LOCAL GOVERNMENTS AS MODERN DAY ROBIN HOODS: SOLVING THE MORTGAGE CRISIS WITH EMINENT DOMAIN

Yasmany Barroso, St. Thomas University School of Law
Local Governments as Modern Day Robin Hoods: Solving the Mortgage Crisis with Eminent Domain

Yasmany Barroso

ABSTRACT

This article addresses one of the most critical, ongoing issues of the twenty-first century, the current mortgage crisis. This crisis is one of the worst disasters in American history, leaving hundreds of thousands homeless. In response, the federal government has legislated fiercely, hoping to help struggling homeowners. However, many programs have failed to fix this problem.

This article flexes scholarly knowledge of the fifth amendment’s taking clause in proposing municipalities buy foreclosed homes to sell back to initial and prospective homeowners. The proposal is firmly rooted in reality, however, solving financing issues by further proposing that homeowners seek financing directly from the municipalities, who in turn generate revenue to acquire abandoned or foreclosed homes through the use of state bonds. This solution would allow the real estate market to recover, while preventing the negative effects home vacancies have on neighborhoods, including lower home values, higher crime rates, and lower tax revenues to municipalities.

Due to the taking clause being vastly expanded by the United States Supreme Court in Kelo v. City of New London, the article provides a solution that complies with the Fifth Amendment’s taking clause’s public use requirement, while allowing local governments to handle the mortgage crisis in an effective manner.

---

1 J.D. candidate at St. Thomas University School of Law in Miami Gardens, Florida, May 2014. The author would like to thank God for giving me the strength and privilege to write this article. I would also like to thank my mother, grandmother, and fiancé for helping me through law school. Last, I would like to thank my Law Review mentor and friend Edward Nazzaro for his patience and writing assistance, and Professor Carol L. Zeiner for helping me formulate ideas about my topic.
I. Introduction

Since December 2007, the United States has been striving to recover from one of the most devastating economic recessions since the Great Depression. One of the biggest factors contributing to the recession was the current mortgage crisis. This crisis was precipitated by a combination of deceptive bank practices, irresponsible borrowing, and the real estate speculation bubble.

The mortgage crisis has led many borrowers to lose their homes through foreclosure. In turn, foreclosures have left neighborhoods with thousands of vacant homes. These vacant homes have plunged neighborhoods into blight. Municipalities have lost tax revenue as a result of the vacancies because tax assessments are not paid for, and they have diverted funds from public services in order combat neighborhood blight. Furthermore, neighborhoods are less secure because criminals use vacant homes for prostitution, arson, and drug dealing. Home

---


4 See Ben S. Bernanke, Chairman, Fed. Reserve Bank, Fostering Sustainable Homeownership, Speech at the National Community Reinvestment Coalition Annual Meeting, (Mar. 14, 2008), available at http://www.federalreserve.gov/newsevents/speech/bernanke20080314a.htm. At the National Community Reinvestment Coalition Annual Meeting, Bernanke gave a speech about the roots of the current mortgage crisis. Id. The focus of the speech was mainly on irresponsible lending practices and borrowers obtaining loans they could not afford. Id.

5 See Miner, supra note 3, at 199; see also James R. Hagerty, Foreclosures, Overdue Mortgages Increase Again, ONLINE.WSJ.COM (Sept. 6, 2008), http://online.wsj.com/article/SB122065813054205679.html?mod=residential_real_estate (discussing that California and Florida are among the states with the highest foreclosure rates).


8 See Alan C. Weinstein, Current and Future Challenges to Local Government Posed by the Housing and Credit Crisis, 2 ALB. GOV’T L. REV. 259, 267 (2009).

9 See generally Schilling, supra note 6, at 110 (finding a correlation between vacant and abandoned properties and a rise in crime).
vacancies also reduce the property values in the neighborhood. This loss in value affects the housing market by lowering the market price of the properties. A decline in property values has been an ongoing problem since 2007.

Before 2000, homeowners had limited options in obtaining financing to purchase homes. Standard loans consisted of prime mortgages, which required strong credit ratings along with income qualifications, and the government-insured loans, which primarily served borrowers who had difficulty qualifying for prime mortgages. The subprime market, which consisted of subprime mortgages that generally served borrowers with poor credit histories and borrowers who did not meet the income requirements for prime mortgages, experienced

10 See id. at 111; see also Andrea J. Boyack, Community Collateral Damage: A Question of Priorities, 43 LOY. U. CHI. L.J. 53, 65 (2011) (“[R]esearch published by Fannie Mae in 2006, focusing on the effect of subprime foreclosures, estimated that 41 million properties in the United States faced declining property values due to foreclosure of nearby parcels, resulting in an aggregate loss of $200 billion in value.”).
11 See Boyack, supra note 10, at 65. Foreclosures have the effect of increasing the supply of homes for sale in a neighborhood and this increased supply, without high demand, lowers the prices on the properties. Id.
12 See Weinstein, supra note 8, at 263–66.
14 U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-08-78R, DEFAULT AND FORECLOSURE TRENDS 2 (2007), http://www.gao.gov/new.items/d0878r.pdf [hereinafter FORECLOSURE TRENDS]; FHA Requirement: Debt Ratios, FHA.COM, http://www.fha.com/fha_requirements_debt.cfm (last visited Jan. 25, 2013) [hereinafter FHA]; VA Loan Guidelines, VALOANS.COM, http://www.valoans.com/va_facts_debt (last visited Jan. 25, 2013) [hereinafter VA Loan]. The federal government offers two types of programs; one operated by the Federal Housing Authority (“FHA”) and the other by the Department of Veterans Affairs (“VA”). FORECLOSURE TRENDS, supra at 8. The first requirement to qualify for a FHA loan is for a borrower to have a good credit history. FHA, supra. This entails not having late payments on credit accounts such as credit cards and car loan payments. Id. In addition, a borrower cannot have foreclosures or bankruptcy in his or her credit history. Id. The second requirement for a FHA loan is meeting the forty-three percent debt to income ratio. Id. This means that a borrower’s mortgage payment including homeowner’s insurance, property taxes, plus other recurring debts (credit cards, student loans, and car payments), after dividing by his or her gross monthly income, is less than or equal to the forty-three percent threshold. Id. To qualify for a VA loan, the borrower must be a veteran from one of the branches of the armed forces, which include the Air Force, Marines, Army, and the Navy. VA Loan, supra. In addition, the borrower must have a good credit history and the debt to income ratio must not exceed forty-one percent of his or her total gross total monthly income. Id.
15 See Chomsisengphet & Pennington-Cross, supra note 13, at 31. Subprime mortgages usually carried higher interest rates than prime mortgages. Id. at 32. For example, prime mortgage interest rates were between five and six percent, while subprime mortgages were between seven and ten percent. Id. at 36. The reason subprime mortgages carried higher interest rates was because of the higher risk associated in lending to borrowers with poor credit histories and low incomes. Id. Some of the subprime programs included stated documentation, which allowed a
increased growth in the early 2000s.\textsuperscript{16} During this period, the majority of the subprime loans carried a pre-payment penalty in order to deter the borrower from refinancing or pre-paying the loan.\textsuperscript{17} This did not prevent borrowers from buying properties using subprime loans, and instead borrowers obtained subprime mortgages they were not able to afford.\textsuperscript{18}

From 2002 until the end of the real estate bubble in 2007, home values in the United States rose dramatically.\textsuperscript{19} However, most of the increase was due to market speculation, which culminated with the burst of the real estate bubble in 2007 ("the Burst").\textsuperscript{20} Immediately after the Burst, real property values started to plummet.\textsuperscript{21} These crushing home values had a profound effect on the economy, contributing to a steep rise in unemployment that started in late 2007 and still has not fallen considerably.\textsuperscript{22} Around the same time as the Burst, the number of U.S. homes

\textsuperscript{16} See Jerry Green & John B. Shoven, The Effects of Interest Rates on Mortgage Prepayments, 18 J. MONEY, CREDIT, & BANKING 41, 42 (1986) (demonstrating the correlation between market rates and prepayment of an existing mortgage); cf. Anthony Pennington-Cross, Credit History and the Performance of Prime and Nonprime Mortgages, 27 (No. 3) J. REAL EST. FIN. ECON. 279, 283 (2003) (indicating that although a majority of prepayment occurs due to refinancing, moving is also a common reason for residential borrowers to prepay their mortgage). See generally Scott Talkov, Exposing the Myth of Mortgage Prepayment Penalties in the Aftermath of River East, 44 (No. 3) REAL PROP., TRUST AND ESTATE L. J. 585, 594–95 (Fall 2009), http://www.academia.edu/460755/Exposing_the_Myth_of_Mortgage_Prepayment_Penalties_In_the_Aftermath_of_River_East (providing an overview of why lenders have prepayment clauses on their mortgages).

