

# URBAN RESILIENCY AND DESTRUCTION

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### I. INTRODUCTION

When considering what makes a city resilient, planners, policy-makers and academics often focus on creating infrastructure to withstand, respond, and adapt to change, whether environmental, economic or demographic.<sup>1</sup> Whether it means developing more sustainable building practices, designing improved infrastructure, or implementing more effective disaster response mechanisms, the focus is often on the *creation* of something that will make the city more resilient.<sup>2</sup>

Yet, destruction is as necessary to urban resiliency as creation.<sup>3</sup> Destruction allows cities to eliminate outdated, underutilized, and vacant buildings; create the necessary physical space for redevelopment and innovation; and redirect the city's economic resources to best meet the needs of residents.<sup>4</sup> As one government official recently explained: "By tearing down houses, we are building neighborhoods. We are open-

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1. See, e.g., Jeb Brugmann, *Building Resilient Cities: From Risk Assessment to Redevelopment*, CERES 1, 11 (Nov. 2013), <http://www.ceres.org/resources/reports/building-resilient-cities-from-risk-assessment-to-redevelopment>; Heather Grady, *Building Resilient Cities*, THE ROCKEFELLER FOUND. (July 9, 2013), <http://www.rockefellerfoundation.org/blog/building-resilient-cities>.

2. See, e.g., Brugmann, *supra* note 1, at 6 (focusing on "development" of urban areas).

3. Artists, economists, philosophers, scientists, and jurists have long recognized the tension between creation and destruction. See, e.g., JOSEPH SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 83 (1st ed. 1942). The term "creative destruction" is a term credited to economist Joseph Schumpeter, who used it to describe the cycle of progress that occurs when free markets are operating properly: the "process of industrial mutation . . . that incessantly revolutionizes the economic structure *from within*, incessantly destroying the old one, incessantly creating a new one." *Id.* The term captures the idea that the price of progress and innovation is that some old ways of thinking and being will decline and ultimately fall by the wayside, and that this decline will have negative impacts on the lives of some people. See *id.* at 85.

4. See, e.g., Press Release, Demolition Grant Program Update Shows 6,000 Abandoned Properties Demolished, (Oct. 22, 2013), *available at* <http://www.ohioattorneygeneral.gov/Media/News-Releases/October-2013/Demolition-Grant-Program-Update-Shows-6-000-Abando>.

ing up land to stop the decline in property values, stimulate many types of economic development, and help our neighborhoods grow and prosper.”<sup>5</sup>

However, although a city may be legally entitled to exercise the right to destroy,<sup>6</sup> not every exercise of that right increases the city’s resiliency. This article contends that the power to destroy can pose risks to the city’s resiliency because of the very characteristics that make it an appealing choice in other contexts: destruction is permanent, cheap, and simple.<sup>7</sup> As a result, cities may engage in a tendency to overuse the power to destroy in situations where it is not the most resilient choice.

For example, in the 1960s, Pittsburgh, like many other cities, pursued an urban renewal program that destroyed properties located in a low income, minority community known as the Society Hill District, and replaced them with a civic arena cut off from the rest of the city by major streets and sprawling surface parking lots.<sup>8</sup> Fifty years later, in 2011, the city demolished the arena<sup>9</sup> and began redeveloping the area with residential uses, retail and office space, along with a new sports

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5. *Id.* The Ohio Attorney General is not alone in focusing on the city’s power to destroy as a means of promoting resiliency. See also Timothy Williams, *Blighted Cities Prefer Razing to Rebuilding*, N.Y. TIMES, Nov. 12, 2013, <http://www.nytimes.com/2013/11/12/us/blighted-cities-prefer-razing-to-rebuilding.html?pagewanted=1> (quoting the president of the Federal Reserve Bank of Cleveland on the “counterintuitive concept that the best policy to stabilize neighborhoods may not always be rehabilitation. It may be demolition.”); *Demolition and Vacant Lot Reuse*, CUYAHOGA LAND BANK, <http://www.cuyahogalandbank.org/demolition.php> (last visited April 15, 2014) (“An aggressive demolition policy is an essential foundation for our future.”) [hereinafter CUYAHOGA LAND BANK]. These sentiments echo those of city planners and politicians in the 1950s and ‘60s, an earlier decade of urban crisis, when large numbers of residents were leaving the city for growing suburbs, and it was thought that “[i]n order to save downtown, it was going to be necessary to destroy it.” BERNARD J. FRIEDEN & LYNNE B. SAGALYN, *DOWNTOWN, INC.: HOW AMERICA REBUILDS CITIES* 16 (1st ed. 1989). The result was massive demolitions and urban renewal projects of questionable success. See *infra* notes 121–22.

6. The term “destroy” can be defined in a variety of ways, some of them very broad. See Lior Jacob Strahilevitz, *The Right to Destroy*, 114 YALE L.J. 781, 792 (2005) (“On the broadest reading of a right to destroy, an owner destroys property every time she eats a piece of cake . . .”). For purposes of this article, “destroy” is used in a more narrow sense to refer to the demolition of buildings and other physical infrastructure (such as roads) by the government, when acting pursuant to its rights as the owner of the property.

7. These characteristics are meant in a relative sense: destruction obviously can cost millions of dollars in the case of large demolition projects, and can require complicated planning. See *infra* note 93. However, destruction is almost universally less expensive and less complex than alternative land use choices. See Ramit Plushnick-Masti, *Astrodome May See 1 Last Inning After ‘No’ Vote*, KVUE.COM (Nov. 11, 2013, 10:12 AM), <http://www.kvue.com/news/state/231439861.html> (citing figures for the demolition of the Houston Astrodome (\$98 million) compared to proposed redevelopment (\$217 million)).

8. FRIEDEN & SAGALYN, *supra* note 5, at 39–42.

9. Associated Press, *Pittsburgh Civic Arena Demolition Begins*, ESPN (Sept. 26, 2011, 11:21 AM), [http://espn.go.com/nhl/story/\\_id/7022042/pittsburgh-civic-arena-demolition-begins](http://espn.go.com/nhl/story/_id/7022042/pittsburgh-civic-arena-demolition-begins).

stadium,<sup>10</sup> essentially recreating the very thing the it destroyed—a dense, multicultural, inner city neighborhood.

While it may be clear in hindsight that the decision of Pittsburgh to exercise the right to destroy the Society Hill District neighborhood in the 1960s did not make that city more resilient, the difficulty is predicting *a priori* when exercising the right to destroy will make a city more resilient and when it will not. Although the standards employed in a particular context may implicate considerations related to resiliency—such as additional review for historic properties or determination of whether the proposed replacement for the property qualifies as a public use in the case of eminent domain—a city’s decision to destroy property is often made on an ad hoc basis, without any explicit consideration of the impact on the city’s resiliency.<sup>11</sup>

This article argues that before exercising the right to destroy as a property owner,<sup>12</sup> a city should conduct a demolition review procedure targeted at evaluating the impacts of the proposed exercise of the right to destroy on the city’s resiliency. Such a demolition review procedure could be modeled on the demolition delay ordinances that a number of jurisdictions have applied to historic properties,<sup>13</sup> as well as on the federal and state environmental laws designed to identify environmental impacts of private actions.<sup>14</sup> While there is no one-size-fits-all solution applicable in all situations, this article suggests that by adopting a procedural mechanism that incorporates a set of heuristics specifically targeted at identifying the impacts of destruction on resiliency, the decision about whether to exercise the right to destroy will not only be better informed, but may be substantively different than the decisions that would be made without such a process.

Section II begins with an overview of why the right to destroy is necessary for resilient cities and a discussion of how cities exercise the right to destroy, focusing on the city’s right to destroy as a property owner. Section III analyzes how the characteristics that make the right to destroy so useful to cities—it is permanent, cheap and simple—also may lead to its overuse in situations where alternatives to destruction would better promote urban resiliency. Section IV suggests that to address the risk of overuse, cities should adopt a demolition review procedure, using existing legal models such as environmental protection laws and demolition delay regulations as models. Section V concludes with an

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10. Christine H. O’Toole, *Pittsburgh Pursues Plan to Demolish ‘the Igloo’*, N.Y. TIMES, Mar. 8, 2011, <http://www.nytimes.com/2011/03/09/realestate/commercial/09civic.html>.

11. See FRIEDEN & SAGALYN, *supra* note 5, at 39–40.

12. See *infra* notes 46–49 and accompanying text (discussing the city’s ability to exercise the power to destroy in a number of legal contexts, but focusing on exercises of the city’s right to destroy as a property owner).

13. See, e.g., IDAHO CODE ANN. § 67-4614 (2006).

14. See U.S. ENVTL. PROT. AGENCY, RCRA IN FOCUS: CONSTRUCTION, DEMOLITION, AND RENOVATION 2 (2004), *available at* <http://www.epa.gov/wastes/inforesources/pubs/infocus/rif-cd.pdf>.

assessment of how the demolition review procedure proposed herein can promote urban resiliency.

## II. CREATING RESILIENCY THROUGH DESTRUCTION

This section begins with a discussion of why the power to destroy is necessary for a resilient city. It then provides an overview of how cities exercise the right to destroy, focusing on the city's right to destroy as a property owner and how it acquires ownership.

### A. Why Cities Need the Power to Destroy

On the most basic level, cities need the power to destroy because there is a fixed amount of land—both on the planet and within the borders of any particular jurisdiction—on which to develop.<sup>15</sup> While reuse and renovation of existing development may be possible, if new development is to be built from the ground up, as a practical matter, it must either be located on available vacant land,<sup>16</sup> or an existing development must be destroyed and replaced.<sup>17</sup>

The power to destroy is also necessary because of the physical limitations of the built environment. The Pyramids and other ancient struc-

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15. See Carin Rubenstein, *The Heart of Teardown Country*, N.Y. TIMES, Dec. 16, 2007, [http://www.nytimes.com/2007/12/16/realestate/16cov.html?pagewanted=all&\\_r=2](http://www.nytimes.com/2007/12/16/realestate/16cov.html?pagewanted=all&_r=2) (quoting a realtor on the fundamental reasons for the proliferation of teardowns in Tenafly, New Jersey, a small community within commuting distance of NYC: “There’s no more land being produced in Tenafly . . .”). While reclamation projects can technically “create” more land, these projects are limited to coastal areas and are frequently not pursued because of significant environmental and cost concerns. See, e.g., Maureen Nandini Mitra, *Is It ‘Smart Growth’ to Build in the San Francisco Bay? Updates from the Field*, S.F. PUB. PRESS (Sept. 13, 2010, 4:45 PM), <http://sfpublicpress.org/news/2010-09/is-it-smart-growth-to-build-in-the-san-francisco-bay-updates-from-the-field> (questioning whether a plan to partially pave 1,436 acres of sea level salt ponds along the San Francisco Bay and building 12,000 buildings on it is appropriate, considering the fragile ecosystem of the Bay, and its vulnerability to earthquakes and rising sea levels); *Hong Kong Plans Land Reclamation*, TAIPEI TIMES, May 29, 2012, <http://www.taipeitimes.com/News/world/archives/2012/05/29/2003534015> (discussing the World Wildlife Fund and other environmental groups’ opposition to plans by Hong Kong authorities to “create a series of islands and waterfront extensions by dumping concrete and other construction waste into the sea”).

16. MICHAEL A. PAGANO & ANN O’M. BOWMAN, BROOKINGS INST. CTR. ON URBAN & METRO. POLICY, VACANT LAND IN CITIES: AN URBAN RESOURCE 3 (Dec. 2000), available at <http://www.brookings.edu/~media/research/files/reports/2001/1/01%20vacant%20land%20pagano/paganofinal.pdf> (stating that on average, roughly 15% of U.S. cities’ land is deemed vacant). However, vacant urban land may not be readily available for development, since it may be ecologically fragile (hillsides, floodplains), environmentally unsafe (brownfields), or otherwise protected, inaccessible, or uninhabitable. *Id.* at 2.

17. A city can also acquire additional land on which to locate development through the process of annexation. See RICHARD BRIFFAULT & LAURIE REYNOLDS, STATE AND LOCAL GOVERNMENT LAW 210 (7th ed. 2009) (“Annexation is the territorial expansion of a municipal corporation through the addition of new land.”). However, annexation still leaves municipalities with the two options discussed above: either locate the new development on available vacant land in the annexed territory or replace existing development within the annexed territory.

tures aside, few buildings are intended to last forever.<sup>18</sup> The physical aspects of cities—the buildings, roads, and other infrastructure—although nonliving, have a life cycle analogous to that of living creatures.<sup>19</sup> The concept of a life cycle extends from individual buildings to the city as a whole: from almost the moment of a city’s inception, a physical “process of obsolescence” begins.<sup>20</sup> Not only do “the first dwellings soon bec[o]me inadequate by the standards of the people who lived in the city, but also . . . the street layouts, the sewage systems, and the water supply systems” soon lag behind the needs of residents.<sup>21</sup> Whether buildings have fallen into such disrepair that they threaten the public health, safety, or welfare,<sup>22</sup> or whether they merely no longer adequately serve residents’ needs, cities need the power to destroy such properties to ensure that the city’s most valuable physical asset—its land—can be effectively used.<sup>23</sup>

The passage of time affects not only buildings, but also society: the needs and desires of residents shift over time in response to technological developments, demographic and economic changes, and new understandings of past decisions.<sup>24</sup> A hospital that was state-of-the-art fifty

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18. See *Buildings and Their Impact on the Environment: A Statistical Summary*, EPA GREEN BLDG. WORKGROUP (Apr. 22, 2009), available at <http://epa.gov/greenbuilding/pubs/gbstats.pdf> (“Every year, approximately 170,000 commercial buildings are constructed, and nearly 44,000 commercial buildings demolished.”) (citation omitted).

