

Regulating Vacant Property

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CITY LEADERS ARE IN A BIND. Few local governments are boasting budget surpluses. Cities are compelled to prioritize among needed public services, often determining which among the cities' needs will go unmet (at least temporarily) while helplessly watching tax revenues and quality of life fall with property values. This decline/bind is due in large part to the circumstances of property ownership in a difficult economy, but also due to the physical circumstances of properties that have suffered through foreclosure or abandonment. It is the latter issue that this article addresses. Across the nation, local lawmakers have seemingly declared war on property owners who cannot guarantee occupancy of their properties.

Of course, there is nothing particularly novel about concern for neighborhood deterioration or the exercise of the police power to combat neighborhood blight,¹ circumstances that can be dangerous and costly for local governments.² One might find something peculiar, however, about this relatively new method of governmental intervention. Local governments have noted a correlation between the characteristics of neglected properties (e.g., unkempt yards, garbage accumulation, unsightly and dangerous structures) and the onslaught of neighborhood blight. Local governments have also noted the coincidence of unoccupied structures and property deterioration caused by lack of maintenance. Accordingly,

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1. *See, e.g.,* *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 394 (1926) (discussing the police power authority for regulating land use and preserving certain uses from others which, under the circumstances, can have nuisance effects); *see also* Nicole Stelle Garnett, *Ordering (and Order in) the City*, 57 STAN. L. REV. 1, 11–18 (2004) (discussing the impact of regulation as “disorder suppression”).

2. *See Colorado to Get \$34M for Blighted Properties*, DENVER BUS. J., Dec. 29, 2008, available at <http://denver.bizjournals.com/denver/stories/2008/12/29/daily7.html>.

local governments (in droves) have employed the police power to regulate property vacancy, or the *non-use* of real estate.

This article introduces vacant property regulations as one approach to dealing with blight. Part I describes property vacancy to identify the target of these regulations. Part II describes the typical regulatory tools found in vacant property ordinances. Part III raises some concerns about the possible consequences of regulating property vacancy.

I. The Circumstances of Vacant Property: Recession, Blight, Broken Windows, and Disease

Cities regulate vacant property because of the correlation between property vacancy and urban blight, including criminal activity and decreasing property values.³ Although vacant properties have varying characteristics, the most common complaints involve neglected or boarded-up buildings, unused or undeveloped lots, vacant or underperforming commercial properties, and neglected industrial properties.⁴ As explained by the “broken window” syndrome, deterioration on vacant and abandoned properties is less likely to be repaired, essentially serving as an advertisement that there is neither local control nor consequences for bad acts. The theory also suggests that broken windows are associated with increased fear and weakened community confidence in affected neighborhoods.⁵ Uninhabited structures are targets for graffiti

3. Professor Ellickson identifies the downward spiral in public places from what he calls a “chronic street nuisance” as follows:

[T]he harms stemming from a chronic street nuisance, trivial to any one pedestrian at any instant, can mount to severe aggravation. First, because the annoying act occurs in a public place, it may affect hundreds or thousands of people per hour. Second, as hours blend into days and weeks, the total annoyance accumulates. Third, a prolonged street nuisance may trigger broken-windows syndrome. As time passes, unchecked street misconduct, like unerased graffiti and unremoved litter, signals a lack of social control. This encourages other users of the same space to misbehave, creates a general apprehension in pedestrians, and prompts defensive measures that may aggravate the appearance of disorder. Fourth, some chronic street offenders violate informal time limits.

Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 YALE L.J. 1165, 1177–78 (1996).

4. NAT'L VACANT PROPS. CAMPAIGN, VACANT PROPERTIES: THE TRUE COST TO COMMUNITIES 1 (2005), available at http://www.vacantproperties.org/latestreports/True%20Costs_Aug05.pdf.

