effect, the Act is rather far-ranging in scope and bequeaths a comprehensive array of powers to the land bank programs constituted under its authority,[143] subject to only a few exceptions explicitly set forth in the statute.[144]

Though the statute establishes a centralized land bank authority at the state level, it only paints in broad strokes an amorphous outline of the essential structure of local land bank authorities.[145] This is coupled with a generalized imperative enunciated by the Legislature that the policies and procedures of such programs serve the "public good."[146] In fact,

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139. *Id.* § 124.759.

140. *See id.* §§ 124.755, 124.756.

141. *Id.* § 124.757.

142. The Act provides land bank programs with the authority to "[b]orrow money and issue bonds and notes," *id.* § 124.754(1)(c), "[s]olicit and accept gifts, grants, labor, loans, and other aid. . . ," *id.* § 124.754(1)(e), "[f]ix, charge, and collect rents, fees, and charges for use of property under the control of the authority. . . ," *id.* § 124.756(1)(b), retain any proceeds received, *id.* § 124.758(2), and "[d]o all other things necessary or convenient to achieve the objectives and purposes of the authority. . . ." *Id.* § 124.754(1)(*l*). Furthermore, the Tax Reverted Clean Title Act created a special tax known as "the [e]ligible tax reverted property specific tax," which is levied upon every owner of eligible tax reverted property. *Id.* § 211.1025(1). Fifty percent of such taxes go to the relevant taxing authority and fifty percent go to the land bank authority for the jurisdiction in which the property is located. MICH. COMP. LAWS ANN. § 211.1025(4)(a)-(b) (West Supp. 2006).

143. The Act spells out a broad concept of general powers possessed by land bank authorities with respect to properties over which they have jurisdiction. Specifically, it provides that an authority "may do all things necessary or convenient to implement the purposes, objectives, and provisions of this act." MICH. COMP. LAWS ANN. § 124.754(1) (West 2006).

144. *See, e.g., id.* § 124.754(6)-(8) (forbidding the authority from participating in casino development, from levying a tax or special assessment, or from exercising the power of eminent domain or property condemnation).

145. The Act sets out a few mandatory requirements and a plethora of *permissive* rules, which local authorities may adopt pursuant to their intergovernmental agreement *if they so choose*. For example, an authority is permitted to initiate an expedited quiet title action, but is not required to do so. *Id.* § 124.759. However, the act does mandate that an intergovernmental agreement contain certain essential provisions, *Id.* § 124.773(6)(a)-(h), but these mandates usually take the form of generalized, non-conclusive prescriptions. *See, e.g., id.* § 124.773(6)(d) ("[a]n intergovernmental agreement . . . shall provide for . . . [t]he qualifications, method of selection, and terms of office of the initial board members.").

146. Specifically, the Act provides that it is:

> [A] valid public purpose for a land bank fast track authority created under this act to acquire, assemble, dispose of, and quiet title to property . . . to provide for the financing of the acquisition, assembly, disposition, and quieting of title to property, and . . . to exercise other powers granted to a land bank fast track authority under this act. *The legislature finds that a land bank fast track authority created under this act and powers conferred by this act constitute a necessary program and serve a necessary public purpose.*

structurally speaking about the only *positive* requirements the act imposes upon local authorities are that these authorities must comprise a "public body corporate,"[147] be constituted by articles of incorporation,[148] and be governed by a board composed of an odd number of members.[149]

The principle vehicle for the construction and delineation of local authorities, as envisioned by the statute, is a device known as an "intergovernmental agreement." Under the LBFTA, an intergovernmental agreement is considered to be a contractual arrangement between governmental agencies or units, in which the parties agree to jointly exercise any powers, privileges, rights or duties established under the statute.[150] Two principal forms of intergovernmental agreements consist of those between county governments and the state and between municipalities and the state.[151] Essentially, the LBFTA creates a centralized state authority with the capacity to contract with local governments in order to establish localized land banks whose form and function are specified by the terms of the intergovernmental agreement within the general parameters dictated by the statute. Simply put, intergovernmental agreements foster intergovernmental coordination and cooperative efforts that, while local in nature, give rise to statewide effects. In doing so, the statutory scheme wisely apprehends that the foci of such efforts must be located at the local level due to the fact that local governmental units occupy an optimally strategic position to address these social and economic problems. This strategic advantage is derived from the primary role played by these entities in the taxation and regulation of property, coupled with their singular capacity to respond in a timely and effective manner to the particular needs of the community over which they govern. Within this context, the LBFTA provides for the creation of local authorities, which are the products of an inherently context-bound and fact-specific analysis. Under this methodology, a certain degree of flexibility is

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Id. § 124.752 (emphasis added).

147. *Id.* § 124.773(6)(a). The term "public body corporate" is intended to connote the legal status of land bank authorities. The authorities created under the Act constitute public corporate entities that are legally independent from both local and state governments. Pursuant to this independent status, authorities may hold title in their own names, *id.* § 124.755(4), are authorized to hold, manage and maintain properties without governmental approval, *id.* § 124.756(1), and must be named as a party and served with process in order for title held by an authority to be set aside in a civil action. *Id.* § 124.762.

148. *Id.* § 124.773(6)(e).

149. *Id.* § 124.773(6)(c).

150. *See id.* § 124.773(5).

151. *See id.* § 124.773(4)-(5). These, however, are not the only forms of intergovernmental agreements recognized by the statute. For example, another form of agreement authorizes local governments to transfer tax-reverted property to the *state* land bank authority for purposes of title clearance, sale and related activities. *Id.* § 124.773(3). It is also permissible for the state, a county and one or more municipalities within the county to enter into such a agreement (e.g., the Genesee County Land Bank).

incorporated into the construction of each land bank, which is integral to the success of these programs and allows local governments, in partnership with the state, to closely tailor the contours of each land bank to localized social, economic and cultural conditions.

D. Related Legislation

Contemporaneous to the enactment of the LBFTA, the Michigan Legislature instituted a host of variegated—though complementary—supplemental legislative measures. Each of these enactments were intended to augment land bank authorities' operative capacities and integrate the land use devices employed by these authorities into the preexisting juridical context; thereby, effectuating the authorities' principal fiscal and developmental objectives.[152] The Michigan Legislature presented these legislative measures in conjunction with the LBFTA and expressly conditioned passage of the LBFTA on enactment of these bills by presenting them on a disjunctive, "take-it-or-leave it" basis.[153]

The majority of this legislation instituted alternative fiscal procedures that were designed to finance land bank operations. However, one of the enactments also created a refined foreclosure notice process.[154] The crux of this measure was its emphasis on the amelioration of persistent notice problems in the state's tax foreclosure system. The following sections (II.B.1-5) review in detail the salient aspects of each of these legislative measures and highlights their functional interface with the LBFTA:

1. Public Act 259 of 2003

One of the more prominent pieces of amendatory legislation, Public Act 259,[155] provided an invaluable financing mechanism for potential land bank authorities by modifying the Michigan Brownfield Redevelopment

152. HOUSE LEGISLATIVE ANALYSIS, *supra* note 84 at 2.

153. *See* H.R. 4483, 92d Leg. Reg. Sess. (Mich. 2003). Enacting Section 2 provided that "this amendatory act does not take effect unless all of the following bills of the 92d Legislature are enacted into law:

(a)House Bill No. 4480
(b)House Bill No. 4482
(c)House Bill No. 4483
(d)House Bill No. 4484
(e)House Bill No. 4488

Each of the above referenced bills contained analogous "enacting sections" which expressly conditioned passage of that specific bill on enactment of the entire corpus of legislation. *See* H.R. 4480, 92d Leg., Reg. Sess. (Mich. 2004); H.R. 4482, 92d Leg., Reg. Sess. (Mich. 2004); H.R. 4484, 92d Leg., Reg. Sess. (Mich. 2004); H.R. 4488, 92d Leg., Reg. Sess. (Mich. 2004).

154. 2003 Mich. Pub. Acts 263.

155. 2003 Mich. Pub. Acts 259.

