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# Superpriority of Remediation Liens: A Cure To The Virus Of Blight

Marilyn Uzdavines

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# **SUPERPRIORITY OF REMEDIATION LIENS: A CURE TO THE VIRUS OF BLIGHT**

**Marilyn L. Uzdavines\***

## **INTRODUCTION**

Blight in a neighborhood is like a virus that spreads throughout the community. If left unchecked, that virus will destroy the community. In cities like Detroit, the spread of blight has ruined the economy and led to a dramatic plunge in population and the underfunding of city services.<sup>1</sup> Blighted communities have transformed into vast swathes of abandoned properties that attract crime and create hazardous conditions to anyone who dares to remain in them. Although cities like Detroit have received exceptional media attention due to their overwhelming problems, blight continues to affect Detroit and communities in many states across the United States. There is, however, a cure that can protect cities against blight's spread: an

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\* Assistant Professor of Law, Nova Southeastern University, Shepard Broad Law Center. I am grateful to Professors Joel Mintz and Kathy Cerminara for their thoughtful comments. I also truly appreciate the comments I received on this article from Professor Tamara F. Lawson and all of the attendees of the South Florida Developing Ideas Workshop on June 9, 2015, of which I was privileged to be a part. I would also like to thank Dina Rosenbaum for her valuable research assistance. Finally, I would like to thank my husband for his unfailing support.

1. "Detroit has more than 140,000 blighted properties, and approximately 78,000 'abandoned and blighted' structures, some 38,000 of which are considered dangerous. In 2012, the City's violent crime rate was five times the national average, and higher than any U.S. city with a population greater than 200,000." Christine Sgarlata Chung, *Zombieland / The Detroit Bankruptcy: Why Debts Associated with Pensions, Benefits, and Municipal Securities Never Die . . . and How They Are Killing Cities Like Detroit*, 41 *FORDHAM URB. L.J.* 771, 773 (2014) (footnotes omitted).

effectively drafted state statute that provides superpriority status<sup>2</sup> to remediation liens.<sup>3</sup>

Ten years ago, after Hurricane Katrina caused extensive losses to the Gulf Coast, New Orleans was faced with the daunting task of rebuilding amidst an overwhelming number of blighted and abandoned flood-damaged properties. That city's efforts have resulted in major successes in large part due to the State of Louisiana's wise enactment of legislation that empowers New Orleans, and other Louisiana local governments, to give superpriority status to remediation liens.<sup>4</sup> Unfortunately, fewer than half of the fifty states have a similar statute in place that gives local governments the power to give remediation liens superpriority status;<sup>5</sup> and in the minority of states that have codified superpriority status for remediation liens, there are a wide variety of approaches in how they handle the procedure for doing so.

This article advocates superlien status for remediation liens as a means of battling urban blight. In it, I assert that it is essential for states to have a state statute in place to remediate blight so that when devastation begins to occur in a community, whether caused by an economic or natural disaster, local governments are equipped to curtail the blight as quickly as possible.

This article explores the disparate approaches of the minority of states that currently codify a procedure for the superpriority of remediation liens and outlines the essential attributes of a model remediation lien statute. I will contend that these proposed attributes

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2. A state or local government will require many tools to help cure blight in a community. However, this article will focus on superpriority of remediation liens as the most effective tool. For a discussion on other tools that can be used to cure blight, see Marilyn L. Uzdavines, *Barking Dogs: Code Enforcement Is All Bark and No Bite (Unless the Inspectors Have Assault Rifles)*, 54 WASHBURN L.J. 161 (2014). For example, some other tools that have been effective in curing blight are community collaboration models, land banks, and state receiver statutes.
  3. The term "remediation lien" will be used in this article to describe any type of lien that is created as a result of a local government rehabilitating a blighted property. This term is meant to include code enforcement liens, nuisance abatement liens, weed liens or any other descriptive term used to convey this meaning.
  4. Allison Plyer & Elaine Ortiz, *Benchmarks for Blight: How Much Blight Does New Orleans Have?*, THE DATA CTR. (Aug. 21, 2012), [http://www.datacenterresearch.org/reports\\_analysis/benchmarks-for-blight/](http://www.datacenterresearch.org/reports_analysis/benchmarks-for-blight/). Also, New Orleans has established "BlightSTAT," a system used by leadership and the community to identify and remediate blight efficiently. BlightSTAT defines procedures from identification through possession of blighted properties and tracks multiple statistics on blight in New Orleans. *BlightSTAT*, CITY OF NEW ORLEANS, <http://www.nola.gov/performance-and-accountability/reports/blightstat/> (last updated Dec. 8, 2015, 5:39:33 PM).
  5. See *infra* note 36.

should be replicated in states that currently have not addressed the need for a remediation statute with superpriority status. Additionally, I will argue states that currently have a statute in place should follow the suggestions that I will present as a guide to amending those statutes that are too cumbersome or poorly drafted and ineffective.

Part I of the article will present an overview of liens on real property including how priority of liens is determined and impact of lien priorities on property values. I will then explain how and why some liens, including remediation liens, are granted special priority. Part II of the article will focus on the minority of states that currently have a state statute addressing superpriority of remediation liens. In particular, I will examine three crucial attributes of those statutes. Part III of this article will address the main objections to giving superpriority status to a remediation lien, including constitutional objections and some practical objections raised by lenders. Part IV of this article will recount a cautionary tale of what may happen when a state fails to address this issue, and it will propose model attributes of an effective remediation statute with superpriority status.

## I. A BRIEF BACKGROUND ON LIENS AND SUPERPRIORITY LIENS

Local governments, usually through the efforts of a code enforcement department, typically have the power to fine non-compliant property owners and eventually place a lien on a property that violates the local housing code.<sup>6</sup> This is an important tool for a local government that allows the municipality to rehabilitate blighted homes that pose a threat to the community and recoup the expenses it incurs in the process. The local government is authorized to do this in order to protect the health, safety, and welfare of its residents.<sup>7</sup> If the local government's fines or expenses for rehabilitating the property are not paid, the local government can foreclose the lien.<sup>8</sup> Typically, however, the threat of the lien is sufficient to encourage owners to bring their property back into compliance.<sup>9</sup> The goal is to get the homeowner to comply with the housing code without the need

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6. MARTIN G. COLLINS, *THE ART OF CODE ENFORCEMENT: A PRACTICAL GUIDE* 5 (2012).

7. See *Berman v. Parker*, 348 U.S. 26, 32 (1954) (stating that “[p]ublic safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs”).

8. ALAN MALLACH, *RESTORING PROBLEM PROPERTIES: A GUIDE TO NEW JERSEY'S ABANDONED PROPERTY TOOLS* 25–26 (Annu Mangat ed., 2005).

9. *Id.* at 47.

for foreclosure, which wastes valuable time and scarce resources for all parties involved.<sup>10</sup>

Foreclosure carries its own set of procedures. These procedures range from a full civil suit to the more streamlined non-judicial sales. Nonetheless, the end result is always the same: the foreclosing party—in this case the municipality or state under which the code enforcement agency derives its authority—takes possession and ownership of the property.<sup>11</sup>

The nature of the resulting governmental ownership depends entirely on lien priority. If the lien that was foreclosed had superior status to all other liens, then the purchaser at the foreclosure sale takes the property free and clear of any other encumbrances, including first mortgages.<sup>12</sup> If, however, the lien is inferior—as is the case with most remediation liens—a purchaser at a foreclosure sale will have an ownership interest in a property that remains heavily encumbered by the first mortgage, and the new owner will have no equity in the property.<sup>13</sup>

The common law rule of “first in time, first in right” has been codified in the majority of states through recording statutes.<sup>14</sup> As a general matter, this idea—that earlier recorded liens will have priority over later recorded liens—is uniformly accepted throughout the country.<sup>15</sup> In the event of a foreclosure, higher priority liens receive proceeds from a sale before junior liens.<sup>16</sup> Also, junior lienholders, should they choose to foreclose, cannot eliminate senior liens in a foreclosure sale.<sup>17</sup> The result in these cases is that even if a junior lienholder decides to foreclose the property, the party who receives the property through the sale takes possession with the senior liens

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10. *Id.*

11. Creola Johnson, *Fight Blight: Cities Sue to Hold Lenders Responsible for the Rise in Foreclosures and Abandoned Properties*, 2008 UTAH L. REV. 1169, 1193 (2008).

12. *See, e.g., Chase Plaza Condo. Ass'n v. JPMorgan Chase Bank, N.A.*, 98 A.3d 166, 173 (D.C. 2014) (explaining the “general principle” of lien priority in foreclosure law).

13. This result may leave the local government, after incurring further expenses in foreclosing its lien, unable to sell the property because it is still encumbered by the first mortgage.

14. *See, e.g., COLO. REV. STAT. ANN.* § 38-35-109 (West 2015).

15. “A lien that is first in time generally has priority and is entitled to prior satisfaction of the property it binds.” *Aames Capital Corp. v. Interstate Bank of Oak Forest*, 734 N.E.2d 493, 496 (Ill. App. Ct. 2000).

16. *Chase Plaza Condo. Ass'n*, 98 A.3d at 172.

17. *Id.* at 176 (“[F]oreclosure on a lien with greater priority extinguishes liens with lower priority.”).

still encumbering the property.<sup>18</sup> This makes foreclosure for junior lienholders an unattractive option. Lien priority, therefore, directly impacts the true value of a lien.

For example, consider a property valued at \$500,000, with two liens—a first mortgage for \$300,000, and a money judgment for \$100,000. The money judgment lienholder can foreclose the property, but that party will take the property subject to the \$300,000 mortgage. In this scenario, if the holder of the first mortgage forecloses, the money judgment lienholder will still have a reasonable expectation of receiving the amount it is owed because the value of the property exceeds the combined value of the liens. However, if the value of the property were to decrease to \$290,000 for example, if the first mortgage foreclosed, the money judgment lienholder would not receive any foreclosure sale proceeds because the sale proceeds would not even cover what the mortgagee was owed. Code enforcement liens often find themselves in just such a subordinate position—holding a legally recorded document that has no value.

Notwithstanding the customary first in time system, many states have passed statutes that provide exceptions to this rule.<sup>19</sup> State governments have created superliens that can increase their priority to become superior to an earlier recorded lien. Superliens are not a recent concept; cases as far back as the 19th century hold that some liens are entitled to superlien status.<sup>20</sup>

For example, it is standard in most states that a property tax lien is superior to all other liens regardless of when the lien was attached to the property.<sup>21</sup> Moreover, there are other liens that, while not having superiority over all liens, are afforded limited priority.<sup>22</sup> For example, in some states, a mechanic's lien enjoys priority over prior

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18. See *id.* at 173.

19. Some examples of liens given some level of superpriority status are community association liens like condominium and homeowner associations, see FLA. STAT. ANN. §§ 718.116(5)(a), 720.3085(1) (West 2015); mechanics liens, WASH. REV. CODE ANN. § 60.04.061 (West 2015) (granting priority to mechanics liens recorded after prior liens provided the work upon which the lien is based began before the prior lien was recorded), attorney fee liens, *Adco Serv., Inc. v. Graphic Color Plate*, 347 A.2d 549, 551 (N.J. Super. Ct. Law Div. 1975), and environmental liens, see MASS GEN. LAWS ANN. ch. 21E, § 13 (West 2010) (establishing a superlien on commercial property where the state conducts environmental cleanup).

20. See *Glendon Co. v. Townsend*, 120 Mass. 346, 347 (1876).

21. Frank S. Alexander, *Tax Liens, Tax Sales, and Due Process*, 75 IND. L.J. 748, 770–71 n.129 (2000) (compiling statutes).