5. See Carolyn Y. Johnson, *Breakthrough on 'broken windows'*, BOSTON GLOBE, Feb. 8, 2009, available at http://www.boston.com/news/local/massachusetts/articles/2009/02/08/breakthrough_on_broken_windows/?page=1; see also James Q. Wilson & George L. Kelling, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC MONTHLY, Mar. 1982, at 29, available at <http://www.theatlantic.com/magazine/archive/1982/03/broken-windows/4465/>; James Q. Wilson & George L. Kelling, *Making Neighborhoods Safe*, 263 ATLANTIC MONTHLY 46, Feb. 1989, available at

and vandalism, provide a haven for illegal drug activity, and encourage unlawful possession of property, circumstances that can have a spiraling and amplifying effect on surrounding property conditions.⁶

The public costs that are arguably associated with vacant properties are persistent and, in many areas, unaffordable.⁷ Especially in tight economic circumstances, local governments find themselves in a Hobson's choice between ignoring the problems associated with property vacancy or allocating law enforcement, fire, and other services in disproportionate measures to areas surrounding vacant buildings.⁸

II. Local Efforts to Regulate Vacancy

Courts have traditionally afforded wide latitude to local governments in matters pertaining to the public health, safety, and welfare.⁹ The police power tool frequently employed to ameliorate neighborhood deterioration and broken windows—nuisance abatement authority¹⁰—has

<http://www.theatlantic.com/past/politics/crime/safehood.htm> (“If the first broken window in a building is not repaired, then people who like breaking windows will assume that no one cares about the building and more windows will be broken. . . . The disorder escalates, possibly to serious crime.”); MALCOLM GLADWELL, *THE TIPPING POINT* 141 (2000).

6. See Garnett, *supra* note 1, at 13 (discussing the “multiplier effect” that blighted properties have on neighborhoods).

7. In many cases, the tax income from such properties is insufficient to cover the time, attention, and money required to provide essential public services (police, fire, and emergency services) to the affected neighborhoods. An analysis of the City of Austin, Texas discovered that

blocks with unsecured [vacant] buildings had 3.2 times as many drug calls to police, 1.8 times as many theft calls, and twice the number of violent calls⁷ as blocks without vacant buildings; [m]ore than 12,000 fires break out in vacant structures each year in the US, resulting in \$73 million in property damage annually. Most are the result of arson. Over the past five years, St. Louis has spent \$15.5 million, or nearly \$100 per household, to demolish vacant buildings. Detroit spends \$800,000 per year and Philadelphia spends \$1,846,745 per year cleaning vacant lots. A 2001 study in Philadelphia found that houses within 150 feet of vacant or abandoned property experienced a net loss of \$7,627 in value.

NAT'L VACANT PROPS. CAMPAIGN, *supra* note 4, at 1.

8. See Benjamin B. Quinones, *Redevelopment Redefined: Revitalizing the Central City with Resident Control*, 27 U. MICH. J.L. REFORM 689 (1994) (explaining that blighted neighborhoods are typically disfavored for public improvement dollars and services).

9. See *Vill. of Brady v. Melcher*, 502 N.W.2d 458 (Neb. 1993) (holding that when a local government acts within the scope of its statutory authority, the court will defer to its judgment).

10. Joseph Schilling, *Code Enforcement and Community Stabilization: The Forgotten First Responders to Vacant and Foreclosed Homes*, 2 ALB. GOV'T L. REV. 101, 104 (2009) (“Local code enforcement officials have the legal and policy responsibilities to enforce a wide array of building, housing, and property maintenance codes and to administer special nuisance abatement processes.”).

proven inadequate to quell the increasing number of vacant properties due to foreclosures, caused in part by the lack of resources available to detect and keep watch over vacant properties.¹¹ In response to growing concerns about the blighting influences of vacant and foreclosed homes, a striking number of local governments are seeking shelter in vacant property registration ordinances.¹²

Although most vacant property ordinances concern the occupancy status of property, there are a variety of approaches for triggering the regulatory scheme (and, as a result, different ideas of what the problem might be). For instance, Pittsburgh, Pennsylvania defines “vacant building” as a structure which is vacant *and* is either unsecured, secured by other than normal means, unsafe, noncompliant with housing or building codes, illegally occupied, or unoccupied for over a year with pending code enforcement citations.¹³ The City of Red Bud, Illinois, has adopted an ordinance that, while not the model of clarity, appears to only regulate “abandoned” properties that are in the foreclosure process or properties from which the mortgagee emerged from the process with title.¹⁴ Under the ordinance adopted in Chula Vista, California, evidence of vacancy encompasses any condition that on its own, or combined with other conditions, would lead a reasonable person to believe that the property is vacant.¹⁵

11. *Id.* at 122–24 (many, if not most, cities report dramatically high levels of calls for public services in affected areas and a similar increase in code enforcement cases from foreclosed properties).