Financing Act ("BRFA"),[156] so as to permit land bank authorities to utilize the BRFA's tax capture provision in order to underwrite the authorities' land acquisition and disposition activities. As originally enacted, the BRFA established a legislative method for financing environmental site remediation and related response activities at contaminated properties.[157] In particular, the BRFA authorized municipalities to constitute Brownfield Authorities to develop and implement brownfield redevelopment financing plans.[158] The loci of the redevelopment plans' fiscal structures are generally founded upon the tax capture provisions provided for in the Act.[159] Essentially, these provisions permit Brownfield Authorities to harness surplus tax revenues generated from increases in the taxable value of "eligible properties"[160] included in the brownfield redevelopment plan and apply these monies to defray the costs associated with conducting adequate environmental response activities (or so-called "eligible activities")[161] in relation to eligible properties.[162]

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156. MICH. COMP. LAWS ANN. § 125.2651 (West 2006).

157. DEP'T OF ENVTL. QUALITY, SUMMARY OF THE BROWNFIELD REDEVELOPMENT FINANCING ACT, PUBLIC ACT 381 OF 1996, as amended (2003), *available at* http://www.michigan.gov/deq/0,1607,7-135-3311_4110_23246-63519---,00.html.

158. *Id.*

159. *See, e.g.*, MICH. COMP. LAWS ANN. §§ 125.2657(2), 2661(c)(i), 2666(1), (2), 2663(1)(c) (West 2005).

160. "Eligible properties" are defined under the BRFA as those parcels of property:

> for which eligible activities are identified under a brownfield plan that was used or is currently used for commercial, industrial, or residential purposes that is either in a qualified local governmental unit and is a facility, functionally obsolete, or blighted or is not in a qualified local governmental unit and is a facility, and includes parcels that are adjacent or contiguous to that property if the development of the adjacent and contiguous parcels is estimated to increase the captured taxable value of that property or tax reverted property owned or under the control of a land bank fast track authority. Eligible property includes, to the extent included in the brownfield plan, personal property located on the property . . . .

Id. § 125.2652(n).

161. The BRFA specifies that "eligible activities" conducted by land bank authorities on eligible properties include:

> (A) Infrastructure improvements that directly benefit eligible property.
>
> (B) Demolition of structures that is not response activity under section 20101 of the natural resources and environmental protection act, 1994 PA 451, MCL 324.20101.
>
> (C) Lead or asbestos abatement.
>
> (D) Site preparation that is not response activity under section 20101 of the natural resources and environmental protection act, 1994 PA 451, MCL 324.20101.
>
> (E) Assistance to a land bank fast track authority in clearing or quieting title to, or selling or otherwise conveying, property owned or under the control of a land bank fast track authority.

Id. § 125.2652(m)(iv)(A)-(E).

162. *Id.* §§ 125.2652(h), 2657(2), 2661(c)(i), 2663(1)(a)(c), 2666(1), (2).

Public Act 259 amended the BRFA to enable properties owned or otherwise under the superintending control of land bank authorities constituted under the LBFTA to be defined as "blighted property" under the BRFA.[163] Under the BRFA, "blighted" or "functionally obsolete" properties are considered to qualify as "eligible properties,"[164] and; thus, constitute proper subjects of financial assistance.[165] More specifically, the local tax increment financing board is empowered to fund a land bank authority's clearing or quieting of title, as well as the disposition of property owned or held by a land bank, through captured tax revenues.[166]

1. Public Act 260 of 2003

Public Act 260 created the Tax Reverted Clean Title Act ("TRCTA"),[167] which imposes a specific tax (possessing the same rate structure as the generic property tax) upon "eligible tax reverted properties" for a period of five (5) years after the sale or transfer of properties previously held by a land bank authority.[168] In large measure the TRCTA is a correlate to 2003 PA 261, insofar as the former recapitulates the latter's formulation regarding the tax exempt status of eligible tax-reverted properties,[169] and the correlative imposition of a specific tax (formally known as an "eligible tax reverted property specific tax"), which is levied upon every owner of eligible tax-reverted property.[170] Further, the mechanics of the specific tax under the TRCTA are substantially similar to those of general ad valorem taxes in that the specific tax is levied annually and is payable at the same time of the year, in the same installments and to the same taxing authorities as are general property taxes.[171]

The distinguishing characteristic between the general ad valorem tax regime and the specific tax consists in the allocation of tax revenues.

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163. *Id.* § 125.2652(e)(vi).

164. *Id.* §125.2652(l)(iv).

165. *Id.* § 125.2657(1)(b).

166. MICH. COMP. LAWS ANN. §§ 125.2652(l)(iv)(E), 2661(c)(i), 2663(1)(a) (West 2006).

167. MICH. COMP. LAWS ANN. §211.1021 (West 2006).

168. *Id.* § 211.1025(1),(2). "Eligible tax reverted property" is defined under the TRCTA as "property that is exempt under section 7gg of the general property tax act. 1893 PA 206, MCL 211.7gg." *Id.* § 211.1022(c).

169. *Id.* § 211.1023.

170. *Id.* § 211.1025(1).

171. *Id.* § 211.1025(4); *see also* MICH. COMP. LAWS ANN. § 211.1025(2), (3) stating that:

> (2) The amount of the eligible tax reverted property specific tax in each year is the amount of tax that would have been collected under the general property tax act . . . .
>
> (3) [T]he eligible tax reverted property specific tax shall be collected, disbursed and assessed in accordance with this act.

Whereas one-half of the revenue raised by the specific tax is utilized to fund land bank authorities' title clearance and land disposition costs.[172]

2. Public Act 261 of 2003

Another significant piece of amendatory legislation, Public Act 261, amends the GPTA[173] to specify that properties, which are under the titled ownership of land bank authorities are exempt from assessment and collection of the standard ad valorem taxes.[174] Additionally, this exemption pertains to parcels that are sold or otherwise conveyed by a land bank authority for a period of five (5) years following this disposition (that is, beginning on December 31st of the year in which the parcel in question was sold or otherwise transferred, until December 31st of the fifth year thereafter).[175] However, in lieu of standard property taxes, an exempt property is subject to a specific tax levied under the Tax Reverted Property Clean Title Act.[176]

3. Public Act 262 of 2003

The final fiscal component of the amendatory legislation was set in place with the enactment of Public Act 262 of 2003, which amended Public Act 105 of 1855.[177] 2003 PA 262 regulates the disposition of surplus funds held by the state treasury by authorizing the state treasurer to invest these funds in the form of loans made to land bank authorities at an interest rate reflecting prevailing market conditions.[178] This fiscal device was instated for the purpose of providing land bank authorities with the capital necessary to clear or quiet title to tax-reverted property held by or under control of a land bank and to finance any other lawful undertaking by a land bank authority with respect to that authority's inventory property.[179] Under 2003 PA 262 loans made to land banks cannot possess a maturity period greater than ten years.[180] However, the remainder of the material terms of such loans are left to the discretion of the state treasurer.[181]

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172. MICH. COMP. LAWS ANN. § 211.1025(4)(b) (West 2006). Such operational costs include, but are not limited to: the cost of quieting title to the tax-reverted parcels held in the land bank's property inventory or which are otherwise situated in the jurisdiction of the local taxing unit and the costs to repay government loans made to the land bank by the state treasurer. *Id.* § 211.1025(4)(b)(i)-(ii).

173. 2003 Mich. Pub. Acts 261 (codified as amended at MICH. COMP. LAWS ANN. § 211.1).

174. MICH. COMP. LAWS ANN. § 211.7gg(1) (West 2006).

175. *Id.* § 211.7gg(2).

176. Discussed in greater detail, *infra*, Section II.B.3.

177. 2003 Mich. Public Acts 262 (codified as amended at MICH. COMP. LAWS ANN. § 21.141).

178. MICH. COMP. LAWS ANN. § 21.142f(1) (West 2006).

179. *Id.*

180. *Id.* § 211.142f(2).