\textsuperscript{17} See Martin Andelman, Our Future Hinges On Just One Thing, MANDELMAN MATTERS (Nov. 14, 2011, 12:06 PM), http://mandelman.ml-implode.com/2011/11/our-future-hinges-on-just-one-thing/; Tom Kerr, Americans Irresponsible with Home Equity, MORTGAGELOAN.COM (Mar. 2008), http://www.mortgageloan.com/americans-irresponsible-with-home-equity-1573. Borrowers obtained mortgages that were not able to afford. Kerr, supra. In addition, some borrowers chose to finance one hundred percent of the purchase price of their homes. Andelman, supra. Others invested in homes believing they could turn around and sell them for a higher price because the values on the properties were on the rise. Id.

\textsuperscript{18} See Dean Baker, The Housing Bubble and the Financial Crisis, 46 REAL-WORLD ECON. REV. 73, 74 (2008), http://paecon.net/PAEReview/issue46/Baker46.pdf. “From the fourth quarter of 2002 to the fourth quarter of 2006, real house prices rose by . . . an annual rate of 7.1 percent”. Id. at 74. However, data from the government shows that from the time period of 1953 to 1995 house prices were largely unchanged. Id.

\textsuperscript{19} See id. at 74–75. One of the causes of the real estate bubble was an oversupply of houses as a result of a boom in construction in the years preceding the Burst. Id. at 74.


\textsuperscript{21} See generally Long-Term Unemployment: Causes, Consequences, and Solutions: Hearing Before the J. Econ. Comm., 111th Cong. 584, 7–8 (2010), http://www.gpo.gov/fdsys/pkg/CHRG-111shrg57058/pdf/CHRG-111shrg57058.pdf [hereinafter Long-Term Unemployment] (statement of Dr. Lawrence Katz and Elizabeth Allison, Professors of Economics at Harvard University) (providing an overview of the causes and consequences of
in foreclosure began to rise, and by June 2007, more than one million mortgages were either in foreclosure or in default.\(^{23}\) This rise in foreclosures represented a fifty percent increase in defaults and foreclosures from 2005.\(^{24}\) In January 2009, the total number of foreclosures was close to three million.\(^{25}\) Recent data indicates that in 2012 there were more than two million foreclosure filings, which included default notices, bank repossessions, and scheduled auctions.\(^{26}\) This data shows the mortgage crisis is far from over.\(^{27}\)

In response to the mortgage crisis, the federal government responded by enacting legislation to speed up the recovery of the housing market.\(^{28}\) The first of the federal aid

unemployment in the U.S.). At the height of the real estate market in 2003, the economy overall benefitted from increased property values. *Long-Term Unemployment, supra.*

\(^{23}\) *See generally Foreclosure Trends, supra* note 14, at 1 (discussing and reporting to the House of Representatives Committee on foreclosure trends on home mortgages).

\(^{24}\) *See Raymond H. Brescia, Elizabeth A. Kelly & John Travis Marshall, Crisis Management: Principles That Should Guide the Disposition of Federally Owned, Foreclosed Properties, 45 Ind. L. Rev. 305, 305–10 (2012)* (providing an analysis of the current mortgage crisis and the effects of federal legislation to remedy the problem); *see also* Miner, *supra* note 3, at 180 (discussing the history of the mortgage crisis and criticizing federal legislation for not having the impact needed to restore the housing market). Data shows that during August of 2011, eight million homeowners were in some stage of the foreclosure process, or at least thirty days behind on their mortgage payment. Brescia, Kelly & Marshall, *supra* note 24, at 305.

\(^{25}\) *See Miner, supra* note 3, at 180; Jim Wasserman, *Citigroup Shift on Senate Bankruptcy Bill May Aid Homeowners, Sacramento Bee*, Jan. 10, 2009, at 7B.

\(^{26}\) *See 1.8 Million U.S. Properties With Foreclosure Filings in 2012, RealtyTrac.com* (Jan. 14, 2013), http://www.realtytrac.com/content/foreclosure-market-report/2012-year-end-foreclosure-market-report-7547[hereinafter 1.8 million]. The exact figures for 2012 foreclosure filings were 2,304, 941 reported on 1,836,634 U.S. homes. *Id.* Data compiled by RealtyTrac.com shows national foreclosure filings in 2012 are down three percent in comparison to 2011. *Id.* However, this same data shows that in several states, foreclosure filings were significantly higher than in 2011. *Id.* For example, New Jersey, Florida, Connecticut, and Indiana all had roughly fifty percent increases, while foreclosure filings in Illinois and New York were also up one-third. *Id.* Florida posted the highest foreclosure rate in 2012 with one in every thirty-two homes receiving a foreclosure filing during the year. *Id.*

\(^{27}\) *See generally David J. Reiss, Reforming the Residential Mortgage-Backed Securities Market, 35 Hamline L. Rev. 475, 476 (2012)* (discussing the failed housing policies from the past and providing a workable solution for the future). The author proposes two solutions in order to restructure two of the biggest federal housing program’s Fannie Mae and Freddie Mac. *Id.* at 479. The first proposal consists of nationalizing both Freddie Mac and Fannie Mae since the government heavily funds them. *Id.* at 481. However, merging both programs will increase loan underwriting, something the federal government does not do well. *Id.* The second proposal is the opposite and argues these programs should be completely privatized because they do not create meaningful benefits to the American people. *Id.* at 482.

\(^{28}\) *See Brescia, Kelly & Marshall, supra* note 24, at 309; *see also* Patricia A. McCoy, *Barriers to Federal Home Mortgage Modification Efforts During the Financial Crisis 9–10 (2010),* http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/nf10-6.pdf (discussing the various programs enacted by the federal government as a response to the mortgage crisis). The federal government created several programs in order to help recover the housing market. Brescia, Kelly & Marshall, *supra* note 24, at 309. The first of the programs was the Home Affordable Modification Program (HAMP), followed by the Emergency Homeowners Loan Program, the
programs was the Home Affordable Modification Program (‘‘HAMP’’), launched in February 2009. HAMP was supposed to help three to four million homeowners avoid foreclosure by lowering their monthly mortgage payments. However, HAMP has not been successful in solving the mortgage crisis. As of March 2011, about 540,000 homeowners received permanent modifications, and close to 800,000 permanent trial modifications had been cancelled.

The Home Affordable Refinance Program (‘‘HARP’’), the second program enacted by the federal government, sought to assist homeowners who were underwater. The program allowed borrowers to refinance underwater loans up to 125% of their home’s current value. However,

---

“Short Refinance” Program, the Home Affordable Refinance Program (HARP), and the Neighborhood Stabilization Program. Id. 29 See McCoy, supra note 28, at 9–10.
30 See Neil Barofsky, Editorial, Broken Promises, N.Y. Times (July 11, 2011), http://www.nytimes.com/roomfordebate/2011/07/11/hanging-on-to-houses/the-treasury-political-theater; Ezra Klein, Column: Four Ways the Foreclosure Mess Could Be Used to Help Homeowners, WASH. POST (Oct. 15, 2010, 10:30 AM), http://voices.washingtonpost.com/ezra-klein/2010/10/column_four_ways_the_foreclosu.html. The HAMP program provided incentives to mortgage lenders and servicers to modify the terms of the mortgage with struggling homeowners by placing the borrowers in a three-month trial period at a reduced rate and then make the new payments permanent. Klein, supra. However, if during the three-month trial period, the borrower failed to make the modified payments on time, the lender or servicer of the loan could deny the modification and reinstate the initial higher payments. Id. Many flaws of the HAMP program are attributed to the government not providing incentives to lenders in order to modify troubled loans. Id. Further, a borrower only qualified for HAMP relief if he or she was in default. Id. Therefore, the program induced borrowers to default on their loans without guarantee that their modifications would be approved. Id.
31 See Legislative Proposals to End Taxpayer Funding for Ineffective Foreclosure Mitigation Programs: Hearing Before the Subcomm. on Ins., Hous., and Cmty. Opportunity of the H. Comm. on Fin. Servs., 112th Cong. 32 (2011), http://financialservices.house.gov/uploadedfiles/112-13.pdf [hereinafter Legislative Proposals] (prepared statement of Hon. Neil Barofsky, Special Inspector General, Troubled Asset Relief Program). The Troubled Assets Relief Program (TARP) Special Inspector General Neil Barofsky testified before the House Financial Services Committee: “HAMP has been beset by problems from the outset and, despite frequent retooling, continues to fall woefully short of meeting its original expectations. . . . [HAMP] benefits only a small portion of distressed homeowners, offers others little more than false hope, and in certain cases causes more harm than good.” Id. at 31–32. Many of these unsuccessful modifications left homeowners in a worse position than they were in, with such problems as late fees, penalties, and worse credit. Id. at 24.
32 Brescia, Kelly & Marshall, supra note 24, at 310. Permanent trial modifications are modifications of the borrower’s debt. Id. Before lenders permanently modified the loans, the borrowers had to pass a trial period typically consisting of paying the modified debt payment for three months. Id. However, the lender was not obligated to make the modified payments permanent. Id.
33 See id. at 312; Home Affordable Refinance Program (HARP), MAKING HOME AFFORDABLE, http://www.makinghomeaffordable.gov/programs/lower-rates/Pages/harp.aspx (last updated Oct. 18, 2012) [hereinafter MAKING HOME AFFORDABLE].
34 Miner, supra note 3, at 196.
just like HAMP, HARP has not succeeded in solving the mortgage crisis. This failure is because HARP is available only to current loans owned by Fannie Mae or Freddie Mac. Thus, because HARP applies only to borrowers with loans serviced by Fannie Mae and Freddie Mac, borrowers who are underwater, in default, and do not have Fannie Mae or Freddie Mac as their servicer are not eligible for relief under the program. Six years have passed since the start of the crisis, and yet there is still no meaningful solution.