19. See CHARLENE BAYER ET AL., GA. INST. OF TECH., AIA GUIDE TO BUILDING LIFE CYCLE ASSESSMENT IN PRACTICE 14–15 (2010), available at <http://www.aia.org/aiaucmp/groups/aia/documents/pdf/aiaab082942.pdf> (describing the life cycle stages of buildings).

20. Raymond Vernon, *The Changing Economic Function of the Central City*, in URBAN RENEWAL: THE RECORD AND THE CONTROVERSY 3, 4 (James Q. Wilson ed. 1966).

21. *Id.* at 4. See also ROBERT D. KAPLAN, AN EMPIRE WILDERNESS: TRAVELS INTO AMERICA’S FUTURE 58 (1998) (describing how destruction is part of natural cycle of city-building: “Omaha, like so many successful American frontier towns, was a business venture that happened to work. ‘Community’ had nothing to do with it. In the 1860s, when Omaha was still a risky proposition, the buildings were hastily constructed of wood, and collapsed or were torn down by the 1870s and the 1880s, much as substandard housing from the quick-growth 1950s and 1960s is being torn down today.”). See also Michael Tortorello, *Finding the Potential in Vacant Lots*, N.Y. TIMES, Aug. 3, 2011, <http://www.nytimes.com/2011/08/04/garden/finding-the-potential-in-vacant-lots-in-the-garden.html?pagewanted=all> (quoting Terry Schwarz, director of Kent State University’s Cleveland Urban Design Collaborative: “[I]f you ask people what’s going to happen [in Cleveland], they’ll say: ‘Oh, we’re going to keep losing population. And Phoenix and Atlanta are going to take our water.’ But the truth is, Phoenix and Atlanta have their own expiration date. Every city does.”).

22. See *infra* note 46 for discussion of the city’s power to abate nuisances under the police power.

23. See Williams, *supra* note 5 (quoting Sandra Pianalto, president of the Federal Reserve Bank of Cleveland: “It is not the house itself that has value, it is the land the house stands on.”).

24. See, e.g., FRANK S. ALEXANDER, CTR. FOR CMTY. PROGRESS, LAND BANKS AND LAND BANKING 60 (2011), available at [http://smartgrowthamerica.org/documents/ccp\\_land\\_banks.pdf](http://smartgrowthamerica.org/documents/ccp_land_banks.pdf) (“Properties and neighbor-

years ago may now no longer serve the needs of patients or providers.<sup>25</sup> Single family residences with no closet space, or inefficient heating and cooling systems may be unmarketable to buyers who value modern amenities and can purchase houses with those amenities in low-cost suburbs.<sup>26</sup> A freeway constructed along a waterfront may now be an eyesore and an inappropriate use of valuable land that would be better used for recreation or tax-producing development.<sup>27</sup> Buildings built along a floodplain or wetlands may now be recognized as both presenting a recurring danger to inhabitants and as a drain on city resources.<sup>28</sup> In each of these cases, the resiliency of a city is at risk unless it can exercise the power to destroy buildings and infrastructure that represent obsolete understandings and needs.

The power to destroy is necessary for economic reasons as well: destruction enables a city to eliminate underused, outdated, or vacant properties that drain a city's resources. Vacant and abandoned properties result in a city incurring direct costs, such as maintenance needed

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hoods are not static and fixed in nature. They are inherently dynamic in the roles they play in the life of a community.”).

25. See Parminder Deo, *Parkland Operates for the Future*, DALLAS S. NEWS, <http://www.dallassouthnews.org/2013/11/11/parkland-operates-for-the-future/> (last visited April 14, 2014) (discussing the reasons Dallas voters approved funds for the construction of a new hospital to replace an existing older hospital: “The physicians and caregivers at Parkland are practicing medicine in a hospital built over 50 years ago, and the hospital has been operating at full capacity for years. In 2011, Parkland came under scrutiny about the complications it had with patient care.”). Technological developments may not only change the type of infrastructure or buildings needed, but may also actually eliminate the need for a particular type of development entirely. Thus, just as the development of indoor plumbing eliminated the necessity of public bathhouses in the 19th century, the digitalization of written materials may eliminate the need for libraries with massive square footage devoted to shelving and storage of books.

26. See Michelle Higgins, *The Teardown Wars*, N.Y. TIMES, June 16, 2006, <http://www.nytimes.com/2006/06/16/realestate/16tear.html?pagewanted=all&r=0> (“It’s a tough balancing act . . . . Some of these homes have no closet space, no garage. There’s one or two bedrooms. If these houses are not keeping up to what today’s families[] need, they’ll fall into disrepair and be lost.” (quoting Jeff Perlman, Delray Beach’s mayor)); see also Roger K. Lewis, *The Challenges of Preserving a Historic Neighborhood*, WASH. POST, Sept. 28, 2012, [http://www.washingtonpost.com/realestate/the-challenges-of-preserving-a-historic-neighborhood/2012/09/27/4a301f5c-0742-11e2-858a-5311df86ab04\\_story.html](http://www.washingtonpost.com/realestate/the-challenges-of-preserving-a-historic-neighborhood/2012/09/27/4a301f5c-0742-11e2-858a-5311df86ab04_story.html) (noting that single-family residences may be “unrealistically small and impractical by today’s standards, may need enlarging, upgrading of windows and exterior materials, and new environmental systems.”).

27. Thus, when existing freeways fall into disrepair, many cities have chosen to demolish them and restore the pre-freeway environment (ironically correcting the exercise of the right to destroy in the 1960s and 70s, where cities destroyed neighborhoods to build the freeways). See John O. Norquist, *Tear it Down!*, THE PRESERVATION INSTITUTE (2000), <http://www.preservenet.com/freeways/FreewaysTear.html> (describing the decision by the city of Milwaukee to tear down a waterfront freeway and redevelop the land and noting that the decision increased property values by an estimated \$250 million).

28. See City of Fargo, VOLUNTARY ACQUISITION PROGRAM (2013), available at <https://www.cityoffargo.com/attachments/0db1bc2b-212f-4d6d-9ffa-3a1066d8b9de/Voluntary%20Acquisition%20Policy%202010-14-13.pdf> (describing the City of Fargo’s program to acquire and demolish properties in locations which have been recognized as prone to flooding and unable to be permanently protected)

to clear litter and board windows, and public safety expenditures such as fire and police personnel required to ensure the property does not become a locus for criminal activity or a fire danger.<sup>29</sup> Such properties also impose indirect costs because they typically decrease neighboring property values<sup>30</sup> and create negative social impacts on nearby residents, such as increases in crime and vagrancy.<sup>31</sup> These costs can be a significant drain on a city's budget and a community's economic health. For example, because of the enormous numbers of vacant properties in many Northeast and Rust Belt cities, municipalities can be forced to spend large sums on the upkeep of abandoned properties: Philadelphia has "more than 40,000 vacant properties, 10,000 of which are city-owned";<sup>32</sup> Cleveland has an estimated 15,000 vacant properties, at least half of which are government owned;<sup>33</sup> Baltimore has 16,000, twenty percent of which are city-owned.<sup>34</sup> By destroying properties that are no longer being used or properties whose use creates excessive negative externalities, cities can redirect the tax resources that would have been used for upkeep of the property towards the needs of remaining resi-

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29. When property owners are low-income residents, absentee landlords unwilling or unable to pay maintenance costs, or banks with ownership of property as a result of foreclosure and little incentive to invest in maintenance, the cost of upkeep often falls on cities, which are often already operating under budget cuts and decreased state and federal funding assistance. Maintenance costs and lost tax revenues can be significant: in Philadelphia, maintenance of vacant properties cost the city \$20 million annually and the owners or former owners of these properties owe \$70 million in back taxes. Jan Ransom, *Land Bank Would Enable City to Deal With Vacant Properties*, PHILLY.COM (Oct. 24, 2012) [http://articles.philly.com/2012-10-24/news/34681937\\_1\\_vacant-properties-land-bank-vacant-land](http://articles.philly.com/2012-10-24/news/34681937_1_vacant-properties-land-bank-vacant-land).

30. The blighted and vacant properties often create a self-perpetuating cycle where their continued existence causes increasing numbers of neighboring residents to leave if they can afford to, leaving more vacant or underused properties, and so on. See Brent Larkin, *Demolishing Houses to Save East Side Neighborhoods*, CLEVELAND.COM (Mar. 3, 2013, 12:05 AM), [http://www.cleveland.com/opinion/index.ssf/2013/03/demolishing\\_houses\\_to\\_save\\_eas.html](http://www.cleveland.com/opinion/index.ssf/2013/03/demolishing_houses_to_save_eas.html) (citing a study on East Cleveland neighborhoods where the areas with the highest population loss are also the ones with the most vacant properties).

31. See DAN IMMERGLUCK ET AL., LOCAL VACANT PROPERTY REGISTRATION ORDINANCES IN THE U.S.: AN ANALYSIS OF GROWTH, REGIONAL TRENDS, AND SOME KEY CHARACTERISTICS 6 (2012), available at <http://community-wealth.org/sites/clone.community-wealth.org/files/downloads/paper-immergluck-et-al.pdf>; see also Funders' Network for Smart Growth and Livable Communities, *Vacant Properties and Smart Growth: Creating Opportunity from Abandonment*, 1 LIVABLE COMMUNITIES @ WORK 1, 5 (2004) [hereinafter *Vacant Properties*], available at [http://www.fundersnetwork.org/files/learn/LCW\\_4\\_Vacant\\_Properties.pdf](http://www.fundersnetwork.org/files/learn/LCW_4_Vacant_Properties.pdf) (citing U.S. Fire Administration statistics which state that over 12,000 fires in vacant buildings are reported in the U.S. annually, with a total annual cost of \$73 million in property damage).

32. Ransom, *supra* note 29.

33. Leila Atassi, *What to Do With Vacant Homes is a Cleveland Quandary*, CLEVELAND.COM (Feb. 3, 2013, 1:37 PM), [http://www.cleveland.com/metro/index.ssf/2013/02/what\\_to\\_do\\_with\\_vacant\\_homes\\_i.html](http://www.cleveland.com/metro/index.ssf/2013/02/what_to_do_with_vacant_homes_i.html).

34. Yvonne Wegner, *City to Raze Hundreds of Vacant Houses in Stepped-Up Plan*, BALTIMORE SUN, Aug. 16, 2013, [http://articles.baltimoresun.com/2013-08-16/news/bs-md-ci-vacants-demolition-20130816\\_1\\_vacant-houses-east-baltimore-rowhouses](http://articles.baltimoresun.com/2013-08-16/news/bs-md-ci-vacants-demolition-20130816_1_vacant-houses-east-baltimore-rowhouses).

dents and lower the likelihood of contagion effects on neighboring properties.<sup>35</sup> While restoration or repair by city or by nonprofits taking over ownership may be an alternative to destruction, it simply may not be economically feasible for some properties.<sup>36</sup> Particularly in “shrinking cities” like Detroit and Cleveland, where large population decreases have left a significant over supply of aging and vacant properties, destruction may simply be a visible manifestation of an end that has already occurred: “The bulldozers are merely ‘burying the dead.’”<sup>37</sup>

Cities need the power to destroy not only to eliminate underused and vacant properties, but also to create the space necessary for new land uses that will contribute to the city’s resiliency. While the exercise of the right to destroy for these purposes may require hard choices—including the destruction of property whose only fault is that it exists in a location where the public good requires something else<sup>38</sup>—nonetheless,

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35. Demolition is often touted as the surest means of ensuring that neighboring property values stabilize or increase. See Jeff Green & Prashant Gopal, *Detroit Survival Depends on Speed of Destruction*, BLOOMBERG (May 30, 2013, 7:06 AM), <http://www.bloomberg.com/news/2013-05-30/detroit-survival-depends-on-speed-of-destruction.html> (citing the opinion of the head of the Detroit Blight Authority, who states that large-scale demolition is the only way to get “the housing market functioning properly again”); *Demolition*, GENESEE COUNTY LAND BANK, <http://www.thelandbank.org/demolition.asp> (last visited April 15, 2014) (“Studies show that demolishing these houses increases both neighborhood safety and property values.”); John B. Saul, *Should We Tear Down Foreclosures?*, MSN MONEY (Nov. 15, 2011, 11:26 AM), <http://money.msn.com/home-loans/should-we-tear-down-foreclosures-saul.aspx> (explaining that in addition to the property condition, market conditions are a determinant of whether a property should be destroyed, and advocating that foreclosed homes should be demolished as a way to help remaining residents, likening the destruction to “pulling a bad tooth to save the rest of them.” (quoting Rick Sharga, Senior Vice President of RealtyTrac)). *But see Vacant Properties*, *supra* note 31 (citing a study from University of Minnesota showing that “a property’s value would fall by \$1,300 as a result of the demolition of a vacant property on the same city block,” a result which stands in contrast to other studies that demolition always improves property values).