181. *Id.*

4. Public Act 263 of 2003

The final piece of legislation, Public Act 263 of 2003, was fashioned by the State Legislature as a remedial measure intended to rectify certain perceived procedural deficiencies in Michigan' tax foreclosure process. In the first instance, 2003 PA 263 concisely delineates an elaborate arrangement of tax foreclosure notice procedures which are designed to effectuate adequate notice of imminent property foreclosure.[182] The Act provides for a first notice of foreclosure via first-class U.S. mail on the June 1st immediately succeeding the date of tax delinquency,[183] and prescribes the specific content of this notice.[184] The Act also provides for a second foreclosure notice via first-class mail on the September 1st immediately succeeding the date of tax delinquency,[185] and a third notice via certified mail, return receipt requested, on the February 1st immediately succeeding the above date.[186] Moreover, the Act contains several discretionary revisions that enable the county treasurer is also authorized to furnish additional notice by publication in a locally circulated newspaper.[187]

Public Act 263 retained the GPTA provision mandating that the county treasurer must initiate a title search on properties targeted for foreclosure on or before the May 1st immediately succeeding forfeiture of the property to the county treasurer in order to identify owners of property interests who are entitled to statutory notice of the pertinent show cause and foreclosure hearings.[188] The Act also invests FGUs with the authority to forego the traditional title search protocol, which is often perceived to be demonstrably unreliable, and commission "1 or more authorized representatives to perform a title search or may request from 1 or more authorized representatives another title search product to identify the owners of a property interest in the property . . . or to perform other functions required for the collection of delinquent taxes . . . ."[189] This provision essentially permits FGUs to outsource their title assurance functions so as to better ensure that the FGU obtains marketable title to tax-

182. *Id.* § 211.78b-i.

183. *Id.* § 211.78b.

184. *Id.* § 211.78b(a)-(g).

185. MICH. COMP. LAWS ANN. § 211.78c (West 2006).

186. *Id.* § 211.78f.

187. *Id.* § 211.78f(2), (3).

188. *Id.* § 211.78i(1).

189. *Id.* "Authorized representatives" are defined as: (1) a title insurance company or agent licensed to conduct business in the State of Michigan, (2) an attorney licensed to practice law in the State of Michigan, (3) a person accredited in land title search procedures by a nationally recognized organization in the field of land title searching; and (4) a person with demonstrated experience searching land title records, as determined by the FGU. *Id.* § 211.78i(11)(A)-(D).

reverted parcels, the hope being that this will facilitate transfer of such properties to productive use and return them to the tax rolls.

If performance of the traditional title search and/or related functions by the FGU, or its duly authorized representatives, does not yield an "address reasonably calculated to apprise" the pertinent property interest holders of the forthcoming show cause and foreclosure hearings, or if it unveils a previous notice defect, the FGU is entitled to follow certain precisely articulated protocols meant to further ensure that interest holders are afforded sufficient notice of foreclosure. These ancillary search protocols are predicated in large part upon the type of property owner involved (that is, whether the property is an "individual," "partnership" or "non-partnership business entity").[190] In regard to individual property owners, the Act enjoins the FGU to search the probate records for the county in which the *locus in quo* is situated,[191] in addition to the qualified voter file.[192] With respect to business entities, the Act suggests that FGUs search partnership records in order to obtain information concerning partnerships[193] and business records filed with Michigan Department of Labor and Economic Growth ("DLEG") for information regarding non-partnership businesses.[194]

Moreover, Public Act 263 enunciates heightened notice provisions for the problematic cases chronicled above, which encapsulate extraordinary efforts to effectuate actual notice of foreclosure. Section (3) of the Act enjoins the FGU or its duly authorized representative(s) to make "personal visits" to the premises of each of the properties targeted for foreclosure in order for the relevant representatives to be able to better ascertain whether each of the properties are occupied or not.[195] If it is determined that a property is in fact occupied, the Act requires that the FGU or its representative personally serve the occupant with the statutorily prescribed notice of foreclosure,[196] while at the same time, orally informing him or her of the nature of the foreclosure proceedings.[197] Section (3)(c) of the Act, embodies a particularly far-reaching solicitude for the interests of property owners, insofar as this section purports to obligate the FGU or its authorized representatives to make a contemporaneous determination whether the occupant "appears to lack the ability to understand the advice given," and if so, the government official must either notify the Department of Human Services, or provide the occupant with the names and telephone

190. *Id.* § 211.78i(2)(a)-(d).
191. MICH. COMP. LAWS ANN. § 211.78i(2)(a) (West 2006).
192. *Id.* § 211.78i(2)(b).
193. *Id.* § 211.78i(2)(c).
194. *Id.* § 211.78i(2)(d).
195. *Id.* § 211.78i(3).
196. *Id.* § 211.78i(3)(a).
197. *Id.* § 211.78i(3)(b).

numbers of government agencies that may assist him or her.[198] Finally, if the FGU or authorized representative is unable to personally serve the occupant, Section (3)(d) of the Act specifies that the official post notice of the impending foreclosure "in a conspicuous manner on the property."[199]

Public Act 263 further provides that the notices relating to the show cause and foreclosure hearings, which are required by the Act, are the "exclusive and exhaustive" procedural notice requirements, meaning other notice or proof of service requirements are not applicable in the context of the tax foreclosure process.[200] The Act also expressly states that if a property owner is accorded the minimum level of due process required under the state and federal constitutions, the government's failure to comply with the statutory notice provisions will not invalidate the foreclosure proceedings or render title unmarketable as a result.[201] In fact, the Act provides that appropriate "notice" may be effectuated outside of the explicit statutory strictures, in cases where: (1) a person could be held to have had *constructive* notice of the hearings by virtue of that person's acquisition of the property interest *after* the date that the notice of forfeiture was recorded;[202] (2) the person appeared at one or both of the hearings and filed written objections with the clerk of the circuit court; and/or (3) where the person had *actual* notice of the pendency of foreclosure.

III. CONCEPTUALIZING THE REMEDY: WHAT IS A LAND BANK?

The concept of a "land bank" is a relative newcomer to the scene in the American land use system, having been first implemented only thirty-five years ago.[203] Given shape in the crucible of urban decay chronicled in preceding sections of this article, the emergence of contemporary land bank programs was predicated upon a novel conceptualization of the indispensable role of a uniquely tailored public authority as a catalyst for private development of distressed urban property. Contemporary land banks were, in effect, envisioned as intermediaries to acquire, hold and manage property for land use purposes and to transfer this property to

198. MICH. COMP. LAWS ANN. § 211.78i(3)(c) (West 2006).

199. *Id.* § 211.78i(3)(d).

200. *Id.* § 211.78i(12).

201. *Id.* § 211.78i(10).

202. *Id.* § 211.78k(5)(f)(i)-(iii).

203. The first contemporary land bank program was instituted in the City of St. Louis in 1971 pursuant to Missouri's Municipal Land Reutilization Law. MO. ANN. STAT. §§ 92.700-92.920 (West 1998). The St. Louis land bank is considered to be the first *contemporary* land bank in that its principal focus "was not as much a desire for long-term metropolitan planning through large-scale land assembly *as it was simply a response to a crisis in property tax delinquency and abandonment.*" Frank S. Alexander, *Land Bank Strategies for Renewing Urban Land*, 14-2 J. AFFORDABLE HOUSING & CMTY. DEV. L. 140, 146 (2005) (emphasis added) [hereinafter Alexander]. There are five major contemporary land bank programs located in Atlanta, Cleveland, St. Louis, Louisville and Genesee County, MI. *See* BROOKS ET AL., *supra* note 18, at 19.

private third parties in order to facilitate its redevelopment.[204] In this sense, land banks were originally intended to serve as a public measure for the amelioration of systemic failures in local property markets.

A. *The Purpose of a Land Bank*

Before addressing the specific considerations germane to an effective proposal for a Detroit Land Bank Authority it may be instructive to first conceptualize the fundamental characteristics of a hypothetical model land bank program in terms of its structure, operation and effect. Though a proper analysis of land bank programs is necessarily an empirically-grounded inquiry that must be grounded in the social particulars of the context in which the land bank is designed to operate, some heuristic value may be obtained by abstracting a general "concept" of a land bank. The instructional value of this concept is derived from the fact that it spells out certain essential features found in each land bank program to date, highlighting several of the salient legal aspects arising from the use of land banks and elucidating the way in which a land bank operates, as well as the purpose for its existence.