This comment proposes a solution to the mortgage crisis through the use of eminent domain by state and local governments acquiring foreclosed homes and reselling them back to their initial owners. The focus of this comment is to provide awareness to state and local governments so they can take the initiative in solving the mortgage crisis themselves, instead of relying on federal aid. Part II provides a background on eminent domain and a discussion of *Kelo v. City of New London,* which expanded the requirement of public use. Part III provides

---

35 See generally 1.8 million, supra note 26 (showing that foreclosure activity increased in twenty-five states in 2012).
36 Making Home Affordable, supra note 33. HARP does not apply to FHA, VA, or USDA loans. Id. Therefore, a large segment of borrowers cannot take advantage of HARP to solve their mortgage problems. Id.
37 See Miner, supra note 3, at 196. See generally id. (stating the requirements to qualify for relief under HARP include that the property be a one-to-four single family home, effectively excluding condominiums). Not everyone is eligible to obtain relief from HARP:
   Homeowners are eligible for HARP if they meet the following conditions: 1) they own a single-family one-to four-unit home, 2) they have a current mortgage guaranteed by Fannie Mae or Freddie Mac, 3) they are current on their payments and 4) the current value of their mortgage does not exceed 125% of the fair market value of their home.

Id.
38 See Joseph E. Stiglitz & Mark Zandi, The One Housing Solution Left: Mass Mortgage Refinancing, N.Y.TIMES (Aug. 12, 2012), http://www.nytimes.com/2012/08/13/opinion/the-one-housing-solution-left-mass-mortgage-refinancing.html?_r=0. But see generally Bill Briggs, Housing Market Recovery on Track, Despite Bumps, NBCNEWS.COM, http://www.nbcnews.com/business/economywatch/housing-market-recovery-track-despite-bumps-839868 (last visited Mar. 8, 2013) (arguing that the housing market is recovering because home sales are up ten percent over the previous year). Six years after the start of the mortgage crisis, there are still 3.5 million homeowners in foreclosure or late on their payments. Stiglitz & Zandi, supra. As a response, President Obama proposed a plan to write down the principal on some of the homeowners who are underwater and struggling with their mortgages. Id. However, the top regulator, Edward J. DeMarco, who oversees the banks Freddie Mac and Fannie Mae, blocked the proposal because he believes it will encourage other borrowers that are not in default to stop payments in order to qualify for the program. Id.
40 See discussion infra Part II; see also id. at 488–89.
an in-depth analysis of public use as it relates to acquiring foreclosed homes.\textsuperscript{41} Part IV provides an overview of just compensation and argues that market value is a fair method to compensate lenders.\textsuperscript{42} Part V discusses state bonds as the solution for states and local governments to generate revenue in order to pay the banks just compensation.\textsuperscript{43} The comment concludes in part VI by discussing the overall impact the economy and the real estate market will have as a result of this proposal.\textsuperscript{44}

II. The \textit{Kelo} Revolution: The Expansion of Public Use

The “Takings Clause” of the Fifth Amendment of the United States Constitution states “nor shall private property be taken for public use, without just compensation.”\textsuperscript{45} This clause does not grant the federal government the power of eminent domain but merely confirms it.\textsuperscript{46} The power of eminent domain has been granted to the states through the Fourteenth Amendment’s Due Process Clause.\textsuperscript{47} States exercise their eminent domain power pursuant to their police powers.\textsuperscript{48} Under their police powers, states as sovereigns have the inherent authority to regulate the property of their citizens for their health, welfare, safety, and morals.\textsuperscript{49} Pursuant

\textsuperscript{41} See discussion \textit{infra} Part III.
\textsuperscript{42} See discussion \textit{infra} Part IV.
\textsuperscript{43} See discussion \textit{infra} Part V.
\textsuperscript{44} See discussion \textit{infra} Part VI.
\textsuperscript{45} U.S. CONST. amend. V.
\textsuperscript{46} See United States v. Carmack, 329 U.S. 230, 241–42 (1946) (stating that the Fifth Amendment recognizes an inherent power of the Federal Government to take private property for public use as long as it pays just compensation).
\textsuperscript{47} See U.S. CONST. amend. XIV § 1; Dolan v. City of Tigard, 512 U.S. 374, 383–84 (1994) (citing Chicago B. & Q. R. Co. v. Chicago, 166 U.S. 226, 239 (1897)) (confirming that the states also have the power of eminent domain by incorporating the Fifth Amendment’s taking clause through the Due Process Cause of the Fourteenth Amendment). The language of the Fourteenth Amendment Due Process clause states “nor shall any state deprive any person of life, liberty, or property, without due process of law.” U.S. CONST. amend. XIV § 1.
\textsuperscript{48} See Goldblatt v. Town of Hempstead, 369 U.S. 590, 593 (1962) (quoting Mugler v. Kansas, 123 U.S. 623,668–69 (1897)); see also New York v. United States, 505 U.S. 144, 156 (1992) (discussing that the powers not delegated to the federal government are reserved to the states through the Tenth Amendment).
\textsuperscript{49} See Lawton v. Steele, 152 U.S. 133, 138 (1894) (stating that the preservation of game and fish was a valid exercise under the police power). But see Roderick E. Walston, \textit{The Constitution and Property: Due Process, Regulatory Takings, and Judicial Takings}, 2001 UTAH L. REV. 379, 383 (2001) (“The Due Process and Takings Clauses limit the regulatory power of the states under the police power.”).
to these police powers, each state has enacted legislation describing the procedures and limits in exercising its eminent domain power.\textsuperscript{50}

The plain meaning of the Takings Clause dictates how states and local governments can properly exercise their eminent domain power.\textsuperscript{51} The first requirement under an eminent domain analysis is that the taking must be of private property.\textsuperscript{52} Second, the private property must be taken by public action.\textsuperscript{53} Third, the property must be taken for public use.\textsuperscript{54} Finally, the affected party must be provided with just compensation.\textsuperscript{55}

Of all the eminent domain requirements, the most controversial one has been public use.\textsuperscript{56} Culminating in the landmark case of \textit{Kelo v. City of New London},\textsuperscript{57} the United States Supreme Court expanded the scope of the public use requirement of the Takings Clause.\textsuperscript{58} In \textit{Kelo}, the Supreme Court faced the question of whether the city of New London’s economic

\textsuperscript{50} See, e.g., \textit{CAL. CONST.} art. I, § 19 (a) (“Private property may be taken or damaged for a public use and only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner.”); \textit{FLA. CONST.} art. X, § 6 (a) (“No private property shall be taken except for a public purpose and with full compensation therefore paid to each owner or secured by deposit in the registry of the court and available to the owner.”); \textit{NEV. CONST.} art. I, § 8 (6) (“Private property shall not be taken for public use without just compensation having been first made, or secured, except in cases of war, riot, fire, or great public peril, in which case compensation shall be afterward made.”).

