

# *A Review of Three Models For Enforcing Housing Codes*

**Draft memo prepared for the Center for Public Health Law Research**

April 4, 2017

By Angus Corbett, Consultant



**Center for Public Health  
Law Research**

*This memo addresses the question of how local governments can enforce housing codes to enable low-income tenants to live in safe and healthy housing. It reviews the market for low-cost rental housing and provides an outline of the “dynamics” of this market. The memo identifies three models in use today for enforcing housing codes: the “deterrence” model, the strategic code enforcement model and a meta-regulation model. The memo uses regulatory theory to analyze the interaction between each of these models and the dynamics of the low-cost rental market for housing. This analysis reveals that local governments often enforce housing codes in ways that reinforce practices that result in low-income tenants living in unsafe and unhealthy housing. It also identifies the potential for local governments to use enforcement to influence the dynamics of the low-cost market for rental housing to enable low-income tenants to live safety and healthy housing. These enforcement approaches require collaboration between local and state governments, the federal government and community organizations.*

Angus Corbett, Consultant

# Table of Contents

<b>Introduction</b>	<b>4</b>
<b>Enforcement Models</b>	<b>7</b>
<b>The perfect storm enveloping low-income households in private rental markets</b>	<b>9</b>
<i>The market dynamics of the “perfect storm”</i>	10
<i>Enforcement and the dynamics of the market for low cost rental housing</i>	12
<i>Health and well-being of those renters caught in the “perfect storm”</i>	15
<i>Health equity impact of market dynamics</i>	17
<b>Using enforcement to influence the “perfect storm” in private rental markets</b>	<b>18</b>
<i>A “deterrence” enforcement model</i>	20
Housing codes	21
Using enforcement to improve health and substandard housing	23
The use of deterrence to abate lead hazards	26
<i>Strategic Code Enforcement</i>	29
Proactive rental inspection programs	31
Implementing a proactive rental inspection program	34
Strategic use of resources to enforce housing codes	35
The use of strategic code enforcement to abate lead hazards	38
Strategic code enforcement conclusion	41
<i>Meta-regulation</i>	42
Fix it Up, Pay it Up, Give it Up	43
The next step in the “Fix it Up, Pay it Up, Give it Up” strategy	45
Meta-regulation	47
<b>Conclusion</b>	<b>48</b>
<b>Bibliography</b>	<b>50</b>

## Introduction

On February 15, 2017 the *New York Times* reported the occurrence of a “cluster” of cases of *leptospirosis* (Santora and Remnick, 2017). Leptospirosis is a flu-like disease that can cause serious complications including kidney damage, meningitis, respiratory distress, liver damage and even death. People contract leptospirosis by way of exposure to the urine of infected animals (Centers for Disease Control and Prevention, 2014). The cluster of cases in the Grand Concourse neighborhood in the Bronx seems to have been caused by exposure to the urine of rats infected with this disease. Recently, a person from this neighborhood contracted leptospirosis while living in an illegal, subcellar apartment rented from “one of the city’s worst landlords” (Santora and Remnick, 2017). When contacted, the Commissioner for the Department of Housing, Preservation and Development acknowledged that this building had a large number of outstanding violations. She commented that:

However, if you look at the trend over the last couple of years, the number of open violations for the building has actually gone down significantly ... A year ago, there were about 300 open violations. That number today is about 80 (Santora and Remnick, 2017).

The Bronx Borough President, Ruben Diaz Jr., commented that it is “unfathomable to me that in this day and age, in one of the most expensive cities in the world and at our most technologically advanced point as a civilization, the city cannot mitigate the rat problem, nor does it have good ideas to do so” (Santora and Remnick, 2017).

On February 25, some 10 days after the report of the outbreak of leptospirosis in New York, three people died in a fire in a large “transitional housing building” in West Oakland, CA. The owners of the building had been issued with 11 safety violations that were outstanding at the time of the fire. Over the preceding decade tenants had made 20 complaints about unsafe and healthy living conditions in the building. These complaints included rodent infestations, lack of heat, and failures to collect garbage (Bodley et al., 2017). The “master tenant,” Urojas Community Services, was at the time of the fire embroiled in a dispute about evictions that had started days after the “Ghost Ship” fire. The founder and director of Urojas Community Services is stated as saying that:

This is another Ghost Ship because of the violations on the building, things aren’t up to code and things weren’t fixed, and that’s always been a concern (Gafni, 2017).

The “Ghost Ship” fire in Oakland, California, resulted in the deaths of 36 people on December 2, 2016 (Wallace-Wells, 2016). After this fire officials were reported as saying that “no building code enforcement inspector had been inside the warehouse in at least 30 years” (Serna and Rocha, 2016). There appears to be evidence that the landlord was consciously aware of exposing poor tenants living

in this building to a significant risk of harm (East Bay Times Editorial Board, 2017).

Each of these events raises some difficult questions for those who are responsible for the enforcement of housing and safety codes. Do the activities of local authorities in New York and in Oakland enable landlords to rent out unsafe and unhealthy “apartments” to poor tenants? More broadly, how can local enforcement bodies justify exposing poor tenants to the risks associated with exposure to fire hazards, rats, and other dangers? How does the claim by the New York Department of Housing Preservation and Development that the number of open violations on the Grand Concourse building had fallen from 300 to 80 at the time of the outbreak of leptospirosis justify exposing poor tenants to the risks associated with living in unsafe and unhealthy housing? Does this indicate that there are perhaps overwhelming limits on the capacity of enforcement authorities to ensure that low-income households live in safe and healthy housing? Are enforcement authorities actually unable to influence the relationships between landlords and tenants in ways that ensure low-income households live in safe and healthy housing?

This memo addresses the problem of enforcing housing codes. Housing codes, and other federal and state laws and standards, seek to define minimum standards for safe and healthy housing, and are important in creating a framework that provides vulnerable people with access to safe and affordable housing. Access to housing is an important determinant of population health because unsafe, unstable housing lies at the heart of many wicked health and social problems for vulnerable people (Rittel and Webber, 1973; Institute of Medicine, 2013: pp.95-105; Bradley and Taylor, 2013: pp.1-20, 134-140). This memo outlines and analyzes the enforcement models used by local authorities to implement housing codes and other legal provisions that aim to improve community health. It aims to assess their strengths and weaknesses, and it outlines potentially successful strategies for improving the safety and quality of housing. While this analysis primarily identifies potentially successful strategies for local enforcement authorities, it also emphasizes that collaboration with other levels of government is essential to realizing the benefits of these successful strategies. In particular, these successful strategies rely upon the federal government and state governments learning to coordinate their own enforcement activities with those local authorities that are exploring innovative approaches to enforcement and regulation.