A land bank can be properly defined as a "single purpose entity" that possesses the tools necessary to reduce, if not eliminate, many of the obstacles to productive use of vacant property and, in fact, employs these tools to obviate such obstacles.[205] The key to adequately comprehending the structural and functional character of a land bank, or in other words, what a land bank is and what it does, is to ascertain *what it is meant to do* (i.e., its *purpose*). As alluded to before, land bank programs are implemented with the purpose of transforming vacant property within its jurisdictional reach, converting what is perceived to be a burden on community resources into a positive asset for the cultivation of community renewal.[206]

1. Policy Objectives

As an intrinsically policy-driven instrument a land bank is largely defined by reference to its underlying political objectives, which are correlated to the particular social and economic character of the community in which the land bank has been designed to operate. Given the considerable diversity in social conditions found in various locales and the varying malignancies inflicting local property market systems, the

204. Alexander, *supra* note 203, at 145.

205. *See* BROOKS ET AL., *supra* note 18, at 1.

206. KIRWAN INST. FOR THE STUDY OF RACE & ETHNICITY: THE OHIO STATE UNIV., POLICY MEMORANDUM: THE MULTIPLE BENEFITS OF LAND BANKING AND COMPREHENSIVE LAND BANK PLANNING FOR DETROIT 3 (2004) [hereinafter THE MULTIPLE BENEFITS OF LAND BANKING], *available at* http://kirwaninstitute.org/documents/Landbank%20Benefits%20Memo2.doc.

operational success of a land bank is dependent upon the precision and clarity with which its policy objectives have been articulated.[207] Furthermore, as a practical matter, the consideration of a land bank's desired operational character is framed by a principle of parsimony, which dictates that a land bank's functional structure should be carefully circumscribed by its policy objectives. The rationale for this principle is founded on a sensible appraisal of the limitations inhering in the resources at the land bank's disposal, coupled with the enormity of the task at hand.[208]

However the specific policy objectives are formulated, the fundamental approach assumed by planners for the five major current land banks may be conceptualized as falling along a continuum between two diametrically opposed models.[209] The first model postulates a land bank to be a relatively passive, fiscal device, whereas, the second model envisions it as a relatively active, strategic land use planning and redevelopment instrument.[210] The passive, fiscally-driven approach assumes that a land bank's primary purpose is to facilitate the procurement of tax revenue from dormant, tax-reverted properties and to provide an economic stimulus for commercial and residential revitalization, at the initiative of pertinent government planning agencies.[211] Under this approach, land bank administrators do not establish criteria by which they select what kind of property should be acquired and for what purpose it should be redeveloped.[212] Instead, the land bank serves a subordinate role to that of local government planners, neighborhood development groups and private redevelopment corporations and effectively functions as a tax-reverted and vacant property clearinghouse for these entities.[213] In contrast, the active,

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207. *See, e.g.*, FRANK S. ALEXANDER, LOCAL INITIATIVES SUPPORT CORP., LAND BANK AUTHORITIES: A GUIDE FOR THE CREATION AND OPERATION OF LOCAL LAND BANKS 29 (2005), [hereinafter ALEXANDER], *available at* http://www.lisc.org/content/publications/detail/793/ ("The success of a land bank depends upon the clarity of the specific goals it is created to achieve and the careful tailoring of policies and procedures to match those goals.").

208. *Id.* ("The greater the number of functions it [the land bank] is expected to perform . . . the greater the likelihood of failure.").

209. *See* BROOKS ET AL., *supra* note 18, at 19-20; *see also* THE MULTIPLE BENEFITS OF LAND BANKING, *supra* note 206, at 3.

210. BROOKS ET AL., *supra* note 18, at 19.

211. *Id.*

212. *Id.*

213. The Atlanta Land Bank Authority is a good example of a passive, fiscally-driven land bank program. The Atlanta LBA assists private developers in the construction of new housing developments in economically distressed neighborhoods by acquiring property that is amendable to redevelopment, but only after the developers have identified suitable properties and requested that it do so. Furthermore, after the developer has identified the relevant properties it is legally required to consult with the municipal planning staff and designated neighborhood development advocacy groups and obtain their final approval of all development plans. LARRY KEATING & DAVID SJOQUIST, *Bottom Fishing: Emergent*

planning-driven approach postulates that a land bank should be principally oriented towards strategically developing sustainable economic growth within a community that is in accord with the community's planning goals. Functioning in this capacity, the land bank independently articulates criteria for the selection of target properties, as well as guiding considerations for redevelopment of distressed properties pursuant to a community's self-perception of its developmental needs. In doing so, land bank administrators seek to cultivate interactive and facilitative relationships with governmental redevelopment agencies, private community development organizations and community advocates in order to engender a holistic approach to cooperative urban renewal.[214]

No matter what approach is taken, the formulation of these policy objectives ultimately results in the balancing of four normative ideals arising from the socioeconomic milieu within which a land bank operates. These ideals call upon a land bank to weigh the relative importance and urgency of eradicating the social and economic harms precipitated by vacant properties, eliminating legal and structural barriers in the local market to the efficient disposition of property, providing for the expedient conveyance of property so as to effectuate its rehabilitation and further economic redevelopment, and assembling vacant properties on a long term basis for strategic planning purposes.[215] Moreover, in negotiating the proper course to be followed in realizing these differing policy goals, a land bank, in order to be successful, must inevitably reconcile competing land use aspirations involving a multiplicity of perspectives on the propriety of urban redevelopment. Many of these policy conceptions implicate socially conscious, humanitarian considerations, such as providing affordable housing for low-income, urban residents, or aesthetic considerations, such as eliminating the deleterious appearance of urban blight.[216] Others are derived from environmental concerns for example, creating and preserving viable green space, and public safety objectives like enforcing housing and

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Policy Regarding Tax Delinquent Properties, 3 HOUSING FACTS & FINDINGS 1 (2001), *available at* http://www.fanniemaefoundation.org/programs/hff//pdf/v3il-fishing.shtml.

214. The Genesee County Land Bank Authority is illustrative of this kind of land bank in that it takes the most active role of all the major land bank programs in community planning decisions. In particular, the Authority establishes well defined standards for the acquisition and disposition of target properties, and assumes a long-term approach to converting tax-delinquent properties to economically productive, tax-generating properties. It does so by strategically bundling properties and foreclosing upon them en masse, demolishing condemned properties and working with local community development corporations to redevelop and maintain such properties. GENESEE COUNTY LAND BANK AUTH., PRIORITIES, POLICIES AND PROCEDURES, 1-2, *available at* http://www.thelandbank.org/policies.asp.

215. *See, e.g.*, HARVEY L. FLECHNER, LAND BANKING IN THE CONTROL OF URBAN DEVELOPMENT 10 (1974) (identifying twelve distinct principal functions of land bank programs).

216. *See* THE MULTIPLE BENEFITS OF LAND BANKING, *supra* note 206, at 6.

building codes or deterring crime.[217] Still others reflect predominantly economic considerations, such as producing and promoting homeownership, and fiscal considerations predicated on the maximization of tax revenues in connection to tax-delinquent properties.[218]

B. The Architecture of a Land Bank

As a policy instrument instituted in a way that is reflective of the particularized exigencies of a defined community, a number of factors inform a land bank's operational structure. Such factors include: the nature of the tax foreclosure system within which the land bank operates; the types of vacant properties found in the community it services; the specific legal and structural barriers it is meant to obviate; the institutional character of the governmental entities with which it interacts; the presence and nature of the private, developmental entities that have been established to serve similar ends and with which it commonly interacts; the tenor of community planning goals which it is oriented towards effectuating; and the political aspirations of its architects and administrators.[219] In order to actualize the specific policy objectives for which they are instituted, land banks are endowed with a collection of legal powers. By definition, land banks possess three essential powers: (1) the power to *acquire* property, (2) the power to *hold and manage* property and (3) the power *to dispose of or transfer* property.[220] In addition, they typically possess an assortment of ancillary powers meant to effectuate the exercise of their essential powers. However, the exercise of these significant powers is attended by the duty to exercise it responsibly. As such, the powers enjoyed by a land bank are frequently coupled with certain administrative standards that circumscribe the permissible scope of land use planning and property disposition.[221]

1. Property Acquisition

Land banks utilize various strategies to acquire distressed properties. As a practical matter, the choice of which strategy or combination of strategies to use as the principal vehicle of property acquisition, inevitably has a profound impact on the functional character and the extent of the acquisition operations performed by a land bank program. Traditionally, land banks have employed four methods of property acquisition.[222] The predominant method involves acquiring properties via the tax foreclosure process. In the majority of land bank programs, tax-reverted properties that

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217. *Id.*

218. *Id.*

219. *Id.*

220. ALEXANDER, *supra* note 207, at 22-25.

221. These standards are generally either specified by statute or in the land bank's enabling documents, and are discussed in greater detail in the following sections.