\textsuperscript{51} \textit{U.S. CONST.} amend. V.


\textsuperscript{55} \textit{U.S. CONST.} amend. V.; \textit{see also First English}, 482 U.S. at 315. “This basic understanding of the Amendment makes clear that it is designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking.” \textit{First English}, 482 U.S. at 315.

\textsuperscript{56} See \textit{Julia D. Mahoney, Kelo’s Legacy: Eminent Domain and the Future of Property Rights}, 2005 \textit{SUP. CT. REV.} 103, 131–33 (2005) (criticizing the Supreme Court’s deference to the legislature in determining what constitutes a valid public use); \textit{see also Thomas W. Merrill, The Economics of Public Use}, 72 \textit{CORNELL L. REV.} 61, 61 (1986) (“[M]ost observers today think the public use limitation is a dead letter.”).


\textsuperscript{58} \textit{See id. at 489–90; Midkiff}, 467 U.S. at 241–42; \textit{Berman v. Parker}, 348 U.S. 26, 35 (1954). In \textit{Berman}, the Court allowed the taking of private properties in a blighted area in order to revitalize the neighborhood for the first time. \textit{Berman}, 348 U.S. at 35. In \textit{Midkiff}, the Court expanded public use by allowing the taking of private property to be given to private individuals in order to break up land monopolies. \textit{Midkiff}, 467 U.S. at 242.
development plan qualified as a public use for purposes of the Fifth Amendment. In 2000, the city of New London approved a development plan, consisting of different phases, to revitalize economically the city due to its distressed nature. To carry out the economic development plan, the city employed the New London Development Corporation (“NLDC”), a private non-profit corporation, as its development agent and authorized the purchase of land needed for the plan through the city’s use of eminent domain.

The plan was set to take place in the Fort Trumbull area, which is located on a peninsula that extends into the Thames River. The Fort Trumbull neighborhood consisted of 115 residential and commercial lots, which the NLDC offered to buy and then sell to private businesses for economic development. Nine homeowners who owned fifteen of the properties in the area refused to sell for various non-commercial reasons. The NLDC responded by filing

59 Kelo, 545 U.S. at 472.
60 See id. at 474; Scott D. Mikkelsen, Eminent Domain After Kelo v. City of New London: Compensating for the Supreme Court’s Refusal to Enforce the Fifth Amendment, 2 DUKE J. CONST. L. & PUB. POL’Y SIDEBAR 11, 12 (2007). “By the early 1990s, the City of New London, Connecticut, already had experienced decades of economic decline. By 1998, the city witnessed an unemployment rate nearly double that of the rest of the state, and harbored a dwindling population of just under 24,000 residents, its lowest since 1920.” Mikkelsen, supra. “In 1996, the Federal government closed the Naval Undersea Warfare Center . . . [that] had employed over 1,500 people.” Kelo, 545 U.S. at 473.
61 See Kelo, 545 U.S. at 473. But see Lucette Lagnado, Why New London, Conn., Still Waits for Its Ship to Come In, Pfizer’s Vision for a Research-Center Area Remains Far From Realized in Bitter Town, WALL ST. J. (Sept. 10, 2002), http://online.wsj.com/article/SB1031611159206380195.html (describing the failure of the economic plan after Pfizer arrived in New London). The NLDC was a private non-profit entity established a few years earlier to help the city of New London in planning the economic development. Kelo, 545 U.S. at 473. In 1998, the State allocated a $5.35 million bond to support NLDC in planning the economic development and ten million dollars to create a Fort Trumbull public park. Id. The development coincided with the announced arrival of the pharmaceutical company Pfizer Inc., that planned to build a three hundred million dollar research facility next to the Fort Trumbull area. Kelo, 545 U.S. at 473. However, Pfizer did not hire many Londoners. Lagnado, supra.
62 Kelo, 545 U.S. at 474. The Fort Trumbull area was comprised of approximately ninety acres. Id. The ninety acres consisted of more than one hundred privately owned properties as well as thirty-two acres of land formerly occupied by a naval facility. Id.
63 Id. at 475.
64 See id. (stating various connections with the homes not tied to money for three of the nine petitioners not to sell their homes, connections that could be equated to sentimental value.). But see id. (“[F]ive [of the holdout properties owned by petitioners] are held as investment properties.”). One of the homeowners was Susette Kelo, who had lived in the Fort Trumbull area for three years prior to the underlying lawsuit. Id. During that time, Kelo had made
condemnation proceedings. The nine homeowners sued in the New London Superior Court to save their properties by claiming that the taking of their properties violated the public use requirement of the Fifth Amendment because the property was going to be used for commercial, for-profit private businesses. Subsequently, the United States Supreme Court faced the question of whether the city of New London’s economic development plan qualified as a valid public use under the Fifth Amendment.

It is established that a state or local government could not take the private property of A for the sole purpose of conveying it to another private party B, even if A was justly compensated. This is because a purely private taking will not bestow a benefit to the public, thus not satisfying the legitimate government purpose requirement of eminent domain. However, the Court stated it was clear a state had the power to transfer property from one private party to another if the purpose for the taking was for future use by the public. Examples include transferring land to a railroad with common-carrier duties or giving a right of way to a public utility company.

---

“extensive improvements to her house, which she prizes for its water view.” Id. Another of the homeowners who refused to sell was Wilhelmina Dery, who was born and lived in her Fort Trumbull house since 1918. Id. Dery’s husband, Charles, had lived in the house for sixty years, since the couple first married. Id. The NLDC had successful negotiations with most of the homeowners in the area except for the nine homeowners who refused to sell. Id. at 475–76.

Id. The New London Superior Court granted the plaintiffs a permanent restraining order prohibiting the taking of some of the properties to be used for “park or marina support” while allowing the taking of others which were to be used as office space. Id. NLDC and the Plaintiffs appealed the ruling to the Supreme Court of Connecticut, which held that all the takings were valid. Id. Subsequently, the ruling was appealed to the United States Supreme Court for determination. Id.

Id. at 477–78.

Kelo, 545 U.S. at 477.

Id. at 477–78.

See id.; Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 241–42 (1984). In Midkiff, the public use consisted of breaking up a land oligarchy through eminent domain in order to allow the public to be able to purchase land. Midkiff, 467 U.S. at 241–42. While in Kelo, the future use by the public consisted of the benefit derived from redeveloping the neighborhood. Kelo, 545 U.S. at 474.

See Kelo, 545 U.S. at 477; Bruce M. Kramer, Texas A Renaissance Year for Oil and Gas Jurisprudence: The Texas Supreme Court, 18 TEX. WESLEYAN L. REV. 627, 628 (2012). Historically, common carriers were allowed to condemn private properties as long as they served the public. Kramer, supra, at 628. Therefore, railroads were allowed to condemn private properties because they provided transportation to the public at large. Id.
The Court then analyzed two cases dealing with the interpretation of the public use requirement. In *Berman v. Parker*, the Supreme Court upheld a redevelopment plan targeting a blighted area of Washington, D.C., where most of the area, housing 5000 residents, was irreparable. The plan consisted of revitalizing the neighborhood by condemning it and utilizing part of it for the construction of schools and streets. The remainder of the land was to be sold or leased to private individuals who would construct low-cost housing. The owner of a department store in the area sued, claiming that since his store was not itself blighted condemning the neighborhood for the creation of a better community was not a valid public use.

The Court held the taking to be valid. The Court reasoned that once the legislature determined that the use of eminent domain was for public benefit, the Court’s role in reviewing the legislature’s determination was narrow. Ultimately, the Court decided to pay great deference to legislative judgment.

*Berman* is influential to this my proposal because it dealt with the use of eminent domain in order to remove distress and blight from a neighborhood. Just like *Berman*, this comment’s proposal will help prevent blight in neighborhoods by eliminating home vacancies as a result of the mortgage crisis. By restoring former owners to their foreclosed properties, municipalities will not suffer from a lack of tax revenue since the new owners will pay the city their tax

---

72 Midkiff, 467 U.S. at 229; Berman v. Parker, 348 U.S. 26, 26 (1954).
73 Berman, 348 U.S. at 26.
74 Id. at 30. “Surveys revealed that in Area B, 64.3% of the dwellings were beyond repair, 18.4% needed major repairs, only 17.3% were satisfactory; 57.8% of the dwellings had outside toilets, 60.3% had no baths, 29.3% lacked electricity, 82.2% had no wash basins or laundry tubs, 83.8% lacked central heating.” Id.
75 Id. at 34–35.
76 Id. at 30–31.
77 Id. at 31.
78 Id. at 36.
79 Berman, 348 U.S. at 33–34.
80 Id.
81 See generally id. at 36 (discussing the use of eminent domain by the District of Columbia in order to remove blight from one of its areas).
assessments. In addition, because the vacant properties will be occupied by the new owners, the properties will be properly maintained and not fall into disrepair. Maintenance by the new owners will ensure neighborhoods do not become slums and prevent municipalities from absorbing the costs associated with the maintenance of vacant buildings.