It is possible to conceive of the leptospirosis cluster and of the occurrence of two serious fires as aberrations or accidents. It is possible to identify the steps that local governments, responsible for enforcing housing codes, should take to remedy the “problem” of this manifestation of unsafe and unhealthy housing. This memo reviews approaches to enforcing housing codes that adopt this perspective. But this perspective fails to address a more troubling problem: That “enforcement” activities can themselves be a part of the conditions, part of the dynamics of the market for low-cost housing, that enable landlords to earn

significant economic returns by renting out unsafe and unhealthy housing to poor tenants. This memo addresses the problem of enforcing housing codes by analyzing the way that different approaches for enforcing housing codes interact with the ongoing patterns of relationships between stakeholders in the low-cost rental market for housing, ultimately permitting a predictable pattern of harm to continue.

In this context, the question concerning housing code enforcement becomes one of asking how each regulator's approach to enforcement influences patterns of interactions between stakeholders in the market for low-cost rental housing. Analyzing the impact of particular approaches to enforcement is one of asking how a particular enforcement model "influences the flow of events" (Parker and Braithwaite, 2003). This can also be characterized as a "systems" approach that examines particular approaches to enforcement influence patterns of interactions between the stakeholders that make up the system that is formed around the low-cost rental housing market (Meadows, 2008: pp.11-34), or who inhabit the "regulatory space" that defines the outlines of this market (Scott, 2001).

A systems approach takes into account the interactions between enforcement models and complex, multi-dimensional patterns of relationships among *all* stakeholders in this market (Corbett, 2016). Take for example the use of governance and regulation to improve safety in a number of domains that include health care and large industrial operations. The occurrence of harm in any of these domains can be interpreted as an aberration, as the failure of a particular component or as the result of human error. But work that focuses on the complexity of these undertakings, and the expertise of those who work as health care professionals or engineers, has come to focus on what makes things in these systems go right (Hollnagel, 2013). In this context harm is not caused by an aberration or failure; these are regularly occurring events. Rather, harm is produced by the same interactions that help keep people safe (Woods, 2006; Dekker, 2011). It is this characteristic of systems that Donald Berwick, in a quote also attributed to Paul Batalden, wanted to emphasize when he said that "Every system is perfectly designed to get exactly the results it gets" (Berwick, 2014: p.78; Carr, 2008; Mitchell, 2015). It is this focus on the dynamic interactions that keep systems functioning effectively that led James Reason to describe safe operations as "a dynamic non-event." In describing safe operations in this way Reason wanted to emphasize that safe operations are the product of "constant change and not constant repetition" (Reason, 1997: at p.37).

This focus on safe operations as the outcome of dynamic patterns of interaction among stakeholders is a useful analogy when considering the failure of enforcement efforts to protect poor tenants. The failure of enforcement of housing codes to prevent poor tenants being exposed to harm by unsafe and unhealthy housing is not a simple aberration. It is not just a failure of inspectors to fulfill their obligations, or even the failure of local governments to provide sufficient resources to support enforcement efforts (Uzdavines, 2014: at pp.169-171). Rather the presence of unsafe and unhealthy housing in the rental market

is the outcome of dynamic interactions among changing stakeholders. It is the result of constant change as stakeholders respond to circumstances. The efforts to improve safety in health care or other domains require changing patterns of interactions in systems to make use of the capacity of individuals to keep those systems operating safely. The efforts to improve enforcement of housing codes similarly involve changing patterns of interactions in systems so that landlords, tenants, and all those concerned with enforcement are able to ensure that low-income tenants are able to live in safe and healthy housing.

One set of dynamic interactions that presents a huge challenge to local governments seeking to use enforcement of housing codes concerns the long history of greater exposure to risk by African-American communities (Coates, 2014). Sustained historical inequities are built into the problem of housing safety, and continue to influence the extent, form and success of code enforcement. Owning and addressing inequities is essential to effective and legitimate reform.

This memo is made up of three parts. The first part outlines three approaches that local governments use to enforce housing codes. The second part provides an account of the interactions among stakeholders in the low-cost rental housing market. This part seeks to emphasize that this market involves dynamic interactions as tenants seek out housing and as landlords in the private rental market seek ways to earn high levels of return on their investments. The third part analyzes the interactions among the existing models used to enforce housing codes and the dynamics of the low cost rental housing market. The main focus of this section will be on the enforcement of housing codes by local government authorities. But the problems associated with the enforcement of these local housing codes also arise in the context of the enforcement of other Federal and State laws and standards that affect housing.

## **Enforcement Models**

The *Five Essential Public Health Law Services* identifies the elements of legal interventions that aim to improve community health. It seeks to “create a strategic legal infrastructure for action” that is able to improve community health by identifying interactions among stakeholders in a given domain of activity that are conducive to the design, enactment, enforcement and assessment of healthy laws and legal practices. This approach to legal action emphasizes the complexity of the social collaborations needed to improve public health. In this perspective the aim of improving public health requires:

[T]he best available science; the active engagement of community leaders from all walks of life; and the effective use of legal tools to justify and support strategic policy choices, implementation mechanisms and enforcement structures that will ensure health for generations yet to come – and all these elements must be effectively networked to constitute a strategic legal infrastructure for action (Law Partnership, 2015). <sup>[1]</sup><sub>SEP</sub>

By networking these elements to constitute a “legal infrastructure,” the partners in this program emphasize the range of relationships and interactions needed to achieve the goal of improving public health.

One of these five services is “support for defending and enforcing legal solutions” to improve public health. It comes after the process of formulating legal solutions and immediately precedes the final “service” that involves monitoring the effectiveness of the enforcement of the “legal solution.” The concept of “enforcing legal solutions” in this context refers to that part of the regulatory intervention that is the “nudge” (Thaler and Sunstein, 2008), or the “motive force” that aims to influence patterns of interactions among stakeholders in a domain of activity. The extent of the motive force needed to influence patterns of interactions between stakeholders is dependent on at least two factors. Firstly, the magnitude of the problem, that is, the nature and extent of the harm suffered by specific populations of people. Secondly, it will depend on the interaction between the strong forces compelling tenants with limited resources to find housing and the power accruing to landlords as a result of the limited supply of “low-cost” housing. The combination of both of these elements will affect the ways that regulators and policymakers fashion enforcement mechanisms to be the motive force to implement particular legal solutions (Law Partnership, 2015).

This memo considers approaches to enforcing housing codes that are currently being used by governmental bodies acting as regulators. It draws upon regulatory theory to highlight three models of enforcement (Gunningham, 2010). The aim is to use these models to specify two different parts of the challenge facing governmental authorities and other regulators as they set out to enforce housing codes. The first is to identify different ways that regulators define the problem of enforcement, that is, what is the goal that regulators are seeking to achieve. The second part of the challenge is to identify the resources that are available to regulators, and how regulators make use of these resources, to influence the conduct of stakeholders in the rental market for low-cost housing to attain their enforcement goals.