36. See, e.g., Eddie Fitzgerald, *New Bern Continues to Tear Down Neglected Homes that Fail to Meet City Codes*, SUN JOURNAL, Apr. 10, 2013, <http://www.newbernsj.com/news/local/new-bern-continues-to-tear-down-neglected-homes-that-fail-to-meet-city-codes-1.124960> (noting that although the city of New Bern offers properties that have been determined to be unfit for habitation and slated for demolition to nonprofits such as Habitat for Humanity, “a lot of them don’t want the properties, saying they are not worth the restoration.” (quoting John Clark, a New Bern building inspector)); see also Ben Austen, *The Death and Life of Chicago*, N.Y. TIMES, May 29, 2013, <http://www.nytimes.com/2013/06/02/magazine/how-chicagos-housing-crisis-ignited-a-new-form-of-activism.html?pagewanted=all> (“[T]he numbers on these blocks simply don’t add up, and no amount of good intentions is going to change that any time soon. Since 2009, the city has funneled \$168 million from the federal Neighborhood Stabilization Program into the purchase of 862 vacant foreclosures, fixing up 804 of them, at an average cost of \$110,000 . . . . So far only 91 of the units have sold.”).

37. Brady Dennis, *Banks Turn to Demolition of Foreclosed Properties to Ease Housing-Market Pressures*, WASH. POST, Oct. 21, 2011, [http://www.washingtonpost.com/business/economy/banks-turn-to-demolition-of-foreclosed-properties-to-ease-housing-market-pressures/2011/10/06/gIQAwigIgL\\_story.html](http://www.washingtonpost.com/business/economy/banks-turn-to-demolition-of-foreclosed-properties-to-ease-housing-market-pressures/2011/10/06/gIQAwigIgL_story.html).

38. See, e.g., *Kelo v. City of New London*, 545 U.S. 469, 475 (2005) (“There is no allegation that any of these properties is blighted or otherwise in poor condition; rather, they

the resiliency of a city depends on the ability of a city to take actions that provide “tangible symbols of civic progress, augment the property tax base, and enhance the appearance of formerly run down sections” of a city.<sup>39</sup>

Finally, the power to destroy is necessary for resilient cities because innovation—architectural, cultural, and social—is impossible without destruction.<sup>40</sup> Much has been written on the difficulty of striking the appropriate balance between preservation and innovation, but even the most ardent preservationists acknowledge that caution should be exercised before saving the old just because it is old.<sup>41</sup> For example, Paris, one of the most admired cities in the world, is noted for its “architectural symphony”<sup>42</sup> and “progressive urban design”;<sup>43</sup> yet Paris’s unmatched “achievement in urban artistry” would not have been possible without massive amounts of destruction.<sup>44</sup>

### B. How Cities Exercise the Power to Destroy

Cities can exercise the power to destroy in several capacities: as a property owner, pursuant to the police power,<sup>45</sup> or by invoking the doc-

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were condemned only because they happen to be located in the development area.”). As another commentator has noted, the best piece of advice “[f]or anyone who want[s] to avoid being victimized by civic improvement . . . [may be] never to get in the way of plans for community progress.” FRIEDEN & SAGALYN, *supra* note 5, at 34.

39. Bernard Frieden, *Policies for Rebuilding*, in *URBAN RENEWAL: THE RECORD AND THE CONTROVERSY* 585, 587 (James Q. Wilson ed. 1966). This type of destruction is often the result of the use of eminent domain for economic redevelopment. *See Kelo*, 545 U.S. at 469 (upholding the use of eminent domain to acquire non-blighted residential properties which were to be demolished and replaced by a redevelopment project that included both public areas (such as parks) and private development (such as offices)). *See infra* notes 52–62 and accompanying text for further discussion of eminent domain and economic redevelopment.

40. *See* Strahilevitz, *supra* note 6, at 821 (“Urban real estate is a scarce commodity, and the city that places too many of its structures off limits to modern architects risks economic and aesthetic stagnation.”).

41. *See* ANTHONY M. TUNG, *PRESERVING THE WORLD’S GREAT CITIES: THE DESTRUCTION AND RENEWAL OF THE HISTORIC METROPOLIS* 413–417 (Clarkson Potter 2001) (“continued urban change is both inevitable and desirable, especially to the degree that it expands social opportunity”). *Id.* at 417.

42. *Id.* at 287.

43. *Id.* at 294.

44. Under the plan put in place by George-Eugene Haussmann in the 1850s, more than 400 miles of streets were paved and 260 miles of sewers were built, requiring the demolition of over 27,000 houses in the city, and many of the most historic, medieval quarters of the city were eliminated. *Id.* at 294–96.

45. In the case of public nuisance, the city does not own the property and therefore is not destroying it pursuant to its rights as a property owner. Rather, the city is destroying property that it does not own to protect the public health, safety, or welfare pursuant to its police powers. *See* Douglas W. Kmiec, *At Last, the Supreme Court Solves the Takings Puzzle*, 19 HARV. J.L. & PUB. POL’Y 147, 148–49 (1995) (“it is the common law of nuisance that simultaneously defines the limits of individual property rights and outlines the general scope of the police power”). No compensation is due to the owner of the destroyed property if the property qualifies as public nuisance. *See, e.g.,* *Shaffer v. City of Winston*, 576 P.2d 823, 825 (Or. Ct. App. 1978) (“The general rule is that a municipality in the exercise of its police power may, without compensating the owner, destroy a building that threatens the public safety

trine of necessity.<sup>46</sup> While important questions about resiliency are raised by the exercise of the city's power to destroy in each of these capacities,<sup>47</sup> this article focuses on exercises of the city's right to destroy as a property owner because the potential impact on resiliency is the greatest in that situation. As a property owner, the city has legal title to the property, which gives it the unique control and choices accorded to a landowner regarding use of its property.<sup>48</sup>

A property owner's right to destroy is derived from the Roman law concept of *jus abutendi*, and can be understood as the extreme version of an owner's other rights, such as the right to use and the right to exclude: destruction literally uses up the property and permanently excludes others from it.<sup>49</sup> While the right to destroy is disfavored in modern American law and limited by numerous common law and statutory doctrines,<sup>50</sup> courts and scholars nonetheless continue to consider it part of a property owner's bundle of rights.<sup>51</sup>

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where, after reasonable notice and opportunity, the owner fails to remedy the dangerous condition.”).

46. The doctrine of necessity is a common law doctrine that permits anyone—private individual or government actor—to destroy private property if necessary to save human life or avert significant property destruction; no compensation is required. *See Bowditch v. Boston*, 101 U.S. 16, 18 (1879) (“At the common law everyone had the right to destroy real and personal property, in cases of actual necessity, to prevent the spreading of a fire, and there was no responsibility on the part of such destroyer, and no remedy for the owner.”).

47. For example, it has been suggested that because “courts generally look at the quantity and severity of the property's defects in determining whether an emergency situation exists and do not consider the actual imminence of public harm,” use of the police power to justify destruction may be warranted less often than it is currently permitted. Elizabeth M. Tisher, *Re-stitching the Urban Fabric: Municipal-Driven Rehabilitation of Vacant and Abandoned Buildings in Ohio's Rust Belt*, 15 VT. J. ENVTL. L. 173, 193 (2013).

48. *See* RESTATEMENT (FIRST) OF PROPERTY §5(e) (1936) (“The totality of these rights, privileges, powers and immunities which it is legally possible for a person to have with regard to a given piece of land, or with regard to a thing other than land, that are other than those which all other members of society have as such, constitutes complete property in such land or thing other than land.”). Although the scope of the city's right to destroy as a property owner may be constrained by statutory limitations (such as historic preservation ordinances or environmental laws), once the city acquires title to property it has relatively unfettered discretion to decide whether to destroy the property or not, as well as control of subsequent decisions about the use of the property. In contrast, when acting pursuant to the police power or under the doctrine of necessity, the city does not own the property and therefore is limited both in the alternatives to destruction that are available, as well as in the post-destruction land use choices. *See Bowditch*, 101 U.S. at 19–20 (1879).

49. Strahilevitz, *supra* note 6 at 787–88, 794.

50. *See* Kellen Zale, *The Government's Right to Destroy*, 46 ARIZ. ST. L.J. \_\_ (forthcoming 2014) (discussing statutory and common law limitations on a private owner's right to destroy, including arson, anti-mansionization ordinances, the doctrine of waste, and historic preservation laws).

51. *See, e.g.,* *Historic Albany Found., Inc. v. Coyne*, 558 N.Y.S.2d 986, 990 (N.Y. App. Div. 1990) (noting that a property owner's right to destroy is “but one strand in the bundle of property rights” enjoyed by an owner); *see also* Strahilevitz, *supra* note 6. The question of whether the right to destroy should continue to be conceived of as part of an owner's bundle of rights is debatable but beyond the scope of this article.

To understand how a city exercises the right to destroy as a property owner, it is necessary to first understand how the city can acquire ownership of property.<sup>52</sup> This section provides an overview of three of the most common legal mechanisms by which government acquires ownership of property: (i) through the use of eminent domain, (ii) through tax lien foreclosure, or (iii) through a voluntary acquisition (purchase and sale or donation) from a private owner.<sup>53</sup>

### i. Eminent Domain

Eminent domain is the power of the government to take private property for public use, provided just compensation is paid to the own-

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52. When a city acquires ownership of property, it may acquire ownership itself, or ownership may be acquired by an associated governmental or quasi-governmental entity such as a redevelopment agency or a land bank. *See* SORELL E. NEGRO, YOU CAN TAKE IT TO THE BANK: THE ROLE OF LAND BANKING IN DEALING WITH DISTRESSED PROPERTIES, ZONING & PLANNING L. REP. 1,2 (2012), available at <http://www.rc.com/publications/ZPLR%202012%20Land%20Banking.%20Negro%20with%20permission.pdf> Redevelopment agencies are authorized under state law in most states; they are typically created to acquire, assemble, and dispose of property in a specific urban area. *See id.* Land banks are independent “governmental [or quasi-governmental] entities that focus[] on the conversion of vacant, abandoned and foreclosed [and nuisance] properties into productive use” through a variety of means: rehabilitation, re-sale, demolition, assembly with other parcels, or reuse. ALEXANDER, *supra* note 24, at 16, 25, 45, 65 (stating the quoted portion on page 16, and comparing vacant properties to nuisance properties on page 25). There are approximately 150 land banks in operation in the U.S. as of 2013. Bryan Chambers, *Land Bank Plays Role in Improving City Housing*, THE HERALD-DISPATCH, Nov. 27, 2013, <http://www.herald-dispatch.com/news/x1584262133/Land-Bank-plays-role-in-improving-city-housing>.

53. The focus in this article is on eminent domain, tax foreclosure, and voluntary purchase because these are the most common legal mechanisms by which government acquires property ownership; however, other means by which government can acquire ownership to property (and thus be entitled to exercise a property owner’s right to destroy) include: civil and criminal forfeiture proceedings against property used in a criminal enterprise or acquired with the assets of illegal activities (*see* J. Donald Cole & Robbie J. Dimon, *Risky Business: Dealing with Forfeiture Titles*, 12-JUN PROB. & PROP. 8, 10 (1998) (discussing the risks in transactions involving government owned property acquired through forfeiture laws)); acquisition as part of a civil or criminal settlement (*see, e.g.*, Jennifer Lindgren, *Demolition of Ariel Castro’s House Begins*, USA TODAY, Aug. 7, 2013, <http://www.usatoday.com/story/news/nation/2013/08/06/ariel-castro-home-coming-down/2625501/> (explaining that the deed to the house owned by Ariel Castro was transferred to a local government entity that then demolished the property as part of Castro’s plea deal to avoid the death sentence)); escheating to the state when an individual dies intestate and without heirs (*see* W.S.R., Annotation, *Necessity of Judicial Proceeding to Vest Title to Real Property in State by Escheat*, 23 A.L.R. 1237 (1923) (stating the majority rule that title automatically vests in the state upon the death of a citizen intestate and without heirs and no judicial proceeding is required)); foreclosure of a nuisance abatement lien (*see* Steven J. Eagle, *Does Blight Really Justify Condemnation?*, 39 URB. LAW. 833, 853 (2007) (explaining that a lien for the cost of nuisance abatement can be enforced through foreclosure, allowing the government to acquire the property for the cost of the unpaid abatement amount)). While these methods of acquisition are less common than the three discussed above, the discussion in Sections III–V about the risks of exercising the right to destroy and the recommendations regarding demolition review procedures are equally applicable to exercises of the right to destroy with regard to property acquired through these means. *See infra* Parts III–V.

er.<sup>54</sup> The power of eminent domain is granted by the Fifth Amendment of the U.S. Constitution, as well as provided for in most state constitutions.<sup>55</sup> Under the Fifth Amendment, public use does not require literal use by the public, but merely that exercise of eminent domain serve the “public purpose.”<sup>56</sup> Eminent domain can be used in a wide variety of circumstances: to acquire land needed for infrastructure and buildings to be used by the public, such as highways or courthouses, as well as to acquire and transfer property to other private owners who will use it in a way that will benefit the public, such as a stadium or downtown retail redevelopment which create new jobs or increased tax revenues.<sup>57</sup>

This latter type of public use is known as economic redevelopment; definitions vary, but one authority has succinctly described it as the “improvement of an area that was developed at some time in the past but presently suffers from real or perceived physical deficiencies such as blight or environmental contamination or is developed for uses that have become obsolete or inappropriate as a result of changing social or market conditions.”<sup>58</sup> In the wake of the Supreme Court’s 2005 decision in *Kelo v. City of New London*, the use of eminent domain for economic redevelopment has been the subject of much debate in the courts, academic literature, and mainstream media,<sup>59</sup> and some states have narrowed what types of uses will be considered to fulfill a “public pur-

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54. “[N]or shall private property be taken for public use, without just compensation.” U.S. CONST. amend. V; see also *Kelo v. City of New London*, 545 U.S. 469, 477 (2005) (“[I]t has long been accepted that the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*, even though *A* is paid just compensation. On the other hand, it is equally clear that a State may transfer property from one private party to another if future ‘use by the public’ is the purpose of the taking . . .”).