The *Kelo* Court then went on to analyze the decision rendered in *Hawaii Housing Authority v. Midkiff*, another seminal case addressing the contours of the public use requirement.\(^82\) In *Midkiff*, the Supreme Court considered a Hawaii statute, allowing the fee title of real property to be taken from lessors, who owned large amounts of land, and conveyed to tenants, in order to eliminate social inequality due to land concentration by the lessors.\(^83\) The Court unanimously upheld the statute, reaffirming the deferential approach to legislative judgment in determining what qualifies as a valid public use as previously found in *Berman*.\(^84\) The Court held that the State’s purpose in eliminating the social and economic evils of a land oligopoly qualified as a valid public use.\(^85\) The Court again refused to scrutinize legislative judgment and held that in determining what constituted a valid public use, it was the taking’s purpose that mattered and not the method itself.\(^86\)

Relying on the previous holdings of *Berman* and *Midkiff*, the *Kelo* Court held that the taking of a citizen’s private property for economic development qualified as a public use as required by the Fifth Amendment.\(^87\) The Court’s rationale was that the economic plan had to be analyzed as a whole and not on a “piecemeal basis, but rather in light of the entire plan.”\(^88\) In addition, the Court emphasized the great latitude legislatures are given in determining what

---

83 See id. (finding by the legislature that the most urbanized Hawaiian island was predominantly owned by only twenty-two landowners).
84 Id. at 241–42.
85 Id. at 242.
86 Id.
88 Id. at 484.
constitutes a public use. However, the Court cautioned that states are free to impose further public use restrictions on their exercise of the takings power by enacting legislation. Therefore, the holding in *Kelo* is only the minimum baseline states have to follow in determining a valid public use.

*Kelo* had the effect of allowing the government to lawfully take property from private parties as long as there is some incidental benefit to the public. Thus, *Kelo* proved to be controversial and was heavily criticized by scholars, attorneys, and legislatures due to the extension of the government’s eminent domain power. There were even movements advocating for further private right protections in several states. It is against this backdrop that this comment proposes local governments use their eminent domain power to benefit the public from the ground up, starting with the individual homeowner facing foreclosure, and ending with far-reaching effects for neighborhoods, cities, home values, and governments.

**III. Fighting the Crisis**

a. The Consequences of the Mortgage Crisis

---

89 *Id.* at 483.
90 See, e.g., W. VA CODE § 54-1-2 (2006) (“[I]n no event may ‘public use’ . . . be construed to mean the exercise of eminent domain primarily for private economic development.”); *id.* at 485.
92 See *id.* (encouraging state legislators to adopt additional requirements in order to restrict the government’s eminent domain power in the wake of the *Kelo* decision). *But see generally* Douglas W. Dahl, II, Student Comment, *Kelo* v. City of New London, Connecticut: *Are Private Property Rights Really in Danger?*, 29 AM. J. TRIAL ADVOC. 443, 443 (2005) (arguing that *Kelo* will not have a significant impact on property rights because state legislatures can amend their laws to restrict the government’s eminent domain power).
93 See Press Release, Institute for Justice, Grassroots Groundswell Grows Against Eminent Domain Abuse (Dec. 7, 2005), available at [http://www.ij.org/private_property/connecticut/7_12_05pr.html](http://www.ij.org/private_property/connecticut/7_12_05pr.html); *see also* Carol L. Zeiner, *Eminent Domain Wolves in Sheep’s Clothing: Private Benefit Masquerading As Classic Public Use*, 28 VA. ENVTL. L.J. 1, 2 (2010) (discussing the potential for abuse by the politically powerful by structuring eminent domain cases like the one in *Kelo*).
Foreclosed homes have the effect of producing vacancies in the housing market. In a perfect world, the bank would foreclose on a property and immediately sell the property to another homeowner, thus recuperating some of the costs associated with the foreclosure. However, in today’s market, the foreclosure process is slow, which inhibits banks from placing properties back in the market quickly, even when there is demand for the properties. This foreclosure process has a detrimental effect on the communities as a whole by slowing down the rate at which the homes become reoccupied, leading to increased vacancies.

At the micro level, vacant properties left unattended have detrimental effects on neighborhoods. Although many if not all, counties have legal requirements that owners maintain their properties, this does not tend to happen. This is due to the opposing interests of banks and municipalities. The latter’s concern is to get rid of the property in the least costly method possible. The former is preventing neighborhoods from turning into slums.

95 See Schilling, supra note 6, at 104.
97 See Kevin F. Jursinski, The Mortgage Foreclosure Crisis in Florida: A 21st Century Solution, FlA. B.J., June 2010, at 91; see also Jay Brady, Clerks vs. Courts, GULF COAST BUS. REV. (July 2, 2009), http://www.review.net/section/detail/clerks-vs.-courts/ (providing insight into the backlog of foreclosures the judicial system has in Florida). Due to a large volume of mortgage defaults, the foreclosure process in Florida takes between twelve and eighteen months. Jursinski, supra.
98 See generally Schilling, supra note 6, at 109 (arguing that the longer the foreclosure process takes, the longer homes will be vacant).
100 See Todd Ruger, Lenders’ Latest Foreclosure Strategy: Waiting, HERALDTRIBUNE.COM (July 12, 2009, 1:00 AM), http://www.heraldtribune.com/article/20090712/ARTICLE/907121067 (stating that lenders delay foreclosure sales in order to avoid upkeep costs on the properties). Once lenders take possession of the properties, they are held accountable for upkeep costs such as taxes, fees, and maintenance costs. Id.
101 Compare Weinstein, supra note 8, at 267 (discussing that it is in the best interest of municipalities to spend money to prevent property abandonments in order to maintain neighborhood stability), with C. Tyler Mulligan, Toward A Comprehensive Program for Regulating Vacant or Abandoned Dwellings in North Carolina: The General Police Power, Minimum Housing Standards, and Vacant Property Registration, 32 CAMPBELL L. REV. 1, 2–3 (2009) (describing the negative effects vacant properties have on municipalities).
One of the problems resulting from home vacancies is the lack of maintenance on the properties. This entails not cutting the grass, maintaining swimming pools, and in some cases the paint. This lack of service is even more prominent in areas where property values are low because lenders do not have an incentive to maintain the properties since a sale will result in a loss. Vacant homes also render neighborhoods less secure because they attract crime. Criminals use vacant properties for prostitution, rape, drug dealing, and as marijuana grow houses. Other crimes involve vandalism of the property, arson, and stripping materials for sale. Thus, vacant properties correlate with an increased crime rate in neighborhoods, affecting the public as a whole.

Abandoned properties also result in increased costs for municipalities. For many of these abandoned homes, an absence of maintenance leads to physical deterioration of the

---

102 See generally Schilling, supra note 6, at 110–11 (discussing the harmful effects that home vacancies produce on neighborhoods such as reduced tax revenue for municipalities, reduced public services, higher crime rates, and even higher insurance premiums).

103 See generally Weinstein, supra note 8, at 267 (discussing the costs municipalities incur by providing minimal exterior services such as cutting the grass).

104 See Cora Currier, Big Banks Slack on Maintaining Foreclosed Homes in Minority Areas, PROPUBLICA.ORG (Apr. 16, 2012), http://www.propublica.org/article/big-banks-slack-on-maintaining-foreclosed-homes-in-minority-areas-complaint. The National Fair Housing Alliance, a non-profit group, filed a complaint to the Department of Housing and Urban Development (“HUD”) alleging that Wells Fargo violated the Fair Housing Act by failing to upkeep homes in minority neighborhoods. Currier, supra. The complaint alleges that in Latino and Black neighborhoods, properties were more likely to have damaged roofs, broken windows, and yards filled with trash than their white counterparts. Id.

105 See Schilling, supra note 6, at 110. The author suggests “there is a direct correlation between crime and vacant and/or abandoned properties”. Id.


