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## Market-Anticipatory Approaches to Rural Property Vacancy

Ann M. Eisenberg

*University of South Carolina School of Law*, [ameisenberg@mail.wvu.edu](mailto:ameisenberg@mail.wvu.edu)

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# Market-Anticipatory Approaches to Rural Property Vacancy

*Ann M. Eisenberg\**

If you rehab it, they will come . . . right? That is, if a local government ends up at the step of last resort with a vacant, dilapidated property—having been unable to find the owner, for instance, or spur a known owner to action—and takes on the burden of acquiring and either demolishing or rehabilitating the problem property, a new buyer will want to purchase the nice, new version of the property afterwards, helping offset the costs the local government incurred—right?<sup>1</sup> Maybe—but maybe not. Maybe no new consumer is waiting at the other end of the process, and the property will continue to sit, unused, with the local government having spent funds that it could not necessarily afford, unable to recoup a much-needed return on its investment.

The calculation of whether and how to acquire and either demolish or rehabilitate a dilapidated property is probably a gamble for any local government, especially those in communities with high rates of property vacancy and dilapidation.<sup>2</sup> Except in localities experiencing consistent growth or the mixed bag of gentrification, it is not necessarily clear that a new user will emerge at the end of a rehabilitation process in order to put a once-derelict property back into productive use and provide a local government with a return on its investment.<sup>3</sup>

For rural local governments in particular—and for the more than one third of rural local governments that are experiencing regional population loss and related socioeconomic decline and distress—this gamble is quite

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\*Associate Professor of Law, University of South Carolina School of Law. My thanks to Jared Nicholson for thoughtful peer review.

1. Cf. Ann M. Eisenberg, *Addressing Rural Blight: Lessons from West Virginia and WV LEAP*, 24 J. AFFORDABLE HOUS. & CMTY. DEV. L. 513, 534 (2016) (describing concern among local government officials that, even when they had the resources to acquire neglected properties, a municipality “could spend tens of thousands of dollars on the process and end up burdened with an empty lot of minimal value”).

2. Although the prevalence of vacant and dilapidated properties in rural communities remains under-studied and poorly documented, small towns and remote regions across the country face associated challenges. See Kim Skobba, Adenola Osinubi & Karen L. Tinsley, *What About Rural Blight? Housing and Neighborhood Conditions in Southeastern Small Towns*, 85 RURAL SOC. 85, 85–86 (2019).

3. See Mairead J. Fitzgerald-Mumford, *Shells of the Stores They Once Were: Returning Vacant Retail Property to Productive Use in the Midst of the “Retail Apocalypse,”* 94 NOTRE DAME L. REV. 1797, 1801–02 (2019).

uncertain.<sup>4</sup> Rural markets for housing, commerce, and other industries are more limited due to greater population scarcity and distance.<sup>5</sup> It is far from guaranteed that a market of consumers will be interested in acquiring any particular rehabilitated property, whether it is a post-demolition vacant lot or a parcel suitable for housing, retail, or industrial uses.

In addition to being uncertain, the gamble for a would-be local government rehabilitator can also be high stakes. Many rural local governments today are experiencing acute fiscal distress as regional tax bases shrink.<sup>6</sup> Local officials are faced with difficult choices as to which services can still be provided in order to match shrunken budgets.<sup>7</sup> Should the police force, schools, or the library be reduced one or two days a week to save money? Or can money be saved by forgoing functions that seem less urgent, like building code enforcement and trying to figure out how to deal with the old, empty theater building crumbling at the end of Main Street?

As an example, Michelle Wilde Anderson notes that distressed Northwestern timber communities have encountered “striking questions about how deep they are willing to cut back the public sector: Must there be police and ambulances available for emergency dispatch at night and on weekends? Do we need a safety net related to mental health disorders, poverty in old age, and drug addiction?”<sup>8</sup> She provides a harrowing account of a rural Oregon woman who called 911 in 2012 “to report a violent ex-boyfriend trying to break into her home, [but] [b]udget cuts meant that the local sheriff’s department did not have anyone on duty on weekends,” and the dispatcher had no one available to send.<sup>9</sup> The woman was raped and murdered, and the county sheriff issued a statement recommending that victims of domestic violence “consider relocating to an area with adequate law enforcement services.”<sup>10</sup>

The choices among some services may seem obvious: keep school open and the police working on weekends, hold off on building code enforcement. But the obviousness of this choice means that “[s]ervices unrelated to public safety and taxes—such as regular park maintenance, summer youth programs, child welfare services, facilities to house the indigent elderly, land use planning, and proactive code enforcement [become] a

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4. *Id.*; Kenneth Johnson & Daniel Lichter, *Rural Depopulation in a Rapidly Urbanizing America*, CARSEY SCH. PUB. POL’Y SCHOLARS’ REPOSITORY 358 (2019), <https://scholars.unh.edu/carsey/358>.

5. Audrey Johnston, *Rural Housing in Modern America*, 26 J. AFFORDABLE HOUS. & CMTY. DEV. L. 281, 286 (2017) (noting that rural areas have less economic activity and a harder time attracting outside investments, in part because lower population density means more challenges to achieving economies of scale).