In light of the challenges confronting code enforcement officials, the National Vacant Properties Campaign conducted a snapshot survey to understand local foreclosure impacts in different markets and differing vacant property trends. . . . Sixteen of the nineteen cities reported increases in the existence of vacant properties ranging from sixteen to forty percent or more.

Id.; see also Ruth Simon, *Vacant-Property Fees Add to Mortgage Firms' Woes*, WALL ST. J., July 29, 2008, at A3.

12. Schilling, *supra* note 10, at 128 (summarizing the statistical data from registration ordinances). Safeguard Properties provides an online database of vacant property regulations nationwide. See Safeguard Properties, <http://www.safeguardproperties.com> (last visited Feb. 19, 2010) (identifying over three hundred and fifty governmental entities—including states, counties and municipalities—that have adopted or considered vacant property legislation).

13. PITTSBURGH, PA., CODE § 115.1 (2007) (“Unsecured” is defined to mean “A building or portion of a building which is open to entry by authorized persons without the use of tools or ladders.”).

14. RED BUD, ILL., ORDINANCES 1195, § 6-6-3 (2008).

15. Specific conditions listed include overgrown vegetation, accumulated mail, past due utility notices, trash and other debris, and statements by neighbors. CHULA VISTA, CA. CODE § 15.60.020 (2008).

Although vacant property ordinances vary,¹⁶ there are common themes in all jurisdictions. The primary aims of the ordinances include finding a cost effective means to track property vacancy (and any ill-effects that may be triggered), to finance the administration of vacant property monitoring, to ensure efficient enforcement of building codes and other health and safety regulations at or near vacant properties, and to provide authority to collect penalties to address violations.¹⁷ Enforcement is delegated to existing code enforcement departments or task-forces assembled for this purpose.¹⁸

The informational goal is served by requiring owners of vacant structures to register their property's occupancy status with the local government. Registration typically involves the disclosure of information that will ease the burdens of code enforcement and facilitate more effective communication with the owner. Local governments are requiring owners to provide a property description and address; names and contact information for the owner and persons who can immediately respond to inquiries from public officers;¹⁹ date on which the property became vacant; whether the property is in foreclosure proceedings; and so on.

These ordinances are public cost-conscious and offer a variety of financing mechanisms. First, virtually all of the ordinances require payment of a registration fee²⁰ that is allocated to routinely monitoring and inspecting vacant properties and the surrounding neighborhoods. Some cities impose fees that increase over time as the property remains un-

16. Variations among the approaches illustrate that local governments are approaching in a manner compatible with local political and economic realities: the diversity of legal structures, market conditions, and foreclosure challenges within each city have influenced the range of approaches in these ordinances. In other words, what works to avoid blight in Detroit may not work in San Bernardino or Cleveland.

17. MIAMI, FLA., CODE § 10-61 (2008), available at <http://library.municode.com/index.aspx?clientId=10933&stateId=9&stateName=Florida>.

18. BOSTON, MA., CODE § 16-52.5 (2008), available at [http://www.amlegal.com/nxt/gateway.dll/Massachusetts/boston/cityofbostonmunicipalcode?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:boston_ma](http://www.amlegal.com/nxt/gateway.dll/Massachusetts/boston/cityofbostonmunicipalcode?f=templates$fn=default.htm$3.0$vid=amlegal:boston_ma) ("The Inspectional Services Department shall have the authority to inspect properties subject to this section for compliance and to issue citations for any violations"); see also QUINCY, MA., MUN. CODE § 8.44.050 (2008), available at http://www.safeguardproperties.com/vpr/docs/Quincy_MA_ordi_nance.pdf.

19. See COCONUT CREEK, FLA., CODE § 6-39(i) (2008), available at <http://coconutcreek.net/newsite/municode.asp>.

20. BOSTON, MA., CODE § 16-52.3 (2008), available at [http://www.amlegal.com/nxt/gateway.dll/Massachusetts/boston/cityofbostonmunicipalcode?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:boston_ma](http://www.amlegal.com/nxt/gateway.dll/Massachusetts/boston/cityofbostonmunicipalcode?f=templates$fn=default.htm$3.0$vid=amlegal:boston_ma) (Registrations valid for one year and a one hundred dollar (\$100) fee must accompany the registration form); CHICAGO, ILL., CODE § 13-12-125 (2008), available at <https://ipi.cityofchicago.org/VacantBuildings/assets/docs/VacantPropertyClean.pdf> (The registration and renewal fee for each registered building is \$250.).