55. See JOSEPH WILLIAM SINGER, PROPERTY 744 (3d ed. 2010).

56. *Kelo*, 545 U.S. at 480 (“Without exception, our cases have defined [public purpose] broadly, reflecting our longstanding policy of deference to legislative judgments in this field.”). The scope of the government’s eminent domain power is thus linked to the scope of the police power; as long as the end goal of the government’s purpose falls within the broad scope of its police power (to act in furtherance of the public health, welfare or safety), then use of eminent domain for that purpose is permissible. See *Berman v. Parker*, 348 U.S. 26, 32 (1954) (“We deal, in other words, with what traditionally has been known as the police power. . . . This principle admits of no exception merely because the power of eminent domain is involved.”).

57. *Kelo*, 545 U.S. at 474, 483–84, 498 (noting at page 483–84 that the City of New London’s plan for economic redevelopment would create more jobs and increased tax revenue for the city, which thus satisfied the public use requirement under the Fifth Amendment).

58. See AM. PLANNING ASS’N, POLICY GUIDE ON PUBLIC REDEVELOPMENT (2004), available at <http://www.planning.org/policy/guides/pdf/publicredevelopment.pdf> (“Redevelopment and infill development may be the only options available to cities trying to respond to new market demands and population growth and can help older urban and suburban areas to maintain their desirability as places to live and conduct business.”).

59. See Michael Allan Wolf, *Hysteria versus History: Public Use in the Public Eye*, in PRIVATE PROPERTY, COMMUNITY DEVELOPMENT, AND EMINENT DOMAIN 15, 15–33 (Robin Paul Malloy ed. 2008) (discussing the reaction in the media and state legislatures in the aftermath of the *Kelo* decision); *Kelo*, 545 U.S. at 489 (foreshadowing the debate that would be raised by its decision: “the necessity and wisdom of using eminent domain to promote economic development are certainly matters of legitimate public debate.”).

pose.”<sup>60</sup> However, even under these narrowed understandings of “public use,” cities still retain the fairly expansive ability to acquire property using eminent domain.<sup>61</sup> Once property is acquired using eminent domain, cities may either destroy the existing structures on the property, or they may transfer ownership of the property to another private party, who can then destroy the existing structures as part of the redevelopment of the area.<sup>62</sup>

## ii. Tax Lien Foreclosure

Tax lien foreclosure is a procedure available to local governments after a property owner has failed to pay property taxes.<sup>63</sup> Although government ownership is often the immediate result of tax lien foreclosure, the primary goal of the process is to return the property to tax-paying status (i.e., private ownership) so it can once again contribute to local revenues.<sup>64</sup> The precise mechanics of tax lien foreclosure vary by juris-

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60. See SINGER, *supra* note 55, at 744 n.386 (citing numerous post-*Kelo* state court decisions holding attempted exercises of eminent domain for economic redevelopment impermissible under state constitutional standards); see also Elisabeth Sperow, *The Kelo Legacy: Political Accountability, Not Legislation, is the Cure*, 38 MCGEORGE L. REV. 405, 405, 418–21 (2007) (describing the post-*Kelo* state legislation passed in thirty-seven states curtailing the use of eminent domain). Even before the *Kelo* decision, some states were narrowing what would serve as a permissible public use under state law for the exercise of eminent domain. See, e.g., *County of Wayne v. Hathcock*, 471 N.W. 2d 445, 481 (Mich. 2004) (overruling precedent and holding that “a generalized economic benefit” is insufficient under the Michigan Constitution to justify the use of eminent domain to transfer property to a private entity).

61. See Sperow, *supra* note 60, at 421–22 (citing a study showing that local governments have exercised the power of eminent domain two-and-a-half times as often in the three years after the *Kelo* decision than they did in a four-year period prior to *Kelo*).

62. See *infra* Section III.

63. While there is a high correlation between vacant and deteriorated properties and tax delinquency, tax lien foreclosure is available regardless of the physical condition of the property. See PAUL C. BROPHY & JENNIFER S. VEY, THE BROOKINGS INST., SEIZING CITY ASSETS: TEN STEPS TO URBAN LAND REFORM 1, 10 (2002), available at <http://www.brookings.edu/~media/research/files/reports/2002/10/metropolitanpolicy%20brophy/brophyveyvacantsteps>

(“The correlation between abandoned properties and those that are chronically tax delinquent is high.”). However, tax lien foreclosure is not available in situations where an owner has effectively abandoned the maintenance of the property, but is still maintaining payment of taxes. See Matthew J. Samsa, Note, *Reclaiming Abandoned Properties: Using Public Nuisance Suits and Land Banks to Pursue Economic Redevelopment*, 56 CLEV. ST. L. REV. 189, 199 (2008) (discussing how in rising real estate markets, speculators hoping to capitalize on the sale of property at a future date may not maintain current property taxes, but fail to maintain the actual physical state of the property, thereby “stym[ing] government agencies that could foreclose” and “impos[ing] the externalities of abandonment without fear of losing the property.”). In those situations, if the government wants to address the blight or disrepair, it must destroy the property through one of the other mechanisms available to it (acquiring the property through voluntary sale or eminent domain, or declaring it a public nuisance). See *id.*

64. See James J. Kelly, Jr., *Bringing Clarity to Title Clearing: Tax Foreclosure and Due Process in the Internet Age*, 77 U. CIN. L. REV. 63, 65 (2008) (“The foreclosure of property tax liens performs an essential economic function by reconnecting underutilized properties to the real estate market.”). In the case of properties that have accumulated multiple years of

diction, but typically the process requires notice to the owner(s) of the delinquency and foreclosure, holding of a sale, a statutory right of redemption for the owner for a limited period of time post-foreclosure, then final decree of title in the successful bidder at the foreclosure sale.<sup>65</sup> If there are no third party bidders at the sale, then the government receives title to the property, extinguishing both the original owner's property interest as well as any prior private liens and interests in the property.<sup>66</sup>

### iii. Voluntary Acquisition

Although the government's use of eminent domain to acquire property tends to receive the most attention (in both scholarly articles and the popular media), in fact, the government much more commonly acquires property through voluntary acquisition—typically purchase and sale, although donation by a private owners also occurs.<sup>67</sup> Voluntary ac-

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tax delinquencies, the liens may exceed the property's fair market value. In such cases, returning the properties to a productive use may require the government forgive outstanding tax liens, or the property will not be able to be transferred on the open market. *See* ALEXANDER, *supra* note 24, at 30 (suggesting that tax lien foreclosure laws be changed “to permit either the minimum bid to be reduced to a lower amount” than the outstanding delinquent taxes and associated interest and penalties, or providing for “the automatic transfer of the property to a public entity such as a land bank,” which is then authorized to extinguish any outstanding taxes on property it acquires).

65. William Weber, Comment and Casenote, *Tax Foreclosure: A Drag on Community Vitality or A Tool for Economic Growth?*, 81 U. CIN. L. REV. 1615, 1620 (2013). While notice requirements and statutory redemption periods are intended to protect property owner's due process rights, critics have contended that they result in the tax lien foreclosure process becoming “lengthy, cumbersome, and filled with doubt[,]” and being a less effective tool for local governments to acquire property than it could be. Brophy & Vey, *supra* note 63, at 11 (noting that in some states, tax foreclosure can take up to seven years); *see also* ALEXANDER, *supra* note 24, at 14–15, 25 (noting on page twenty-five that “[i]n many jurisdictions, foreclosure laws fail to provide either an efficient or effective enforcement mechanism” because of a lengthy process, constitutional deficiencies in notice procedures, use of nonjudicial proceedings, and difficulty with obtaining a clear title because of multiple owners and heir properties with no clear records). A few states have reformed their tax foreclosure process to streamline the process in the case of vacant or abandoned properties. *Id.* at 30.

66. Although most tax lien foreclosure sales are open to the public, studies indicate that a majority of properties that go through the tax foreclosure process become owned by either the foreclosing government entity or a designated quasi-governmental agency, such as a land bank. *See* Weber, *supra* note 65, at 1627, 1636 (citing statistics for Hamilton County, Ohio in 2011, indicating that of the 428 properties offered at auction through the tax lien foreclosure process, only 81 received bids from third parties and of these, only 73 were actually successfully transferred to third parties; the remaining 339 properties became government-owned).

67. *See, e.g.*, CAL. GOV'T CODE §§ 7267, 7267.1 (West 2013) ([T]o encourage and expedite the acquisition of real property by agreements with owners, to avoid litigation and relieve congestion in the courts, to assure consistent treatment for owners in the public programs, and to promote public confidence in public land acquisition practices, public entities shall, to the greatest extent practicable, be guided by [subsequent provisions of the code, including 7267.1(a), which provides: a “public entity shall make every reasonable effort to acquire expeditiously real property by negotiation.”]). *See also* Heath Urie, *Boulder Seeks Eminent Domain Authority to Force Land Sale Near Airport*, DAILY CAMERA, Dec. 3, 2011,

quisition by purchase and sale typically occurs when a city seeks to acquire property for public purposes, but there is no particular location required for the project. Rather than utilize eminent domain in such circumstances, a city will acquire property at fair market value from a private owner pursuant to a public advertisement and negotiations.<sup>68</sup> Cities may also acquire properties through donation from owners who are unable to continue to pay for upkeep of the property; typically, before accepting properties through donation, a city will require that any mortgages be paid off and that a Phase I environmental assessment be conducted if conditions warrant.<sup>69</sup>

### III. RISKS TO RESILIENCY IN DESTRUCTION

While a city may be legally entitled to exercise the right to destroy after acquiring property through eminent domain, tax lien foreclosure, or other mechanisms, it is not always in the best interests of the city's resiliency to do so. Although the power to destroy is essential for urban resiliency for the reasons discussed in Section II(A), the very characteristics that make the right to destroy so appealing—it is permanent, cheap, and simple—also may lead to its overuse in situations where alternatives to destruction would better promote urban resiliency. This section discusses the risks to resiliency posed by each of these characteristics of destruction.

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[http://www.dailycamera.com/ci\\_19463709](http://www.dailycamera.com/ci_19463709) (discussing the city of Boulder's plan to pursue eminent domain for acquisition of property near an airport to comply with FAA requirements if negotiations with the owner fail and quoting the city attorney's opinion: "It's definitely not our first choice."). Many jurisdictions have in place policies expressly disclaiming use of eminent domain for certain purposes and indicating that they will only acquire lands for those purposes by voluntary means. *See, e.g.,* COLLIER CNTY., FLA., DRAFT ORDINANCE 2002-\_\_\_\_ (2002), *available at* <http://www.colliergov.net/Modules/ShowDocument.aspx?documentid=4265> (ordinance stating that county will only acquire environmentally sensitive lands by voluntary acquisition, not by eminent domain); CHUCK HUCKELBERRY ET AL., PIMA CNTY., ARIZ., PROTECTING OUR LAND, WATER, AND HERITAGE: PIMA COUNTY'S VOTER-SUPPORTED CONSERVATION EFFORTS 110–11 (2011), *available at* [http://www.pima.gov/cmo/admin/reports/ConservationReport/PDF/POL\\_sm.pdf](http://www.pima.gov/cmo/admin/reports/ConservationReport/PDF/POL_sm.pdf) (providing that the county will only pursue acquisition of property in floodplain areas by voluntary means, not eminent domain).

68. *See, e.g.,* LA. DIV. OF ADMIN., OFFICE OF CMTY. DEV., REAL PROP. ACQUISITION (2013), *available at* [http://www.doa.louisiana.gov/cdbg/CH%20D\\_Real\\_Property\\_Acquisition.pdf](http://www.doa.louisiana.gov/cdbg/CH%20D_Real_Property_Acquisition.pdf) (stating that voluntary acquisitions are exempt from certain federal requirements applicable to acquisitions involving eminent domain). While a sale by a property owner in lieu of eminent domain may be technically "voluntary," more typically, a sale is only considered voluntary if there is no use of or *threat of use of* eminent domain by the acquiring government entity. *See, e.g.,* U.S. DEP'T OF HOUS. & URBAN DEV., HUD HANDBOOK 1378 § 5-2(a) (2013), *available at* <http://www.hud.gov/offices/adm/hudclips/handbooks/cpdh/1378.0/1378c5CPDH.pdf> (distinguishing between voluntary acquisitions and involuntary acquisitions).