The first of these approaches is the deterrence model that “refers to the way government ensures that its citizens abide by the law and specifies the consequences for failing to do so” (ChangeLab Solutions, 2014: at p.3). The second model is sometimes referred to as “strategic code enforcement” which is a form of “responsive regulation” (Ayres and Braithwaite, 1992). Allan Mallach defines “strategic code compliance” as “code enforcement that goes beyond complaint response to strategically address systemic targets and focus on bringing properties into compliance with codes”(Mallach, 2015: at p.7; Center for Community Progress, 2016c). “Responsive regulation” is an approach to regulation in which “enforcement strategies punish the worst offenders, while at the same time encouraging and helping employers to comply voluntarily” (Gunningham, 2010: at p.127). One of the goals of strategic code enforcement is to create the conditions for the emergence of compliance systems for landlords that enable them to bring their properties into “immediate compliance, full



compliance, and continuous compliance” (Food and Agriculture Organization, 2006: at p.10).

The third approach is sometimes referred to as “meta-regulation” but can also be referred to as a systems approach to regulation. Meta-regulation “involves government, rather than regulating directly, risk-managing the risk management of individual enterprises” (Gunningham, 2010: at p.135). It refers to the “ways that outside regulators deliberately—rather than unintentionally—seek to induce targets to develop their own internal, self-regulatory responses to public problems” (Coglianese and Mendelson, 2010: p.150). It seeks to re-frame the problem of enforcement as one of inducing property owners to modify conceptions of “responsible property ownership” in ways that are responsive to achieving public policy goals of improving the safety and quality of housing (Center for Community Progress, 2016c). Meta-regulation is founded on a systems approach to regulation because it specifies the goal of inducing changes in conceptions of “responsible” property ownership as the ultimate goal of enforcement and works backwards from this ultimate goal. It seeks to identify ways of designing and testing enforcement mechanisms that will enable the “system” to move towards this ultimate goal (Schneider, 2012: pp.133-137; Huising and Silbey, 2011: pp.25-33). This will involve, amongst other things, enabling, nudging, and sometimes forcing, property owners to develop business models and management systems to provide a reasonable rate of return while also meeting the goals of providing safe and healthy housing (Toering and Alexander, 2014: p.5; Center for Community Progress, 2016b: p.18).

Governmental authorities and regulators are currently making use of each of these models to enforce housing codes. The memo reviews the limited available evidence to evaluate the effectiveness of each of these models and it uses regulatory theory to outline patterns of success and failure in the use of these models. Finally, the memo provides guidance on how regulators and policymakers can learn to nurture and spread successful strategies.

## **The perfect storm enveloping low-income households in private rental markets**

This section provides an account of the “system” that particular models of enforcement must influence if they are to improve health outcomes for members of households living in low-cost housing. The aim of enforcement models is to influence the dynamics of the system, that is, the patterns of interactions between stakeholders. The goal is to influence these interactions in ways that move the system closer to reaching the conditions that will improve the health of households living in low cost housing. This account aims to show that the negative patterns of interaction among stakeholders in low-cost rental markets are robust and resilient and present challenges for those seeking to enforce housing codes and other public laws to improve health.

There are many interactions among stakeholders that frame the context in which markets for low-cost rental housing operate. These include interactions that affect broad economic systems that affect employment, wages, and conditions of work. Governments administer systems of planning, welfare, and law that define the rights of landlords and tenants. The outcome of these interactions puts landlords who provide access to housing and low-income households in a strong bargaining position in relation to low-income households seeking access to affordable, habitable and safe housing (Desmond, 2016: at pp.305-308).

The private market for low-cost rental housing that has emerged out of these interactions has a number of important characteristics. There are an increasing number of households seeking rental housing; there are a diminishing number of housing units that are available for rent; and there are declining vacancy rates for rental property in this market. As events have unfolded in this market, low-income households have encountered increasing rents without significant improvements in the quality of housing. These events have worsened some of the adverse health outcomes associated with households living in low-cost housing rented on the private market.

### **THE MARKET DYNAMICS OF THE “PERFECT STORM”**

In the decade leading up to 2015 the number of renters increased by 9 million with the result that 36 percent of US householders have chosen to rent rather than own their homes (Joint Center for Housing Studies at Harvard University, 2016: at p.1; Samara, 2014: at p.10). In this period nearly half of the net growth in renters, around 4 million in number, was among households earning less than \$25,000 (Joint Center for Housing Studies at Harvard University, 2016: at p.26). At the same time as the increase in demand for housing by renters, there has been no corresponding increase in the supply of low cost rental housing.

Factoring in other changes to the stock, the number of low-cost units rose only 11.2 percent over the decade—less than half the increase in higher-rent units and far below the growing number of low-income renters for which these low-cost units would be affordable (Joint Center for Housing Studies at Harvard University, 2016: at p.27)

The failure to increase the supply of low-cost housing is the result of three factors: 1) affordable housing units being lost as affordability housing requirements expire, 2) the demolition of low cost housing (Samara, 2014: at pp.21-22), and 3) deferred maintenance on public housing (Rose and Miller, 2016: at p.15). In the years between 2003 and 2013, “the number of low cost units renting for less than \$400 increased by 10 percent, but the number of renter households in need of these units increased by 40 percent” (Yentel et al., 2016: at p.4). The National Low Income Housing Coalition estimates that:

The nation’s 10.4 million [Extremely Low Income] renter households currently face a shortage of 7.2 million affordable and available rental

units, leaving 31 affordable and available units for every 100 ELI renter households (Yentel et al., 2016: at p.4)

These figures indicate the magnitude of the difficulties facing those on very low incomes as they seek to find housing. The tragic story of Arleen Bell recounted in *Evicted* is an account of how this plays out in the life of an African American woman who is seeking housing for herself and her two sons. In *Evicted* we see Ms. Belle setting out to do the right thing by her sons, but without the resources to enable her family to be resilient as they respond to the ordinary challenges of life. She perseveres and endures in the face of what appear to be insuperable obstacles. At the end of her story in the book, Ms. Belle says that she wishes that her life were different and that as an old lady she could look at her kids:

And they be grown. And they, you know, become something. Something more than me. And we'll all be together, and be laughing. We be remembering stuff like this and be laughing at it (Desmond, 2016: p.292)

In a way that is consistent with the main themes of *Evicted* we are left with an aching sense that this wished-for-future will not materialize (Desmond, 2016: pp.282-292, 297-299).

The result of the increasing demand for rental housing combined with an inadequate supply of housing has been increases in rents. (Desmond and Bell, 2015: at p.22). Between 2000 and 2012 there was a real increase in rents of 6 percent (Samara, 2014: at p.13). In 2015, vacancy rates for rental housing had fallen to 7.1 percent, and rents increased by 3.6 percent. The Joint Center for Housing Studies at Harvard University emphasized the significance of this state of affairs by noting that when “adjusted for inflation, it has been three decades since either of these measures registered such tightness in the rental market” (Joint Center for Housing Studies at Harvard University, 2016: at p.4).