222. *See* Alexander, *supra* note 203, at 151-52.

have been foreclosed upon and have not been subsequently redeemed are automatically forfeited to the land bank, which is obligated to tender the minimum bid for these properties at the tax sale auction.[223] The lesser three means of property acquisition consist of intergovernmental transfers of publicly-owned properties from local governments to the land bank,[224] voluntary donative transfers from private owners to the land bank,[225] and contractual purchases or leases of distressed properties by the land bank on the open market.[226] Though not the principal focus of a land bank's acquisition strategy, these methods imbue its acquisition power with a great degree of flexibility, and, thus, in many cases may be integral to the land bank's successful operation.

In conjunction with these acquisition powers, specific criteria for the selection of property to be acquired have been promulgated, either by statute or within the land bank's enabling documents. These criteria may be either obligatory in nature and amount to legal directives,[227] or be merely advisory, constituting legislative suggestions.[228] Furthermore, the criteria typically delineate the types of property that should or must be acquired, for what purpose they are to be acquired and for whom they should be acquired. For example, under the LBFTA, Michigan land banks are given a broad, discretionary power to acquire title to any type of property—irrespective of whether it is currently vacant or occupied, or whether it is zoned for residential or commercial use.[229]

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223. The Genesee Land Bank Authority, however, does not *automatically* receive tax-reverted properties. Under the LBFTA, land bank programs are authorized to receive such properties, but do not automatically do so. MICH. COMP. LAWS ANN. § 124.755(3)(b) (West 2006). This is due to the fact that Public Act 123 mandates that at the end of tax foreclosure proceedings the foreclosing governmental unit that initiated the proceedings receives the unredeemed property. MICH. COMP. LAWS ANN. § 211.78g(1) (West 2005). Additionally, Michigan law provides both the state and local governments with a *right of first refusal* on tax-forfeited properties. MICH. COMP. LAWS ANN. § 124.755(6) (West 2006); *cf.* MICH. COMP. LAWS ANN. § 211.78m(1) (West 2005). Consequently, the foreclosing governmental unit may only transfer the property to the land bank if, and only if, the state or local governments decide not to acquire the property for their own purposes.

224. Alexander, *supra* note 203, at 151. Oftentimes, this method relates both to properties that were acquired, before the creation of the land bank by virtue of tax foreclosure, and those properties that constitute surplus holdings in the municipal property inventory.

225. *Id.* The majority of property donations to land banks are comprised of tax-delinquent properties that are subject to foreclosure, and, thus, are made in lieu of foreclosure proceedings. *Id.*

226. *Id.* at 152.

227. *See, e.g.*, GENESEE COUNTY LAND BANK AUTH., *supra* note 214, at 1 (enumerating a set of factors that land bank administrators are *required* to consider in determining what properties to acquire).

228. *See, e.g.*, MICH. COMP. LAWS ANN. § 124.755(2) (West 2006) ("[t]he authority may acquire real property or rights or interests in real property for any purpose the authority considers necessary to carry out the purposes of this act . . . .").

229. *Id.* § 124.755(1).

a. Property Holding and Management

"Each of the five major land banks is required by law to maintain an inventory of their property holdings and classify them according to their potential uses."[230] Moreover, the land banks become legally responsible for all relevant aspects of the management and maintenance of their inventory properties, once acquired. Unfortunately, this often imposes a considerable burden on the land banks' resources due to the significant volume of inventory properties, coupled with the fact that they are vacant and require regular monitoring. In addition, many of the holdings are decaying properties that contain dilapidated structures, environmental contamination and a plethora of other safety hazards. Accordingly, each of the five major land bank programs have been given powers relating to the holding and management of properties after they have been acquired.[231]

By and large, these powers are tailored to the endemic difficulties arising from the holding and management of the vacant, tax-reverted properties acquired by land banks. In order to better shoulder the burdens associated with these difficulties, land bank administrators should and often are expressly authorized to contract with private third parties to provide for the management and operation of inventory properties.[232] Outsourcing management functions to the private sector is often desirable, if not necessary, given the sheer number of acquired properties and the wide range in types of such properties. Moreover, private companies specializing in the management and maintenance of real estate holdings commonly possess advantages in terms of managerial expertise and resources not enjoyed by land bank administrators.

One of the more salient difficulties that occurs in the holding and management of vacant, tax-reverted properties stems from the frequent environmental degradation of these properties. The very real fear of

230. ALEXANDER, *supra* note 207, at 24.

231. For instance, the Atlanta Land Bank is authorized *inter alia* to "manage, maintain, protect, rent, lease, repair, insure, [and] alter . . . any property." INTERLOCAL COOPERATION AGREEMENT ESTABLISHING THE FULTON COUNTY/CITY OF ATLANTA LAND BANK AUTHORITY, INC., VI.C.4. *reprinted in* ALEXANDER, *supra* note 207, app. C-1, at 85 [hereinafter ATLANTA LAND BANK INTERLOCAL AGREEMENT]. Conversely, the St. Louis Land Bank is provided with all powers "*necessary and incidental* to the effective management . . . of real estate." MO. ANN. STAT. § 92.875(1) (West 1998) (emphasis added).

232. The LBFTA enumerates the most extensive set of statutory management powers to date. In particular, the statute commands that such powers must be liberally construed so as to provide Michigan land banks with total managerial control over such properties, "as if it represented a private property owner." MICH. COMP. LAWS ANN. §124.764(1) (West 2006). The Michigan statute also explicitly confers the authority to land banks to enter into management contracts and professional service agreements with third parties when the land bank deems it necessary to do so. *Id.* §124.754(1)(d), (k). Additionally, land bank authorities are provided with the ability to set fees and collect rents for occupied properties that have been acquired, or for vacant properties that are subsequently rehabilitated and leased to third parties. *Id.* §124.756(1)(b).

potential liability for the accrual of remediation costs under federal[233] and state.[234] law militates against the unequivocal acceptance of all available tax-reverted properties by land bank authorities. However, land banks' liability exposure may be reduced and the concomitant disincentive to acquire, hold and manage potentially contaminated properties may be allayed under certain circumstances. Under both federal and state law, a safe harbor provision exists that grants governmental entities a qualified immunity from cleanup costs when ownership of the property in question is considered to be the product of an involuntary acquisition.[235] Thus, in fashioning the statutory architecture of a land bank, the state legislature may, if it so chooses, exempt land bank authorities from *state* environmental liability, by expressly defining their methods of acquisition as "involuntary."[236]

b. Property Disposition

The power to sell or otherwise transfer acquired property is the final "essential" power possessed by all five major land banks, and may legitimately be perceived as the capstone of a land bank's developmental strategy. This power generally includes, *inter alia*, the capacity to sell, lease, transfer, alienate, convey, donate and assign inventory properties.[237] The way in which land bank planners choose to structure a land bank's dispositional power is particularly important, because the vast majority of properties it acquires are, at least initially, relatively unmarketable and therefore lack sufficient market demand to enable the land banks to transfer them at market price and on favorable terms. Consequently, as one commentator has noted, "[o]ne important function of a land bank is to recognize the special nature of these properties and create a far greater degree of flexibility in the terms and conditions under which the properties can be conveyed to third parties."[238]

2. Disposition Priority Guidelines (Transfer Preference Hierarchies)

Land bank planners will often incorporate their policy objectives into a land bank's power to transfer property in the form of disposition priority

233. 42 U.S.C. § 9607 (2002).