69. *See, e.g.,* LAND BANK OF KANSAS CITY, MO., PROP. DONATION FORM, *available at* <http://www.kcmolandbank.org/Property%20Donation.pdf>.

## A. Destruction is Permanent

Unlike other rights in a property owner's bundle of rights, the right to destroy permanently alters the very nature of property:<sup>70</sup> the property that is destroyed no longer exists.<sup>71</sup> While this permanent elimination is the key to the effectiveness of destruction, it also poses a risk: any value existing in the property is permanently lost when the property is destroyed.<sup>72</sup>

The "value" of property exists in a variety of forms: it may be in the actual physical structure, such as the wood and bricks and glass of which the building is constructed;<sup>73</sup> in the embedded energy savings that the building offers over the energy of new construction;<sup>74</sup> in the property's significance to the community, such as its potential historic nature;<sup>75</sup> or in the property's ability to contribute to the needs of the city through avenues other than destruction, such as reuse, renovation or adaptation.<sup>76</sup> The potential loss of value through destruction is particularly striking in light of the sheer numbers of properties being contemplated for destruction in cities across the county. In Detroit, for example, the administration's goal was to demolish 10,000 buildings per year in both 2012 and 2013.<sup>77</sup> In Cleveland, the county land bank demolishes

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70. The exercise of other rights in the property owner's bundle—such as the right to exclude or transfer—does not permanently alter the nature of property in the same fundamental way that the right to destroy does. It may be expensive or time-consuming to undo the exercise of the right to exclude or the right to transfer, but it is almost always possible to take actions so that the pre-existing state of affairs exists once again; once the right to destroy is exercised, however, the action cannot be undone. *See* TUNG, *supra* note 41, at 68 (“[I]n preservation one principle is absolute: we cannot replace the past once we have destroyed it. We may build facsimiles; but having forfeited the original, we have no way to judge how exact our copies are . . .”).

71. As noted in Section I *supra*, the focus of this article is on physical structures and infrastructure, which the act of destruction eliminates; the land on which the destroyed properties were located obviously continues to exist.

72. *See* TUNG, *supra* note 41, at 68.

73. A few cities have begun to recoup this type of value—the physical structure—from destroyed property by engaging in deconstruction programs when demolishing property. *See* Green & Gopal, *supra* note 35 and accompanying text.

74. *See infra* notes 90-91 and accompanying text.

75. Extensive scholarship exists, in both legal and non-legal forums, on the value that historic properties contribute to cities, and historic preservation laws exist at all levels of government. *See, e.g.*, Penn Cent. Transp. Co. v. N.Y.C., 438 U.S. 104, 108 (1978). While even the most ardent preservationists do not contend that the old should be saved simply because it is old, “[t]hat the architecture of the past should be saved as part of the city of the future is both a very recent and a very old idea.” TUNG, *supra* note 41, at 30.

76. *See, e.g.*, Lee Chilcote, *Done on a Dime: Creative Reuse Method Aims to Save Neighborhoods*, FRESH WATER (May 23, 2013), <http://www.freshwatercleveland.com/features/renovsdemo052313.aspx>.

77. Mayor's Office, *Residential Demolition Program*, CITY OF DETROIT, <http://www.detroitmi.gov/DepartmentsandAgencies/MayorsOffice/Initiatives/ResidentialDemolitionProgram.aspx> (last visited April 15, 2014); Adam Allington, *Cities Demolish Homes, but Problems Linger*, MARKETPLACE (July 16, 2012, 11:53 AM), <http://www.marketplace.org/topics/economy/cities-demolish-homes-problems-linger>.

over 50% of the properties it acquires;<sup>78</sup> as of 2013, over 2,500 buildings had been demolished in Cuyahoga County.<sup>79</sup> In Buffalo, New York, the city did not quite meet its goal of bulldozing 5,000 properties, but did demolish almost 3,000 buildings in the five-year period from 2007 to 2012.<sup>80</sup>

Destruction on this kind of massive scale may be necessary and appropriate to deal with the significant demographic and economic downsizing cities such as Detroit have experienced.<sup>81</sup> However, the permanent nature of destruction means the future trajectory of a city may be irreversibly put into place by such massive acts of destruction: “[Over-demolition] is the difference between a fragile neighborhood that can be brought back and a neighborhood that is going to be so diminished that no developer in their right mind would be able to take it on.”<sup>82</sup> In historic neighborhoods, the wide-scale application of a city’s right to destroy results not only in the loss of the potential for cohesive communities, but may also result in the loss of the area’s historic designation under federal or state laws, which typically require a certain percentage of individual historic buildings to exist in the area for historic district designation.<sup>83</sup> Without that designation, and the grants and funding available pursuant to it, such areas are pushed even deeper into a cycle of deterioration.<sup>84</sup>

In addition, wide-scale destruction of entire neighborhoods may eliminate the infrastructure and land use patterns that represent the kind of sustainability essential to a resilient city. Built before zoning codes that required separation of uses and large amounts of surface parking, many of the areas slated for wide-scale destruction are the same ones that have “more walkable places, [and are] already laid out for a mix of uses. . . .”<sup>85</sup> Destruction on a wide scale almost invariably

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78. Laura Johnston, *Cuyahoga County Land Bank Appointees Replace Controversial Members*, CLEVELAND.COM (Sept. 11, 2012), [http://www.cleveland.com/cuyahoga-county/index.ssf/2012/09/cuyahoga\\_county\\_land\\_bank\\_appointees\\_replace\\_controversial\\_members.html](http://www.cleveland.com/cuyahoga-county/index.ssf/2012/09/cuyahoga_county_land_bank_appointees_replace_controversial_members.html).

79. *Demolition Grant Program Update Shows 6,000 Abandoned Properties Demolished*, OHIO ATTORNEY GENERAL (Oct. 22, 2013), <http://www.ohioattorneygeneral.gov/Media/News-Releases/October-2013/Demolition-Grant-Program-Update-Shows-6-000-Abando>.

80. Green & Gopal, *supra* note 35.

81. See Williams, *supra* note 5 (“In the past, cities would look at buildings individually, determine there was a problem, tear them down and then quickly find another use for the land,” said Justin B. Hollander, an urban planning professor at Tufts University. Now they’re looking at the whole DNA of the city and saying, ‘There are just too many structures for the population we have.’”).

82. Allington, *supra* note 77 (quoting Michael Allen, the Director of the St. Louis-based Preservation Research Office).

83. See Tisher, *supra* note 47, at 177–79 (discussing the National Trust for Historic Preservation’s designation of Over-the-Rhine neighborhood in Cleveland as one of the country’s “Most Endangered Historic Places.”).

84. *Id.* at 177.

85. *Vacant Properties*, *supra* note 31.

produces sprawl: when vast swaths of inner city neighborhoods are demolished, there is nowhere left for a community to grow and develop, and any existing residents are even more likely to leave for the suburbs.<sup>86</sup> Cities are thus left with the worst of both worlds, i.e. an inner core with infrastructure in place but a lack of population, and outer edges in constant need of new infrastructure and investment to serve the growing population.<sup>87</sup>

Even when a city exercises the right to destroy on a less extensive scale, the permanent nature of destruction may fail to be a sustainable use of resources. While the construction of new energy efficient buildings to replace older, less technologically advanced buildings may eventually bring about energy savings, preservationists would caution that, “the greenest building is . . . one that is already built.”<sup>88</sup> According to one study, when the “energy that’s already bound up in preexisting buildings” and the “energy used to construct a new green building instead of reusing an old one” are taken into account, it can take up to 65 years to recoup the embedded energy lost when the older building is demolished.<sup>89</sup>

The permanent nature of destruction also poses a risk because urban planning is an imperfect science at best.<sup>90</sup> For example, the planners of the 1960s and 1970s declared that middle-class residents returning to cities “would fly in the face of deep-seated historical trends, based on powerful sociological forces”;<sup>91</sup> yet today, populations in cities are growing faster than suburbs, even in the sprawling urban areas of the Sunbelt.<sup>92</sup> While cities have a responsibility to make choices that reflect

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86.. Tony Favro, *US Cities Use Demolition as Planning Tool but Results are Often Problematic*, CITY MAYORS (May 7, 2006), [http://www.citymayors.com/development/demolition\\_usa.html](http://www.citymayors.com/development/demolition_usa.html).

87. *Id.*

88. Carl Elefante, *The Greenest Building is . . . One that is Already Built*, 21 J. OF NAT'L TRUST FOR HISTORIC PRESERVATION 26, 32 (2007), *available at* [http://www.ipedinc.net/referencematerials/Article\\_The\\_Greenest\\_Building\\_Is\\_One\\_That\\_Is\\_Already\\_Built\\_by\\_Carl\\_Elefante\\_AIA\\_LEED\\_AP\\_Forum\\_Journal\\_Summer\\_2007.pdf](http://www.ipedinc.net/referencematerials/Article_The_Greenest_Building_Is_One_That_Is_Already_Built_by_Carl_Elefante_AIA_LEED_AP_Forum_Journal_Summer_2007.pdf).

89. Wayne Curtis, *A Cautionary Tale*, NAT'L TRUST FOR HISTORIC PRESERVATION, <http://www.preservationnation.org/magazine/2008/january-february/cautionary-tale.html> (last visited April 15, 2014).

90. *See* FRIEDEN & SAGALYN, *supra* note 5 at 260–61 (describing redevelopment efforts in American cities in the latter half of the 20th century: “[t]he connections among [downtown] developments do not mean that city officials anticipated how they would fit together . . . most . . . cities took their opportunities as they saw them. . .”); *see also* KAPLAN, *supra* note 21, at 63 (quoting an urban planner acknowledging the imprecise nature of redevelopment: “all big redevelopment projects are, by definition, high risk, because no one really knows how they will affect city life. Thus, the truly worthwhile urban renewals are always those that happen gradually and by themselves—by accident, almost.”).

91. VERNON, *supra* note 20, at 23.

92. *See* Conor Dougherty & Robbie Whelan, *Cities Outpace Suburbs in Growth*, WALL ST. J. (June 28, 2012, 2:57 AM), <http://online.wsj.com/news/articles/SB10001424052702304830704577493032619987956>; William H. Frey, *A Big City Growth Revival?*, BROOKINGS (May 28, 2013), <http://www.brookings.edu/research/opinions/2013/05/28-city-growth-frey#> (“[T]he suburbs of Sunbelt metropolitan areas like Austin, Houston, and Orlando continue to grow very fast.

anticipated needs, the permanent nature of destruction should serve as a reminder that cities also have a countervailing “responsibility to sustain the parts . . . that, at least for the moment, have lost vitality.”<sup>93</sup>

### B. Destruction is Cheap

While the demolition of large infrastructure or buildings can cost millions of dollars, destruction is typically less expensive than alternatives such as renovation, reuse, or ongoing maintenance.<sup>94</sup> Through demolition, a property that has been a liability to a city—by draining resources and failing to produce tax revenues—can be transformed into a positive asset, through transfer to a tax-paying owner or by being cleared for low-cost open space.<sup>95</sup>

Funds for demolition are also often more readily available to a city than funding for alternatives. For example, federal funds in the form of Community Development Block Grants have been characterized as “easy to come by,” in contrast to “[m]oney for stabilization and/or renovation,” which must “be patched together from multiple sources.”<sup>96</sup> Since the foreclosure crisis of 2008, numerous additional funds for demolition have been available: banks such as Wells Fargo and Bank of America have reached agreements with city governments to donate bank-owned foreclosed properties and pay for demolition costs;<sup>97</sup> non-profits have also made funds available for the costs of demolition;<sup>98</sup> and federal

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Yet their big cities are also growing rapidly, faster relative to their suburbs than in the 2000s.”).

93. Austen, *supra* note 36 (quoting a planner who suggested that cities should consider the long view of history, as well as short term needs: “Think about Rome . . . About 1,000 years ago, the population there had shrunk to something like 20,000; now the city was bustling with more than two million people.”).

94. See Plushnick-Masti, *supra* note 7 (noting estimated demolition costs for the Houston Astrodome are \$78 million, as compared to \$217 million for redevelopment).

95. The low cost of destruction also offers indirect economic benefits by eliminating a source of properties, which could keep home prices depressed. Although “the idea that we are at the point where banks would be better off knocking down houses than reselling them shows there is still something very wrong with the housing market,” destruction offers a low-cost solution to the potential long-term impact the glut of bank-owned foreclosed properties could have on the housing market. Stephen Gandel, *Bulldoze: The New Way to Foreclose*, TIME (Aug. 1, 2011), <http://business.time.com/2011/08/01/bulldoze-the-new-way-to-foreclose/>.

96. See Roberta Brandes Gratz, *Shrinking Cities: Urban Renewal Revisited?*, PLANETIZEN (Apr. 19, 2010, 5:00 AM), <http://www.planetizen.com/node/43826> (“Lenders don’t like the look of dilapidated old buildings, even if they are historic and architecturally beautiful. They do, however, understand demolition and formulaic building projects.”).

97. *Collaborations and Partnerships*, CUYAHOGA LAND BANK, <http://cuyahogalandbank.org/collaboration.php> (last visited April 15, 2014) (noting that the Cuyahoga Land Bank reached agreements in 2011 with Wells Fargo and Bank of America for the banks to donate low asset properties the bank owned through foreclosure to the land bank and contribute up to \$7500 per property for demolition costs); see Jessica Mulholland, *Ohio County Demolishes Homes to Remove Blight*, GOVERNING (Nov. 2011), <http://www.governing.com/topics/health-human-services/housing/cuyahoga-county-ohio-demolishes-homes-to-remove-blight.html>.