These forces driving demand and supply for housing are strong ones, and they have produced “tightness in the rental market.” But this understates the risks that households face when they enter the private rental market, and they negotiate the problem of having to pay increasing rents. At the same time, as the rental market has tightened, households choosing to obtain housing in this market have experienced falling incomes. In the period 2000-2014 there was an 18 percent drop in real incomes for 25-34 year olds, and a nine percent decline for 35-44 year olds.(Joint Center for Housing Studies at Harvard University, 2016: at p.2). This fall in real incomes has had very a significant impact on the capacity of many working people to afford adequate housing. The National Low Income Housing Coalition calculate that a worker earning the federal minimum wage of \$7.25 per hour would need to work 2.8 full-time jobs “in order to afford a two-bedroom apartment at HUD’s Fair Market Rent.” The problem of finding affordable housing extends beyond those earning the minimum wage to those earning average wages. The average hourly wage of renters in the United States is \$15.42 per hour, \$4.88 less than the “Two Bedroom Housing Wage” (Yentel et al., 2016: p.1). The financial stress on those earning either average, or below

average, wages has significantly increased the number of cost burdened households. The number of households paying more than 30 percent of their income in rent rose by 3.6 million between 2008-2014 to reach 21.3 million. While in the same period the number of households facing the severe burden of paying more than 50 percent of their income for housing increased by 2.1 million to reach 11.4 million households (Joint Center for Housing Studies at Harvard University, 2016: at p.4, 31).

The forces propelling low-income households to expend more of their limited incomes on housing have been further strengthened by a fall in the number of very low-income renters who receive assistance from the U.S. Department of Housing and Urban Development. The Joint Center for Housing Studies concludes that “only one in four income-eligible renters receives assistance of any kind, leaving millions to try to find housing they can afford in the private market” (Joint Center for Housing Studies at Harvard University, 2016: at p.5).

The dynamic equilibrium emerging out of the interactions among stakeholders in the private rental market is one that exposes renting households to a number of significant risks. Households in the private rental market are confronted with the problem of being forced into paying higher rents, even as they are constrained by reduced incomes and more limited access to public housing assistance. There are additional factors in the private rental market, that add moreover, to the bundle of risks that low-income households bear as they negotiate the problem of finding housing. The first of these is that the law governing landlord and tenants provides few limitations on the capacity of landlords to evict renters for non-payment of rent (Desmond and Bell, 2015: at pp.23-24; Desmond, 2016: at pp.128-129). The second of these factors is that in many cities and counties in the United States, governments administering public income support for low-income households have done little to ameliorate the impact of severe cost burdens associated with the payment of rent (Desmond and Bell, 2015: at p.15 (record keeping), at pp.23-27 (forced displacements)). A large proportion of public support for low-income households flows to landlords who are able to benefit from high rents in the private rental market (Desmond, 2016: at pp.305-308).

## **ENFORCEMENT AND THE DYNAMICS OF THE MARKET FOR LOW COST RENTAL HOUSING**

Housing codes specify standards governing the safety and quality of housing. Enforcement of housing codes is one of the foundations that support effective and efficient markets for low-cost rental housing. Housing codes specify a set of community standards that are designed to enable markets to settle upon rents that are responsive to both the limited resources of low-income households and to the full cost of providing housing. These costs include a reasonable rate of return that is payable on the capital and any other resources invested by landlords. Housing code enforcement thus enables markets to explore the space to find an equilibrium that balances each of these competing interests. The

capacity of effective and efficient markets to find this equilibrium is an important reference point for policymakers and governments that are responsible for forming and implementing public policy that is directed at alleviating poverty. Rents that emerge out of this dynamic process can be characterized as fair provided that the housing available to low income households is safe and healthy, that is, it complies with housing codes. Households that are not able to afford to pay rent in these circumstances do not have access to “affordable” housing. It is the responsibility of governments to establish policies and programs that are responsive to the needs of these low-income households.

An analysis of the effectiveness of housing code enforcement must therefore address the question of whether the implementation of models for enforcing housing codes effectively establishes parameters governing the safety and quality of housing in the low-cost rental market. The dynamics of the market for low-cost rental housing indicate the presence of very strong forces governing the demand for, and the supply of, low-cost rental housing. These dynamics create the conditions for market failure where processes for enforcing housing codes fail to establish parameters for the safety and quality of housing. In these circumstances markets may produce results that are neither fair, nor effective, nor efficient. In particular, these markets may result in low-income households being required to pay an excessive amount of rent to live in unsafe and unhealthy housing.

The combined effect of increased demand for housing, of an insufficient supply of affordable housing, and of falling real incomes for low-income households, creates the conditions that challenge the capacity of governments to enforce housing codes to set parameters for safe and healthy housing. In effect these conditions in the private rental market create the conditions for market failure. These conditions enable landlords to develop business models that are based upon the capacity to earn high rents and high rates of return. This market opportunity has drawn in institutional investors seeking to take advantage of the high yields in the single-family rental market (Samara, 2014: at pp.22-23; Fields, 2014). This is not necessarily an example of market failure where tenants in those markets are able to afford to pay those rents. It is otherwise in the low-cost rental market for housing. Take for example, the emergence of what Matthew Desmond has described as the landlord as “inner-city entrepreneur” (Desmond, 2016: at p.13). The growth of this new category of entrepreneurs can be measured by the growth in the number of people employed in the business of professional property management and by the associated growth in professional associations. In the period since 1970, the number of those engaged in professional property management has quadrupled (Desmond, 2016: at p.28).

Desmond provides a compelling account of the business of being an inner-city landlord entrepreneur:

The same thing that made homeownership a bad investment in poor, black neighborhoods – depressed property values – made landlording

there a potentially lucrative one. Property values for similar homes were double or triple in white, middle-class sections of the city; but rents in those neighborhoods were not. A landlord might have been able to fetch \$750 for a two-bedroom unit in the suburb of Wauwatosa and only \$550 for a similar unit in Milwaukee's poverty-stricken 53206 zip code. But the Wauwatosa property would have come with a much higher mortgage payment and tax bill, not to mention higher standards for the condition of the unit (Desmond, 2016: at pp.151-152).

The immediate impact of this "business model" for the members of low-income households renting housing units in the poverty-stricken 53206 zip code is clear. What is less clear, but equally important, in the context of the enforcement of housing codes is the time horizon for this business investment. One landlord neatly encapsulated this characteristic of this investment when he said that "You don't buy properties for their appreciative value. You're not in it for the future but for now" (Desmond, 2016: at p.152). The immediate consequence of the "buy for now" phenomenon is the very limited incentive to take steps to improve the condition of a property. Indeed, in the portfolio of the entrepreneurial landlord using this business model it is quite possible for the worst properties to yield the biggest returns (Desmond, 2016: at p.76). Desmond describes a landlord's response to a fire that destroyed one of her properties. The landlord was shaken by the death of a baby in the fire but the loss of the property was a positive one. The landlord demolished the building and with money she collected from the insurance she was able to purchase two more duplexes (Desmond, 2016: at p.255).