6. *Id.*; Fitzgerald-Mumford, *supra* note 3, at 1802.

7. See generally Michelle W. Anderson, *The Western, Rural Rustbelt: Learning from Local Fiscal Crisis in Oregon*, 50 WILLAMETTE L. REV. 465 (2014).

8. *Id.* at 467.

9. *Id.* at 485.

10. *Id.*

luxury of the past.”<sup>11</sup> A problem undergirding this difficult trade-off is that letting the less urgent-seeming, shorter-term issues with building code enforcement and nuisance properties fall by the wayside can have long-term consequences.<sup>12</sup>

Property vacancy and dilapidation rates go up when a locality is distressed. Properties emptying out and falling apart are one piece of the puzzle in a difficult, vicious downward cycle of socioeconomic decline.<sup>13</sup> The cycle often goes like this: A local employer, one among few (if not the only one), shuts down. A portion of local residents move away, and more young people move away when they come of age because they are unable to make a living by staying. The local government’s tax revenue shrinks with the loss of population. The built environment becomes too large for the population, so more and more buildings sit empty and untended. The buildings start to crumble, but the local government becomes less and less equipped to step in to fix them due to its growing budgetary concerns.

Yet, if a community has a chance at reversing such a downward cycle, addressing the property vacancy and dilapidation problem has to be part of the solution. Not addressing the crumbling built environment means that a community will have a much more challenging time attracting new residents, new employers, and new businesses and services. Thus, if a locality hopes to turn things around, it likely needs to find some way to address problem properties. Such a strategy needs to include both short-term problems including acute hazards, such as a vacant house posing a fire risk to neighboring residents, and long-term problems, such as a high volume of vacant properties that need to be addressed strategically and systematically.

So, what is a cash-strapped, rural local government supposed to do? Ideally, a given community will approach its problem properties with a multi-pronged strategy. That strategy should include creating a legal foundation if it does not already exist, such as by adopting building codes, comprehensive plans, and zoning ordinances; determining the right enforcement mechanisms for the locality; and aiming to access and leverage as many federal and state resources as possible, such as the U.S. Department of Agriculture’s grant and loan programs for housing and infrastructure.<sup>14</sup>

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11. *Id.* at 485–86.

12. Kyle Slaughter, *Code Compliance: Difficulties and Ideas for Small Towns*, W. PLANNER (2017), <https://www.westernplanner.org/2017publishedfeatures/2018/6/27/code-compliance-difficulties-and-ideas-for-small-towns> (noting both skepticism of code enforcement in small towns and its importance to pursuing ideal community vision).

13. Ann Eisenberg, *Rural Blight*, 13 HARV. L. & POL’Y REV. 187, 194–99 (2018).

14. See generally *From Liability to Viability: A Legal Toolkit to Address Neglected Properties in West Virginia*, WVU LAW LAND USE & SUSTAINABLE DEV. L. CLINIC (2017), <https://wvleap.wvu.edu/files/d/cf7aade6-10ca-4df7-b154-6956dbad3b85/from-liability-to-viability.pdf> [hereinafter *Toolkit*]; Johnston, *supra* note 5, at 289–95 (describing USDA programs focused on rural housing).

Different communities will be at different starting points on the long-term journey of addressing a crumbling built environment. Some may be ready for a land bank, while others may need to take the first step of simply inventorying their properties and garnering support among residents to take action.<sup>15</sup> Most communities need to take action both to mitigate immediate hazards and to work towards prevention of property deterioration in the future.

One interesting strategy for addressing vacant and dilapidated properties in rural areas is what recent law graduate Mairead Fitzgerald-Mumford has labeled the “market-anticipatory approach” in her Note on tackling greyfields.<sup>16</sup> The market-anticipatory approach is a potential answer to the problem outlined above of limited consumer markets for any given property in any given rural area. In light of these limited markets, it may be neither the most strategic move for a local government, nor the most efficient use of resources, for a local government to acquire a problem property, rehabilitate it, then hope that the right buyer will come along to make it all worthwhile. Rather, Fitzgerald-Mumford argues, the local government should first anticipate the likeliest end use for the property, then use that end use to shape its strategy for addressing the property at the outset.

Fitzgerald-Mumford describes the market-anticipatory approach in the context of greyfields still in the hands of private owners who are failing to find new, productive tenants for vacant retail properties. According to this approach, municipalities “must first identify the path of least resistance by which a new tenant will take over the structure, and then take steps to remove barriers that would slow down or prevent such a transaction.”<sup>17</sup> The first step, a diagnostic one, “is to determine the marketability of the building in question by identifying the highest-value use of the property and then assessing the suitability of the existing structure to that use.”<sup>18</sup> This assessment “is highly contextual and will depend largely on the likely economic return on a particular use of the parcel, offset by negative externalities imposed on the community by that use.”<sup>19</sup>

The next step for the local government is to expedite and streamline the process for placing the property in the hands of the next user. Fitzgerald-Mumford recommends several strategies for local governments to do so. To encourage action on the part of owners, local governments can enact ordinances that penalize inaction. To encourage adaptive reuses by new tenants, local governments can remove barriers to such uses by being more flexible granting variances and by adopting building codes that minimize the need for structure modifications for particular uses.<sup>20</sup> Fitzgerald-Mumford empha-

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15. See Toolkit, *supra* note 14, at 4 (describing first step in blight remediation plan as “laying the foundation”).