98. The Detroit Blight Authority is a non-governmental, non-profit organization created by Bill Pulte, who is part of the family that also has the for-profit Pulte Homes. See

agencies such as Fannie Mae and HUD have provided millions of dollars in federal funding (some of it originally marked for foreclosure prevention) to cities and states to use for demolition.<sup>99</sup>

Yet the relatively low immediate costs associated with destruction may overshadow the larger long-term costs associated with the decision to destroy.<sup>100</sup> Even in the simplest of scenarios, where no rebuilding is intended after destruction and where the city plans to transfer the property to private ownership—such as side lot and community garden programs run by many land banks<sup>101</sup>—the anticipated economic benefit to the city depends, in large part, on another private owner or neighborhood group being able to maintain the property.<sup>102</sup> If the new owner does not maintain it, “[t]he subsequent vacant lot leaves dead space in neighborhoods, attracting crime and detracting from the cohesiveness of a residential or commercial environment,”<sup>103</sup> and requiring the city to continue to incur maintenance costs.<sup>104</sup> The same scenario can play out on a

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*Our Work and Your Role*, DETROIT BLIGHT AUTHORITY, <http://www.blightauthority.com/> (last visited April 15, 2014). The goal of the Detroit Blight Authority is to “clear lots block by block rather than picking individual homes throughout the city ....” Paul Beshouri, ‘*Detroit Blight Authority*’ to Revolutionize and Privatize the City’s Demolition, CURBED (Feb. 14, 2013), <http://www.detroit.curbed.com/archives/2013/02/detroit-blight-authority-to-revolutionizeprivatize-detroits-demolition.php>.

99. See Thomas Ott, *Cleveland and Cuyahoga County Hope to Get Millions for Demolition*, CLEVELAND.COM, [http://blog.cleveland.com/metro/2012/02/cleveland\\_county\\_hope\\_to\\_get\\_m.html](http://blog.cleveland.com/metro/2012/02/cleveland_county_hope_to_get_m.html) (last updated Feb. 10, 2012, 3:15 PM); Sarah Goodyear, *Why the Feds Agreed to Spend TARP Money on Demolishing Michigan’s Empty Buildings*, ATLANTIC CITIES (June 7, 2013), <http://www.theatlanticcities.com/jobs-and-economy/2013/06/why-feds-agreed-spend-tarp-money-demolishing-michigans-empty-buildings/5842/>; U.S. DEPT OF HOUS. & URBAN DEV., OFFICE OF POLICY DEV. & RESEARCH, REVITALIZING FORECLOSED PROPERTIES WITH LAND BANKS 5, (2009), available at <http://www.huduser.org/publications/PDF/landbanks.pdf> (discussing the Neighborhood Stabilization Program, which provides funding to local governments to reclaim and redevelop vacant and foreclosed properties, and the 2009 amendments to it in the American Recovery and Reinvestment Act, which allocate federal funds to cities and states that may be used for demolition of blighted properties); *Wells Fargo, Bank of America Donating Properties to Cuyahoga Land Bank*, CUYAHOGA LAND BANK (June 28, 2011), [http://www.cuyahogalandbank.org/articles/20110628\\_boa\\_wf.php](http://www.cuyahogalandbank.org/articles/20110628_boa_wf.php).

100. Demolition costs typically range from \$3000 to \$9000 for residential properties. *Demolition Cost*, DEMOLITION CONNECTION, <http://www.demolitionconnection.com/demolition-cost/> (last visited April 15, 2014).

101. See *Demolition and Vacant Lot Reuse*, CUYAHOGA LAND BANK, [www.cuyahogalandbank.org/demolition.php](http://www.cuyahogalandbank.org/demolition.php) (last visited April 15, 2014). Under a side lot program, after a vacant or dilapidated or tax-delinquent property is torn down, a land bank may offer the cleared lot to a neighboring owner at a nominal cost; the land then becomes part of the neighboring parcel and taxes can once again be collected (now, on the enhanced value of the neighboring owner’s new, larger parcel of land). REVITALIZING FORECLOSED PROPERTIES WITH LAND BANKS, *supra* note 99, at 3–4.

102. REVITALIZING FORECLOSED PROPERTIES WITH LAND BANKS, *supra* note 99, at 14–15.

103. David T. Kraut, Note, *Hanging Out the No Vacancy Sign: Eliminating the Blight of Vacant Buildings from Urban Areas*, 74 N.Y.U. L. REV. 1139, 1141 (1999).

104. *Id.* at 1160 (noting that demolishing abandoned or vacant properties and leaving a vacant lot may actually exacerbate the quality of life problems [litter, aesthetics, etc.] and potential for criminal activity because it may take many years for any rebuilding to take

larger scale when planned redevelopment projects do not materialize, leaving “nothing to show for . . . highly publicized [redevelopment] efforts except fields of rubble . . .”<sup>105</sup>

Furthermore, while destruction is often less expensive than alternatives, that may be because the full range of alternatives has not been considered. For example, in Cleveland, where the cost of demolition of single-family houses can cost up to ten-thousand dollars, a few developers have found cost-efficient ways to rehabilitate deteriorated but structurally sound properties for the same amount demolition would cost, and then rent the properties at a sustainable rental rate that allows them to make a profit on the investment.<sup>106</sup> These developers have found it is possible to make “homes built around the turn of the century more acceptable to how people live today,”<sup>107</sup> and maintain the vitality of neighborhoods that might otherwise not be considered viable.<sup>108</sup> While such cost-efficient alternatives to destruction currently may be the exception, not the rule, relying on the low cost of the physical act of destruction as compared to alternatives as a justification for its use fails to take into account both the longer-term costs associated with destruction, as well as the non-monetary costs it imposes on communities.

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place on the property, and if the cleared lot is left untended, the above problems may remain even though no building is on the property anymore). *See also* Tim Logan, *Mysterious Firm Bought More Than 240 City Properties, Then Did Nothing*, ST. LOUIS POST-DISPATCH (Aug. 25, 2013, 11:45 AM), [http://www.stltoday.com/business/local/mysterious-firm-bought-more-than-city-properties-then-did-nothing/article\\_32df225a-306d-5584-84ab-0c8313226614.html](http://www.stltoday.com/business/local/mysterious-firm-bought-more-than-city-properties-then-did-nothing/article_32df225a-306d-5584-84ab-0c8313226614.html) (describing the purchase of over 200 already dilapidated properties in St. Louis in 2008 and 2009 by a mystery buyer, who has allowed the properties to continue to dilapidate and has failed to pay property taxes on them).

105. FRIEDEN & SAGALYN, *supra* note 5, at 43 (describing redevelopment projects in Detroit in the 1950s, where properties were destroyed, but the city struggled for years to find private market parties interested in redeveloping the land with productive use). *See also* Favro, *supra* note 86 (noting that the city of Baltimore owns 14,000 vacant lots where buildings were demolished, many of which were originally intended for redevelopment, but nothing has materialized in their place).

106. Olivera Perkins, *Low-Cost Loft Home Conversions Make Old Houses Marketable, Avoiding Demolition*, CLEVELAND.COM (Mar. 30, 2013, 2:00 PM), [http://www.cleveland.com/business/index.ssf/2013/03/loft\\_home\\_conversions\\_offer\\_a.html](http://www.cleveland.com/business/index.ssf/2013/03/loft_home_conversions_offer_a.html).

107. Chilcote, *supra* note 76 (quoting developer Charles Scaravelli).

108. *Id.* (describing the low-cost renovation of century-old properties in Cleveland by Scaravelli, who chooses properties that have balloon framing, which is “strong enough to withstand the removal of interior walls and ceilings,” leaving an open-plan interior design appealing to modern residents, as well as reducing the costs of rehabilitation). “I don’t have to fix that wall because it’s not there.” *Id.* (quoting Scaravelli). The county land bank has taken notice, and has provided Scaravelli with a low-interest loan to complete more low-cost rehabilitations and “mak[e] it possible to save homes that otherwise would be demolished.” *Id.*; *see also* Perkins, *supra* note 106.

## C. Destruction is Simple

The simplicity of destruction is a powerful source of its appeal to both policymakers and the public.<sup>109</sup> Destruction provides an immediate and tangible response to threats to a city's resiliency, such as vacant or dilapidated structures. It literally makes the problem disappear, leaving the city with a blank slate on which to start over.<sup>110</sup>

However, the "problem" faced by cities exercising the right to destroy is often far more complex than a simple physical structure.<sup>111</sup> Unlike the brick and mortar of demolished buildings, underlying issues such as unemployment, crime, poverty, and lack of affordable housing cannot be eliminated by a demolition crew.<sup>112</sup> As the "slum clearance" efforts of 1950s and '60s urban renewal demonstrated, eliminating a physical manifestation of urban decay will rarely, on its own, make the city more resilient,<sup>113</sup> and destruction may do nothing but shift the problem elsewhere.<sup>114</sup> Unless something positive is added to the community, the simplicity of destruction may be its greatest weakness: "[r]emoval of a negative harm is itself a positive achievement, but not all positive achievements are equal."<sup>115</sup>

While destruction may be a simpler concept to understand than the alternatives—renovating, reusing, or stabilizing property—destruction is, at best, only the first step in improving urban resiliency. While the physical infrastructure and built environment of a city are essential to its existence, the resiliency of a city depends on many other factors; as one Cleveland city council member opposed to wide-scale demolition in that city stated: "You don't stabilize a community simply by tearing down houses."<sup>116</sup>

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109. Lenders also appreciate the simplicity of demolition when making loan decisions. Gratz, *supra* note 96.

110. *See id.*

111. *See* PAGANO & BOWMAN, *supra* note 16, at 7–8.

112. *See id.* at 1–2 ("[A]ttention to regulating and managing vacant land has often resulted in short-term fixes rather than long-term solutions.")

113. *See* Amy Lavine, *Urban Renewal and the Story of Berman v. Parker*, 42 URB. LAW. 423, 469 (2010) ("While federal housing and slum clearance policies may have been crafted with the intent of ameliorating the lives of low income families, by the mid-1960s a growing number of people from both sides of the political spectrum had come to the conclusion that urban renewal was a social failure.")

114. *See* Green & Gopal, *supra* note 35 ("[A] study of Buffalo, where 2,814 buildings were knocked down in a five-year span from September 2007 through August 2012, [showed] crime simply shifted away from areas that were cleaned up to less stable areas nearby."). *See also* Austen, *supra* note 36 (describing the efforts by Chicago over the past fifteen years to tear down all eighty-two of its high-rise public housing projects, which themselves replaced slum housing in the 1950s and '60s, but which had become the locus of gang and criminal activity).

115. ALEXANDER, *supra* note 24, at 59.

116. Larkin, *supra* note 30 (quoting East Cleveland city council member Zack Reed). *See also* Sandra Pianalto, *Fixing Cleveland's Housing Problem: Sandra Pianalto*, CLEVELAND.COM (Aug. 9, 2013, 7:18 AM), [http://www.cleveland.com/opinion/index.ssf/2013/08/fixing\\_clevelands\\_housing\\_prob.html](http://www.cleveland.com/opinion/index.ssf/2013/08/fixing_clevelands_housing_prob.html)

The simplicity of the act of destruction also masks the larger, societal trade-offs made when a city exercises the right to destroy. For example, the destruction of numerous low-income neighborhoods across the country during the urban renewal of the 1950s and '60s, while driven by well-intentioned motivations to eliminate sub-standard housing and make affordable housing available to all city residents,<sup>117</sup> permanently eliminated cohesive, minority communities and displaced hundreds of thousands of families and small businesses.<sup>118</sup> While more recent exercises of the right to destroy are typically made with awareness of the failures of the urban renewal efforts of the mid-twentieth century,<sup>119</sup> the seeming simplicity of the act of destruction may blind city decision-makers to the complexity of the “displacement dilemma” which may re-

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(explaining that property values are most influenced by the value of the land, rather than the value of the structures on the land). Thus, unless there is a “strong, ongoing interest in the land itself” (*id.*), exercising the right to destroy may have little effect on the continued relevance of a particular neighborhood.

117. While the urban renewal of this period may have been well intentioned, most commentators agree it was largely a failure. See JOHN R. LOGAN & HARVEY L. MOLOTCH, *URBAN FORTUNES: THE POLITICAL ECONOMY OF PLACE 167–69* (20th Anniversary ed. 2007) (describing the legacy of the National Housing Act of 1949 and subsequent urban renewal of the 1950s-60s as both a policy failure and “fiscal loser”: “There seems to be little disagreement about the devastating effects of urban renewal on the poor and minorities....” Although improving the housing of the poor was ostensibly the program’s key goal . . . [i]n reality, urban renewal destroyed more housing . . . than it created.”).