107 Elphinstone, supra note 94.

108 See Weinstein, supra note 8, at 267 (explaining that many cities believe it is in their long-term interest to spend money to combat foreclosures and abandonment in order to maintain neighborhood stability); see also Jim Kasuba, WYANDOTTE: City Awarded $7.8M in Federal Funds for Foreclosure Stimulus, THENEWSHERALD.COM (Jan. 16, 2010), http://www.thenewsherald.com/articles/2010/01/16/news/doc4b51eda7f2b68357523406.txt (stating that the HUD granted $7.8 million to the city of Wyandotte, Michigan, to acquire and redevelop foreclosed properties in order to prevent blight in the neighborhoods).
building. In order for municipalities to prevent blight from occurring, they can either maintain the properties or demolish them. Either of the two alternatives cost the municipalities thousands of dollars that could be used for other projects to benefit the public.

Abandoned properties also diminish tax revenue. The loss in revenue occurs because property taxes are not paid during the foreclosure period. Legally, lenders are required to pay the taxes on the property; however, lenders strategically choose to avoid paying the taxes because maintaining the property result in a loss. The overwhelming majority of tax revenue by municipalities comes from property tax assessments. In turn, the revenue generated by municipalities comes from property tax assessments.

---

109 See Peter Bodley, Paying the Cost of Foreclosed Vacant Properties, ABCNEWSPAPERS.COM (June 27, 2012, 2:57 PM), http://abcnewspapers.com/2012/06/27/paying-the-cost-of-foreclosed-vacant-properties/. Citizens of Coon Rapids City, Minnesota, petitioned the city council to enact an ordinance requiring the banks that own foreclosure homes to pay $6000 upfront for any future maintenance costs associated with the properties they owned. Id. The city currently charges $600 for residential properties and $1000 for commercial properties if the city has to go to the property more than three times a year to address any issues, such as not cutting the grass, waste disposal, and plumbing. Id. However, this is assuming citizens take the time to report any property violations. Id.

110 Schilling, supra note 6, at 110–111.

111 See OHIO REV. CODE ANN. § 3767.41 (West 2009); Weinstein, supra note 8, at 267–68. Often, when a city demolishes a property, the vacant lot can become a free dumping site for trash and debris. Id. at 268. The trash and debris often pollute the soil, which ultimately costs the city large sums of money to clean up. Id. However, there are cities taking aggressive measures to fix property abandonment and reduce costs. Id. For example, in Cleveland, the presiding judge has employed the court’s exclusive jurisdiction to hear nuisance abatement cases brought pursuant to the state’s receivership statute in order to combat property abandonment. OHIO REV. CODE ANN. § 3767.41(B) (1). The receivership statute authorizes a receiver to take control of a residential property that is considered a public nuisance and allows the receiver to recover any costs incurred while abating the nuisance through a priority lien. Id. § 3767.41(B)-(1), (H)-(2)-(a). A receiver can be a financial institution that possesses an interest of record in the property, a nonprofit corporation, or any other qualified property manager. Id. § 3767.41(C)-(1), (3)-(a). In Buffalo, New York, the city has addressed its vacant property problem by suing twenty-eight national mortgage lenders to force them to maintain properties that were abandoned after the banks foreclosed on the owners. Weinstein, supra, note 8, at 268. In South Florida, several cities have executed daily fines against banks for failure to maintain foreclosed homes. Id. In Southern California, some cities have adopted legislation that requires owners, banks, and other lenders to register abandoned homes in foreclosure with the city. Id. In addition, the ordinance imposes an obligation on the lenders to maintain the homes. Id. at 269. If the lenders fail to comply with the ordinance, they can be fined up to $2500 per property. Id.

112 See Johnson, supra note 107, at 1181.

113 See WILLIAM C. APGAR, THE MUNICIPAL COST OF FORECLOSURES: A CHICAGO CASE STUDY 2, 11 (2005), http://www.nw.org/network/neighborworksProgs/foreclosuresolutions/pdf_docs/2005Apgar-DudaStudy-FullVersion.pdf. Municipalities have the option of placing a lien in the property when a borrower fails to pay his or her taxes. APGAR, supra. However, the process can take months or years, and the municipalities are not guaranteed they will collect the entire amount of the debt. Id.

114 See generally Ruger, supra note 101 (discussing that in a distressed market, lenders choose to strategically avoid paying taxes and house upkeep in order to save capital).

115 See Weinstein, supra note 8, at 266. In addition to the lack of tax payments by homeowners that are in foreclosure, local governments are affected by the general decline in property values. Id. This decline in property values means tax assessments generally drop resulting in less revenue for the city. Id.
property taxes is spent on public services, including firefighters, police officers, public schools, road maintenance, public parks, and other public projects. Therefore, the less revenue a municipality has, the lower the quality of service is going to provide to the public.

Vacant and abandoned properties also reduce the value of the surrounding properties, affecting all home values in the neighborhood. This loss in value results from the distressed nature of foreclosed homes. Every time a foreclosed home is sold, the value is recorded for purposes of a comparable analysis. Therefore, it is difficult for a seller to sell his or her house at a reasonable price because foreclosure sales are factored into the property appraisal, resulting in a loss in value. Mortgage foreclosures also increase the supply of properties for sale in the neighborhood. This increased supply, without high demand, lowers the market price of properties.

At the macro level, abandoned, vacant, and foreclosed homes exacerbate the economy. The more homeowners that are in foreclosure, the less they spend in order to avoid default on their properties. Less spending by homeowners affects business revenue, which leads to increased unemployment. Furthermore, less spending translates into a general reduction in

---

116 See Patricia E. Salkin & Charles Gottlieb, Engaging Deliberative Democracy at the Grassroots: Prioritizing the Effects of the Fiscal Crisis in New York at the Local Government Level, 39 FORDHAM URB. L.J. 727, 733 (2012). The author provides a case study of the typical expenditures of the state of New York. Salkin & Gottlieb, supra. For example, in 2008, thirty percent of the state’s expenditure was for education, while sixteen percent was for general government services and employee benefits such as law enforcement and firefighters. Id. Other services included public safety, debt service, transportation, and sanitation and utilities. Id.

117 See Brescia, Kelly & Marshall, supra note 24, at 308–09; Schilling, supra note 6, at 111.

118 See Boyack, supra note 10, at 65. “Because the market traditionally prices homes based on comparable sales within the same community, any below-market sale creates a drag on neighboring values and sale prices.” Id.

119 Id.

120 See generally id. (discussing the effects of foreclosures on the housing market).

121 See generally Weinstein, supra note 8, at 266 (mentioning that homeowners who face mortgage difficulties often reduce spending on other things in order to avoid default).

sales tax revenue for the government.\textsuperscript{123} This reduction in tax revenue occurs because consumers who are in default are constantly trying to catch up on their mortgage payments; therefore, they have less money to spend on discretionary purchases such as entertainment, tobacco, alcohol, hotels, and restaurants.\textsuperscript{124} Ultimately, less spending by consumers weakens the overall economy.\textsuperscript{125}

One of the main reasons why homes are foreclosed on is due to high mortgage payments.\textsuperscript{126} These high mortgage payments do not reflect the values of the properties because the amount owed on these mortgages is higher than the value of the properties. Accordingly, borrowers find themselves with both high mortgage payments and underwater mortgages.\textsuperscript{127}

Borrowers who find themselves with high mortgage payments and underwater mortgages do not have the option of refinancing their mortgages in order to lower their payments.\textsuperscript{128} The reason is that lenders require borrowers to have sufficient equity in their homes in order to qualify for a new loan.\textsuperscript{129} However, most of these borrowers have underwater mortgages, which means they do not have access to financing in order to lower their mortgage payments.\textsuperscript{130} This problem leads to borrowers eventually defaulting on their loans.

unemployment-rate-edges-up-to-7-9.html?_r=0 (discussing the unemployment rate in 2013 amidst the mortgage crisis).

\textsuperscript{123} Weinstein, \textit{supra} note 8, at 266–67. Cities tend to rely on sales tax revenue as part of their budgets. \textit{Id.}

\textsuperscript{124} \textit{See id.}

\textsuperscript{125} \textit{Id.}

\textsuperscript{126} \textit{See generally} Baldy Martinez, Comment, \textit{Subprime Loans: Turning the American Dream into A Nightmare}, 21 ST. THOMAS L. REV. 514, 531–32 (2009) (denouncing subprime lenders for lending to borrowers who did not have the ability to repay the loans).