234. MICH. COMP. LAWS ANN. § 324.20126 (West 1999 & Supp. 2006).

235. ALEXANDER, *supra* note 207, at 25.

236. Though not adopting this approach, the LBFTA nonetheless grants an exemption from environmental liability for property acquired by the Michigan land banks under the Act. MICH. COMP. LAWS ANN. §124.760(3) (West 2006). Specifically, the statute provides that the land bank will be immune from environmental liability in relation to the property it acquires, "unless [it] is responsible for an activity causing a release on the property or other activity giving rise to liability under the natural resources and environmental protection act." *Id.*

237. *See* ALEXANDER, *supra* note 207, at 24.

238. *Id.* at 25.

guidelines. Essentially, these are administrative standards that establish a hierarchical structure of transfer preferences, which are predicated on two general categories.[239] The first set of guidelines involves the *status of the transferee* and directs the land bank to favor certain kinds of prospective transferees over others in deciding how to convey properties.[240] Generally speaking, primacy is given to community development corporations ("CDCs") and related nonprofit organizations on the belief that such entities have a greater interest in the long-term, sustainable revitalization of a particular community or neighborhood.[241] Each of the five major land banks also require prospective buyers to submit a written development proposal that satisfies certain baseline redevelopment standards,[242] and mandates that the purchasers achieve these developmental goals within a certain time frame.[243] Furthermore, most land banks will not transfer property to individuals or entities that are currently delinquent in the payment of taxes on their own property.[244] Additionally, with respect to single family, owner-occupant properties, most land banks will require the

239. *Id.* at 44. The Genesee Land Bank has adopted an additional set of guidelines in evaluating proposed property transfers, which reflect considerations of the character of a particular neighborhood and community, along with proper developmental goals. *See generally* GENESEE COUNTY LAND BANK AUTH., *supra* note 214.

240. For example, the Genesee Land Bank prioritizes prospective transferees in the following order:

> 1. Qualified nonprofits [sic] corporations that will hold title to the property on a long-term basis . . . or hold title to the property for purposes of subsequent reconveyance to private third parties for homeownership.
>
> 2. Governmental entities.
>
> 3. Nonprofit institutions such as academic institutions and religious institutions.
>
> 4. Entities that are a partnership, limited liability corporation, or joint venture comprised of a private nonprofit corporations [sic] and a private for-profit entity.
>
> 5. Individuals who own and occupy residential property for purpose of the Side Lot Disposition Program.

GENESEE COUNTY LAND BANK AUTH., *supra* note 214, at 2. Furthermore, "Individuals and entities that were the prior owners of property at the time of the tax foreclosure . . . [are] ineligible to be the transferee of such property from the Treasurer." *Id.*

241. *See, e.g.*, ALEXANDER, *supra* note 207, at 45 ("The rationales for this preference are that the efforts of a public entity such as a land bank should not be used to subsidize private developers if nonprofit developers can fulfill the purpose, and to encourage joint ventures between community development corporations and for-profit real estate developments.").

242. *See, e.g.*, GENESEE COUNTY LAND BANK AUTH., *supra* note 214, at 12. (requiring a detailed purchase application for commercial land transfers asking for information similar to that which would be required in an application for development financing). Other land bank programs have specifically defined time limit requirements. *See, e.g.*, ATLANTA LAND BANK INTERLOCAL AGREEMENT, *supra* note 231, at 88 (establishing a three-year time limit for the commencement of "construction or rehabilitation" of acquired property).

243. *See, e.g., id.* at 8 (providing for a flexible scheme for the establishment of developmental time frames, leaving the specifics of this requirement to be negotiated by the Land Bank and the transferee).

244. *See, e.g., id.* at 6.

buyer to reside on the property for a minimum of five years following the sale.[245] Taken *in toto*, this first category of priorities and restrictions evidences the planners' interests in deterring rampant land speculation and promoting the revitalization of blighted properties.

The second set of administrative priority guidelines relate to the *future intended use* and generally favor uses that are ordered towards "community improvement or other public purposes."[246] The predominant public purpose that land bank dispositional strategies have attempted to attain is the development of affordable housing and the active promotion of higher levels of homeownership.[247] However, other public uses have included "community gardens, playgrounds, and parking for schools and cultural centers[,]"[248] or even the precipitation of commercial and retail redevelopment.[249] Other land bank programs prioritize the acquisition of smaller properties, which once contained single-family residences that have since been destroyed, and target such properties for so-called "side-lot programs."[250]

3. Pricing Policies

An essential ingredient in every land bank's dispositional methodology is the price structure of its property transfers, and it is precisely in this area that various land banks differ the most.[251] In general, land banks tend to convey property for either nominal consideration or for an approximation of fair market value; though at times, there is a certain amount of discretionary flexibility included in their pricing mechanisms. In many ways, the divergent approaches to the pricing of land bank properties highlights a tension in underlying principles. A classical tenet of state and local governmental law holds that public properties should be sold

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245. *See, e.g. id.* at 9. The buyer's breach of this residency requirement gives rise to a cause of action against the buyer for the full value of the price subsidy provided by the land bank. *Id.*

246. ATLANTA LAND BANK INTERLOCAL AGREEMENT, *supra* note 231, at 87.

247. *See, e.g., id.* (setting forth certain policy considerations, which the land bank authority must take into account when entertaining requests for the conveyance of properties, including that of "production or rehabilitation" for persons of low or moderate income).

248. ALEXANDER, *supra* note 207, at 44.

249. *Id.* at App. D-3, at 113.

250. "Side lot" programs have been instituted in a number of jurisdictions in order to deal with vacant and unimproved lots of real estate that share a contiguous border with owner-occupied properties and which are generally too small to merit fruitful redevelopment. The majority of land bank programs are authorized to convey such lots to adjacent property owners for nominal consideration. *See, e.g.*, GENESEE COUNTY LAND BANK AUTH., *supra* note 214, at 6-7; *see also* City of Cleveland, Ohio Land Bank Program, http://www.city.cleveland.oh.us/government/departments/commdev/cdneigdev/cdndlandbank.html; *see also* ST. LOUIS LAND BANK POLICIES, *reprinted in* ALEXANDER, *supra* note 207, app. D-5, at 115 (2005) [hereinafter ST. LOUIS LAND BANK POLICIES].

251. ALEXANDER, *supra* note 207, at 46.

at fair market value to preclude both corruptive practices and the appearance of favoritism,[252] whereas the position many urban development advocates posit is that land bank properties should be sold for little or no monetary consideration in order to subsidize the land bank's long-term, strategic developmental objectives.[253] Though the "market value" approach is not without its justifications, the "nominal price" position is ultimately supported by more cogent reasoning. Requiring land banks to sell or lease properties at their putative fair market value is often premised on a fundamental misunderstanding of the nature of a land bank's property holdings in that "many properties end up in the land bank precisely because there is no clear private market for their sale, or no clear market value."[254] The "market value" approach is often also counterproductive in that it increases the transaction costs of a sale, because a reasonably accurate assessment of the market value usually requires a professional appraisal.[255] Most importantly, a fair market value requirement substantially undermines the land bank's capability to achieve its primary fiscal objective—converting fallow, tax-delinquent properties into productive, tax-producing properties—by depriving it of price subsidization, its primary economic tool to realize this purpose. Many of the financing concerns raised by proponents of the "market value" approach fail to appreciate that in proffering price subsidies a land bank will arguably return more properties to the tax rolls than if it is limited to transferring properties at market price. If the land bank program is provided a share of these revenues it should be able to fund its operations at little additional public cost.

4. Enforcing the Transferee's Contractual Commitments

As previously noted, before transferring properties, land bank authorities generally require prospective transferees to submit extensively detailed development plans and often establish a definitive time table in which these plans must be completed.[256] These developmental obligations are contractually imposed upon transferees in an attempt to ensure that land bank properties are not acquired for the mere purpose of engaging in land speculation, but are instead effectively redeveloped and put to economically constructive use. How land bank authorities go about ensuring that transferees adhere to these developmental obligations is

252. This legal impediment to land disposition is discussed, *supra* Part II.A.4. With this mind, it is apparent that a seminal threshold issue in determining how a land bank should price its properties involves ascertaining whether the land bank should be subject to extant state and/or local laws prohibiting the disposition of public assets at prices below fair market value, or whether it should be exempted from such restrictions.