22. See CAL. CIV. CODE § 8450(a) (West 2015); FLA. STAT. § 718.116(1)(b), (5)(a) (West 2015).

recorded liens, but only over those liens recorded after a notice of commencement of work by the mechanic lienholder.<sup>23</sup> Finally, another group of liens may be given priority over all other liens except tax liens, essentially giving them co-equal status with tax liens.<sup>24</sup>

Public policy supports the use of superliens. The theory is that prejudicing a senior lien's priority is warranted to protect the interest of a junior lienholder.<sup>25</sup> For example, policy supports superpriority status for property tax liens so that the state may be able to receive its due tax in order to obtain the money necessary to operate the government and provide local citizens needed services such as schools, police, firefighters, etc.<sup>26</sup> Whether the tax lien was the last to attach to a property is irrelevant because this tax is crucial to the operation of the government, so the tax lien is treated as the most superior lien on the property.<sup>27</sup> In another example, condominium associations in Florida are given limited superpriority.<sup>28</sup> The public policy justification behind this limited statutory protection is that the associations rely on the monthly or annual community service fees from their owners to operate.<sup>29</sup> The fees collected from those owners are used to pay for utilities, waste removal, salaries of the staff, and maintenance of the grounds.<sup>30</sup> If no limited superpriority status was given to a condominium association's lien, the association would routinely fail to recover the judgment amount owed to them from the foreclosure sale proceeds. Such a result would cause turmoil for the condominium association's finances and potentially bankrupt the association altogether.<sup>31</sup> Instead, the limited superpriority status for

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23. See CAL. CIV. CODE § 8450.

24. Discussed below, Louisiana has codified superlien status for liens recorded by code enforcement to secure payment of remediation costs and fines.

25. See Alexander, *supra* note 21, at 753, 755, 770–71.

26. *Id.* at 753, 755.

27. *Id.* at 770.

28. Condominium liens are protected against first mortgage foreclosures up to twelve months or one percent of the original mortgage. FLA. STAT. ANN. § 718.116(1)(b)(1) (West 2015 & Supp. 2016).

29. See Peter P. Hargitai, *Gotcha! Associations Corner Mortgages for Past Due Assessments*, PRAC. REAL EST. LAW., Jan. 2013, at 19, 21, [https://www.hklaw.com/files/Publication/3bb1cc07-2371-460a-b730-2050c4aeac73/Presentation/PublicationAttachment/9a349dfc-a592-45f8-9aba-3de3ee150795/PREL1301\\_Hartigai.pdf](https://www.hklaw.com/files/Publication/3bb1cc07-2371-460a-b730-2050c4aeac73/Presentation/PublicationAttachment/9a349dfc-a592-45f8-9aba-3de3ee150795/PREL1301_Hartigai.pdf).

30. See Gabriela Islas, *HOA Fees: What Do They Cover?*, QUICKEN LOANS: ZING! (Apr. 11, 2011), <http://www.quickenloans.com/blog/what-do-hoa-fees-cover>.

31. Condominium associations will forego placing a lien on the property if it will be eliminated by a mortgage foreclosure; with no recourse to collect assessments, expenses exceed revenue and associations are forced to explore bankruptcy. Joseph



condominium association liens benefits all owners in the condominium association, a result that the state of Florida considers important.<sup>32</sup>

In the context of remediating blight, superlien statutes generally seek to place remediation liens as top priority, co-equal with tax liens.<sup>33</sup> This creates a heightened incentive for owners or lenders to remediate the problems with their properties before the local governing body has to step in to remedy the violations. Rather than lose their security interest or equity altogether, lenders or owners are thus encouraged to immediately improve their property, rather than leave the property in a blighted state, until they can finally sell the property to other parties.<sup>34</sup>

Because the goal of the remediation superlien statute is to incentivize action on the part of the owner or superior lienholders (i.e., to cure the blight before the superlien must be enforced) a discussion of the steps leading up to the perfecting of the lien is important. Additionally, the level of priority the lien is given, and the procedure required to enforce or collect the lien, are important to realizing of the goal of the statute. If the process breaks down at any point, the result may be that the local government's superlien will still be devalued or even completely negated.<sup>35</sup> The entire process, from identifying the violation to enforcing a superlien, must thus be evaluated to ensure that the desired goal of curing the blight occurs as efficiently as possible. It is to these important matters that this article next turns.

## II. ONLY A MINORITY OF STATES CODIFY REMEDIATION LIEN SUPERPRIORITY.

As noted above, out of the fifty states, fewer than half have statutes that address the superpriority of remediation liens.<sup>36</sup> Each of the

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Dobrian, *Condo Conundrum: Condominium Associations Hit Hard by Foreclosures Consider Bankruptcy*, J. PROP. MGMT., May-June 2010, at 30, 32.

32. See William C. Matthews, Comment, *Aventura Management, LLC v. Spiaggia Ocean Condominium Association: Condominium Associations Beware*, 66 FLA. L. REV. 1731, 1743 (2014).

33. See *infra* notes 68, 75, 86-87 and accompanying text. See generally discussion *infra* Part II.B.

34. See discussion *infra* notes 182-83, 203 and accompanying text.

35. See discussion *infra* Part IV.C.2.

36. See ALA. CODE §§ 45-37A-41(d), 230(d), 251.53 (2015); ALA. CODE § 11-67-8 (LexisNexis 2008); ARIZ. REV. STAT. ANN. § 9-499(E) (Supp. 2015); COLO. REV. STAT. ANN. § 30-15-401(1)(a)(I)(A) (West 2002); CONN. GEN. STAT. ANN. § 7-148aa (West 2008); DEL. CODE ANN. tit. 25, §§ 4602, 4604 (2009); GA. CODE ANN. § 41-2-

states that do address this issue, do so in a slightly different manner.<sup>37</sup> Evidently, few states have made an effort to compare their approach with those of other states, nor have they attempted to adopt best practices.

Within the group of states that do address the superpriority of remediation liens, there exist three distinct attributes that are central to the operation of each statute. The first of those attributes is whether the statute *mandates* that the local governments' remediation liens have superpriority status, or *merely authorizes* local governments to create superpriority status for their remediation liens.<sup>38</sup> The latter group requires that the local government take some additional action to enable the superpriority status for remediation liens, while the former group requires no additional action at the local level to achieve superpriority status for remediation liens.<sup>39</sup> The second attribute that I will discuss is what level of priority the

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9(b)(1) (2014); 65 ILL. COMP. STAT. ANN. 5/11-20-15(a) (West Supp. 2015); KY. REV. STAT. ANN. § 82.720(1) (West 2006); LA. STAT. ANN. § 9:4821(A)(1) (Supp. 2015); MD. CODE ANN., LOCAL GOV'T § 5-205(d)(1) (West 2013); NEV. REV. STAT. ANN. § 266.335(3)(d) (LexisNexis 2011); N.H. REV. STAT. ANN. § 155-B:9(I) (LexisNexis 2010); N.M. STAT. ANN. § 3-36-2 (LexisNexis 2004); N.Y. PUB. HEALTH LAW § 1307(1) (McKinney 2012); N.C. GEN. STAT. § 160A-193(a) (Supp. 2014); OKLA. STAT. ANN. tit. 11 §§ 22-111(A)(6), -112.4(B)(7) (West Supp. 2016); S.C. CODE ANN. § 31-15-30(6) (2007); TEX. LOC. GOV'T CODE ANN. § 214.001(o) (West Supp. 2015); VT. STAT. ANN. tit. 24, § 2291(24) (Supp. 2015); WASH. REV. CODE ANN. § 35.80.030(1)(h) (West Supp. 2015).

37. If our federal system of government is intended, at least in part, to permit experimentation among our various states in achieving the best forms of governance, then there should be clear models of excellence and efficiency in the collection of this tax. Instead, there are over 150 different systems in the United States for collecting the property tax. Most states have at least two entirely different approaches for enforcing payment of the property tax, with one procedure having its origins in the mid-nineteenth century and an alternative second procedure, equally available for use by local governments, having been developed in the middle of the twentieth century. Other states leave the enforcement of the property tax to local governments, with little consistency in procedures as one moves from city to city and from county to county across a state.

Alexander, *supra* note 21, at 748; *see also* discussion *infra* Part IV.C.1.

38. Alexander, *supra* note 21, at 770-72.

39. The New Hampshire statute is self-executing, stating that a governing body's lien for costs *shall* be a lien levied and collected as tax liens. N.H. REV. STAT. ANN. § 155-B:9. On the other hand, Georgia's statute only authorizes counties and municipalities to adopt ordinances establishing remediation liens with superpriority. GA. CODE ANN. § 41-2-9.

remediation lien is given.<sup>40</sup> Whether the lien is to be superior to all other liens except tax liens, co-equal with tax liens, or given some other limited type of priority over liens is an essential determination that must be made in designing the statute. The final attribute that I will address in this section is how the remediation lien is to be enforced.<sup>41</sup>

The disparity in methods and classifications may seem inconsequential when one considers the statutes' effect on priority alone, since remediation lien statutes effectively establish such liens as superior to all other liens except ad valorem property taxes. However, superpriority liens are best seen as a means, not an end. Their goal must be to enable local governments to cure blight in their jurisdictions. As we shall see, when considered in light of that purpose, many currently existing superlien statutes are regrettably ineffective.

*A. States May Either Mandate that Remediation Liens Have Superpriority Status or They May Authorize Local Governments to Decide Whether Remediation Liens Will Have Superpriority Status.*

1. States that Mandate Superpriority Status for Remediation Liens

Some state statutes set forth a system for remediation of blight that applies to all local governments throughout the state.<sup>42</sup> Along with the process for identifying and remediating blighted property, these statutes delineate the procedure for local governments to recoup their expenses through a lien on the property.<sup>43</sup> These measures apply statewide without the need for a local government to enact any other law.<sup>44</sup>

In this system, the statute will typically first define what constitutes blight.<sup>45</sup> Two typical components in analyzing whether a property is

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40. See *infra* Part II.B.

41. See *infra* Part II.C.

42. North Carolina, for example, gives every city the authority to abate conditions dangerous to the public, and lien the property for its costs, the priority of which is equal to ad valorem taxes. N.C. GEN. STAT. § 160A-193(a) to (b) (2010).

43. N.H. REV. STAT. ANN. § 155-B:1 to 15 (LexisNexis 2010).

44. See N.C. GEN. STAT. § 160A-193(a).

45. Definition of blighted properties is set forth in usually one of two places—a definitions section of the statute, or in the section of the statute that authorizes local governments to effect remediation of impaired properties. New Hampshire defines “hazardous building” in a definitions section of the statute. See N.H. REV. STAT. ANN. § 155-B:1(II). South Carolina, however, defines blight in the same statute that

blighted are the structure of the building upon the property and the condition of the premises as a whole. Common terms for a structure that qualifies for remediation are “ruined” and “dilapidated.”<sup>46</sup> Generally, statutes are concerned with buildings that pose an inherent danger to occupants.<sup>47</sup> For the premises to qualify for remediation, statutes look not just to safety, adding public interests like “comfort, health, peace or safety” to query the status of the property.<sup>48</sup> Terms like “garbage” and “rubbish” are often used to describe conditions on properties that are eligible for remediation.<sup>49</sup> Additionally, states vary on whether they use the term code enforcement violation or nuisance abatement.<sup>50</sup> In some states, blight and nuisance are used

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establishes the power for municipalities to remediate blighted property. *See* S.C. CODE ANN. § 31-15-20 (2007) (defining the power for municipalities to “exercise its police powers to repair, close or demolish” any dwelling structure that it determines is “unfit for human habitation due to (a) dilapidation, (b) defects increasing the hazards of fire, accidents or other calamities, (c) lack of ventilation, light or sanitary facilities or (d) other conditions rendering such dwellings unsafe or insanitary, dangerous or detrimental to the health, safety or morals”).

Washington’s statute states:

A “blight on the surrounding neighborhood” is any property, dwelling, building, or structure that meets any two of the following factors: (1) If a dwelling, building, or structure exists on the property, the dwelling, building, or structure has not been lawfully occupied for a period of one year or more; (2) the property, dwelling, building, or structure constitutes a threat to the public health, safety, or welfare as determined by the executive authority of the county, city, or town, or the designee of the executive authority; or (3) the property, dwelling, building, or structure is or has been associated with illegal drug activity during the previous twelve months.

WASH. REV. CODE ANN. § 35.80A.010 (West 2003).