This business model therefore combines high rates of return for landlords with low capital value of housing and a very limited interest in the long-term value of the properties that are rented out to poor tenants. Landlords earn significant incomes renting out properties to poor tenants (Desmond, 2016: at p.152). At the same time the neighborhoods in which those landlords own those properties fall into a state of distress. This set of market dynamics presents challenges for local authorities, or other governments, seeking to enforce housing codes. In particular, it seems to be possible for landlords to externalize some of the costs associated with property ownership by allowing low-value properties to cycle into vacancy and abandonment as those properties deteriorate. When landlords are able to successfully avoid paying the full costs associated with abandonment of properties they will have externalized the liability to meet these costs. The result is those costs are borne by neighbors, communities and public authorities. These market dynamics also open up the possibility that low-income households will have to pay high rents to live in housing that is neither safe nor healthy. This prevents markets from settling on a "price" for providing safe and healthy housing and therefore prevents governments and public policymakers from formulating programs that aim to alleviate poverty by supporting those who are unable to afford the rent for "affordable housing."

As an empirical question it is not clear how much private rental markets for low-cost housing are influenced by the activities of "inner-city entrepreneurs." The

evidence presented by Matthew Desmond in *Evicted* indicates that the rental market for low-cost housing in Milwaukee was profoundly influenced by the approach to landlordism adopted by these entrepreneurs (Desmond, 2016: pp.144-157). It also appears that the conditions for the emergence of these inner city entrepreneurs exist in other cities (Center for Community Progress, 2016b: pp.28-29; Philadelphia City Council, 2017). The purpose for highlighting this particular set of market dynamics is that it is an example of the ways in which the failure to enforce housing codes can support the emergence of markets that leave poor households paying large amounts of their incomes to live in unsafe and unhealthy housing. As the following section suggests the prevalence of low-income households living in unsafe and unhealthy housing indicates that a failure to effectively enforce housing codes is also supporting the emergence ineffective, unfair, and inefficient rental markets for affordable housing.

### **HEALTH AND WELL-BEING OF THOSE RENTERS CAUGHT IN THE “PERFECT STORM”**

Some stakeholders who are engaged in seeking to improve access to safe and healthy housing have described low-income households buffeted by these market dynamics as being enveloped in a “perfect storm” (Samara, 2014: at p.14) These market dynamics expose members of low-income households to a range of risks to their health and well-being. But while these market dynamics create the need for enforcement of local housing codes to improve health and well-being they also complicate the problem of developing and implementing enforcement models that have the potential to achieve these goals. This section provides a brief overview of some of the risks to health and well-being experienced by members of low-income households in the private rental market.

The current state of the private rental market, and of the housing market more generally, has had an impact on the quality of housing in the United States. Desmond and Ball conclude current conditions have contributed to a “general stagnation in housing quality.”

A cursory look at the evidence indicates that cities made great strides in improving housing conditions in decades past, but recent years have witnessed a general stagnation in housing quality alongside steep rent increases (Desmond and Bell, 2015: at p.22).

Yet significant numbers of low-income households live in substandard housing:

In 2013, 10 percent of low-income renters lived in units that lacked complete plumbing or kitchen facilities, experienced frequent breakdowns in major systems, or had other physical defects (Joint Center for Housing Studies at Harvard University, 2016: at p.4).

For example, in the period 2009-2011, nearly half of all renters in Milwaukee “experienced a serious and lasting housing problem.” African Americans’ households were most likely to experience these problems and average rents

were the same whether or not the apartment had housing problems (Desmond, 2016: at p.76). In addition to poor plumbing, these defects include breakdowns in heating and electrical systems, the presence of rodents, cockroaches or other pests, peeling paint, and fire hazards (Center for Public Health Law Research, 2016). For example “lead-based paint is found in 37.1 million homes (35 percent of all housing units), and 86 percent of homes built before 1940” (Center for Public Health Law Research, 2016: at p.2).

The National Safe and Healthy Housing Coalition extrapolates from this evidence that:

Nearly 6 million families live in housing rivaling that of developing countries, with broken heating and plumbing, holes in walls and windows, roach and rodent infestation, falling plaster, crumbling foundations, and leaking roofs. Millions more in all 50 states live in housing with serious health and safety hazards from mold, exposed wiring, radon, unvented heaters, toxic chemicals, broken stairs, missing smoke detectors, and other hazards (National Safe and Healthy Housing Coalition, 2015: at p.1)

These substandard housing conditions increase risks of harm for those living in these conditions arising from exposure to lead, carbon monoxide, and mold. There is also increased risk of harm from injuries caused by unsafe conditions in substandard housing (National Safe and Healthy Housing Coalition, 2015: at pp.1-2).

In addition to these “direct” effects on health there are a number of indirect impacts on those living in low-income households. Increased food insecurity for severely cost burdened households is one of these indirect effects of the high cost of housing.

The most significant cutback low-income households make is on basic sustenance. Compared with otherwise similar households able to find housing they can afford, severely burdened households in the bottom expenditure quartile spend \$150 (41 percent) less on food each month (Joint Center for Housing Studies at Harvard University, 2016: at p.5).

High rates of eviction are an important feature of the private low-cost rental market (Desmond and Bell, 2015: at pp.23-24). Evictions expose members of these low-cost households to many risks.

One study of urban mothers found that those who experienced an eviction in the past year exhibited one standard deviation higher rates of material hardship, compared with matched mothers who did not (Desmond and Bell, 2015: at p.25).

More broadly those living in low-cost housing are exposed to a range of environment toxins.



Exposure to environmental toxins exacerbates the suffering of the poor, reducing their intellectual capacities and threatening their mental health. Studies have shown low-income black and Hispanic neighborhoods to have relatively high rates of pollution. Race- and class-based segregation not only correlates with dangerous streets and failing schools but also is accompanied by proximity to trash incinerators or hazardous waste as well as lead poisoning in children (Desmond and Bell, 2015: at p.22).

Each of these phenomena exposes those living in low-cost housing to added risks of harm and adverse health effects.

### **HEALTH EQUITY IMPACT OF MARKET DYNAMICS**

The market for low-cost rental housing exposes poor tenants to risks of harm associated with living in unsafe and unhealthy housing. But these risks do not fall equally on all parts of the community. The adverse impact on health and well-being that emerges out of the dynamics of the private low-cost rental market fall unequally on communities of color. This arises because larger proportions of communities of color are cost-burdened and because these communities suffer disproportionately from the conditions and injuries associated with substandard housing.

The unusual “tightness” in the private rental market identified by the Joint Center for Housing Studies at Harvard University imposes a number of very serious burdens on low-income households and on communities where a high proportion of renters are either “cost-burdened” or “severely cost-burdened” (Joint Center for Housing Studies at Harvard University, 2016: p.6). These burdens that are imposed on low-income households do not fall equally on all parts of the community.