253. ALEXANDER, *supra* note 207, at 46. The justifications for this approach, in the land bank context, are principally fourfold. *Id.*

254. *Id.* at 47.

255. *Id.*

256. *See supra* Part III.B.2.

therefore a prominent concern for land bank planners. With this in mind, the existence of adequate enforcement procedures can be said to constitute the lynchpin of the dispositional methodologies adopted by every major land bank program to date.

One way in which land bank planners endeavor to establish an efficacious contractual enforcement mechanism is by retaining a reversionary interest, either in the form of a *right of re-entry*[257] or a *possibility of reverter*,[258] in the property which they convey. Under these arrangements, the land bank creates defeasible estates by incorporating into the deed or other instrument of conveyance, conditions which, if breached, will either automatically terminate the transferee's ownership interest in the property,[259] or which will provide the land bank authority with the discretionary power to oust the transferee from the property and regain possession of it.[260] Several contemporary land banks employ one of these strategies in order to compel contractual performance on the part of transferees.[261]

In recent years, the use of defeasible estates as an enforcement device has fallen into disfavor due to the intransigence of the remedies which they provide. The use of a fee simple determinable transfer can be principally criticized for the inflexibility of its "all-or-nothing" approach and the severity of its remedies.[262] Breaches of the conditions attached to fee simple determinable estates occasion automatic reversions of the proprietary interest in the property to the land bank, irrespective of any compelling reasons for the breach.[263] Furthermore, it often unjustly penalizes transferees for being only slightly behind schedule and deprives them of the value of substantial investments they have made in the

257. A right of re-entry is "a provision in a deed by which the grantor or the grantor's heirs may, upon breach by the grantee of the condition annexed to the fee, reenter and thereby reclaim possession." 16 MICH. CIV. JUR. *Life Estates, Remainders, and Reversions* § 16 (1999). Under Michigan law, a right of re-entry is *unenforceable* if the condition is not breached within thirty years of creation of the reentry interest. MICH. COMP. LAWS ANN. § 554.62 (West 2005). However, Michigan land banks, as agencies of the state government, are not subject to this statutory restriction. *Id.* § 554.64(d).

258. A possibility of reverter is "a right which the grantor or his or her heirs have under a provision in a deed by which the property reverts automatically to the grantor or the grantor's heirs upon the breach by the grantee of the condition annexed to the fee." 16 MICH. CIV. JUR. *Life Estates, Remainders, and Reversions* § 15 (1999).

259. An estate of this type is known as a fee simple determinable with possibility of reverter. 28 AM. JUR. 2D *Estates* § 207 (2000).

260. An estate of this type is known as a fee simple subject to condition subsequent. *Id.*

261. *See, e.g.*, ST. LOUIS LAND BANK POLICIES, *supra* note 250, at 117 (retaining *right of re-entry* in the land bank for an eighteen-month period following closing); *see also* ATLANTA LAND BANK INTERLOCAL AGREEMENT, *supra* note 231, at 88 (providing the land bank with a *possibility of reverter*, specifying that title will revert to the land bank if "construction or rehabilitation" is not initiated within three years of conveyance).

262. ALEXANDER, *supra* note 207, at 48.

263. *Id.*

property. In addition, use of both types of defeasible estates can be criticized on the basis of prudential financing considerations. Lending institutions are understandably wary of providing construction financing for redevelopment projects in cases where the transferee's interest in the property is subject to stringent forfeiture provisions.[264] Given these concerns, many officials who have recently contemplated the creation of a land bank have sought to design more flexible means for the enforcement of the contractual commitments of transferees. With increasing frequency, land bank planners have utilized at least one of three alternative strategies in connection with or in lieu of the establishment of defeasible estates as an instrument of contractual control.[265]

The first of these modern strategies involves the use of *development agreements* in conjunction with and subsidiary to the contract for conveyance.[266] Agreements of this kind enjoy an advantage over defeasible estates in terms of the relative malleability of their substantive terms and remedial provisions. In development agreements with transferees and land bank administrators, the precise contours of the transferees' contractual commitments may be negotiated and demarcated, including *inter alia*, the nature of the proposed development or expected investment, the initial project schedule, the scope of permissible future uses for the property, and any relevant restrictions on the subsequent transfer of the property.[267] The advantages in the use of development agreements stemming from their purely contractual nature also pose several inherent limitations on their enforceability. As a practical matter, their efficacy as an enforcement tool is largely predicated upon the solvency of the transferee. Though, a transferee can be rendered civilly liable for monetary damages upon breach of its obligations under a development agreement, those transferees that are mere holding companies or who subsequently file for bankruptcy will likely be judgment proof.[268] Additionally, the obligations imposed upon transferees under the original development agreement will most likely not be legally binding on subsequent transferees, given that these individuals or entities are not parties to the development agreement itself and, thus, are not in strict privity of contract with the land bank authority.

A second complementary approach to the enforcement issue may be utilized to address the deficiencies in the enforceability of development agreements. This approach entails incorporating *restrictive real covenants* into the deeds of conveyance.[269] When it comes to enforceability, these covenants are more advantageous than development agreements in that the

264. *Id.*
265. *Id.*
266. *Id.* at 48-49.
267. *Id.* at 48.
268. *See id.* at 48-49.
269. *Id.* at 49.

covenants are binding on both the initial and subsequent transferees.[270] However, their usefulness is significantly limited because they embody *negative* restrictions, or prohibitions, on specific future uses of a given property and, as such, are not useful for enforcing *affirmative* contractual obligations assumed by transferees.[271]

The third and final contemporary method for enforcing the contractual commitments of transferees is perhaps the most effective enforcement device. This method involves the creation of a *secured financing transaction*, whereby the land bank uses a mortgage to secure a promissory note for the amount of the debt owed by the transferee.[272] Utilizing a mortgage to secure the debt provides the land bank with the power to foreclose upon the transferred property in the event of a default by the transferee caused by either paying down the debt or violating the ancillary contractual commitments pertaining to the property's redevelopment. The growing popularity of this approach is in large part attributable to its efficiency in preserving the public's investment in the land bank in the event of nonperforming transferees by giving the land bank discretion to reacquire unproductive property and to re-convey such property.

IV. A PROPOSAL FOR A DETROIT LAND BANK AUTHORITY: SIXTEEN FOUNDATIONAL NORMATIVE CONSIDERATIONS

A successful land bank is a land use device carefully tailored to the specific exigencies of the sociocultural context in which it operates and is designed to be highly interactive with local business interests, community development groups and the like. Therefore, any truly successful proposal for a Detroit Land Bank Authority must attend to and reflect the shared developmental vision of Detroit residents. Thus far, there have been varying levels of advocacy for a Detroit land bank program from both within and outside the community.[273] In the recent past, an influential local

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270. *Id.* This is the case because even though subsequent transferees are not in *privity of contract* with the original transferor (land bank), they remain in *privity of estate* with the grantor. 34 AM. JUR. PROOF OF FACTS 3D *Restrictive Covenant* § 2 (1995). Under this doctrine, negative conditions set forth in an instrument of conveyance are said to "run with the land," meaning that they legally burden transferees subsequent to the original transferee, and are enforceable by the original transferor against the subsequent transferee. *Id.*

271. *Id.*

272. *See* ALEXANDER, *supra* note 207, at 49.