46. N.M. STAT. ANN. § 3-18-5 (2004). Additional terms commonly used are those that convey a hazard, failure to maintain the structure, failure to abide by the fire or building code, abandonment, or unhealthy conditions.
47. *See id.* (“[T]he governing body of a municipality may by resolution find that the ruined, damaged, and dilapidated building, structure or premise is a menace to the public comfort, health, peace or safety . . .”).
48. *See, e.g., id.*
49. Arkansas authorizes its municipalities to cut weeds; to remove garbage, rubbish, and other unsightly and unsanitary articles and things upon the property; and to eliminate, fill up, or remove stagnant pools of water or any other unsanitary thing, place, or condition which might become a breeding place for mosquitoes, flies, and germs harmful to the health of the community. ARK. CODE ANN. § 14-54-901 (West 2015).
50. *Compare* KY. REV. STAT. ANN. § 82.710 (West 2006), *with* ALA. CODE § 11-67-10 (2015).

interchangeably,<sup>51</sup> while other states bifurcate remediation of blight and nuisance abatement.<sup>52</sup> Regardless of what each state calls the problem, the statutes encompass the remediation of the violation and the need for superpriority to protect the local government.

Once the definition of a blighted property is established, these statutes typically set forth the procedure a local government must undertake to begin remediation of the property. The first step is defining who within the local government determines that a property is blighted and in need of remediation.<sup>53</sup> Some statutes leave that determination to the local governing body, while others define specific members of local government who are authorized to determine that a property is blighted.<sup>54</sup> For example, in New Mexico,

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51. Georgia makes little distinction between nuisances and blight remediation. The Georgia statute that sets forth the required provisions local governments must include in their local ordinances designed to protect the health and safety of its community along with the superpriority of remediation liens is located within the chapter titled “Nuisances.” GA. CODE ANN. § 41-2-9 (2014).

52. Virginia defines procedures specifically for blighted properties while maintaining a separate statute for nuisances. “[A]ny locality may, by ordinance, declare any blighted property as defined in § 36-3 to constitute a nuisance, and thereupon abate the nuisance pursuant to § 15.2-900 or § 15.2-1115.” VA. CODE ANN. § 36-49.1:1 (Supp. 2015); *see also id.* § 15.2-900 (2012); *id.* § 15.2-1115 (Supp. 2015).

53. *See infra* notes 54–55.

54. New Hampshire contains a general charge to the “governing body of any city or town.” N.H. REV. STAT. ANN. § 155-B:2 (LexisNexis 2010). Virginia places the authority to determine blight with “[t]he chief executive or designee of the locality or authority.” VA. CODE ANN. § 36-49.1:1. Vermont allows determination by “a municipal building inspector, health officer, or fire marshal.” VT. STAT. ANN. tit. 24, § 2291(24) (Supp. 2015). Arkansas specifically permits notice of violations to be given by a “(1) Police officer employed by the city or town; (2) City or town attorney; or (3) Code enforcement officer employed by the city or town.” ARK. CODE ANN. § 14-54-903(d) (Supp. 2015). Georgia’s statute creates a procedure by which residents may institute action against a blighted property by filing a request with the designated public officer:

[W]henever a request is filed with the public officer by a public authority or by at least five residents of the municipality or by five residents of the unincorporated area of the county if the property in question is located in the unincorporated area of the county charging that any dwelling, building, structure, or property is unfit for human habitation or for commercial, industrial, or business use and not in compliance with applicable codes; is vacant and being used in connection with the commission of drug crimes; or constitutes an endangerment to the public health or safety as a result of unsanitary or unsafe conditions, the public officer shall make an investigation or inspection of the specific dwelling, building, structure, or property.

the governing body of the municipality must pass a resolution declaring that a property requires remediation of dilapidated structures or removal of debris.<sup>55</sup>

Regardless of how the determination is made, every jurisdiction requires some form of notice before proceeding with remediation. Some jurisdictions only require notice to the property owner<sup>56</sup>; others require notice to all interested parties.<sup>57</sup> Some states require notice pursuant to civil procedure,<sup>58</sup> while others permit certified mailing.<sup>59</sup>

GA. CODE ANN. § 41-2-9 (a)(3).

Delaware has created a public entity in each community called the "slum clearance and redevelopment authority." DEL. CODE ANN. tit. 31, § 4503 (2009). Each local government must pass a resolution approving such an authority within its community, or, alternatively, granting the equivalent rights to the community itself or a housing authority. *Id.* The powers of the authority are broadly stated and include the exercise of eminent domain and remediation of blight. *Id.* § 4516.

55. N.M. STAT. ANN. § 3-18-5(A) (LexisNexis 2004).

56. *E.g.*, KY. REV. STAT. ANN. § 82.715 (West 2006) ("Any person who violates the nuisance code shall be cited for the violation and shall receive notice of the violation."); *see also* VA. CODE ANN. § 36-49.1:1 ("No spot blight abatement plan shall be effective until notice has been sent to the property owner or owners of record . . .").

57. In order to secure superpriority status for a remediation lien, some states require notice to all interested parties. *E.g.*, ARK. CODE ANN. § 14-54-903(c)(7)(A) (Supp. 2015) ("If the city or town wishes to secure a priority clean-up lien, it shall provide seven (7) business days' notice to lienholders before undertaking any work at the property."); DALL., TEX. CODE OF ORDINANCES § 27-16.8(e)(2) (2015) ("The city's lien for the expenses is a privileged lien subordinate only to tax liens, if each mortgagee and lienholder is given notice and an opportunity to repair, demolish, vacate, or secure the structure, or relocate the occupants of the structure, whichever applies.").

58. New Hampshire's statute calls for service pursuant to the rules of civil procedure, including provision for publication in the event the owner is absent:

The order shall be served upon the owner of record, or his agent if an agent is in charge of the building, and upon the occupying tenant, if there is one, and upon all lien holders of record, in the manner provided for service of a summons in a civil action. If the owner cannot be found, the order shall be served upon him by posting it at the main entrance to the building and by 4 weeks' publication in a published newspaper of the municipality if there is one, otherwise in a newspaper of general circulation in the state.

N.H. REV. STAT. ANN. § 155-B:4 (LexisNexis 2010); *see also* N.M. STAT. ANN. § 3-18-5(B) (LexisNexis 2004).

59. For example, Delaware's statute provides the following:

For purposes of this subsection, the mailing of a certified letter, return receipt requested, at least 30 days prior to commencement of any exterior improvements, to the last known address of the record owner, owners or lien holders and notifying same of the address of the property to be improved, the condition of the

States vary on the step that follows notice. Some require a hearing before a court<sup>60</sup> or a local government board.<sup>61</sup> Others treat the process as a civil court action, mandating that the person served file an answer to the allegation that the property is blighted.<sup>62</sup> Some require the person served to contest the determination actively, either by filing a petition with the court or an objection with the board of the local government.<sup>63</sup> In all of these models, however, a court or authorized party must determine whether remediation shall take place,<sup>64</sup> and many states offer appellate procedures for property owners to challenge determinations that blight exists.<sup>65</sup>

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property and the legal right of the municipality or political subdivision to obtain a judgment against the owner and a lien against the property after completion of the exterior improvements, shall be deemed sufficient notice.

DEL. CODE ANN. tit. 25, § 4603(a) (2009).

60. In Georgia, a notice of violation is always followed by a court hearing: “The summons shall notify the interested parties that a hearing will be held before a court of competent jurisdiction as determined by Code Section 41-2-5, at a date and time certain and at a place within the county or municipality where the property is located.” GA. CODE ANN. § 41-2-9(a)(3) (2014).

61. *See, e.g.*, WASH. REV. CODE ANN. § 35.80.030(1)(c) (West Supp. 2014) (“Such complaint shall contain a notice that a hearing will be held before the board or officer, at a place therein fixed, not less than ten days nor more than thirty days after the serving of the complaint.”); *see also* DEL. CODE ANN. tit. 31, § 4524 (2009); KY. REV. STAT. ANN. § 82.710(3) (West 2006).

62. N.H. REV. STAT. ANN. § 155-B:6 to 8. The person served with an order that the property requires remediation may serve an answer denying the allegations; failure to do so results in a default and a court order allowing the local government to proceed with remediation. If the person does file an answer, the parties then proceed in the same manner as a civil action in the state. *Id.*

63. *E.g.*, S.C. CODE ANN. § 31-15-70 (2007) (“Any person affected by an order issued by a public officer may within sixty days after the posting and service of the order petition the circuit court for an injunction restraining the public officer from carrying out the provisions of the order . . . .”); KY. REV. STAT. ANN. § 82.715 (West Supp. 2015) (“The notice of violation shall represent a determination that a violation has been committed, and that determination shall be final unless contested.”).

64. *E.g.*, GA. CODE ANN. § 41-2-9 (a)(4)(A)–(B) (2014).

65. Kentucky, for example, provides that:

[a]n appeal from the hearing board’s determination may be made to the District Court of the county in which the city is located within thirty (30) days of the board’s determination. The appeal shall be initiated by the filing of a complaint and a copy of the board’s order in the same manner as any civil action under the Rules of Civil Procedure.

KY. REV. STAT. ANN. § 82.715(4). Arizona requires some provision for appeal to both the notice of remediation and the subsequent assessments for the cost of remediation:

Once a property is deemed to qualify for remediation, statutes typically give the property owner reasonable time to comply with the order.<sup>66</sup> Once that time expires without remediation, the local government is authorized to cause the repair or removal to be completed pursuant to the order.<sup>67</sup> Once completed, the local government is authorized by statute to record a lien for the expenses incurred in remediating the property.<sup>68</sup> This remediation lien automatically has superpriority status because it was mandated through the relevant state statute.<sup>69</sup>

## 2. States that Merely Authorize Superpriority Status for Remediation Liens

Not all states that address this issue provide for mandatory superpriority status for local government remediation liens. Some states simply authorize local governments to enact legislation that sets forth the policies and procedures for remediation of blight and the superpriority of the lien, if they choose to do so.<sup>70</sup> Unless the local government takes this additional step, it does not have the necessary legal authority to achieve the goal of a remediation superlien.<sup>71</sup>

There are three different ways that states merely authorize local governments to enact superpriority ordinances for remediation liens. First, some states give a general consent to the local government that superpriority is permitted, and at most give general guidelines that must be followed to achieve this goal.<sup>72</sup> For example, Kentucky authorizes local governments to enact a nuisance code<sup>73</sup>, which requires notice to be “reasonably calculated to inform the person of the nature of the violation,”<sup>74</sup> and declares liens perfected pursuant to the local government’s enacted code to enjoy superpriority over all

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“Provisions for appeal on both the notice and the assessments, unless the removal or abatement is ordered by a court.” ARIZ. REV. STAT. ANN. § 9-499(A)(2) (Supp. 2015).

66. ALA. CODE § 45-37A-41(b) (2015); CAL. HEALTH & SAFETY CODE § 17980.7(c)(1) (West Supp. 2016); N.H. REV. STAT. ANN. § 155-B:3 (LexisNexis 2010); *see* WASH. REV. CODE ANN. § 35.80.030(1)(f).

67. *See* NEV. REV. STAT. ANN. § 244.3605(4)(a)–(c) (LexisNexis Supp. 2013). *But see* N.H. REV. STAT. ANN. § 155-B:7 (LexisNexis 2010) (requiring a motion to the court to enforce the order for remediation.).

68. NEV. REV. STAT. ANN. § 266.335(3)(a) (LexisNexis 2011).

69. *Id.* § 266.335 (3)(d).

70. *See, e.g.*, COLO. REV. STAT. ANN. § 30-15-401 (West Supp. 2015).

71. *See id.*

72. *See, e.g.*, KY. REV. STAT. ANN. § 82.700–725 (West 2006).

73. *Id.* § 82.705.

74. *Id.* § 82.715.



liens except state taxes.<sup>75</sup> Under this system, local governments have discretion, within the statutory guidelines, to create the procedures by which remediation liens are perfected.