\textsuperscript{127} \textit{See Brent T. White, Underwater and Not Walking Away: Shame, Fear, and the Social Management of the Housing Crisis}, 45 \textit{WAKE FOREST L. REV.} 971, 971 (2010). The term “underwater mortgage” is used to refer to a mortgage that is higher in value than the market value of the property to which it is secured. \textit{Id.}

\textsuperscript{128} \textit{See Martinez, supra} note 127, at 531–32; Associated Press, \textit{Foreclosures Hurt Neighbors’ Refinance Efforts: Even if Homeowner’s Credit is Good, Property Values are Affected}, MSNBC.COM (Mar. 12, 2008, 6:37 PM), http://www.msnbc.msn.com/id/23599085/. As neighborhoods became flooded with foreclosures, the values on the properties dropped. Martinez, \textit{supra} note 127, at 531–32. At the same time, lenders require equity on a property in order to refinance. Associated Press, \textit{supra}. Accordingly, a decline in property values has left many homeowners unable to refinance their properties and stuck with high mortgage payments. \textit{Id.}

\textsuperscript{129} Martinez, \textit{supra} note 127, at 533.

\textsuperscript{130} \textit{Id.} at 532.
The other alternative these borrowers have is to apply for loan modifications. Still, most of these loan modifications are not successful because banks do not significantly lower the mortgage payments or simply because banks refuse to approve them. Even on occasions in which banks do modify the mortgage payments, the values of the mortgages remain higher than the value of the property. Due to this disparity, some borrowers choose to default on the mortgages because remaining with the property does not prove to be a good investment.

b. The Solution to the Mortgage Crisis

The solution to the mortgage crisis can come from state and local governments. By exercising their power of eminent domain, local governments can acquire foreclosed homes with the goal of reversing the harmful effects that result from these vacancies, satisfying the public use requirement. This comment proposes local governments acquire vacant properties for their current value. In doing so, the local governments can sell back the property to the initial owner, on whom the bank foreclosed, for the current value of the property.
Selling the foreclosed properties back to their initial owners will eliminate defaults because the former owners will now be able to afford the new loan payments since they will reflect the lower property values. For example, assume that a homeowner initially purchased a home for $300,000 at an interest rate of seven percent for a term of thirty years. Additionally, assume the homeowner’s mortgage payments were $2500 each month. Eventually, the property loses value, and the homeowner defaults on the mortgage.\textsuperscript{136} Two years later, the bank forecloses on the property, but the bank is not able to sell it for the market price of $120,000. Exercising its eminent domain power, the municipality acquires the property for the current market value and then sells it back to the initial owner for the new market price of $120,000, at an interest rate of four percent, and a mortgage payment of $1000. The result is that by having a low mortgage payment, the homeowner will not default on the loan, will pay property taxes, will upkeep the property, and will remain with the property.

In order for the plan to work, the borrowers will have to obtain the financing for the loan directly from the municipalities. This is because the initial homeowners will not be able to qualify for a mortgage loan through a lending institution since their credit score is probably ruined due to the initial foreclosure.\textsuperscript{137} Consequently, the municipalities will have to set up loan departments in order to provide the initial owners with the financing. The municipality will have to set up lending guidelines detailing the requirements to qualify for these loans.\textsuperscript{138} The most important requirement will have to be the borrower’s income. Thus, the borrower will have to provide income verification in the form of a W-2 or an income tax return in order to prove he or

\textsuperscript{136} See generally Cox, supra note 97, at 697–98 (discussing the rights of borrowers and lenders in foreclosure proceedings).

\textsuperscript{137} See generally Les Christie, How Foreclosure Impacts Your Credit Score, CNNMONEY.COM (Apr. 22, 2010, 4:44 PM), http://money.cnn.com/2010/04/22/real_estate/foreclosure_credit_score/ (discussing the negative impact a foreclosure has on a borrower’s credit rating).

\textsuperscript{138} FHA, supra note 14. Municipalities can set up lending guidelines similar to FHA, except, the credit score requirement. Id.
she is able to qualify for the new loan payment. Nevertheless, it will not be required of the 
borrower to have a clean credit score because most likely his or her credit rating will be poor.

One concern regarding the financing aspect of the plan is who will bear the costs. The 
solution will be to charge the borrowers origination fees for the loan. Therefore, the public 
does not have to absorb the cost associated with setting up financing departments.

This plan meets the public use requirement of the Takings Clause because it benefits the 
public as whole. By having the properties occupied, the municipalities will be able to obtain tax 
revenue because the owners will pay their tax assessments. By having the tax revenue of these 
occupied properties, the municipalities will be able to provide better services to the public by 
having more firefighters, police officers, public parks, and better maintenance on the roads and 
public schools. Additionally, by having the properties occupied, the municipalities do not have 
to invest money in maintaining the homes because the owners will take care of the maintenance. 
Therefore, since municipalities do not have to maintain the properties, the public benefits as a 
whole in the form of decreased tax assessments.

Another benefit resulting from the plan is public safety. Once the vacant properties are 
occupied, neighborhoods will be safer because the houses will not be used for growing 
marijuana, dealing drug, prostitution, rape, or arson—common problems associated with vacant 
properties. An additional benefit resulting from the plan is increased property values.

by the lender in order to cover the costs associated with issuing the loan. Mansfield, supra, at 547. These costs 
include paying employee salaries, commissions, and advertisements. Id. Among other things, predatory lending 
involves charging borrowers excessive origination fees. Hauser, supra, at 1510.

140 See generally Kristen David Adams, Homeownership: American Dream or Illusion of Empowerment?, 60 S.C. L. 
REV. 573, 590–91 (2009) (stating that homeownership has tangible benefits such as educational achievements, 
security, and a lower incidence of crime).

141 See generally id. (providing a correlation with homeownership and lower incidences of crimes).

142 See id. at 593–94.
Property values will increase because properties will be occupied and maintained; therefore, sellers will be able to sell their properties at market price since the neighborhoods will be attractive to buyers. These market price sales in turn will increase values in the neighborhood.

IV. Compensating Lenders based on Fair Market Value

Another important element in effectuating a proper taking is that the party whose property is taken must be justly compensated. The just compensation requirement serves the purpose of preventing the government from forcing some people alone to incur public burdens that, in fairness and justice, should be incurred by society as a whole. Just compensation is determined based on the fair market value of the property being taken. The notion behind fair market value is that the owner should be placed in the same monetary position he or she would have been in if his or her property had not been taken.

In determining the fair market value of a property, the majority of courts use a comparable sales analysis. Under this type of analysis, appraisers look at data regarding the

---

143 See Lynne Dearborn, Homeownership: The Problematics of Ideals and Realities, 16 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 40, 40 (2006). Dearborn suggests homeowners have incentives to maintain their properties because they like to live in a house that is in good repair, and they hope to obtain financial gain when the house is sold. Id.

144 U.S. CONST. amend. V.


146 Compare United States v. Reynolds, 397 U.S. 14, 16 (1970) (stating fair market value is the standard used to measure just compensation), and United States v. Miller, 317 U.S. 369, 374 (1943) (stating the courts adopted the fair market value standard in order to have a practical method of valuation), with Gideon Kanner, Condemnation Blight: Just How Just is Just Compensation?, 48 NOTRE DAME L. REV. 765, 772–73 (1973), as reprinted in C730 ALI-ABA 219 (criticizing the fair market value standard for failing to take into account the principle that every property is unique in its own way), and Margaret Jane Radin, Property and Personhood, 34 STAN. L. REV. 957, 1004 (1982) (arguing fair market value is inadequate as a means of just compensation because it fails to take into consideration a person’s sentimental value of the property).

147 See Miller, 317 U.S. at 374.

148 See United States v. 564.54 Acres of Land, 441 U.S. 506, 514 (1979) (finding by the Court that a comparable sales analysis was proper to determine fair market value on a nonprofit property); United States v. 819.98 Acres of Land, 78 F.3d 1468, 1471 (10th Cir. 1996) (holding that when similar situated properties exist, the comparable sales analysis is the best approach). But see Theresa H. Waller & Neil G. Waller, Real Estate Appraisal: The Legal Liability, 18 REAL EST. L.J. 233, 236–37 (1990) (discussing that the cost approach is used to value new or improved properties). Appraisers also employ the cost approach when appraising unique properties such as churches, museums, or libraries because they usually have few comparable sales. Waller & Waller, supra, at 236.
sales of similar situated properties around the neighborhood and then adjust the value of the property being taken based on differences between the properties compared.\textsuperscript{149} Therefore, the comparable sales analysis has the effect of eliminating any subjective factors in determining the value of the property.\textsuperscript{150}

Most likely, banks will oppose the plan because of the investment they have made in the properties. The banks will argue that many of the homes they have foreclosed on have outstanding mortgages at higher values than the fair market value municipalities will pay for the properties. Thus, receiving payment for only the fair market value of the property will undercompensate them for their investment. Similarly, a homeowner who has sentimental value for his or her property because he or she has lived in the property for a long time also may feel undercompensated by market value and not want to sell.\textsuperscript{151} However, both arguments for undercompensation fail because the recognized standard employed by the courts for just compensation is the fair market value of the property and does not account for investment value or sentimental value.\textsuperscript{152} Furthermore, unlike a homeowner who does not have other recourse but to obtain the fair market value of his or her property, banks have remedies that ensure they recover the losses

resulting from a foreclosure. One of the remedies available to banks is private mortgage insurance ("PMI"), which allows banks to recuperate a percentage of loss from a foreclosure.