occupied.²¹ Most of the ordinances impose on owners a responsibility to reimburse cities for repair and remediation costs incurred by local governments that take the initiative to fix windows, secure doors, remove garbage or otherwise abate nuisance conditions on the properties. Finally, most ordinances provide penalties for noncompliance with the registration requirement that range from a misdemeanor violation to hefty fines that may run against the property daily²² under the notion that substantial fines will either result in some form of transfer of the property to the public or a persuasive incentive to maintain the appearance and security of the property.²³

Other common provisions include requiring owners to carry general liability insurance²⁴ and requiring the owner to give written consent al-

21. ARLINGTON, TEX., ORDINANCES. § 08-241 (2008), *available at* http://www.safe-guardproperties.com/pub/pdf/Arlington_TX_resolution.pdf (The vacant structure fee escalates from no fee for a structure vacant less than a year to \$3,660 annual fee for a structure vacant between ten or more years); CARBONDALE, PA., ORDINANCES § 14-2008 (2008) (Fee of \$100 for properties vacant forty-five days to a year and escalating to \$5,000 fee for properties vacant ten years and an additional \$500 for every year over ten years); Wilmington, Delaware enacted a vacant property registration ordinance with an escalating annual fee—the longer the property remains vacant, the greater the fee. The ordinance allows up to a maximum of \$5,000 if the property has been vacant ten years or more. WILMINGTON, DEL., ORDINANCES 4-27 § 125 (2009); SMYRNA, DEL., ORDINANCES. § 18-1557 (2007), *available at* http://library5.municode.com/default-test/home.htm?infobase=12853&doc_action=whatsnew (No fee for properties vacant for less than one year, escalating to a \$2,000 fee for properties vacant at least five years plus an additional \$500 for each year in excess of ten years).

22. BALTIMORE, MD., CODE art. 13, § 4-13 (2007), *available at* <http://www.baltimorecity.gov/Government/CityCharterCodes.aspx> (“Any person who violates a provision of this subtitle . . . is guilty of a misdemeanor and, on conviction is subject to fine of no more than \$500”); *see also* MINNEAPOLIS, MINN., CODE § 249.90 (2001), *available at* http://library1.municode.com/default-test/home.htm?infobase=11490&doc_action=whatsnew (“Any person who violates a provision of this chapter or provides false information on a required registration or plan, is guilty of a misdemeanor or shall be punished by a fine not to exceed seven hundred dollars (\$700.00) or by imprisonment not to exceed ninety (90) days or both. . . . Each day’s continuation of a violation shall constitute a separate offense.”); CHICAGO, ILL., CODE § 13-12-125 (2008), *available at* <https://ipi.cityofchicago.org/VacantBuildings/assets/docs/VacantPropertyClean.pdf> (“If a vacant building in the tripled period is in violation of any provision of the building code or fire code at the time renewal is required, the fee shall be \$1,000 for such renewal, and shall remain at \$1,000 for each subsequent renewal”).

23. *See* Creola Johnson, *Fight Blight: Cities Sue To Hold Lenders Responsible For The Rise In Foreclosures And Abandoned Properties*, 2008 UTAH L. REV. 1169, 1246 (2008) (“By charging hefty fines of, say \$1000 per day, until violation of the ordinance is corrected, cities would make it too expensive for lenders to violate the law”); *see also*, *e.g.*, WESTMINSTER, COLO., CODE § 1-8-1 (1994) (establishing a fine of up to \$1,000 per day), *available at* http://www.cl.westminster.co.us/code/874_1372.htm.

24. Cincinnati’s ordinance requires evidence of general liability insurance for the property with a minimum of \$300,000 for residential properties and \$1,000,000 for commercial or industrial. CINCINNATI, OHIO, CODE § 1101-77.1(b) (2006), *available at* http://www.cincinnati-oh.gov/bldginsp/downloads/bldginsp_eps15018.pdf.

lowing the police department to enforce trespassing violations.²⁵ Several of the programs encourage or require owners to prepare and submit plans to “rehabilitate” the property or otherwise end the vacancy.²⁶

III. Making “Vacancy” a Bad Word: The Means and Ends of Vacancy Regulations

Vacant property ordinances reflect the difficulties in finding and eliminating the sources of blight. Yet, these ordinances suggest problems of their own. Although we admittedly suspect that the future for vacant property ordinances will be as much a muddle as it is a mystery, a few comments can be made. We raise three related, but ultimately independent concerns: that property vacancy bears a questionable relationship to local land use authority; that registration ordinances may run afoul of constitutional protections for private property; and that the timing of these ordinances is ill-advised (if ever there was a good time).