Second, some states authorize local governments to create remediation liens with superpriority status, but only if the local government has enacted legislation with certain terms.<sup>76</sup> For example, Georgia authorizes blight remediation ordinances by local governments, but requires certain provisions to be included. Georgia requires each local government to appoint a public officer to whom complaints of blight may be registered, and establishes with specificity the investigatory findings of a public officer and the procedures that must be followed in response to a complaint of blight.<sup>77</sup> Vermont, in contrast, provides for superpriority of remediation liens, “provided, however, that the town, city, or incorporated village has adopted rules to determine the habitability of a building, including provisions for notice in accordance with 32 V.S.A. § 5252(3) to the building’s owner prior to incurring expenses and including provisions for an administrative appeals process.”<sup>78</sup>

Finally, a small number of states only authorize certain types of local jurisdictions (such as “first-class” cities) within their state to enact local ordinances for blight removal and superpriority status for remediation liens.<sup>79</sup> For example, Washington permits “[f]irst-class cities” (those with a population of over ten thousand at the time of its organization or re-organization) to “provide for . . . the removing of garbage, debris, grass, weeds, and brush on property in the city.”<sup>80</sup> It also gives a general authorization to first-class cities to establish by general ordinance the procedure for collecting its costs.<sup>81</sup> Included in the power granted to first-class cities is the ability to declare its costs a lien on the property, to be “collected in such a manner as is prescribed in the ordinance.”<sup>82</sup> The practical effect of this statute is that a first-class city in Washington has the discretion to enact an ordinance defining the process by which it will remediate weeds,

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75. *Id.* § 82.720 (West Supp. 2015).

76. *E.g.*, GA. CODE ANN. § 41-2-9 (2014); LA. STAT. ANN. § 13:2575(B)(1) (2011).

77. GA. CODE ANN. § 41-2-9.

78. VT. STAT. ANN. tit. 24, § 2291(24) (Supp. 2015).

79. *See, e.g.*, WASH. REV. CODE ANN. § 35.22.310 (West 2003); *see also* LA. STAT. ANN. §§ 13:2575.1–2575.7 (2011 & Supp. 2015).

80. WASH. REV. CODE ANN. §§ 35.01.010, .22.310 (West 2003).

81. *Id.* § 35.22.320. Washington is an example of statutes that give permission to its local governments to remediate blight but refrains from including particular requirements with respect to notice, determination and collection of costs.

82. *Id.*

garbage or debris, declare that its costs are a lien upon the subject property, and decide whether to establish that lien as having superpriority.<sup>83</sup> This privilege, however, is not afforded to the cities that do not qualify as first-class cities.<sup>84</sup>

### *B. Level of Priority Given to Remediation Liens*

Another attribute of remediation superlien statutes is the level of priority that is assigned to the liens associated with the costs of cleanup.<sup>85</sup> States that elevate the priority of remediation liens will usually either declare the lien to be co-equal with that of the ad valorem property tax<sup>86</sup>, or prior in status to all liens *except* the ad valorem property tax.<sup>87</sup> The difference between these last two examples may appear negligible, but it is important nonetheless. If the property tax lien remains superior to the remediation lien, then a default and foreclosure of the property tax lien potentially eliminates the security interest of the remediation lien.<sup>88</sup> Carefully drafted statutes will contain language protecting the remediation lien in the

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83. Washington also has enacted the "Community Renewal Law," an extensive act designed to combat blighted areas. *Id.* § 35.81.005. This is just one of many examples in which states have overlapping methods for curing blight in its jurisdictions. The distinction between many of these statutes is that there are provisions at the individual property level—like the removal of weeds or debris—and at the neighborhood level—where entire blocks of properties are in constant state of disrepair or danger. Where the former takes on the form of a code enforcement action, the latter is typically characterized as a community renewal project, often requiring board approval of plans and the exercise of eminent domain.

84. *Id.* § 35.01.010.

85. Georgia's statute states, "The lien shall be superior to all other liens on the property, except liens for taxes to which the lien shall be inferior . . ." GA. CODE ANN. § 41-2-9 (2014); *see also* ALA. CODE § 45-37A-41(d) (2015). Arizona states the superpriority for remediation liens with more specificity while maintaining primacy for property taxes: "Any assessment recorded after July 15, 1996 is prior and superior to all other liens, obligations, mortgages or other encumbrances, except liens for general taxes." ARIZ. REV. STAT. ANN. § 9-499(E) (Supp. 2015). "The lien shall be superior to all other liens on the property except liens for taxes." ALA. CODE § 45-37A-41(d).

86. Nevada's statute requires any nuisance abatement ordinance enacted by a city council to declare that the expense for removal of a nuisance is a lien on the subject property, which must "[b]e coequal with the latest lien thereon to secure the payment of general taxes." NEV. REV. STAT. ANN. § 266.335(3)(b) (LexisNexis 2011). In Oklahoma's statute on the treatment of abandoned buildings, the cost of the abatement process is declared a lien, which "shall be coequal with the lien of ad valorem taxes and all other taxes and special assessments and shall be prior and superior to all other titles and liens against the property." OKLA. STAT. ANN. tit. 11, § 22-112.4(B)(7) (West Supp. 2015).

87. ALA. CODE § 45-37-243.15 (2015); N.M. STAT. ANN. § 3-36-2 (LexisNexis 2004).

88. ALA. CODE § 45-37-243.15 (2015); N.M. STAT. ANN. § 3-36-2 (LexisNexis 2004).

event of a property tax foreclosure sale. For example, the Nevada statute mandates that the lien must “[n]ot be subject to extinguishment by the sale of any property because of the nonpayment of general taxes.”<sup>89</sup> This approach, while maintaining the primacy of the general property tax, effectively protects remediation liens from losing their security interest should the owner fail to pay the property tax.<sup>90</sup>

The 2006 Nebraska case of *INA Group, LLC v. Young*<sup>91</sup> provides a useful illustration of what may occur when a statute fails to give a remediation lien specific priority over a tax lien. Nebraska’s statute provided superpriority for local governments’ special assessments, which included what Nebraska calls “weed liens,” over all prior liens except general property taxes.<sup>92</sup> No other statutory language protected special assessments from the effects of a general tax foreclosure sale.<sup>93</sup> The question before the court was whether the foreclosure of a general tax lien would extinguish the City’s special assessment liens.<sup>94</sup> Because no statutory language existed to indicate otherwise, the court held that the special assessment liens were extinguished.<sup>95</sup>

A small number of states merge remediation costs into the property tax.<sup>96</sup> The costs are simply added to the tax roll of the prior year.<sup>97</sup>

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89. NEV. REV. STAT. ANN. § 266.335.

90. *See id.*

91. *INA Grp., LLC v. Young*, 716 N.W.2d 733 (Neb. 2006).

92. *Id.* at 736 (“Special assessments levied by cities, villages, and special improvement districts are also a lien on the real estate, second only to the first lien of general taxes.” (citing NEB. REV. STAT. ANN. §§ 77-209, 1917.01 (2006)); *see also* *Echo Fin. v. Peachtree Props., L.L.C.*, 864 N.W.2d 695, 699 (2015)).

93. *INA Group* was decided in 2006. In 2011, Nebraska amended its statutes to include an exception to the common law rule that foreclosure by a superior lienholder extinguishes all junior lienholders: “The delivery of the sheriff’s deed shall pass title to the purchaser free and clear of all liens and interests of all persons who were parties to the proceedings . . . excluding any lien on real estate for special assessments levied by any sanitary and improvement district . . . .” NEB. REV. STAT. ANN. § 77-1914 (West Supp. 2015).

94. *INA Grp.*, 716 N.W.2d at 740.

95. *Id.* at 742.

96. *See* IDAHO CODE § 50-1008 (2009); UTAH CODE ANN. § 10-11-4(1) to (2) (LexisNexis 2012); WIS. STAT. ANN. § 74.53(1)(a)–(b) (West 2011).

97. California’s Water Districts typically contain statutory language that establishes costs for remediating water violations as nuisance abatement costs, collectable as liens which are added to the following year’s annual taxes:

The amount of any costs incurred by the district in abating such a nuisance upon real property shall be added to the annual taxes next levied upon the real property subject to abatement and shall

As discussed below, the method of enforcement for these remediation liens becomes the method in which property taxes are collected.

### *C. Enforcement of the Remediation Lien*

Another attribute of remediation lien statutes is the method of enforcing the lien. Most states decree that the lien shall be enforced in the same manner as property taxes, while a minority establish a distinct procedure from property taxes. For example, New Hampshire's statute states that the remediation lien "may be levied and collected in the same manner as provided . . . for tax liens."<sup>98</sup>

While many state statutes make reference to the manner and procedure for the collection of tax liens, with superpriority for remediation liens, there is little uniformity among those statutes in the process they establish for enforcing property tax liens.<sup>99</sup> Thus, tax liens can be enforced by strict foreclosure, judicial foreclosure, non-judicial foreclosure, a sale of the tax certificate and subsequent foreclosure of the property, or sale of the tax certificate without the need to foreclose.<sup>100</sup> Additionally, states vary as to whether a statutory right of redemption exists after foreclosure. Some states require that two or more years of delinquent taxes accrue before a foreclosure may begin, while other states do not require this waiting period.<sup>101</sup> The various procedures for tax sales are very often inefficient, a circumstance that does not help the local governments in need of recouping expenses they have incurred in curing blighted properties.<sup>102</sup>

States that do not lump enforcement of remediation liens with tax liens usually conform to a standard procedure for enforcing property liens in general.<sup>103</sup> Arizona is one example of a state that gives its local governments the power to execute their lien immediately: "A city or town shall have the right to bring an action to enforce the assessment in the superior court in the county in which the property is

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constitute a lien upon that real property as of the same time and in the same manner as does the tax lien securing those annual taxes.

CAL. WATER CODE § 31144.2(b) (West Supp. 2015).

98. N.H. REV. STAT. ANN. § 155-B:9-a (LexisNexis 2010); *see also* VT. STAT. ANN. tit. 24, § 2291(24) (Supp. 2015) (granting "a lien on the property in the same manner and to the same extent as taxes assessed on the grand list, and all procedures and remedies for the collection of taxes shall apply to the collection of those expenses").

99. *See* Alexander, *supra* note 21, at 772–73.

100. *Id.*

101. *Id.* at 775.

102. Johnson, *supra* note 11, at 1194.

103. *See* OKLA. STAT. ANN. tit. 11, § 22-111(A)(6) (West Supp. 2015).

located at any time after the recording of the assessment . . . .”<sup>104</sup> New Mexico, in a more streamlined approach, declares all municipal liens (including those for remediation of blighted properties) to be superior to all prior liens on the property except state and county taxes<sup>105</sup>, and then authorizes the lienholder to foreclose the lien in the same manner as mortgages.<sup>106</sup> The practical effect of a statute like New Mexico’s is that a municipality may begin the collection action on its lien immediately after the lien is perfected.

Arkansas, in contrast, requires a multi-step process to secure a lien, establish its superpriority, and collect it.<sup>107</sup> First, it requires seven days notice to all other lienholders *prior to remediation* if the local government wishes to establish its lien with superpriority.<sup>108</sup> Next, after work is completed, the local government must provide a second notice to prior lienholders of the final amount of the lien.<sup>109</sup> A public hearing is then held before the governing body of the municipality, after which municipal lienholders seeking to obtain superpriority for their liens must seek declaratory relief in a circuit court action.<sup>110</sup> Once this process is complete, the local government may then enforce the lien, either by foreclosing it or certifying the lien to the tax collector so that it may be added to the tax rolls and collected as delinquent property taxes.<sup>111</sup>

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104. ARIZ. REV. STAT. ANN. § 9-499(D) (Supp. 2015) (emphasis added).

105. N.M. STAT. ANN. § 3-36-2 (LexisNexis 2004).

106. *Id.* § 3-36-4(B).

107. *See generally* ARK. CODE ANN. § 14-54-903 (Supp. 2015).

108. “If the city or town wishes to secure a priority clean-up lien, it shall provide seven (7) business days’ notice to lienholders before undertaking any work at the property.” *Id.* § 14-54-903(c)(7)(A).