16. Fitzgerald-Mumford, *supra* note 3, at 1802.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* at 1814–15.

sizes the need for rural local governments to tackle these issues “in ways that will have the least amount of impact on strained municipal budgets.”<sup>21</sup>

In prior work, this Essay’s author formulated a similar recommendation as to strategic approaches to problem properties for local governments with limited resources. That recommendation focused on local governments either dealing with properties directly due to owners that are unknown or absentee or engaging with known owners who have not taken action to address their problem properties. Drawing upon anecdotal data gathered in West Virginia, this prior work observed, “Generally, having an intended end use for a property can streamline the process of acquiring and transferring the title to a productive user.”<sup>22</sup> One county’s land bank in West Virginia observed that it “benefited from acquiring only properties that had a known and intended end use.”<sup>23</sup>

Determining what the best use of a particular property may be at the outset of proceedings—“whether it is sale to a new owner, redevelopment, or simple repairs”—can allow that choice “to shape the strategy of how to address it.”<sup>24</sup> That is, “[k]nowing the end use first shapes the choice of appropriate strategy and partnership and can facilitate title acquisition” by a new owner.<sup>25</sup> Significantly, the ability to tailor the strategy to the predetermined outcome has the potential to help reduce entanglement with burdensome legal processes, reduce costs to the local government, and move the process along more quickly.

As one example, if a vacant and dilapidated residential property with an unknown or absentee owner were located next to an occupied residential property, the city attorney could reach out to the owner of the neighboring property before taking action.<sup>26</sup> If the neighboring owner were interested in potentially expanding her lot, the local government and the neighbor might be able to come up with an agreement wherein the city would acquire title to the lot, split the costs of demolition with the neighbor, then have the neighbor become the new owner of the formerly problematic lot at an affordable price—a win-win solution for both the local government and the neighbor.<sup>27</sup> As another example, if the locality were experiencing a housing shortage or needed a senior center, local government officials

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21. *Id.* at 1800.

22. Eisenberg, *supra* note 1, at 542 n.174.

23. *Id.*

24. *Id.* at 545.

25. *Id.*

26. *Id.*

27. Of course, whether this or similar avenues were available to the local government would depend on state and local law. For instance, a municipality in South Carolina “may sell property by negotiated contract without public bidding” for a value that city council deems appropriate, but may only do so after council passes an ordinance. *Forms and Powers of Municipal Government*, S.C. MUN. ASS’N 12 (2017), <https://www.masc.sc/SiteCollectionDocuments/Administration/Forms%20and%20Powers2.pdf> (discussing S.C. CODE ANN. §§ 5-7-40, 5-7-260, 30-4-70).

could seek analogous partnerships with housing developers and non-profit organizations to turn an abandoned school building into apartments—again finding ways to share costs among multiple stakeholders.<sup>28</sup>

In one sense, these market-anticipatory approaches are about what a cash-strapped local government should try to avoid. On the one hand, a local government must not fail to act to address the problem properties at all. But, on the other hand, a local government with a strained budget is likely not in a position to acquire title to all problem properties in the hopes of finding resources to demolish or rehabilitate dilapidated structures and then find new users out in the ether. When the anticipated end use determines the strategic approach, it can save the local government time, energy, and resources, of which it likely has little to spare.

Certainly, attempting to anticipate the end use of the property does not mitigate all the risks and uncertainties inherent in the challenge of dealing with problem properties. One risk is that local government officials will incorrectly anticipate a possible end use for the property, and their efforts will be for naught, despite their use of this approach. Ideally, the market-anticipatory approach would be pursued within the context of a community's broader planning initiatives. For instance, a comprehensive plan would provide helpful guidelines about possible uses for any given property, reflecting the input of the community, local residents' hopes for the future, and prior consideration of the community's strengths, weaknesses, and areas of potential, possibly shedding light on relevant markets for properties and neighborhoods.

Every community's approach to addressing property vacancy and dilapidation will be a little bit different. No one-size-fits-all approach will work for every locality. But savvy tactics and success stories from around the country can be informative. Market-anticipatory approaches to problem properties are one way that rural local governments might be able to stretch their resources further and produce more impactful outcomes for their communities.

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28. See Donna Kimura, *School Conversions Breathe Life into Affordable Housing*, MULTIFAMILY EXEC. (July 12, 2012), [https://www.multifamilyexecutive.com/design-development/school-conversions-breathe-life-into-affordable-housing\\_o](https://www.multifamilyexecutive.com/design-development/school-conversions-breathe-life-into-affordable-housing_o).