First, despite the apparent reasonableness of the general argument in favor of vacant property regulations—that such properties cause or contribute to blight through neglect—these ordinances are ambiguous in identifying the regulated activity. Traditionally, land use regulations have been lauded as a means of controlling the impacts from the *use* of land;²⁷ land uses often have impacts that do not respect property boundaries, and the authority to require a permit for land use is associated with granting the owner the privilege of causing such impacts. Land use controls have developed around the idea that the regulation of use is legitimate when the regulations are rationally related to the character of

25. MIAMI, FLA., CODE § 10-64 (2008), available at <http://library.municode.com/index.aspx?clientId=10933&stateId=9&stateName=Florida>.

26. See, e.g., BINGHAMTON, N.Y., CODE § 265-14.C.3 (2007), available at <http://www.cityofbinghamton.com/pdfs/VacantPropertyRegOrdinance.pdf> (requiring a vacant building plan in which the property owner indicates what actions will be taken to cease the vacancy); FRESNO, CAL., CODE § 10-617 (2008), available at http://www2.safeguardproperties.com/pub/pdf/Ord-_Vacant_Buildings_8-19-08.pdf (proposing a plan to either occupy, sell, lease, or demolish the building within one-hundred eighty (180) days or such other time as determined reasonable by the Director under the circumstances).

27. See, e.g., ADVISORY COMM. ON ZONING, A STANDARD STATE ZONING ENABLING ACT: UNDER WHICH MUNICIPALITIES MAY ADOPT ZONING REGULATIONS 4-5 (1926), available at <http://myapa.planning.org/growingsmart/pdf/SZEnablingAct1926.pdf> (“For the purpose of promoting health, safety, morals, or the general welfare of the community,” municipalities are authorized “to regulate or restrict” building height, bulk, “and the location and/or use of buildings, structures and land for trade, industry, residence or other purposes.”); *Id.* at 6 (authorizing the division of a municipality into districts, within which “it may regulate and restrict the erection, construction, reconstruction, alteration, repair, or use of buildings, structures, or land.”).

the land use. This system has worked, in large part, because owners of land have *sought* to engage in particular land uses, and as a result, there has been no shortage of permit applications or governmental control associated with the permitting process.

In contrast, vacant property ordinances regulate an “activity” that is seldom (if ever) pursued by the property owner. These regulations are instead premised on the *non-use* of property.²⁸ Here, it is important to distinguish an owner’s decision to leave property in noncompliance with local building codes (which are typically enforceable under local regulations anyway²⁹) from the owner’s “decision” to leave a building vacant.³⁰ At least as to the latter, which is also the subject of vacant property regulations, the “activity” does not fall into any of the traditional land use categories (including nuisance), and in any event, is more likely the result of circumstance than choice. Nevertheless, these regulations *treat* the owner’s non-use as a land use. For instance, in Riverdale, Georgia, all vacant buildings within the city are required to attain a “vacant structure permit.”³¹ To obtain this permit property owners must disclose information about the property, some of which might be considered sensitive information (such as the date on which the struc-

28. Alternatively, some of the regulatory schemes do not appear to regulate non-use, but instead the identity of the user. For instance, the regulation in the City of Red Bud, Illinois appears to apply only to lenders that come into possession as a result of a borrower’s default. RED BUD, ILL., ORDINANCES 1195, § 6-6-3 (2008), *available at* <http://www.cityofredbud.org/code%20of%20ordinances/Abandoned%20Real%20Estate%20062309.pdf>. This approach does not help the ambiguity. Although lender-ownership may be a factor in instances of broken window syndrome and neighborhood deterioration, there is seldom (if ever) a legitimate nexus between the character of the owners and the harm sought to be avoided by regulation.