109. “If the city or town wishes to secure a priority clean-up lien after the work has been completed, it shall provide second notice to the lienholders of record of the total amount of the clean-up lien.” *Id.* § 14-54-903(e)(1)(B).

110. *Id.* § 14-54-903(f).

If the city or town wishes to secure a first-priority status for any priority clean-up lien created and imposed under this section, it shall file an action with the circuit court within which the property is located seeking a declaration that the clean-up lien is entitled to priority over previously recorded liens and naming the holders of the recorded liens as defendants.

*Id.* § 14-54-903(j)(1).

111. *Id.* § 14-54-904(a)(1) to (2)(B). The Arkansas statute is one of several that define specific procedures for the collection of remediation liens once they are perfected.

### III. ANALYSIS OF OBJECTIONS TO SUPERPRIORITY LIENS

#### *A. Constitutional Objections to Superpriority Will Fail.*

The underlying legal principle behind a lien is that it secures a debt owed by the owner of property to the lienor.<sup>112</sup> As previously discussed, the priority of liens is generally established based on the order in time in which they were perfected.<sup>113</sup> Given this, and the fact that under state legislation a superpriority lienholder will have its interests recognized ahead of earlier recorded liens,<sup>114</sup> it has been asserted that junior lienholders rights to due process of law have been infringed upon by this arrangement.<sup>115</sup> However, in the seminal cases addressing the constitutionality of states' statutes granting superpriority to governmental liens,<sup>116</sup> the courts have upheld the superpriority lien statutes against challenges.<sup>117</sup> If a statute is well-drafted, and the superpriority lien is properly perfected, due process-based objections to governmental lien superpriority are likely to fail.<sup>118</sup>

The Fourteenth Amendment of the Constitution prohibits states from depriving any person of property without "due process of law."<sup>119</sup> The first element of a due process argument is adequate notice.<sup>120</sup> State statutes that do not require notice to junior lienholders

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112. "Essence of 'lien' at common law is right to retain possession of personal property until a charge thereon for a debt or duty is satisfied, and ordinarily the lien is lost by lienholder's voluntary and unconditional surrender of possession or control of the property." *Nature & Incidents in General*, in LIENS, WEST'S A.L.R. DIGEST, § 1, Westlaw ALRDG 239K1 (database updated Dec. 2015) (quoting *Agnew v. Am. Ice Co.*, 66 A.2d 330 (N.J. 1949)).

113. Priority of liens generally depends upon time that they attach to property involved. *Priorities*, in LIENS, WEST'S A.L.R. DIGEST § 12, Westlaw ALRDG 239K12 (database updated Dec. 2015) (citing *In re Foreclosure of Deed of Trust*, 279 S.E.2d (N.C. 1981)).

114. Margaret Murphy, *The Impact of "Superfund" and Other Environmental Statutes on Commercial Lending and Investment Activities*, 41 BUS. LAW. 1133, 1134 (1986).

115. *Randone v. Appellate Dep't.*, 488 P.2d 13, 23 (Cal. 1971); see also Jonathan Remy Nash, *Environmental Superliens and the Problem of Mortgage-Backed Securitization*, 59 WASH. & LEE L. REV. 127, 149-51 (2002).

116. This discussion incorporates the arguments and holdings of cases involving various types of superliens, including mechanics' and environmental cleanup liens. The legal theory in the area is germane to remediation liens in that they share the public purpose as the other liens; therefore, the constitutional objections and responses are applicable to remediation lien statutes.

117. See, e.g., *Kessler v. Tarrats*, 476 A.2d 326, 329, 332 (N.J. Super. Ct. App. Div. 1984).

118. See Nash, *supra* note 115, at 150.

119. U.S. CONST. amend. XIV, § 1.

120. Nash, *supra* note 115, at 149.

before perfecting a superlien run the risk of a constitutional challenge.<sup>121</sup> The lack of due process argument will usually fail regarding the superpriority of a remediation lien, however, because all state statutes and local governments require that some level of notice be given to the interested parties.

A second potential constitutional challenge is whether a superlien statute constitutes a governmental taking.<sup>122</sup> Although courts and commentators have taken differing positions as to whether a superpriority lien may be a governmental taking, even in a case where a court found that a superpriority lien did constitute a taking, the taking was deemed constitutional based on the notice requirements of due process.<sup>123</sup> Two decided cases provide analyses of constitutional objections that are relevant to the constitutionality of remedial superpriority lien legislation. They involve types of liens that are analogous to remediation liens: mechanics' liens and environmental cleanup liens.<sup>124</sup>

The New Jersey Superior Court found that an environmental cleanup lien with superpriority did not constitute a governmental taking.<sup>125</sup> Environmental cleanup liens are analogous to local government's remediation liens in that both grant the government power to enter privately held property for the purpose of cleanup or otherwise bringing the property into compliance with a statute or code.<sup>126</sup> Many states have enacted legislation regarding the contamination of real property by toxic or otherwise hazardous waste.<sup>127</sup> The environmental agencies charged with cleanup of

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121. *Id.*

122. *Id.* at 149–50.

123. *See Connolly Dev., Inc. v. Superior Ct.*, 553 P.2d 637, 643 (Cal. 1976).

124. Mechanics' liens are statutory constructs, designed to protect a party from non-payment for work or supplies for the improvement of real property. The mechanics' lien is typically granted priority over all liens that are recorded subsequent to commencement of work on the property, even if the mechanics' lien is not yet filed. The mechanics' lien and remediation liens are similar in that they both secure repayment of costs in improving a third party's real property. *See infra* notes 141–47 and accompanying text.

125. *Kessler v. Tarrats*, 476 A.2d 326, 332 (N.J. Super. Ct. App. Div. 1984).

126. *See infra* notes 148–51 and accompanying text.

127. *E.g.*, CONN. GEN. STAT. ANN. § 22a-452a (West 2015); 65 ILL. COMP. STAT. ANN. § 5/11-31-1 (e) to -1(f) (West 2005); LA. STAT. ANN. § 30:2195(F)(2) (2000); MASS. GEN. LAWS ANN. ch. 21E, § 13 (West 2010); ME. REV. STAT. ANN. tit. 38, § 1371 (2001); MICH. COMP. LAWS ANN. § 324.20138(2) (West 2009); MONT. CODE ANN. § 82-4-239(5)(a), (c) (West 2015); N.J. STAT. ANN. §§ 58:10-23.11(f), :10B-25.2 (West 2006); N.Y. ENVTL. CONSERV. LAW § 56-0508 (McKinney 2008); 32 PA. STAT. AND CONS. STAT. ANN. § 5116(a)(1) (West 1997); WIS. STAT. ANN. § 292.81 (West 2015).

contaminated properties are permitted to lien the subject property for the costs of cleanup, and in some states, those liens are granted superpriority status.<sup>128</sup> In *Kessler v. Tarrats*, the Superior Court of New Jersey held that an environmental cleanup lien with superpriority did not constitute a governmental taking without just compensation.<sup>129</sup> The court's reasoning hinged on two factors—the state's police power and the circumstances that led to the imposition of the lien.<sup>130</sup>

First, the court noted that each state has "authority . . . to safeguard the vital interests of its citizens."<sup>131</sup> In *Kessler*, the State of New Jersey had enacted legislation that provided for the cleanup of toxic waste on property, including state action when the responsible parties fail to abide by the statute.<sup>132</sup> The court added, "It cannot be disputed that the State had the authority to clean up this property upon the failure of those responsible to do so."<sup>133</sup> The court concluded that the state action amounted to a restriction on the use of land pursuant to the state's police power and not a taking for governmental use.<sup>134</sup> However, the circumstances under which the government was required to take action to clean the property were equally relevant to the court's holding.

The *Kessler* court explained that the state's involvement was solely due to the presence of toxic materials on the property.<sup>135</sup> The state had "the unquestioned authority . . . to require abatement of a health nuisance, and the ability . . . to close down a property or facility which creates a public health menace."<sup>136</sup> The court noted that the diminution of any security interest in the property should be

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128. See, e.g., N.J. STAT. ANN. § 58:10-23.11(f) (West 2006).

129. *Kessler*, 476 A.2d at 328, 332 (interpreting § 58:10-23.11(f)).

130. *Id.* at 331–32.

131. *Id.* at 331 (citing *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 434 (1934)). Another constitutional argument presented in *Kessler* was that the statute violated the Contracts Clause of the Constitution, which prohibits state action that impairs parties' obligations in contracts. U.S. CONST. art I, § 10. The *Kessler* court relied on the United States Supreme Court, which held that the prohibition "is not an absolute and is not to be read 'with literal exactness like a mathematical formula.'" *Kessler*, 476 A.2d at 331 (quoting *Home Bldg. & Loan Ass'n*, 290 U.S. at 428); see also *Tex. Bank & Tr. Co. of Beaumont v. Smith*, 192 S.W. 533 (Tex. 1917) ("Ordinarily a statutory lien will not be given precedence over an existing and duly registered lien. But there is no question as to the power of a legislature to give a statutory lien such priority where its object is to secure charges necessary for the preservation of the property.").

132. See N.J. STAT. ANN. § 58:10–23.11f.

133. *Kessler*, 476 A.2d at 332.

134. *Id.*

135. *Id.*

136. *Id.*



attributed to the party responsible for the contamination, and not the government.<sup>137</sup> The state took action only after the owner, having been notified of the contamination, failed to take action.<sup>138</sup> The court concluded:

The State did not take property, but rather assisted in its enhancement by doing what the owners should have done but did not do. There thus exists a right of reimbursement. *Such action inured to the benefit not only of the owner, but all existing lienholders.* Hence, the State's priority lien status is warranted."<sup>139</sup>

Thus, notably the court not only found that the superpriority environmental cleanup lien was not a governmental taking, but it found that the state was actually providing a benefit to all interested parties.<sup>140</sup>

In contrast, the California Supreme Court reviewed mechanics' liens and their relationship with the Fourteenth Amendment in *Connolly Dev., Inc. v. Superior Court*<sup>141</sup> and determined that a superpriority lien was a governmental taking.<sup>142</sup> The Court stated, "A 'taking' of property under the Fourteenth Amendment encompasses any significant deprivation of a property interest . . . ."<sup>143</sup> It added that physical seizure of property is not a requirement for the Fourteenth Amendment to apply.<sup>144</sup> The court reasoned that even if the property owner retained possession of the property, the lien could impair the owner's ability to sell or mortgage the property.<sup>145</sup> Based on that reasoning, it held that the recording of a mechanics' lien constituted a taking, requiring adherence to the principles of due process.<sup>146</sup> However, even though the *Connolly* court held that the

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137. *Id.*

138. *Id.*

139. *Id.* (emphasis added) (citations omitted).

140. *Id.*

141. *Connolly Dev., Inc. v. Superior Ct.*, 553 P.2d 637 (Cal. 1976).

142. *See id.* at 644.

143. *Id.* at 642.

144. *Id.* at 643.

145. *Id.*

146. *Id.* at 644. A separate, but relevant, consideration is whether a lien attaches to other property owned by the debtor. The court found that the California statutes:

[P]ermit laborers and materialmen to place a lien only on property whose value they have enhanced by their labor, and to garnish only accounts set aside to pay their claims. Hence in the present case the admonition of *Mitchell v. W. T. Grant Co.*, *supra*, 416

lien's superpriority constituted a taking, the court still allowed the superpriority because the state's actions complied with due process requirements.<sup>147</sup>

The *Kessler* court's constitutional analysis should apply to remediation liens. A local government becomes involved with a property only upon its failure to abide by the code governing the safe maintenance of real property.<sup>148</sup> Dilapidated buildings, garbage or debris, even overgrown weeds and brush, all present hazards to the community and diminution in value to property. These conditions are not the product of government action, just as in *Kessler* where the State of New Jersey was not the party responsible for contamination of the property at issue.<sup>149</sup> A local government's action in remediating blight is always preceded by notice to the owner or interested parties and the opportunity to cure the defects. When those parties have failed to take action, the state exercises its police power to abate the hazardous condition, incurring costs in doing so. This action enhances the property, and, in the words of the *Kessler* court, "[t]here thus exists a right of reimbursement."<sup>150</sup> Most importantly, where a local government remediates blight from a property, the benefit inures not only to the owner, but also to all existing lienholders.<sup>151</sup> Therefore, because the government involvement to remediate a property is a benefit to the property owners, any

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U.S. 600, 604, applies: that when the creditor has an *interest* in the property seized, resolution of the due process question requires an accommodation of the interests of *both* creditor and debtor.