118. See FRIEDEN & SAGALYN, *supra* note 5, at 29 (“Whatever the motivation, the poor and the minorities were the leading victims of the highway and renewal programs.”). In the period between the start of the urban renewal in the 1950s and interstate highway program through 1967, over 700,000 families—primarily low income and minority—were displaced. *Id.* See also Chester Hartman, *The Housing of Relocated Families*, in *URBAN RENEWAL: THE RECORD AND THE CONTROVERSY* 293, 315, 321 (James Q. Wilson ed. 1966) (noting these redevelopment efforts produced “limited and inconsistent gains” “accompanied by widespread increases in housing costs,” and that a majority of displaced residents still lived in substandard housing after being relocated and overcrowding may have actually increased).

119. Part of this awareness is the recognition of a need to strike a balance between making the city attractive to middle-class residents and providing affordable housing to low-income populations. See JOHN D. LANDIS ET AL., *INST. OF URBAN & REG’L DEV., UNIV. OF CAL. BERKELEY, THE FUTURE OF INFILL HOUSING IN CALIFORNIA: OPPORTUNITIES, POTENTIAL, FEASIBILITY AND DEMAND* iv, 16 (2005), *available at* [http://www.hcd.ca.gov/hpd/infill\\_parcel/](http://www.hcd.ca.gov/hpd/infill_parcel/) (highlighting the tension between opportunities for infill development in urban areas that can reduce sprawl and conserve resources and the fact that potential locations for such infill development are often occupied by low-income rental housing, thus “present[ing] a policy dilemma. In the long run, additional housing supplies will help moderate price and rent increases, and thus, promote increased affordability for housing consumers in general. In the short run, the demolition of existing affordable rental units to make way for additional market-rate units could result in substantial displacement of low-income families.”).

Modern redevelopment efforts also differ from the urban renewal projects of the mid-twentieth century, which focused on “slum clearance,” because current efforts “have been directed at places which have viable uses, and which are not characterized by tenement housing. Moreover, revitalization efforts have included housing only as a component, not as the primary focus of activity. Thus, both with respect to the character of the areas being replanned, and the contents of the planning itself, the new revitalization differs” from earlier efforts. Peter A. Buchsbaum, *Old Wine in New Bottles: Redevelopment Tales of a City, a Suburb, and a State*, 30 *URB. LAW.* 745, 745–46 (1998).

sult from the exercising of the right to destroy. The displacement dilemma is a term used to describe the fact that if cities are successful in the goal of creating new uses that generate new tax revenues, they are also likely to displace low-income residents, simply because higher value properties generate greater tax revenues.<sup>120</sup> Thus, a city's exercise of the right to destroy may result in the city's most vulnerable residents—low-income and minority groups—“being sacrificed so that the city can be reborn.”<sup>121</sup>

Finally, the simplicity of the act of destruction may distort the complex relationship between demographics and infrastructure. Just like “[a] grown man is not, at least physically, merely a very large baby” (or vice-versa), a city that has experienced significant population growth or decline is not just a large or smaller version of itself that works in the exact same way; its fundamental structure has likely also changed.<sup>122</sup> Simple reductive strategies alone are unlikely to be able to address the structural shifts in shrinking cities like Detroit and Cleveland.

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120. See generally Marc Levin, *Neighborhood Development and the Displacement of the Elderly*, 18 URB. L. J. 223 (1980). See also *Growing Pains/Malling America: The Fast-Moving Fight to Stop Urban Sprawl*, E-THE ENVTL. MAG. (Apr. 30, 2000), <http://www.emagazine.com/includes/print-article/magazine-archive/7768/> (“What makes the issue [of smart growth] so complex, however, is that the urban renaissance sweeping many of the nation's cities has simultaneously displaced large numbers of minority and low-income families. Focusing development on the inner city instead of the suburbs doesn't automatically translate into more affordable housing.”). One commentator expressed the “displacement dilemma” in particularly stark terms: “The crux of poor people's urban problem is that their routines—indeed their very being—are often damaging to exchange values.” LOGAN & MOLOTCH, *supra* note 117, at 112. Because low-income residents pay less rent and have less buying power, they are disfavored tenants and customers; because the land uses associated with low-income residents (pawnshops, taverns, bookie joints, etc.) are not the kind of establishments that attract high income residents/businesses/customers, they are often the first on the list to be replaced by redevelopment. *Id.* at 112–13. The displacement dilemma also reflects a catch-22 cities find themselves in—because of a disappearing tax base, a city can't afford to invest in deteriorating neighborhoods unless it can use the power of eminent domain to acquire and destroy properties in those neighborhoods and replace them with tax-producing higher value uses, which then results in low-income residents being priced out of the area. See, e.g., *Mt. Holly Gardens Citizens in Action v. Twp. of Mt. Holly*, 658 F.3d 375 (3d Cir. 2011).

121. Austen, *supra* note 36 (describing conditions on the ground in Chicago in 2010: “[H]omes were being allowed to turn into wrecks” and “the city had a shortage of 120,000 units of affordable housing and some 100,000 people sleeping in shelters or on the street each year. Chicago didn't have just a housing crisis . . . it had a moral crisis.”); see also Allington, *supra* note 77 (expressing concern that large-scale demolition efforts like that of Detroit's current administration may just be urban renewal in new clothing—a chance for cities to clear the land of the urban poor and open up cheap land for developers”). The foreclosure crisis has further compounded the displacement dilemma by creating a glut of vacant bank-owned properties at the same time as there is a need for affordable housing. See Mulholland, *supra* note 97 (quoting an officer of the Cuyahoga County Land Bank as saying that “up until this housing crisis, you always worked hard to save any house that you could—particularly affordable housing. That's just not the case anymore.”); Saul, *supra* note 31, at 3 (“Why houses are being torn down when homelessness is going up is a question that comes up often” in homelessness community advocacy groups.).

122. William Alonso, *Cities, Planners, and Urban Renewal*, in *URBAN RENEWAL: THE RECORD AND THE CONTROVERSY* 437, 442–43 (James Q. Wilson ed. 1966).

## IV. DECIDING TO DESTROY

The city's right to destroy is a powerful tool that can enhance urban resiliency by eliminating vacant and underperforming properties and providing the space necessary for the land uses and amenities residents need. However, as the discussion above indicates, the right to destroy can also negatively impact resiliency: it can disproportionately impact the most vulnerable residents, create negative environmental impacts, and provide only a short-term fix inadequate to address long-term problems.<sup>123</sup> The challenge for cities is determining when the exercise of the right to destroy promotes resiliency and when it does not.

Too often, however, cities make decisions about whether to exercise the right to destroy on an ad hoc basis, without any explicit consideration of the impact of destruction on the city's resiliency. In many cities, destruction has become the default mode of urban planning, with the assumption that resiliency must follow.<sup>124</sup> Even when resiliency is implicitly factored into decisions about destruction, the decision-making process may be opaque and lacking clear standards about how the exercise of the right to destroy will impact resiliency.<sup>125</sup>

In part, the lack of explicit standards is because a city's exercise of the right to destroy occurs in a variety of legal contexts, where the focus is often on the validity of the city's acquisition of the property and less on the decisions the city subsequently makes as owner of the property.<sup>126</sup> While common issues and opportunities are raised by the exercise of the right to destroy in each of these legal contexts, because they occur pursuant to different legal mechanisms and because they are often handled by different governmental departments,<sup>127</sup> a standard approach to

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123. See generally *supra* Section III.

124. Williams, *supra* note 5 (“[D]espite the well-publicized embrace by young professionals of once-struggling city centers in New York, Seattle and Los Angeles, for many cities urban planning has often become a form of creative destruction.”).

125. See, e.g., Mulholland, *supra* note 97 (describing as “quick and dirty” the review that Cuyahoga Land Bank conducts before demolishing properties donated by federal agencies such as Fannie Mae or HUD); CUYAHOGA LAND BANK, *supra* note 5 (explaining that the land bank “identifies properties for demolition based on physical condition, local input and other criteria,” but providing no further explanation of what distinguishes a property that should be destroyed versus one that should not be).

126. See *supra* Part II.B. Thus, in the eminent domain context, the focus is primarily on whether the proposed use of the property is a “public use” within the meaning of federal and state constitutional requirements. *Supra* Part II.B.i. Similarly, in the tax foreclosure context, the focus is often on whether constitutional notice requirements have been satisfied such that ownership can be validly transferred from the non-tax paying owner to the foreclosing government. *Supra* Part II.B.ii. The decision of the city to exercise the right to destroy after it has acquired ownership thus becomes a secondary matter.

127. For example, eminent domain may be handled by city and county attorneys' offices, while tax foreclosure may be handled by tax collectors, and voluntary sales or donations may be handled by redevelopment agencies or land banks. See BROPHY & VEY, *supra* note 63, at 8 (noting that in the context of redevelopment, this type of fragmentation can be a “major stumbling block” to successful redevelopment).

evaluating the impacts of destruction on urban resiliency has not developed.

This article argues that before exercising the right to destroy as a property owner,<sup>128</sup> a city should conduct a demolition review procedure targeted at evaluating the impacts of the proposed exercise of the right to destroy on the city's resiliency.<sup>129</sup> The proposed process would not require a city to engage in any particular substantive actions, but it would require a city to go through an explicit procedure focusing on how the proposed exercise of the right to destroy impacts sustainability. By considering heuristics such as sustainability, efficiency, and proportionality, such a procedural mechanism could act as a counterbalance to the characteristics of destruction—its permanent nature, low cost, and apparent simplicity—that create the potential for overuse.<sup>130</sup> By limiting the procedure to a relatively short time frame, such as thirty to ninety days, cities could be assured that exercises of the right to destroy that will promote resiliency will not be unnecessarily delayed.

While not advocating any particular one-size-fits-all process, this article suggests that certain existing legal mechanisms provide useful models for how such a demolition review process could be structured. First, numerous jurisdictions have enacted demolition delay ordinances that apply to privately owned historic properties.<sup>131</sup> The details of demo-

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128. As noted in Section II.B., this article is focused on exercises of the city's right to destroy as a property owner, and the demolition review process proposed herein would only apply to such instances: it would not apply to exercises of the city's power to destroy pursuant to the police power or under the doctrine of necessity. *Supra* Part II.B. In such circumstances, a pre-demolition review is likely to be inappropriate because of concerns about public safety or welfare; in contrast, when the government is exercising the right to destroy as a property owner, it rarely is facing such emergency considerations.

129. While the kind of wide-scale, multi-property demolitions being conducted in Detroit and other cities raise concerns about overuse of the right to destroy, the author does not necessarily suggest that the demolition review procedure needs to be conducted on a parcel-by-parcel basis. In situations where entire blocks are being contemplated for demolition, the demolition review procedure could aggregate the individual properties being slated for destruction in one grouping; in such cases, a categorical heuristic could be added to the procedure itself to evaluate the impact of multi-parcel destruction on resiliency.

130. See Wendy J. Gordon, *On Owning Information: Intellectual Property and the Restitutory Impulse*, 78 VA. L. REV. 149, 196 (1992) ("The doctrines are to serve not as sources for determinate answers, but heuristically, as sources for themes that may assist in demystifying and limiting the appropriate claim.").

131. See, e.g., CANTON HIST. COMM'N, DEMOLITION DELAY BYLAW (2003), available at [http://www.town.canton.ma.us/hist\\_comm/resources/Demolition%20Delay%20Bylaw.pdf](http://www.town.canton.ma.us/hist_comm/resources/Demolition%20Delay%20Bylaw.pdf); *Historic Preservation Commission Frequently Asked Questions (FAQ's)*, WHITEFISH BAY WIS., [http://www.wfbvillage.org/index.asp?SEC=3DE9BC9B-8280-4D07-84DF-2FB06113BD95&Type=B\\_LIST](http://www.wfbvillage.org/index.asp?SEC=3DE9BC9B-8280-4D07-84DF-2FB06113BD95&Type=B_LIST) (last visited April 15, 2014); SOMERVILLE HIST. PRESERVATION COMM'N, REVIEW OF DEMOLITION PERMIT APPLICATION, available at <http://www.somervillema.gov/sites/default/files/DemoReviewInfo.pdf> (last visited April 15, 2014). Some jurisdictions have gone further and enacted demolition review ordinances that apply to all properties in the jurisdiction, whether or not potentially historic. See, e.g., ALAMO HEIGHTS, TEX., CODE OF ORDINANCES pt. II, ch. 5, art. IX, § 5-131(a)-(b) (2010) ("This article shall apply to all proposed building, demolition, construction, additions or alterations located within the jurisdiction of the City of Alamo Heights . . . except where such demolition is necessary to protect the public health, safety and welfare."); *id.* § 5-134(a) ("The goal of the

lition delay ordinances vary, but in general, these ordinances do not prohibit the destruction of property;<sup>132</sup> rather, they put in place additional levels of review and require consideration of alternatives to demolition before destruction of potentially historic property is permitted.<sup>133</sup> The delay authorized by these types of ordinances is typically between three and nine months, during which time the owner and city work together to explore alternatives to demolition such as using tax incentives or other financial assistance to rehabilitate the property, adapting it to a new use, or finding a purchaser willing and able to restore the property.<sup>134</sup>

The enactment of a demolition delay ordinance that is applicable to a city's proposed exercise of the right to destroy would give local governments and stakeholders an opportunity to consider alternatives to demolition that might have been overlooked without the additional time provided by the process.<sup>135</sup> The delay imposed by a demolition review

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demolition review process is to allow public review and comment regarding the impact that the proposed demolition, and any replacement structures, may have on the surrounding neighborhood and the city.”)