Under PMI, lenders are compensated based on the fair market value of the properties. The process will involve appraisers visiting the vacant property and doing an evaluation based on the property values around the neighborhood. Subsequently, the municipality then files a condemnation action with the court, followed by a deposit of the money with the clerk. Consequently, the process safeguards the bank’s rights in obtaining just compensation.

---

153 See Brian Tackenberg, *Instituting Nonjudicial Foreclosure in Florida: When It Comes to Foreclosure, Florida’s Judiciary Should Let Lenders Lead*, 64 FlA. L. REV. 1839, 1844–45 (2012). Generally, banks foreclose on the property and proceed to sell it in order to cover any losses. Id. at 1844. However, if the property sells for less than the amount owed on the mortgage, the bank can obtain a deficiency judgment from the court and hold the borrower personally liable for the difference. Id. at 1844–45.


155 See id. PMI is a type of mortgage insurance that provides protection to lenders in the case a loan falls into default. Id. However, PMI does not cover the entire amount of a loan that is in default. Id. at 793. PMI’s coverage depends on what is agreed upon by the PMI company and the lender. Id. The percentage of coverage by PMI is generally between the top twenty percent and the top thirty percent of the lender’s claim of loss. Id. For example, if a borrower purchases a home for $140,000 and makes a down payment of five percent, a lender can obtain private mortgage insurance on the mortgage amount of $133,000 and reduce its exposure to loss from $133,000 to $93,100. In this example, the mortgage insurance covers the top thirty of the mortgage. Id.


157 See Wilson, supra note 150, at 50.

158 See Fla. STAT. ANN. § 73.021 (West 2006). The Florida statute prescribes that condemnation proceedings may be done by filing a petition in the circuit court of the county where the property is located, the petition shall set forth:

(1) The authority under which and the public use or purpose for which the property is to be acquired, and that the property is necessary for that public use or purpose; (2) A description identifying the property sought to be acquired. The petitioners may join in the same action all properties involved in a planned project whether in the same or different ownership, or whether or not the property is sought for the same use; (3) The estate or interest in the property which the petitioner intends to acquire; (4) The names, places of residence, legal disabilities, if any, and interests in the property of all owners, lessees, mortgagees, judgment creditors, and lienholders, so far as ascertainable by diligent search, and all unknown persons having an interest in the property when the petitioner has been unable to ascertain the identity of such persons by diligent search and inquiry; (5) Whether any mobile home is located on the property sought to be acquired and, if so, whether the removal of that mobile home will be required. If such removal shall be required, the petition shall name the owners of each such mobile home as defendants. This subsection shall not apply to any governmental authority exercising its power of eminent domain when reasonable relocation or removal expenses must be paid to mobile home owners under other provisions of law or agency rule applicable to such exercise of power; (6) A statement that the petitioner has surveyed and located its line or area of construction, and intends in good faith to construct the project on or over the described property; and (7) A demand for relief that the property be
V. Visiting an Old Friend: Municipalities Generate Revenue through State Bonds

One of the challenges municipalities will face in implementing the plan is generating enough revenue to provide banks with just compensation.\textsuperscript{160} Municipalities have the option of raising taxes, cutting public services, or issuing municipal bonds.\textsuperscript{161} However, the better option for raising revenue will be to issue municipal bonds.\textsuperscript{162} This is because municipalities are constantly making cuts to their budgets and reducing public services.\textsuperscript{163} Therefore, through municipal bonds, municipalities can borrow money from investors in exchange for periodic interest payments without having to raise taxes or cut public services.\textsuperscript{164}

The municipalities can pay the interest on the municipal bonds with the revenue generated from the interest payments of the mortgage.\textsuperscript{165} Paying the interest of the bonds directly from the interest received from the mortgages ensures municipalities do not raise taxes

\textsuperscript{159} See Fla. Stat. Ann. § 73.111 (West 2012). The petitioner has twenty days to deposit the money into the registry of the court. \textit{Id.} Once the money is deposited, the petitioner obtains the interest he or she sought. \textit{Id.}
\textsuperscript{160} See Patrick Manchester, \textit{Be Kind to Your Foreign Investor Friends}, 98 GEO. L.J. 1823, 1824 (2010); Danielle Kurtzleben, \textit{Budget Woes Strike Most Major U.S. Cities}, USNEWS.COM (July 22, 2011), http://www.usnews.com/news/best-cities/articles/2011/07/22/budget-woes-strike-most-major-us-cities. Major U.S. cities are feeling the impact of the mortgage crisis through diminished tax revenues. Kurtzleben, supra. For instance, Mayor Antonio Villaraigosa of the city of Los Angeles had to close a 336 million dollar shortfall through large cuts coming from the fire and police departments. \textit{Id.} The city of Miami faced a fifty million dollar deficit for its fiscal year of 2012. \textit{Id.} New York City had a shortfall of $3.26 billion for 2012, which it was able to balance out by tapping into its reserves. \textit{Id.}
\textsuperscript{161} See generally Manchester, supra note 161, at 1824 (advocating that municipalities issue municipal bonds to raise revenue).
\textsuperscript{162} See \textit{id.} at 1828–29 (“Financing local activities through municipal bonds is an attractive option for municipal government officials because it allows such governments to carry on infrastructure projects without having to increase state and local taxes.”).
\textsuperscript{163} See generally Kurtzleben, supra note 161 (providing an overview of the spending cuts municipalities make in order to balance their budgets).
\textsuperscript{164} See Frederic S. Mishkin, \textit{The Economics of Money, Banking, and Financial Markets} 3–4 (7th ed. 2004) (“A bond is a debt security that promises to make payments periodically for a specified period of time. The bond market is especially important to economic activity because it enables corporations or governments to borrow to finance their activities . . . .”).
\textsuperscript{165} See discussion supra Part III.b.
on the public to meet this new debt. Under this proposal, the principal on the debt can be paid from the homeowners’ periodic payments on their mortgages. 166

VI. Conclusion

The real estate market has been hit by the worst mortgage crisis in the past century. 167 As a result, countless numbers of people have lost their homes to foreclosure. In an attempt to combat this crisis, the federal government enacted legislation that fell short of making any meaningful impact. 168 The failure of these federal programs resulted in municipalities being hit the hardest. 169 With less tax revenue and increased crime as a result of home vacancies, municipalities find themselves having to do more with less. 170 Home values in neighborhoods have reached rock bottom and some owners find themselves in limbo—forced to choose between making their next mortgage payment on a property valued significantly lower than their mortgage or walking away. 171

Using the tools of eminent domain, this comment proposes a solution to the mortgage crisis that will come from states and local governments. Municipalities possess the power of eminent domain to acquire vacant foreclosed homes and turn the crisis around. 172 Home vacancies correlate with increased crime, lower home values, less tax revenue, and reduction of public services. 173 However, by acquiring foreclosed homes, municipalities can resell those properties back to their initial homeowner and solve the problems associated with the vacancies. By having the properties occupied, the municipalities will be able to obtain tax revenue and in turn will be able to provide better public services. Home occupancy will render neighborhoods

166 See id.
167 See supra notes 2–4 and accompanying text.
168 See supra notes 28–33 and accompanying text.
169 See supra notes 100–26 and accompanying text.
170 See supra notes 103–18 and accompanying text.
171 See supra notes 118–21 and accompanying text.
172 See supra notes 46–48 and accompanying text.
173 See supra notes 106–08 and accompanying text.
more secure. Furthermore, because the properties will be maintained, home values in the neighborhood will increase.\textsuperscript{174} Despite the uncertain future, there is still light at the end of the tunnel.

\textsuperscript{174}See supra notes 143–44 and accompanying text.