*Id.* at 649. This distinction is significant because some states declare that a remediation lien may be satisfied, should the subject property's value be insufficient, by attachment to any property owned by the subject property's owner. *See, e.g.*, N.H. REV. STAT. ANN. § 155-B:9(II) (LexisNexis 2010). New Hampshire contains such a provision, authorizing a municipality to "place a lien for the balance of the cost on any other real property in the state that is owned by the same owner, which additional lien may be levied and collected in the same manner as provided in RSA 80 for tax liens . . . ." *Id.* However, in an example of constitutional awareness and careful statutory drafting, the statute specifically removes superpriority status from liens recorded pursuant to that subsection, thereby avoiding what would likely give rise to a constitutional challenge. *Id.*

147. The determination of a governmental taking does not automatically render state action unconstitutional. Adequate notice and opportunity to object to the lien were key reasons why the California court held the mechanics' lien statute valid. *Connolly Dev., Inc.*, 553 P.2d at 653-54.

148. *See id.* at 645-46.

149. *Kessler v. Tarrats*, 476 A.2d 326, 332 (N.J. Super. Ct. App. Div. 1984).

150. *Id.*

151. *Id.*

argument that remediation liens violate the constitutional prohibition upon governmental taking should fail.

Even if a court were to follow California's reasoning in *Connolly* that a superlien is a taking, the court could apply the test used in *Connolly* to determine that the taking is justified provided the statute accounts for notice to interested parties.<sup>152</sup> However, it is more likely that a court would find a remediation lien similar to an environmental cleanup lien because, in both scenarios, the government is entering private property to bring a property into compliance with a code. In this case, a court will likely follow the *Kessler* decision and find that the environmental cleanup lien is not a taking, but rather provides a benefit to the interested parties.<sup>153</sup> In either scenario, however, the constitutional challenge of a governmental taking will fail to prohibit superpriority of the lien.

### *B. Lenders' Practical Objections to Superpriority Will Fail.*

As we have seen, superpriority of a remediation lien impacts all prior liens on the subject property. The equitable value of a lien—like a first mortgage—is reduced by the value of the remediation lien.<sup>154</sup> Mortgage lenders argue that granting superpriority to remediation liens “prejudices lenders’ ability to sell their loans on the secondary market . . . . This harms the lending market, and in turn, the housing market.”<sup>155</sup> For reasons stated below, this assertion is without merit.

Securitization is a critical element of residential mortgage lending.<sup>156</sup> The original mortgage lender often sells its rights to the mortgage to a securitization promoter, who then bundles groups of mortgages for sale as a security to investors.<sup>157</sup> This system relies on calculation of risks, so mortgages may be valued correctly.<sup>158</sup> That calculation is grounded in predictability of lien priority.<sup>159</sup> Superlien statutes, it is argued, destroys this predictability because at any given

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152. See *Connolly Dev., Inc.*, 553 P.2d at 643.

153. See *Kessler*, 476 A.2d at 332.

154. See Amicus Curiae Brief of the Florida Bankers Ass’n in Support of Respondent’s Answer Brief at 1–2, *City of Palm Bay v. Wells Fargo Bank, N.A.*, 114 So. 3d 924 (Fla. 2013) (No. SC11-830), 2011 WL 6100873 [hereinafter Amicus Curiae Brief].

155. *Id.* at 1.

156. Nash, *supra* note 115, at 177.

157. For a detailed overview of mortgage-backed securities, see *id.* at 138–45.

158. *Id.* at 179–80.

159. *Id.* at 180.

time, a mortgage's security interest could be usurped by a remediation lien.<sup>160</sup>

Complaints over lost equity are unconvincing. Lenders would like to present the subordination of their lien in a vacuum—noting simply that they have lost value in their security interest. Remediation liens, however, are not just liens that have appeared from some transaction between the local government and the property owner unrelated to the first mortgage holder. Instead, remediation liens are the product of a local government improving the condition and value of the property, to both the owner and lender's benefit. To argue against the proper reimbursement of local governments' expenses is to support the idea that local governments should clean up blighted properties at their own expense so that lenders can ultimately sell them and reap the benefits. The alternative is for local governments to do nothing and let blight expand in communities, an approach which diminishes the value of all properties in the area (including all lenders' security interests).

Moreover, the impact of superliens is generally overstated in arguments against them. In the context of environmental superliens, commentators surmise that the value of a lender's security interest is less at issue than their interest in taking ownership at all.<sup>161</sup> Where remediation of a property's hazardous condition would not occur but for a superlien statute, it serves all parties' interests, including the lender's, to have such a statute in effect.<sup>162</sup>

While environmental liens usually involve a greater scope of contamination and higher costs than do liens for remediation of nuisances or blight, the two areas are analogous.<sup>163</sup> In each instance,

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160. Arguing against the validity of a municipal superlien statute, the Florida Bankers Association states, "It is not unrealistic to predict that home lending could shut down in Florida if these ordinances are deemed valid due to the level of uncertainty superpriority liens create." Amicus Curiae Brief, *supra* note 154, at 13.

161. Rather, Budnitz and Chaitman argue that the "greatest concern" for lenders arising out of superlien statutes is "the lien on business revenues that might otherwise be used to satisfy the business's debt to its lender." This argument persuasively suggests that superlien statutes may cause commercial mortgage lenders to increase substantially the cost of borrowed funds to insure against this increased risk. At the same time, this argument implies by omission that residential lenders will not experience a similar motivation.

Nash, *supra* note 115, at 168 (footnote omitted).

162. *Id.* at 170.

163. While, true, this notion is not universal. Dilapidated structures that require demolition can drastically diminish the value of property.

the defect on the property presents a hazard to public, the interested parties have failed to remediate the issue, and the local government has expended resources in correcting the problem. If there is any diminution in the value of a lender's security interest, it occurs when the property becomes blighted, not when a local government perfects a lien for reimbursement of costs associated with improving the value of that property.<sup>164</sup>

Because the risk of a property's value becoming diminished due to blight exists irrespective of a remediation superlien statute, the predictability of that risk is already at issue in a blighted area for mortgage-backed securities. Superlien statutes increase the likelihood that a local government will take action to prevent blight. In the aggregate, this not only aids the value of the subject property, but the surrounding properties also. Therefore, a remediation superlien statute actually benefits mortgage lenders across a state since they have some assurance that the value of their security interests, including their interests in properties that remain in good standing, will not be diminished due to creeping blight. For these reasons, the notion that superlien statutes would "dramatically alter the mortgage market" is misleading.<sup>165</sup>

#### IV. A PROPERLY DRAFTED REMEDIATION SUPERPRIORITY STATUTE CAN CURE BLIGHT.

A properly drafted superpriority statute for remediation liens can dramatically improve a local government's ability to cure blight. However, when there is no state statute on point, the local governments are left without guidance or authority to properly remove blight and recover their costs. This first section of Part IV will take a look at a case of what can happen when a state is silent on this issue.<sup>166</sup> The second section of Part IV will highlight the success of a few states that have a statute in place to allow for superpriority of remediation liens.<sup>167</sup> Finally, the third section of Part IV will analyze the three attributes discussed in Part II and propose model attributes for a remediation statute.<sup>168</sup>

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164. *Kessler v. Tarrats*, 476 A.2d 326, 332 (N.J. Super. Ct. App. Div. 1984).

165. Amicus Curiae Brief, *supra* note 154, at 13.

166. See *infra* Part IV.A.

167. See *infra* Part IV.B.

168. See *infra* Part IV.C.

*A. Florida's Legislature Failed to Create a Remediation Superpriority Statute and Local Governments Cannot Effectively Cure Blighted Communities.*

When a state is silent as to whether the local government has authority to create a superpriority remediation lien, the local government does not have the tool necessary to cure blight with proper reimbursement. Moreover, the owner and the lienholders have no appropriate incentive to maintain the property so as to prevent a need for code enforcement. In states with large amounts of REO properties,<sup>169</sup> lender owners will simply stall the maintenance of the property as long as possible because there will be no threat that a code enforcement lien for cleanup of a property will diminish their security interest. The importance of having a state statute in place addressing superpriority for remediation liens was highlighted by the recent Florida Supreme Court decision in *City of Palm Bay v. Wells Fargo, N.A.*<sup>170</sup> In *City of Palm Bay*, the Florida Supreme Court was called to address whether Palm Bay, a municipality in the state of Florida, was permitted to enact local legislation that established its municipal code enforcement liens as having superpriority status.<sup>171</sup> The Florida Supreme Court examined three Florida statutes that address lien priority before holding Palm Bay's ordinance invalid.<sup>172</sup> Two of the statutes are recording statutes, which mandate the procedure that clerks of the court must follow to record official records; the third requires that all official records be recorded according to statute to be valid against subsequent creditors or purchasers without notice.<sup>173</sup> The Court found that the municipal ordinance allowing superpriority of a local government lien conflicted with the recording statutes.<sup>174</sup> There was no express authority granted at the state level for a local government to create a lien that had superpriority.<sup>175</sup>

Florida, like many other states, was hit very hard by the housing market crash and the ensuing foreclosure crisis, and there are a record

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169. Real Estate Owned (REO) Inventory is defined as bank-owned homes as a result of foreclosure. Stephen M. Dane, Tara K. Ramchandani & Anne P. Bellows, *Discriminatory Maintenance of REO Properties as a Violation of the Federal Fair Housing Act*, 17 CUNY L. REV. 383, 383 (2014).

170. 114 So. 3d 924, 928 (Fla. 2013).

171. *Id.* at 926.

172. *Id.* at 927 (quoting FLA. STAT. ANN. § 28.222(2) (West 2010); FLA. STAT. ANN. §§ 695.01(1), .11 (West 1994)).

173. *Id.*

174. *Id.* at 928–29.

175. *Id.* at 927.

number of abandoned and REO properties in the state.<sup>176</sup> Unfortunately, the decision in *City of Palm Bay* produced a result in which local governments are now blocked from enacting superlien legislation, not because the state legislature has expressly preempted it, but because of an opinion focused on statutes which are “scattered and separately enacted.”<sup>177</sup> Junior lienholders, including mortgage lenders, can now ignore blight with impunity because remediation liens can be eliminated through foreclosure.<sup>178</sup> Local governments in Florida hesitate to get involved in rehabilitating blighted properties because many such properties are still lacking equity, and it is unlikely the government will ever recoup the expenses invested.<sup>179</sup> In an age of austerity and shrinking budgets, many properties will therefore remain in a blighted condition.

*B. Louisiana Successfully Equips New Orleans to Cure Blight with a State Superpriority Remediation Statute.*

Several states have proven that enacting a superpriority remediation statute can help stop the spread of blight in a community. One example is the rehabilitation of New Orleans in the years following Hurricane Katrina in 2005. By 2010, almost one-quarter of the residential properties of New Orleans had become blighted.<sup>180</sup> However, by 2014, New Orleans “now is considered a national model for blight reduction.”<sup>181</sup> The New Orleans model relies on the city’s ability to take action against owners of blighted properties. The

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176. “In the first 10 months of 2009, Florida already had 335,994 foreclosure filings, with a clearance rate of 60 percent—likely to top 400,000 cases for the year. Compare that with just three years ago, when foreclosure filings were 73,878 and the clearance rate was 79 percent.” Jesse H. Diner, *Averting the “Tipping Point of Dysfunction”*, 84 FLA. B.J. 6, 6 (2010); see also *supra* note 169 and accompanying text.

177. *City of Palm Bay*, 114 So. 3d at 931.