In 2000 6.5 million Americans lived in neighborhoods with poverty rates of at least 40 percent. In 2014, the population in these areas had more than doubled to 13.7 million, with substantial increases across all racial and ethnic groups ... Even so, income disparities as well as still-high levels of racial segregation have consigned 25 percent of poor blacks and 18 percent of poor Hispanics to high-poverty communities, compared with only 6 percent of poor whites (Joint Center for Housing Studies at Harvard University, 2016: at pp.5-6)

This pattern of people of color bearing disparate burdens created by housing law and policy reinforces past housing practices that have led to people of color bearing similar disparate burdens (Rose and Miller, 2016: at pp.5-8; Coates, 2014).

In addition, diseases, conditions, and injuries associated with living in substandard housing fall disproportionately on communities of color:

Low-income families, and particularly children and the elderly, suffer disproportionately from substandard housing, 95 percent of which live in

private rentals units or owner-occupied houses. People of color are twice as likely as their white counterparts to live in moderately or severely deficient homes. Correspondingly, morbidity and mortality rates from housing-related injuries and illnesses are disproportionately higher among these groups. For example, African American children are twice as likely to die from residential injuries as white children (National Safe and Healthy Housing Coalition, 2015: at p.2) <sup>11</sup><sub>SEP</sub>

While the “perfect storm” in the private rental market for low-cost housing increases all of the risks associated with living in poverty for all communities these negative consequences fall unequally on people of color.

This has important ramifications for local governments that seek to improve the safety and quality of housing by enforcing housing codes. In its work with High Point, North Carolina, the Center for Community Progress makes it clear that developing an effective strategy for enforcing housing codes is also an act of reconciliation. It involves the recognition of past wrongs and a commitment to move towards a future state of affairs in which all communities have the opportunity to share in the benefits associated with improved housing conditions.

The severely distressed neighborhoods in the Core of High Point—like so many across all of America’s large and small cities—are also not accidentally poor and predominantly black. Trying to overcome decades of disinvestment and unjust public policy at so many levels will require deep, extensive partnerships committed to bold and pragmatic systems-level change (Center for Community Progress, 2016b: at p.34).

Effective enforcement of housing codes is necessarily also a step towards reconciling with communities that have sustained the adverse consequences of discrimination. Local governments seeking to ensure that poor tenants have an opportunity to live in safe and healthy housing must frame this effort as part of the process of reconciliation with communities of color. This has particular significance in considering the role of disadvantaged communities in the delivery of the Five Services. A technocratic approach to improving code enforcement to produce better health outcomes cannot be counted on to engage people with a broader vision of the problem and what counts as meaningful change.

## **Using enforcement to influence the “perfect storm” in private rental markets**

The dynamics of private low-cost rental markets create an opportunity for using enforcement of housing codes, and other related laws, to improve health and well-being for low-cost households. But these dynamics also complicate the problem of designing and implementing enforcement mechanisms that can influence market dynamics in ways that improve health and well-being. This section reviews three models of enforcement and analyzes the way in which these enforcement mechanisms interact with the dynamics of the private rental

market. At the outset it is important to specify clearly what this analysis of enforcement models can reveal about the interaction between interventions designed to enforce housing codes and the dynamics of the low-cost private rental market for housing. It is also important to be clear about the limits of this analysis in answering the broad question about how to ensure that housing in private rental markets is safe and healthy.

This memo analyzes three models that local authorities, and other regulators, currently use to enforce housing codes. These are the “deterrence” model, the compliance model and a systems (meta-regulation) model. The analysis of the use of these enforcement mechanisms provides a powerful lens for analyzing the effectiveness and coherence of the broader regulatory system of which these enforcement mechanisms are a part. The enforcement model that a regulator uses to enforce a particular set of standards creates a connection between the problem that gave rise to the need for regulation and the public policy goal that the regulator is setting out to achieve. In this sense a regulator’s choice of an enforcement model will define the outlines of the path that connects the market dynamics that have produced the problem of unsafe and unhealthy housing with the public policy goal of improving the safety and quality of housing. In specifying the outlines of this enforcement model a regulator will indicate the direction of the path, its magnitude and the resources that are needed to build and maintain the set of legal interventions that will modify the market dynamics that produced the problem. In specifying the set of legal interventions that are part of a particular enforcement model a regulator will reveal in broad terms whether this path is viable, that is, whether it will influence market dynamics in ways that ensure that low income households live in safe and healthy housing.

However this analysis has quite clear limitations. Effective regulation involves much more than enforcement of codes, laws, or rules. In their review of regulation Christine Parker and John Braithwaite emphasize that using regulation to influence particular domains of activity involves many different kinds of intervention to influence the activity of a range of stakeholders.

Indeed, it can be fruitful to think of compliance with regulation occurring in a ‘regulatory space’ in which various regulatory regimes simultaneously operate and compete with each other to secure compliance. Government regulators have to compete with, form alliances with, or influence these non-state forms of regulation in order to be effective at gaining compliance with public policy goals. Legal sanctions rarely achieve prime legitimacy and efficacy automatically in social and economic life. *In order to understand the impact of legal regulation, it is therefore necessary to understand how law connects or fails to connect with the other sources of normative ordering* (Parker and Braithwaite, 2003: p.137 (emphasis added))

The following analysis of enforcement models therefore situates enforcement in the context of the broader regulatory context. In the *Five Essential Public Health Law Services Framework* “defending and enforcing legal solutions” comes after

three other forms of engagement with regulation. These include expertise and knowledge aimed at defining the problem, access to expertise in designing legal solutions, and engaging with communities and building political will. Each of the different enforcement models analyzed in this section frames the problem of unsafe and unhealthy housing in different ways. In addition, the success of each of these enforcement models is greatly dependent on particular forms of engagement with communities and on building and maintaining political support. While it is crucial to acknowledge the different ways in which enforcement is nested in this broad legal context the following analysis does not specify how to achieve the right kinds of community engagement or how to build and maintain political support.

Effective enforcement also involves much more than analysis of the enforcement models used by regulators. The study of Regulatory Excellence conducted by the Penn Program on Regulation argued that an excellent regulator would have three attributes, “utmost integrity,” “empathic engagement,” and “stellar competence.” These attributes of excellence must then be applied to the regulator’s traits, for example, the regulator’s commitment to serve the public interest), the regulator’s actions (including enforcement actions), and whether the regulatory outcomes were publicly valued outcomes (Coglianese, 2015: pp.ii-vii).

Only if the people working in a regulatory authority are committed to doing their utmost to deliver public value, and to learning and improving their ability to deliver that value in a manner that demonstrates respectful engagement with others, can a regulator expect to achieve true excellence (Coglianese, 2015: p.vi)

In this sense effective enforcement involves regulators learning how to interact with multiple sets of stakeholders in multiple ways to influence interactions in ways that modify the dynamics of the low-cost private rental market for housing. While the following analysis notes that regulators need to develop this capacity it does not specify how regulators set about developing or mobilizing this capacity.