29. L.A., CAL., MUNICIPAL CODE § 91.103.1 (2010), *available at* http://www.amlegal.com/nxt/gateway.dll?f=templates&fn=default.htm&vid=amlegal:lanc_ca (“No person shall construct, alter, repair, demolish, remove, demolish, remove, move, use, occupy or maintain, within the City, any building or structure or any portion thereof, except as provided by this Code”); CHICAGO, ILL., MUNICIPAL CODE § 13-8-070 (2010), *available at* [http://www.amlegal.com/nxt/gateway.dll/Illinois/chicago_il/municipalcodeofchicago?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:chicago_il](http://www.amlegal.com/nxt/gateway.dll/Illinois/chicago_il/municipalcodeofchicago?f=templates$fn=default.htm$3.0$vid=amlegal:chicago_il) (“In the event that the changes, alterations, repairs or requirements ordered by the notice of the building commissioner are not made or performed to the satisfaction of the building commissioner within the time specified in the notice, the commissioner may institute enforcement proceedings based on violations of this Code”).

30. This analysis may be different, albeit not with a different result, for undeveloped properties. Controls on non-use of *structures* in *occupied neighborhoods*, concern the impacts of non-use, failure to maintain, and failure to secure, which can trigger broken window declines in neighborhoods. Although vacant lands do not suffer window breakage, they may be targets for garbage and other abuses. The real difference, however, is that properties with structures are already subject to buildings codes and occupancy regulations.

31. RIVERDALE, GA., CODE art. V, § 18-122 (2008), *available at* http://library6.municode.com/default-now/home.htm?infobase=11472&doc_action=whatsnew.

ture became vacant³² and a vacant structure plan, including possible improvements or plans to sell the property).³³ One important question, which is relevant in the land *use* context, is whether the local government has the power to deny the application: what effect comes of the denial of an application to own a vacant structure?

Second, there may be implications of the registration requirements that cause concern to those interested in the constitutional confines of “property.” For instance, the ordinance in Riverdale, Georgia requires owners to provide “a letter of written consent by the owner granting permission for city officials to enter and inspect the property and all structures upon it.”³⁴ Of course, obtaining such consent from owners of vacant property will be a major convenience for local code enforcement officials who, under normal circumstances, would be faced with the owner’s entitlement to refuse consent to a warrantless entry.³⁵ The problem, however, is that the authority to regulate generally does not entail the authority to require public access to private property: submission to the authority of a permitting agency is not itself a waiver of the right to exclude.³⁶ In addition, in the absence of exigent circumstances, police do not generally have the authority to enter private property without a warrant, unless the consent of the owner is first obtained.³⁷ Such searches are presumptively unreasonable.³⁸ Despite the arguably legit-

32. § 18-122(1)(a)(2)(vii).

33. § 18-122(2)(c). There is no provision requiring the owner to comply with the plan, but the plan is subject to the city’s initial approval, and the ordinance specifies that “any subsequent owner is subject to the terms of the plan as long as the structure remains vacant unless the department grants relief from same.” *Id.*

34. § 18-122(2)(a)(iii).

35. *Camara v. Mun. Court of S.F.*, 387 U.S. 523, 534 (1967) (“[A]dministrative searches [by municipal health and safety inspectors] are significant intrusions upon the interests protected by the Fourth Amendment, that such searches when authorized and conducted without a warrant procedure lack the traditional safeguards.”).

36. *See, e.g., Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

37. *See Illinois v. Rodriguez*, 497 U.S. 177 (1990); *Payton v. New York*, 445 U.S. 573 (1980).

38. An occupant can act on that presumption and refuse admission. Under the Fourth Amendment, an occupant of property is provided a constitutional right to refuse consent to entry and search, and the assertion of that right cannot itself be considered a crime. *See Camara*, 387 U.S. at 530-33; *Schneckloth v. Bustamonte*, 412 U.S. 218, 233 (1973). In *Johnson v. United States*, 333 U.S. 10, 14 (1948), the Court also noted that “[a]ny assumption that evidence sufficient to support a magistrate’s disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people’s homes secure only in the discretion of police officers.” In general, the inconvenience of filing paperwork and articulating the basis for reasonable suspicion does not justify dispensing with the warrant requirement. *Id.* at 15. Consent granted as a submission to apparent authority, rather than as a voluntary waiver of the right, also does not dispense with the

imate objectives of these efforts, requiring property owners to waive their right to warrantless searches of the property may leave lawmakers and municipal attorneys scrambling to defend the constitutionality of their ordinances.³⁹

In truth, consent to access may be the least problematic aspect of the regulatory efforts, at least because timely access by law enforcement to abate criminal or nuisance activity by trespassers will often serve the owner's interests as well as the public welfare. The problem, rather, lies in the seemingly innocuous registration requirement: by registering their properties as "vacant," owners (including mortgagees, landlords, and other owners not-in-residence) are effectively declaring to the world not just that their houses are empty, but also that their properties are nuisances,⁴⁰ a consequence of the trend to equate property vacancy with property neglect.⁴¹ Lists of vacant properties, in the possession of local governments, may become the primary identifiers of problem neighborhoods and unsellable properties. If property value was a problem before,⁴² registration of vacant properties may not help.