178. Because their costs are unlikely to be reimbursed, local governments will be less likely to take action to remediate properties, leaving communities to endure the blight.

179. See Miho Favela, *5.1 Million U.S. Properties Still Remain in Negative Equity*, WORLD PROP. J. (June 17, 2015, 9:05 AM), <http://www.worldpropertyjournal.com/real-estate-news/united-states/tampa-real-estate-news/negative-home-equity-report-2015-corelogic-underwater-homes-negative-home-loans-under-equited-homes-frank-nothaft-anand-nallathambi-9168.php> (noting Florida had the second highest percentage of mortgaged properties in negative equity through the first quarter of 2015).

180. Charles Chieppo, *New Orleans’ Winning Strategy in the War on Blight*, GOVERNING (Mar. 18, 2014), <http://www.governing.com/blogs/bfc/col-new-orleans-blightstat-vacant-dilapidated-property.html> (reporting the estimated figure of blighted properties in 2010 was 43,755).

181. *Id.*

remediation superlien statute in Louisiana ensures that the city has the financial resources to remediate properties. As Deputy Mayor and Chief Administrative Office Andy Kopplin explained, "Before, owners of blighted properties just ignored city fines, and peer pressure didn't change their behavior . . . . But once they know you'll seize their property, they get religion."<sup>182</sup> Acquiring property is feasible for a city only when the property is not encumbered by a mortgage that exceeds the value of the property, which is common for properties that require remediation. The knowledge that ownership or a security interest is at stake has been sufficient motivation for owners and lienholders to remediate properties rather than lose them, which is the primary goal of the superlien statute.

Louisiana established superpriority for remediation liens at the state level. Municipalities may impose civil fines for property that is blighted, abandoned or otherwise poses a danger to the public as a result of housing code violations.<sup>183</sup> A separate statute grants municipalities the authority to remove unsanitary weeds and growth from a property and the sidewalks around it.<sup>184</sup> Most importantly, municipalities have a lien for any maintenance, removal or demolition it conducts on a derelict property.<sup>185</sup> The Louisiana legislature reiterated the superiority of all of these liens in the statute regarding lien priority.<sup>186</sup> The result is that municipalities in

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182. *Id.*

183. LA. STAT. ANN. § 13:2575 (2011). The statute distinguishes between municipalities with populations of seventy thousand or more and those with populations of less than seventy thousand. For those under seventy thousand, code violations do not qualify as instances where fines would apply.

184. LA. STAT. ANN. § 33:5062 (2009).

185. The parish or municipality has a privilege and lien upon an immovable and its improvements, and the owner is personally liable for:

(1) The cost to the parish or municipality of maintenance of the immovable or improvements; and

(2) The cost to the parish or municipality of demolishing or removing, or both, a building or other structure situated upon the immovable or improvements, and all attorney fees incurred by the parish or municipality in connection with such demolition or removal.

*Id.* § 33:4766(A).

186. LA. STAT. ANN. § 9:4821 (2007). The statute prioritizes the ranking and privileges granted and imposed by sections 9:4801 and 9:4802 in the following order:

Privileges for ad valorem taxes or local assessments for public improvements against the property, liens, and privileges granted in favor of parishes for reasonable charges imposed on the property under R.S. 33:1236, liens and privileges granted in favor



Louisiana can undertake remediation of blighted properties with the confidence that they can recover their costs. As a result, since 2010, the city of New Orleans has reduced blight by thirty percent, and it has recovered \$3.4 million through the lien foreclosure process.<sup>187</sup> Moreover, there has been a reduction of approximately 13,000 blighted properties as of early 2014, and as of this writing, the New Orleans blight reduction program remains active and effective.<sup>188</sup>

Another example of a successful use of remediation liens is the work of a community task force in Collier County, Florida that was initiated in 2008, prior to the ruling in *City of Palm Bay v. Wells Fargo*. Collier County formed “five community task force teams, which [we]re comprised of code enforcement, attorneys, law enforcement officers, fire district officials, utilities, Domestic Animals Services, civic associations, homeowners associations and other organizations.”<sup>189</sup> Its focus was on compliance, and the task force worked with banks to stem the tide of blight.<sup>190</sup> It also enacted a local ordinance that established superpriority for the county’s remediation liens, although that ordinance subordinated the lien to first mortgages.<sup>191</sup> The effort resulted in banks effecting repairs on over 1,000 properties, spending about \$1.5 million in the process.<sup>192</sup> The County received national recognition for its achievements in

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of municipalities for reasonable charges imposed on property under R.S. 33:4752, 4753, 4754, 4766, 5062, and 5062.1, and liens and privileges granted in favor of a parish or municipality for reasonable charges imposed on the property under R.S. 13:2575 are first in rank and concurrent regardless of the dates of recordation or notation of such liens and privileges in any public record, public office, or public document.

*Id.* § 9:4821(1).

187. CITY OF NEW ORLEANS, BLIGHT REDUCTION REPORT, 4, 20–21, 23 (Jan. 2014), [http://www.nola.gov/getattachment/Performance-and-Accountability/Initiatives-and-Reports/BlightSTAT/Blight-Report\\_web.pdf/](http://www.nola.gov/getattachment/Performance-and-Accountability/Initiatives-and-Reports/BlightSTAT/Blight-Report_web.pdf/) [hereinafter BLIGHT REDUCTION REPORT]. New Orleans reduced blighted homes by 10,000 from 2010 to 2014. Other jurisdictions with superlien for code enforcement include: 415 ILL. COMP. STAT. ANN. 5/21.3 (West 2011); N.M. STAT. ANN. §§ 3-48-1 to -7 (LexisNexis 2004); WIS. STAT. ANN. § 292.81 (West 2006).

188. See BLIGHT REDUCTION REPORT, *supra* note 187, at 4, 23; see also *BlightSTAT*, *supra* note 4.

189. Kelly Farrell, *Neighborhood Blight: Agencies in Collier, Lee Grapple with Decline from High Foreclosure Rates*, NAPLES DAILY NEWS (Apr. 16, 2010), <http://www.naplesnews.com/community/neighborhood-blight-agencies-in-coller-lee-grapple-with-decline-from-high-foreclosure-rates-ep-3951-332224602.html>.

190. *Id.*

191. *Id.*

192. *Id.*

combating blight.<sup>193</sup> Unfortunately, due to the 2014 Florida Supreme Court ruling in *City of Palm Bay*, this type of ordinance is no longer authorized in the state until the state legislature specifically enacts a state statute to authorize local governments to create liens with superpriority status.

### *C. Model Attributes of a Superpriority Remediation Statute*

#### **1. States Should Mandate Superpriority for Remediation Liens.**

The first consideration is whether states should enact a remediation lien statute that applies statewide, or merely authorize local governments to enact their own legislation to apply locally, if they so choose. While the latter may appear to benefit local governments because it provides them wide discretion, that approach creates more of a burden than a benefit for them. It requires local governments to expend time and resources creating systems for identification of a violation, what actions it can take, and what method to use to collect on the lien. A statewide system, on the other hand, provides a default framework that every local government can utilize. Additionally, as evidenced by the variety of systems that currently exist across the country, the systems within a state may well be equally varied. This leads to the second problem with giving local governments' full discretion: a lack of predictability.

When the state gives the local government full discretion as to how to implement a remediation superpriority lien, a lack of predictability is problematic for owners, lenders, and courts. The absence of a unified statewide system leaves residents, courts and lenders with the task of navigating the differences between local jurisdictions. As discussed above in Part III, an argument against superpriority of liens that lenders assert is that their exposure becomes unpredictable when liens subsequent to their security interest are permitted to jump them in priority.<sup>194</sup> Allowing local governments discretion to grant superpriority to remediation liens gives this lender objection more validity since municipalities may enact such an ordinance at any time; and there may be no consistency between cities on the matter. Additionally, where a statewide mandate for superpriority of remediation liens does not exist, lenders could target those municipalities that have enacted such ordinances by withholding

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193. In 2009, Collier County was awarded the National Association of Counties Achievement Award. *Id.*

194. *See supra* Part III.

loans within its borders.<sup>195</sup> Such an option does not exist where a superlien statute applies statewide (except, of course, in the unlikely event that a lender wishes to stop loans throughout the entire state).<sup>196</sup> Similarly, owners who move to different local jurisdictions throughout a state would need to be aware of the distinct powers of each local government to ensure they are aware of the risks involved with failing to repair code violations.

A statute that mandates a statewide system for remediation of blight and the reimbursement of costs is the most effective means of accomplishing the state's goal. This legal regime will give local governments the power to immediately act to remove blight with the protection of a superpriority lien, without their having to expend resources to draft additional legislation to achieve their goal.

This need not mean that all discretion must be removed from local governments. Throughout the suggestions advanced below, there are facets of the system that I contend are best left to the local governments. Nonetheless, the state statute should convey the intent of each part of the process so that local governments are not left to decipher the statute on their own. The best version of a remediation superlien statute accounts for the differences in local governments while giving a directive that applies to all of them. How to define blight, or what level the community could be involved in identifying blight, can be left open to local government discretion.<sup>197</sup>

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195. Richmond, California is one place where financial institutions threatened to withhold lending following legislation deemed harmful to their interests. Richmond, beset with foreclosures and blight, created a plan to use eminent domain to purchase loans on properties at risk of foreclosure, abandonment or blight, due mainly to the loan exceeding the value of the property. The plan received the attention of Wells Fargo, Fannie Mae and Freddie Mac, who all opposed the plan to the extent of threatening to stop lending in Richmond or any other city that attempted a similar legislation. Shaila Dewan, *Eminent Domain: A Long Shot Against Blight*, N.Y. TIMES (Jan. 11, 2014), [http://www.nytimes.com/2014/01/12/business/in-richmond-california-a-long-shot-against-blight.html?\\_r=0](http://www.nytimes.com/2014/01/12/business/in-richmond-california-a-long-shot-against-blight.html?_r=0).

196. Such an occurrence took place in Georgia in 2002. A law was passed which limited high-risk loans and loan reselling, and imposed harsh penalties upon every party involved in a loan should it violate any laws. The mortgage industry in Georgia fell by over fifteen percent and the legislators were quickly pressured into gutting the law. Arielle Kass, *Dismantled Law Could Have Cushioned Recession's Fall*, ATLANTA J. CONST. (Apr. 29, 2013, 3:12 PM), <http://www.ajc.com/news/business/realestate/dismantled-law-could-have-cushioned-recessions-fal/nXbcs/>.

197. Community involvement in rehabilitating blighted neighborhoods can be incredibly effective. Because of the distinct nature of individual communities, whether to involve the community in cleanup is something left to be decided at the local level. For a more detailed discussion on the benefits of the community working together

For example, the pertinent Georgia statute creates the opportunity for community involvement by requiring each local government to appoint a public officer to whom complaints may be made by residents.<sup>198</sup> Upon receiving at least five complaints, the public officer must begin the process of taking action against the property.<sup>199</sup> By providing specifically for a non-governmental complaint process, it signals to the community that remediation of blight is a joint task between the local government and the community.<sup>200</sup>

A procedure for appropriate notice should also be expressly included in the state statute that is mandated statewide. Both the party or parties who must be served, and what manner of service is effective must be specified.<sup>201</sup> Failure to carefully consider these issues could create constitutional issues for the statute as noted *supra*.<sup>202</sup> Service of notice for violations of blight statutes must always be made on the owner of the property. The owner is ultimately responsible for the condition of the property and, should the local government remediate the property and foreclose a lien for its costs, the owner would be deprived of ownership. However, because the statute anticipates superpriority for a remediation lien should the local government take action, all lienholders should be afforded the opportunity to cure the defect before the local government acts. Therefore, if a superlien is imposed on the property, the lienholders whose security interests are affected must be given the opportunity to remediate the condition and avoid the local government's involvement.<sup>203</sup>

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with the local government to cure blight, see Uzdavines, *supra* note 2, at 161, 163, 165, 190–91.

198. GA. CODE ANN. § 41-2-9(a)(2) (2014).

199. *Id.* § 41-2-9(a)(3).