## **A “DETERRENCE” ENFORCEMENT MODEL**

Housing codes and other laws relating to the safety and quality of housing are regulatory instruments that are designed, among other goals, to ensure that housing is safe and healthy for everyone. As a regulatory instrument, housing codes rely upon an interaction between the essential elements of systems of regulation.

The essential characteristics of any regulatory instrument or approach are fourfold: target, regulator, command, and consequences. The target is the entity to which the regulation applies and upon whom the consequences of non-compliance are imposed. Typically, the target will be a business firm or facility. But targets of regulation can also include individuals (e.g. drivers), governmental organisations (e.g. school districts), and non-profit organisations (e.g. hospitals) (Coglianese and Mendelson, 2010: at pp.147-148).

In the context of a private rental market, regulation centered on enforcement of housing codes identifies a target (owners and landlords), specifies a regulator (an inspectorate), specifies a command (the particular requirements in the code), and the consequence for failure to comply (sanctions for non-compliance). The ultimate goal of this approach to enforcement is to ensure that landlords “abide by the law” (ChangeLab Solutions, 2014: at p.3).

A deterrence approach is founded on the assumption that a “one-by-one” application of sanctions on landlords who fail to comply with an element of the housing codes will act as a general deterrent for all landlords.

The deterrence strategy emphasises a confrontational style of enforcement and the sanctioning of rule-breaking behaviour. It assumes that those regulated are rational actors capable of responding to incentives, and that if offenders are detected with sufficient frequency and punished with sufficient severity, then they, and other potential violators, will be deterred from violations in the future (Gunningham, 2010: at p.121)

There are many variables that affect the success of this strategy. These include the rate of non-compliance in a given target population of houses, the costs incurred by landlords to remedy non-compliance with the housing codes, the likelihood of detection, and the amount of the sanction imposed for non-compliance. The application of the deterrence enforcement model provides an opportunity to consider the challenges associated with using enforcement of housing codes to improve the safety and quality of housing.

### **Housing codes**

There are two ways of approaching the definition of standards for housing. In the first, broadly defined housing codes specify general standards of maintenance for properties. These housing codes aim to promote public health and protect property values (ChangeLab Solutions, 2014: at p.2). In the second approach to defining standards, laws that are targeted at remedying a specific problem, for example, exposure to lead in the home (Korfmacher and Hanley, 2013). Often different levels of government will have responsibility for enforcing both of these kinds of laws simultaneously. One issue that therefore arises is as to how different levels of government coordinate their enforcement activities. One of the main conclusions of this memo concerning the effective enforcement of laws concerned with improving the safety and quality of housing concerns the importance of developing forms of collaboration to support effective coordination of enforcement activities. But irrespective of concerns about the need for collaboration, and irrespective of which level of government is responsible for enforcement there are several problems with the use of a deterrence model to enforce housing codes.

Housing codes specify standards for property maintenance. These include general obligations such as the obligation that the interior of a structure “be maintained in good repair, structurally sound, and in sanitary condition”

(International Code Council, 2015: at s.305.1). They also include specific provisions such as the requirement that “every door shall fit reasonably well within its frame and shall be capable of being opened and closed by being properly secured to the jambs, headers or tracks as intended by the manufacturer” (International Code Council, 2015: at s.305.6). Commentators have noted that many of the standards represent ideal or middle-class standards of property maintenance and nearly always leave open significant room for discretion as to their application in any specific circumstances (Uzdavines, 2014: at p.172; Ross, 1995: at pp.141-143). In addition these housing codes do not specify any priorities as between different kinds of non-compliance that failure to maintain in good repair or failure to maintain in a sanitary condition (Uzdavines, 2014: at pp.172-173).

Local authorities that have responsibility for enforcing these codes usually form an inspectorate for that purpose. Inspectors for licensing and inspections are generally separate from those responsible for monitoring compliance with building standards (Center for Public Health Law Research, 2016: at p.4). Inspectors, who have responsibility for enforcing housing codes, rely on an enforcement model that:

1. Detects violations
2. Issues orders to remedy violations
3. Monitors and responds to actions to remedy violations,
4. Initiates proceedings to impose sanctions where owners have not remedied violations
5. Initiates proceedings to restore or demolish properties where owners have not complied with orders after the application of sanctions.

Each of these steps enables inspectors to exercise discretion but also requires inspectors and others responsible for initiating proceedings to impose sanctions to follow complex processes (Uzdavines, 2014: at pp.163-168).

There are a variety of approaches to detecting violations of housing codes. The most common approach to detecting violations is one that relies upon inspectors receiving complaints (Uzdavines, 2014: at pp. 163-164; Petro et al., 2016: at p.7; Philadelphia City Council, 2017). Uzdavines argues that:

The complaint-based model becomes a de facto system when no one in authority has developed a strategy for prioritizing violations. This has the added effect of minimizing the volume of violations that would be produced under a proactive inspection system (Uzdavines, 2014: at pp. 163-164).

After receiving a complaint and having determined that there is a violation an inspector will issue an informal notice to comply. Where the owner fails to comply with the informal notice an inspector will issue a formal notice to comply. The inspector must then re-inspect the building before initiating proceedings to

impose a sanction for the violation. These can be either a form of administrative proceeding or they may be formal criminal proceedings in which a court will ultimately determine whether the inspector has been able to establish that there was a violation of the housing code. There are a variety of deterrence tools or “hammers” that courts can use to ensure that owners comply with the formal finding of non-compliance with the housing code (Uzdavines, 2014: at p.167). Where an owner fails to comply with the former order to remedy a local authority may take steps to restore the building or it may demolish the building (Uzdavines, 2014: at p.168).

### **Using enforcement to improve health and substandard housing**

The most striking problem arising out of the use of a deterrence approach to enforce housing codes in the low-cost rental market is that it is unable to bring sufficient force to bear on the dynamics of this market. In simple terms, a cadre of inspectors armed with limited civil and criminal sanctions is unable to contain the strong forces of demand and supply in these markets, and thus unable to influence the business models used by inner-city entrepreneurs that are emerging in these markets. The explication of the reasons why inspectors are unable to housing markets will also help inform the discussion of how and why many local governments have sought to use strategic code enforcement to improve the standard of housing for low-income households.

There are at least four reasons why low-cost rental markets have been able to adapt to this model of enforcement without evidence of improvement of substandard housing. These are:

1. A complaint-based model of detection enables landlords to draw low-cost households into collusive practices that ensure building inspectors do not receive complaints. This significantly reduces the probability that substandard housing will come to the attention of the regulator and thereby enables landlords to avoid obligations that are included in housing codes.
2. Inspectors face nearly insuperable challenges when they seek to enforce housing codes in circumstances where there is widespread non-compliance and where enforcement of the codes has unintended consequences.
3. A deterrence model is dependent on the capacity of the regulator to impose a sanction for breach of a specific rule. The likelihood of a court imposing a sanction on a landlord is reduced by the generality of the code, the procedural complexity of imposing sanctions (especially if the sanction is a criminal sanction), and the ultimate size of the sanction.
4. The capacity of the sanction to be a “hammer” to force a landlord into compliance is diminished where it is in the interest of the landlord to walk away from the property and leave either restoration or demolition to the local government authority.