It is arguable that while local resources are squeezed from declining tax revenues, vacant property registration ordinances permit lawmakers

requirement. *Id.* at 13. Moreover, mere suspicion that misdemeanors are being committed is insufficient to overcome the protections afforded to property owners, although some minor trespasses are permissible. *See Swint v. City of Wadley*, 51 F.3d 988 (11th Cir. 1995); *Guin v. Riviera Beach*, 388 So. 2d 604 (Fla. Dist. Ct. App. 1980).

39. *See, e.g., Hometown Coop. Apartments v. City of Hometown*, 495 F. Supp. 55, 60 (N.D. Ill. 1980) (point of sale inspection regulation held "unconstitutional under the fourth amendment insofar as it failed to provide for a warrant as a prerequisite for the . . . inspection."). However, in *Mann v. Calumet City, Illinois*, the Seventh Circuit recently upheld a point of sale inspection regulation, citing policy reasons that are echoed in the vacant property regulations. *See* 588 F.3d 949, 952-53 (7th Cir. 2009) (arguing that "assuring full compliance with building codes is difficult after a building is built, because most violations are committed inside the building and thus out of sight until a violation results in damage visible from the outside."). Of course, although the *Mann* controversy encumbered the process of real property conveyance, it nonetheless involved the regulation of building code compliance and not (as here) mere property vacancy.

40. *See, e.g., AURORA, COLO., CODE § 22-641 (2009)*, available at <http://www.auroragov.org/stellent/groups/public/documents/article-publication/051707.pdf> (referring to vacant houses as attractive nuisances).

41. *See NAT'L VACANT PROPS. CAMPAIGN, VACANT PROPERTIES: THE TRUE COST TO COMMUNITIES 3 (2005)*, available at http://www.vacantproperties.org/latestreports/True%20Costs_Aug05.pdf ("Vacant properties have been neglected by their owners, leaving it up to city governments to keep them from becoming crime magnets, fire hazards, or dumping grounds.").

42. *See E. PENN. ORG. PROJECT, TEMPLE UNIV. CTR. FOR PUB. POLICY, & DIAMOND & ASSOCS., BLIGHT FREE PHILADELPHIA: A PUBLIC-PRIVATE STRATEGY TO CREATE AND ENHANCE NEIGHBORHOOD VALUE 22-24 (2001)*, available at <http://astro.temple.edu/~ashlay/blight.pdf> (discussing the relationship between economic circumstances in neighborhoods, abandoned properties and blight).

to focus efforts to maintain neighborhoods in an economical way. In a troubled real estate market such efforts may also help property owners, who have an obvious interest in the maintenance of property values (including the preservation of neighborhood quality), until market conditions improve.⁴³ Given the gravity of the issue, it is also argued that this regulatory tool strikes an appropriate balance between the rights of property owners and the needs of the public welfare.⁴⁴ On the other hand, vacant property regulations pose special, perhaps unanticipated, problems for owners and neighborhoods: owners of vacant homes now find themselves having to pay for permission to receive no rent, worrying about what code violations will be found by their governmental invitees, and dealing with the dual challenges of managing and marketing properties that have been labeled as nuisances.⁴⁵ Although property owners must “learn how to deal with challenges associated with handling vacant properties,”⁴⁶ the current iterations of vacant property regulation may do more harm than good.

43. Mary Ellen Podmolik, *A chilling effect of the foreclosure crisis*, CHICAGO TRIBUNE, Jan. 9, 2009, available at http://articles.chicagotribune.com/2009-01-09/entertainment/0901070559_1_vacant-homes-vacant-buildings-foreclosed.

44. Schilling, *supra* note 10, at 130.

45. Podmolik, *supra* note 43.

46. Eric Lipton, *Homeowners' Hard Times Are Good for the Foreclosure Business*, N.Y. TIMES, April 5, 2009, at A11, available at http://www.nytimes.com/2009/04/06/us/06convene.html?_r=1&ref=us.