200. See Uzdavines, *supra* note 2, at 187–90, for a detailed discussion on how community involvement benefits the remediation process.

201. “An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950).

202. Notwithstanding the favorable treatment superlien statutes have received, like in *Kessler*, above, the case law on the subject is sparse. Legislators would be wise to take every precaution against future litigation over the constitutional issues surrounding superliens, rather than rely on the few friendly cases that would provide mere suggestion and not precedential authority.

203. This logic was important to the court in *Kessler*: the superlien represented not a government intrusion, but the reimbursement of costs associated with the owner's failure to take action in curing violations on the property. *Kessler v. Tarrats*, 476 A.2d 326, 332 (N.J. Super. Ct. App. Div. 1984). By notifying all lienholders prior to

The prescribed method of service should mirror the state's civil procedure for service of court actions. This requirement is more burdensome than the service currently permitted in some states, which includes simply mailing the notice to the subject property and the lienholder's address listed on recorded liens or judgments. However, the burden is not unduly onerous, and it has considerable benefit for the local government.<sup>204</sup> Mailed notices are not always received. If the goal in these situations is that someone other than the local government remediate the property, requiring additional steps to give notice will help achieve that goal. By ensuring that the owner and all interested parties receive notice, the likelihood that someone other than the government will take action to cure the blight will increase.

## 2. Remediation Liens Should Be Given Co-Equal Priority with Tax Liens and Protected from Being Extinguished.

A state statute that mandates superpriority of the lien must also declare the lien's level of superpriority. The statute should state that the lien is prior to all other claims on the property except those for general property taxes, co-equal with the most recent lien for general property taxes, and not extinguishable by foreclosure of a general property tax lien. The Nevada statute for nuisance abatement liens is an excellent example of how this can be accomplished. It provides that:

[T]he expense of removal is a lien upon the property upon which the nuisance is located. The lien must:

- (a) Be perfected by recording with the county recorder a statement by the city clerk of the amount of expenses due and unpaid and describing the property subject to the lien.
- (b) Be coequal with the latest lien thereon to secure the payment of general taxes.

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a local government's cleanup, the constitutional argument against superpriority is further diminished by permitting those lienholders the opportunity to avoid government involvement.

204. By mandating that the state's civil procedure rules for service of process apply, the statute provides stability and familiarity within the system. It obviates the need to come up with a new system of service, and should litigation arise over proper service, courts are well-informed on the rules, along with whatever precedential guidance its courts have promulgated over the years. Rather than creating new body of law, parties may rely on the well-established jurisprudence in the area to guide them.

- (c) Not be subject to extinguishment by the sale of any property because of the nonpayment of general taxes.
- (d) Be prior and superior to all liens, claims, encumbrances and titles other than the liens of assessments and general taxes.<sup>205</sup>

That statute is comprehensive in establishing the priority of the lien and protecting the lien once it is perfected. Notably, it states that it is both “prior and superior,” that its priority is over “liens, claims, encumbrances and titles[,]”<sup>206</sup> and that the lien is coequal with property taxes and not extinguished by a foreclosure of the same.<sup>207</sup> It also provides for a simple yet clear procedure for perfecting the lien.

The practical effect of this type of clause is more important than it may seem. Because there are usually many problems with a blighted property, remediation liens do not exist in a vacuum. A blighted property may have judgment liens, first and second mortgages in default, code enforcement violations, nuisance orders (for those jurisdictions that bifurcate them from code violations), an unpaid condominium or homeowner’s association lien, and unpaid ad valorem taxes. With ad valorem property taxes always in first position in the hierarchy of liens, a foreclosure of the property tax typically wipes out all liens on the property. The ability of local governments to fund cleanup of blighted properties hinges on their ability to recoup those costs. Without protection from extinguishment, as can be found in the Nevada statute,<sup>208</sup> local governments would often find themselves with superliens that are still eliminated due to foreclosure. They would thus be unable to continue to bear the costs of remediating properties, effectively defeating the purpose of the statutes. Therefore, a statute mandating a remediation lien, which is co-equal with general property taxes and cannot be extinguished by a property tax foreclosure, is essential for protecting the local government’s lien.

### 3. Remediation Superliens Should Be Enforced in the Same Manner as Real Property Liens.

Once the lien is perfected, the statute must mandate the manner in which the lien may be enforced. As discussed, many states authorize

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205. NEV. REV. STAT. ANN. § 266.335(3) (LexisNexis 2011).

206. *Id.* § 266.335(3)(d). A statute that fails to cover all potential property interests invites challenges from those interests not covered.

207. *Id.* § 266.335(3)(b)–(c).

208. *Id.* § 266.335.

enforcement of remediation liens in the same manner as general property taxes.<sup>209</sup> In most states, foreclosure of a tax lien can only occur after multiple years of delinquency.<sup>210</sup> This is not an effective method for local governments to recoup their expenses. A statute authorizing local governments to remediate blight must provide a lien enforcement method that is efficient while protecting the interests of all interested parties.

Additionally, a statute that creates multiple steps to enforcement, like the one in Arkansas,<sup>211</sup> requires a local government to spend considerable resources to recoup its costs for remediating blight.<sup>212</sup> The complexity of the foreclosure action alone is enough to dissuade many municipalities from exercising their power to remediate blight, and requiring an additional civil action merely to establish superpriority of the lien only adds to the burden. Additionally, the length of time that must expire between the local government incurring the expense of remediation and the reimbursement of those costs creates budgeting issues for local governments. Having to carry remediation costs for years, with little indication of if or when those costs will be recovered, makes the entire process unpalatable, particularly for smaller local governments.

The enforcement method that best balances the interests of all parties is the process by which real property liens are foreclosed within the state. States have already deemed their system for foreclosure of liens to be an equitable one, and the civil procedure for enforcing a lien will be well established under that arrangement. The main distinction between states will be whether the foreclosure procedure is judicial or non-judicial.

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209. See *supra* note 98 and accompanying text.

210. See *supra* note 101 and accompanying text.

211. As we have seen in Arkansas, the local government must provide notice to all interested parties twice, file a circuit court action to establish its superpriority, and then file another civil action to foreclose the lien. See ARK. CODE ANN. § 14-54-903 (Supp. 2015).

212. The notice requirement between states varies; some, like Arkansas, deem it sufficient to mail notice to the lienholder's address listed in the public records. *Id.* § 14-54-903(c)(7)(B). Other states require service akin to civil procedure, which could involve the often arduous task of publication for those parties who cannot be served personally. N.H. REV. STAT. ANN. § 155-B:4 (LexisNexis 2010). Even in states that permit mailing notice, publication may be necessary to serve unknown or non-resident parties. See ARK. CODE ANN. § 14-54-902 (Supp. 2015).

Non-judicial foreclosures are a shorter process, essentially placing the burden of litigation on the defaulting party.<sup>213</sup> For example, in California, a non-judicial foreclosure could take as little as four months.<sup>214</sup> In judicial foreclosures, although a literal reading of the pertinent rules of civil procedure might lead one to conclude that the process could be completed in just a few months, in actuality, the process usually takes between twelve and thirty-six months.<sup>215</sup> Even uncontested matters rely on clogged court dockets for a summary judgment hearing, and sale dates are commonly set sixty to ninety days from the date of the hearing.<sup>216</sup> Therefore, in judicial foreclosure states, remediation superlien statutes should include two sections that expedite the enforcement stage.

First, the statute should provide that in any civil litigation, the remediation lien is *prima facie* evidence of indebtedness. New Mexico's statute is an example of this: "At the trial of any case foreclosing any lien, the recitals of the lien or other evidence of indebtedness shall be received in evidence as *prima facie* true."<sup>217</sup> While New Mexico's statute states, "At the trial of any case foreclosing any lien," a more complete statute would read "In any civil action."<sup>218</sup>

Second, the statute should authorize a fast-track procedure to expedite the foreclosure process. When utilizing this option, the lienholder should be permitted to request from the court an order to show cause for the entry of a final judgment of foreclosure. The process should work as follows: (1) the lienholder must file a request for an order to show cause; (2) the court must immediately review the court file to determine that the complaint is verified, properly alleges

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213. In a non-judicial foreclosure, the property owner is served with a notice of default, and it is incumbent upon the owner to take action to stop the foreclosure, as opposed to a non-judicial foreclosure where the lienholder must progress litigation. CAL. CIV. CODE § 2924(c) (West 2012).

214. California permits a non-judicial sale approximately ninety days from the recordation of a notice of default. *Id.* § 2924(a)(1)(D)(2).

215. The time it takes to foreclose can be attributed to both the plaintiff's role in moving the case, but also the dates assigned by the court for litigation milestones like final judgment hearings, trial dates, and sale dates. See Debra Pogrand Stark, *Facing the Facts: An Empirical Study of the Fairness and Efficiency of Foreclosures and a Proposal for Reform*, 30 U. MICH. J.L. REFORM 639, 669 (1997).

216. Jurisdictions, of course, vary in the availability of hearings and sale dates. The salient point is that there are variables outside of the statutes and parties control that affect the length of time it takes to accomplish a judicial foreclosure.

217. N.M. STAT. ANN. § 3-36-4(B) (LexisNexis 2004).

218. *Id.* This would cover summary judgment, along with any other litigation that might arise out of the subject property.



a cause of action, and has attached to it a copy of a valid, recorded lien; (3) the court will then issue to all other parties to the action an order to show cause as to why a final judgment should not be entered;<sup>219</sup> and (4) upon the other parties waiving the right to be heard, or the court determining that the parties have not evidenced sufficient cause to avoid a final judgment, the court will promptly enter a final judgment without a hearing. This procedure will allow local governments to expedite its reimbursement while still affording the other interested parties the opportunity to be heard.

While the remediation lien summary foreclosure option will expedite the normal process of foreclosure, it is likely that this streamlined approach will still effectively balance the interests of the owner and lienholders against the interest of the local government. If the remediation process has reached this point, it is unlikely that the interested parties are really “interested” because proper notice has already been received and action was not taken to cure the blight. It makes little sense to require a local government to undergo a year-long foreclosure process, occupying hearing times and municipal and judicial resources, when an expedited process would accomplish the same goal with less time and expense. Additionally, all of the standard evidentiary requirements of a mortgage foreclosure are not necessary in a local government lien foreclosure.<sup>220</sup> In a remediation lien foreclosure proceeding, the lien is the only pertinent document; and while the municipality’s alleged remediation costs could be incorrect, or the lien improperly executed, those errors may be easily raised in a response to a show cause order.<sup>221</sup> Following the state’s general lien foreclosure process, while also allowing for a remediation lien summary foreclosure proceeding to streamline the process, will therefore create less uncertainty in the process, while simultaneously promoting an efficient means of reimbursing the local government.

## CONCLUSION

Blight can occur for many reasons including economic disasters, natural disasters, and population migration, among others. When a state is left unprepared to deal with blight, the entire state may be in danger of experiencing spreading hazardous conditions that affect its

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219. See FLA. STAT. ANN. § 702.10 (West 1994 & Supp. 2015). That statute applies to all foreclosures and lienholders thereto.

220. See *supra* note 217 and accompanying text.

221. See FLA. STAT. ANN. § 702.10.

residents when property values plummet and property owners lose any equity they may have realized. However, when a state is proactive and has an effective remediation superlien statute in place, the state can incentivize property owners or lienholders to eliminate blight or else risk of losing their interest in the property through foreclosure of a superior lien. If the owners or lienholders still fail to act, the local government has the power to step in and cure the blight, and recoup its expenses because of the superpriority status. Looking at states like Louisiana, one can see the success of a well-drafted statute that protects local governments dealing with blight on a massive scale.<sup>222</sup> Unfortunately, the Louisiana statute was only enacted after Hurricane Katrina, and so it took several years to see the removal of blight and stabilization of New Orleans. When a state has such a statute in place before a disaster occurs, its local governments can act swiftly to cure blight before it spreads with devastating consequences for the state's communities and their inhabitants.

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222. *See supra* Part IV.B.