132. See, e.g., *Stewart v. Fed. Reserve Bank of Atlanta, New Orleans Branch*, No. 00-3183, 2000 WL 1681235, at \*2 (E.D. La. Nov. 7, 2000) (“The National Historic Preservation Act requires a federal agency to consider the views of the Advisory Council on Historic Preservation before taking any action that will adversely affect” property eligible for inclusion in the National Historic Register, but “[w]hile the Advisory Council comments must be taken into account and integrated into the decision-making process, program decisions rest with the agency implementing the undertaking.”).

133. The ordinances typically have exemptions on the basis of economic hardship, as well as public safety. *Preservation Ordinance FAQ*, NAT'L TRUST FOR HIST. PRESERVATION, <http://www.preservationnation.org/information-center/law-and-policy/legal-resources/preservation-law-101/local-law/ordinances.html> (last visited April 15, 2014).

134. Nadine Peterson & Maggie Stier, “Blue Ribbon” *Strategies for Demolition Review Ordinances*, N.H. DIV. OF HIST. RESOURCES, [www.nh.gov/nhdhr/publications/documents/demolition.ppt](http://www.nh.gov/nhdhr/publications/documents/demolition.ppt) (last visited April 15, 2014) (discussing these options in terms of a demo review ordinance that applies to private historical properties in N.H.). Other possibilities include removing the building to another site; incorporating the building into the owner/applicant's redevelopment plans; and using an alternative site for the owner/applicant's project. *Id.* An additional alternative that is available in the case of government-owned property is “mothballing,” which is the preserving and maintaining of properties to limit vandalism and deterioration until they can be put into productive use. *Preservation and Inspection*, CUYAHOGA LAND BANK, <http://cuyahogalandbank.org/preservation.php> (last visited April 15, 2014).

135. For example, during the review period, nonprofits that rehabilitate or stabilize and hold property can be contacted to determine if they are interested in taking ownership of the property. Some non-emergency public nuisance abatement ordinances require this type of action before a local government is permitted to demolish the property. See, e.g., NEW BERN, N.C., CODE OF ORDINANCES pt. II, ch. 38, art. II, § 38-29(b)(4) (1971) (“Whenever a determination is made . . . that a dwelling must be vacated and closed, or removed or demolished, . . . notice of the order shall be given by first-class mail to any organization involved in providing or restoring dwellings for affordable housing that has filed a written request for such notices. A minimum period of 45 days from the mailing of such notice shall be given before removal or demolition . . . to allow the opportunity for any organization to negotiate with the owner to make repairs, lease, or purchase the property for the purpose of providing affordable housing.”). In seeking new owners, cities should be guided by the lessons learned by land banks, and seek owners who are “current on taxes, ha[ve] no history of code viola-

procedure may also be beneficial because even if no alternatives are pursued and demolition is ultimately decided upon, the delay provides time to put in place a more sustainable demolition process—such as deconstruction—that promotes resiliency in a way than traditional demolition does not.<sup>136</sup> In light of the permanent nature of destruction, a thirty- or sixty-day delay caused by a demolition review process is a small price to pay for a better-informed decision.

Another model that could inform the development of demolition review procedures is the National Environmental Protection Act (“NEPA”), which offers an example of how a procedural mechanism with no substantive mandate can nonetheless result in more informed decision-making. NEPA is designed to “embed environmental considerations into the [government] decision making process[es]” by requiring that before a government agency take an action or approve a project that may have a potential impact on the environment, it must prepare a formal assessment identifying the potential environmental impacts of the proposed action.<sup>137</sup> Under NEPA (as well as many state environmental protection laws modeled on NEPA), no particular substantive outcome is required; thus, a government agency may proceed with a proposed action even if review under NEPA indicates it will have significant impacts on the environment.<sup>138</sup> However, by requiring the government to

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tions and ha[ve] the resources to make promised changes.” Jon Hurdle, *Philadelphia Raises Stakes with Plan to Reverse Blight*, N.Y. TIMES, Sept. 22, 2013, [http://www.nytimes.com/2013/09/23/us/philadelphia-hopes-a-land-bank-will-combat-urban-blight.html?\\_r=0](http://www.nytimes.com/2013/09/23/us/philadelphia-hopes-a-land-bank-will-combat-urban-blight.html?_r=0) (discussing the strategy of the New Philadelphia Land Bank to avoid having properties fall into the hands of speculators who do not improve properties).

136. Rather than clearing a site entirely, deconstruction more carefully dismantles property and “focuses on giving the materials within a building a new life once the building as a whole no longer has a reasonable functional or sustainable use.” INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, *Deconstruction in Lieu of Demolition*, (Jun. 5, 2011), [http://icma.org/en/Article/101220/Deconstruction\\_in\\_Lieu\\_of\\_Demolition](http://icma.org/en/Article/101220/Deconstruction_in_Lieu_of_Demolition). Some cities already implement deconstruction as part of certain decisions to destroy. See CUYAHOGA LAND BANK, *supra* note 5 (stating a policy of “maximiz[ing] the re-use and recycling potential of materials within” buildings that it demolishes).

137. Daniel P. Selmi, *Themes in the Evolution of the State Environmental Policy Acts*, 38 URB. LAW. 949, 954–55, 958 (2006). While NEPA and some state environmental protection laws modeled on NEPA may apply to certain exercises of a city’s right to destroy for the most part, a city’s exercise of the right to destroy is not covered under existing environmental laws. See, e.g., HAW. CODE R. § 11-200-8(a) (West 2013) (declaring exempt from the Hawaii Environmental Policy Act the “demolition of structures, except those structures located on a historic site as designated in the national register or Hawaii register as provided for in the National Historic Preservation Act”); *Comm. to Save the Fox Bldg. v. Birmingham Branch of the Fed. Reserve Bank of Atlanta*, 497 F. Supp. 504, 511 (N.D. Ala. 1980) (overruled on other grounds) (holding that the demolition of a federally owned building does not trigger NEPA where no significant impacts on the physical environment were alleged but only socio-economic impacts: “socio-economic effects are insufficient to trigger an agency’s obligation to prepare an (environmental impact statement).”).

138. Sixteen states, along with the District of Columbia, have state environmental protection laws modeled on NEPA. PATRICK MARCHMAN, “LITTLE NEPAS”: STATE EQUIVALENTS TO THE NATIONAL ENVIRONMENTAL POLICY ACT IN INDIANA, MINNESOTA AND WISCONSIN 3 (2012) available at <http://dukespace.lib.duke.edu/dspace/bitstream/handle/10161>

go through a process designed to identify environmental impacts, the law makes it more likely that the substantive outcomes reached will be ones that do not unnecessarily negatively impact the environment.<sup>139</sup>

Similarly, a demolition review procedure designed to require cities to consider the impacts of any proposed act of destruction on resiliency is likely to result in decisions that better promote resiliency, even if there is no substantive requirement to do so. Just as environmental assessments under NEPA require government agencies to consider the environmental consequences of a proposed action, a demolition review procedure could require a city to consider the effects of a proposed action on the cities' resiliency. While it might be contended that such a procedure would add unnecessary delay and bureaucracy, experience with environmental protection laws like NEPA demonstrate that there is a value to non-substantive legal rules: procedural requirements can have substantive impacts.<sup>140</sup> By going through a process that requires identification of the impacts of destruction on resiliency, the decision about whether to exercise the right to destroy will not only be better-informed but may be substantively different than the decisions that would be made without such a process.

#### IV. CONCLUSION

The issues implicated by a city's right to destroy are complex, and this article is not meant to suggest that a simple, one-size-fits-all solution will resolve the difficult questions it raises. Rather, the article is meant to focus attention on what is often an ad hoc decision-making process which lacks formal procedural guidelines. An explicit demolition review procedure that promotes public discourse about decisions by the city to destroy is more likely to result in outcomes that promote urban

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*/5891/P.%20Marchman%20Little%20NEPAs\_Final\_w%20endnotes.pdf?sequence=1*. In a handful of these states, such as California and Washington, the state environmental protection laws do require substantive action to be taken as a result of any environmental review. See Kellen Zale, *Changing the Plan: The Challenge of Applying Environmental Review to Land Use Initiatives*, \_\_\_ ECOLOGY L.Q. \_\_ (2014) (forthcoming).

139. See *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350–51 (1989) (“[i]f the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs. . . . Other statutes may impose substantive environmental obligations on federal agencies, but NEPA merely prohibits uninformed—rather than unwise—agency action.”).

140. See, e.g., *id.* at 349 (“[B]y focusing the agency’s attention on the environmental consequences of a proposed project, NEPA ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast.”). In suggesting NEPA and state environmental laws modeled on NEPA as a model for a demolition review procedure, this article is not recommending that the proposed demolition review procedure be as detailed or time-consuming as the environmental review process under those laws are; rather, the value of NEPA and similar laws as a model is in demonstrating the ability of procedural mechanisms to shape substantive outcomes.

resiliency.<sup>141</sup> By creating a non-binding procedure that identifies the impact of destruction on specific heuristics related to resiliency, the demolition review procedure advocated herein creates a limited check on a city's right to destroy while, at the same time, ensuring that cities have the flexibility to exercise the right to destroy when it is appropriate.

Although this article recommends an additional procedural mechanism before the city can exercise the right to destroy as a property owner, it should not be read as taking a position against destruction as an urban planning tool.<sup>142</sup> In many cases, destruction may be the most efficient,<sup>143</sup> sustainable,<sup>144</sup> and proportional means for a city to achieve resiliency, and it must remain available to cities to use when they acquire ownership of property. What this article suggests, however, is that because destruction is permanent, cheap, and simple, it may be overused as a default first choice when alternatives would better achieve resiliency. Therefore, an additional layer of legal review is appropriate to ensure that the unintended consequences of the exercise of the right to destroy are identified and addressed.<sup>145</sup>

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141. In addition to a demolition review procedure, there are numerous other legal mechanisms a city might pursue to address the potential overuse of the right to destroy. For example, cities can adopt "smart codes," which are building codes that impose age-appropriate standards for older properties in "recogn[iti]on of] the limitations of older structures in meeting certain aspects of new construction standards," and thus allowing greater opportunity for cost-effective reuse and renovation of older buildings. *Vacant Properties*, *supra* note 31, at 8 (quoting Local Initiatives Support Corporation). In addition, many cities have enacted vacant property registration ordinances (VPROs), which require owners of vacant properties to register and pay an annual fee to cover the city's costs of maintenance. IMMERGLUCK ET AL., *supra* note 31, at 1–3. While the success of such ordinances depends on owners actually paying the fees, the ordinances can give the city time to make more careful consideration regarding decisions to acquire the property and exercise the right to destroy since the costs of maintenance are being borne by the private owner. *Id.* Even the establishment of a basic database that provides identifying information about government-owned properties in a city (as well as properties most likely to fall into government ownership, such as tax delinquent properties and properties with numerous code violations) can result in better-informed decisions about exercising the right to destroy. ALEXANDER, *supra* note 24, at 28–29.

142. See Lavine, *supra* note 113, at 471–73 (making a comparable comment about the use of eminent domain: "[E]minent domain is merely a tool, and the fact that it was used unwisely in the redevelopment projects of the 1950s and 1960s does not mean that it will always be abused in the contemporary economic development setting.").

143. For example, when dealing with physically connected row houses, like those that exist in many Rust Belt and Northeast cities, one or two sub-standard/blighted properties in the midst of a block of properties that are structurally connected makes it physically difficult and/or cost-prohibitive to cherry-pick renovations/remodels. The only options might be to tear it all down or tear nothing down.

144. See, e.g., Michael Tortorello, *Finding the Potential in Vacant Lots*, N.Y. TIMES, Aug. 4, 2011, at D1, available at <http://www.nytimes.com/2011/08/04/garden/finding-the-potential-in-vacant-lots-in-the-garden.html> (discussing community gardens and other agricultural uses of urban lots where cities have previously demolished buildings).

145. Thus, this article should not be interpreted to suggest that risks raised by the exercise of the city's right to destroy justify enacting sweeping changes in legal standards analogous to those passed by many states with respect to the standard for public use after

Achieving urban resiliency through legal mechanisms will always be a challenge because of the inherently unchartable nature of cities: “[T]he general imprint [of American cities] has been that of the jackpot, not the temple.”<sup>146</sup> However, a city’s future should not be relegated to the jackpot simply because determining what will promote urban resiliency is difficult. The demolition review procedure proposed herein may make a city’s decision about whether to exercise the right to destroy more difficult because it exposes decision makers to the fact that destruction is more than just a permanent, cheap, and simple solution. But if the decision to destroy is made more difficult because it is understood to be more complex, the author would contend that the long-term benefits of such complexity outweigh the short-term losses.

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the Supreme Court’s 2005 decision in *Kelo v. City of New London, Connecticut*, 545 U.S. 469 (2005).

146. Charles Abrams, *Some Blessings of Urban Renewal*, in *URBAN RENEWAL: THE RECORD AND THE CONTROVERSY* 558, 559 (James Q. Wilson ed. 1966). As Winston Churchill stated in another context, “It is always wise to look ahead, but difficult to look farther than you can see.” *Winston Churchill and the Cold War*, NAT’L CHURCHILL MUSEUM, <https://www.nationalchurchillmuseum.org/winston-churchill-and-the-cold-war.html> (last visited April 15, 2014).