273. *See, e.g.*, Ann Mullen, *Land bank statement: Detroiters see legislation as vital tool to redevelop vacant properties,* METRO TIMES, Feb. 4, 2004, *available at* http://www.metrotimes.com/editorial/story.asp?id=5906 ("noting that the 2004 land bank legislation enjoyed widespread grassroots support, but also chronicling the abortive attempt by state legislators to pass land banking legislation in 2002".). The failed legislative effort in 2002 was defeated, in large part, because of certain provisions contained in the legislation that enabled the City of Detroit's mayoral office to appoint the proposed Detroit land bank's governing board and which bequeathed virtually unfettered control over the disposition of city-owned properties to the mayor. *Id.* A number of groups have enthusiastically

organization known as Metropolitan Organizing Strategy Enabling Strength ("MOSES"), a self-described "congregation-centered, faith-based community organization reflecting the religious, racial, and ethnic diversity of Detroit[,]"[274] has promulgated a set of draft principles/priorities for a Detroit land bank.[275] A cursory examination of these draft principles is particularly instructive in that they are the product of an inter-congregational deliberative process emblematic of the developmental aspirations of the ordinary Detroiter. Consequently, I have chosen to articulate a series of foundational normative considerations, which are in part modeled upon the MOSES draft principles/priorities (though clarifying, qualifying and expanding upon them in certain respects). It is my hope that a careful consideration of these ideas may yield the intellectual framework within which a Detroit land bank proposal can be properly contextualized.

The sixteen foundational normative principles are as follows:

(1) Streamlining land sales transactions.

(The idea being that a land bank program can be created which capitalizes on the 1999 tax foreclosure reform in order to provide an approximate equivalence between the length of time necessary for the sale of city-owned properties with that of private land sale transactions).

(2) Provision of clear title.

(A Detroit land bank should attempt to ameliorate the uncertainty shrouding title to tax-reverted and vacant properties by means of more intensive title searches and notice procedures, coupled with proactive initiation of quiet title actions).

(3) Nominal pricing schema.

(City-owned land should be sold for nominal prices so as to enhance the marketability of distressed properties, which are often worth much less than fair market value given that they are encumbered with exorbitantly valued tax liens).

(4) Intergovernmental development coordination.

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supported the idea of a Detroit land bank authority. Several have published policy papers or reports on the subject, including: University of Michigan -Taubman College of Architecture and Urban Planning, The Ohio State University - Kirwan Institute for the Study of Race and Ethnicity, Community Development Advocates of Detroit and Local Initiatives Support Corporation.

274. MOSES, About Us, http://www.mosesmi.org/index_files/Page899.htm (last visited Oct. 29, 2007).

275. MOSES, Land Bank Committee, Principles/Priorities for Detroit Land Bank (July 2004), http://www.mosesmi.org/pages/landbank.shtml.

(A Detroit land bank program should seek to coordinate the communicative and developmental efforts of local government entities with respect to land sales in order to engender a more efficient land disposition system).

(5) Community-centered developmental strategies.

(Development proposals tendered to the land bank should be required to be in line with neighborhood redevelopment plans and any municipal developmental criteria adopted by the City of Detroit).

(6) Prevention of land speculation.

(A Detroit land bank program should adopt a corpus of focused dispositional criteria that requires prospective purchasers/lessees to specify their intended future use of property and to set forth a development proposal, the approval of which is subject to some form of community oversight).

(7) Channeling tax-reverted city surplus property into land bank property inventory.

(A land bank authority should actively attempt to incorporate current Detroit surplus property into the new land bank program, thereby, facilitating the conversion of blighted, tax-dormant property held for long periods of time by the City into productive, useful, tax-generative property).

(8) Planning-driven land bank program.

(A planning-driven program should be established, which embraces long-term, community development goals in order to spark economic revitalization and enhance the quality of life in Detroit).

(9) Shared governance.

(Land bank planners should institute a shared governance structure that confers decision-making authority to a diverse body of stakeholders, and the capacity to appoint this body should be allocated to both the Mayor and City Council on a coequal basis).

(10) Adequate local representation.

(A Detroit land bank proposal should ensure adequate local representation in the land bank (thus possibly appeasing Home Rule) by mandating that two-thirds of the land bank's executive leadership be comprised of Detroit residents, while retaining the option to enlist external planning expertise if needed).

(11) Public safety integration.

(Detroit land bank administrators should consciously and coherently tie the program's operative capacities to public safety issues and initiatives and should seek to creatively implement public safety measures in connection with their acquisitive and dispositional strategies).

(12) Promotion of environmental responsibility.

(A Detroit land bank should proactively target blighted properties and effectively rehabilitate them, thereby halting further environmental degradation and presumably precipitating remediation efforts).

(13) Enhancement of quality of life and the urban aesthetic.

(This objective can be achieved by identifying vacant parcels that are unsuitable for either commercial or residential redevelopment and converting them into beautified public open spaces, small pocket parks or community gardens).

(14) Regional integration.

(Land bank planners should integrate the program's policy objectives with regional planning initiatives in Southeast Michigan and should look to augment the redevelopment opportunities for Detroit residents by linking them to region-wide economic opportunities).

(15) Land disposition prioritization.

(The land bank program should establish a dispositional preference favoring church congregations, community groups and community development corporations in regard to the acquisition of small, neighboring or adjoining parcels of land bank property, at least so long as these entities adhere to community development plans).

(16) Public accountability.

(The land bank's operational processes should be conducted at maximum efficiency, while retaining transparency and providing ample access for public input with respect to the programs' acquisitive and dispositional decisions).

On the basis of these normative principles, it is apparent that Detroit's resident-activists believe that an optimally effective Detroit land bank program should be built around a proactive developmental strategy (in way that is roughly analogous to that of the Genesee Land Bank), and should possess a broad range of powers pertaining to the acquisition, holding/management and disposition of property in order to effectuate its proactive, long-term strategic approach. These policy objectives may

involve furthering non-economic interests (in addition to economic ones), including those implicating public safety, environmental concerns and miscellaneous aesthetic values. In formulating its developmental strategies and conducting its acquisitive and dispositional operations, a Detroit land bank should be required to solicit a sufficient quantum of public opinion to ensure that the land bank follows strategies that are in accord with the public interest. Moreover, its policies and operations should be subjected to a sufficient level of public oversight to safeguard against gross administrative inefficiencies, incongruence with public opinion and corruptive practices. In other words, a Detroit land bank should, in the first instance, be administered in a fundamentally democratic manner and should be ordered towards developmental goals manifesting a pluralistic consensus. On a final note, Detroit's resident-activists have made it abundantly clear that a land bank program should be constituted in a manner that provides adequate representation in its governance structure to local residents. Further, it should seek to foster a coordinated intergovernmental dialectic between the City and both Wayne County and the state.

CONCLUSION

The fundamental issue at play in Detroit's contemporary land use crisis is how to recapture the inchoate economic value inhering in vacant, tax-reverted properties, thereby converting what was once negatively perceived as community *liabilities* into community *assets*. In large measure, the key to answering this dilemma may be found in the adoption of a Detroit Land Bank Authority, pursuant to the Michigan LBFTA, which is provided with the requisite powers necessary to eliminate the variable legal and structural impediments to property disposition with which it is faced. In exercising these powers, a Detroit land bank should be given a fair degree of latitude in selecting what types of properties to acquire and in determining to whom it should convey acquired property and for what purpose the property should be used. However, this discretionary flexibility should also be subordinated to the overarching developmental goals and interests of Detroit residents. If this approach is embraced, a Detroit land bank should be able to successfully precipitate a socially interactive land use process that sparks revitalization in severely blighted communities in Detroit. Though, a properly conceived land bank program admittedly would not be a panacea for Detroit's socioeconomic woes, it would represent a substantial step in the right direction towards expunging the specter of urban malaise.*

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* Author Note: On November 30, 2006, the Wayne County Board of Commissioners voted 8-6 to approve the establishment of a Wayne County Land Bank pursuant to a proposal authored by Wayne County Treasurer, Raymond J. Wojtowicz and Wayne County Executive, Robert A. Ficano. *See, e.g.*, News --- Land Bank Clears Commission Ready to Begin Neighborhood Revitalization,

http://www.waynecounty.com/news/2006/landbank.htm (last visited Oct. 17, 2007). The new land bank authority is governed by an intergovernmental agreement between the county and the State Land Bank Fast Track Authority and is administered by a five-member board of directors under this agreement (further information regarding the Wayne County Land Bank is available at http://www.waynecounty.com/landbank/about.asp.). Unfortunately, it is still too early for a thoroughgoing and systematic analysis of the land bank's operational data.