Any one of these factors taken singly can seriously diminish the success of a deterrence enforcement strategy but taken together they represent insuperable obstacles that make this enforcement style an ineffective one in this context. These four factors have enabled low-cost rental markets to adapt to this enforcement model without complying with the underlying obligation to provide safe and healthy housing.

There are many reasons why tenants in low-cost housing will not make complaints about substandard housing. Laurence Ross in his study of housing code enforcement undertaken in the early 1990s reported that “No-one is happy to see the inspector, someone will have to pay money” (Ross, 1995: at p.138). The generalized threat that a landlord could evict a tenant may be sufficient to force the most vulnerable tenants to accept substandard housing. In 2009, Linda Argo, the Director of the Department of Consumer and Regulatory Affairs (DCRA) for the District of Columbia, in testimony before the District of Columbia City about the need for a proactive rental inspection said that:

“[F]or the vast majority of properties named in the slumlord lawsuits [initiated by the Attorney General], DCRA had not received any recent complaints from residents of those buildings. And for the worst of the properties, we never received a single complaint (Ackerman, 2014: at pp.5-6)”

This is particularly pressing problem in the low-cost rental market in the period after 2008 where rents are high, vacancy rates are low, and evictions rates are high (Desmond and Bell, 2015: pp.23-25). In his study of low-cost rental housing in Milwaukee, Matthew Desmond documents the practice of tenants accepting substandard housing once they relinquished the protections that were designed to keep housing healthy and safe. A tenant who fell behind in rent, or otherwise breached the rental agreement, would lose the benefit of these protections. A tenant “tempted eviction” if they filed a complaint with a building inspector in these circumstances. Once a tenant had fallen behind a landlord could “respond by neglecting repairs.” In simple terms “for many landlords, it was cheaper to deal with the expense of eviction than it was to maintain their properties” (Desmond, 2016: at pp. 18, 75-76).

Inspectors responsible for enforcing housing codes exercise a broad discretion (Scott, 2010: at pp.109-110). Laurence Ross found that “inspectorial discretion constitutes the bulk of the code enforcement enterprise” (Ross, 1995: at p.138). Inspectors exercise this discretion in circumstances where housing codes offer little guidance as to priorities, where the inflow of complaints determines enforcement priorities, and where there is a yawning gap between the standard of housing and the capacity or willingness of landlords to remedy substandard housing (Uzdavines, 2014: at p.173; Ross, 1995: at p.135; Desmond, 2016: at p.17). In particular the business practices of landlords in Milwaukee showed little inclination to remedy substandard housing because the primary source of the value of the rental property was its capacity to earn high rents in the present.



Landlords appeared to have little interest in the long-term value of the property (Desmond, 2016; Ross, 1995: at pp.141-143).

A deterrence model is founded ultimately on the capacity of the regulator to impose sanctions of sufficient magnitude to make it economically rational to comply with the order to remedy substandard housing (Gunningham, 2010: at p.121; Coffee, 1981). There are a number of factors that reduce the risk that a landlord will face the imposition of a sanction. The legal structure to support the imposition of sanctions on non-compliant landlords is complex (ChangeLab Solutions, 2014; Petro et al., 2016: at pp.5-6). The legal and administrative processes that regulators use to impose sanctions are costly and often complex (Uzdavines, 2014: at p.167, 174; Center for Community Progress, 2016a: pp.9-15; Petro et al., 2016: pp.5-6; Center for Community Progress, 2015: pp.18-29). The Center for Community Progress has conducted a number of detailed case studies of housing code and tax enforcement that suggest that even once courts impose sanctions there is a significant level of non-compliance with orders to remedy code violations (Toering and Alexander, 2014: pp.6-12; Center for Community Progress, 2016b: pp.19-22; Center for Community Progress, 2015: pp.28-29, 32-33). Finally, when seeking to obtain compliance with both civil and criminal orders, local government authorities risk exposing poor and vulnerable property owners to harsh and unreasonable punishment (Uzdavines, 2014: at pp.174-176; Toering and Alexander, 2014: at p.12; Center for Community Progress, 2015: pp.32-33).

When landlords fail to remedy defects in rental housing after the imposition of fines or other sanctions, this non-compliance can reduce the effectiveness of an enforcement strategy. But perhaps more profoundly, the failure to ensure that landlords pay fines and sanctions, and a failure of local government authorities to collect delinquent taxes, can contribute to the problem of unsafe and unhealthy housing in low-cost rental markets (Center for Community Progress, 2016b: at pp.21-29). In its study of housing markets in High Point, North Carolina, the Center for Community Progress argued that enforcement failures have very significant consequences.

In the absence of any real strategic and consistent code enforcement program over the last decade delaying the enforcement of delinquent taxes invites negligence and abuse by unscrupulous owners, particularly in Core neighborhoods with a prevalence of substandard rental housing and constrained or weak housing markets. With these two preventative systems inefficient, ineffective, or both, a property that could have been repaired may eventually need to be demolished. A rental property owner might reasonably “ride it out,” letting the tax bills mount, carrying out only basic maintenance, relying on the City for basic lawn maintenance, and collecting \$5,000 or more per year in rent in a weak Core neighborhood. Seven years later, that property has deteriorated, generated no tax revenue, negatively impacted the equity of adjacent homeowners, and will now require a greater investment to repair, if repair is even feasible. In other words, the broken preventative systems can enable an individual

owner to profit handsomely, externalize all the costs of ownership to the public and the local taxpayer, and then simply walk away without penalty (Center for Community Progress, 2016b: at p.29)

In effect, this failure to enforce housing codes opens up the possibility that “unscrupulous owners” are able to capture this regulatory process in the sense that they are able to make use of the process to pursue their own economic interests. Other absentee property owners are able to use this process to walk away from problem properties. This is important because the practice of collecting fines once they have been imposed and collecting payment of delinquent taxes is a complex problem (Petro et al., 2016: at pp.6-7). It requires coordination by departments within local governments, the collection and effective use of information (Lind, 2017), and the development of effective legal strategies to recover debts owed by landowners (Center for Community Progress, 2016b; Center for Community Progress, 2016a; Toering and Alexander, 2014).

Each of these factors highlight the problems entailed in using enforcement to improve health by remedying substandard housing in the low-cost rental market.

#### **The use of deterrence to abate lead hazards**

Most housing codes do not include a requirement to ensure the removal or containment of lead in housing (International Code Council, 2015). There are exceptions. In 2014, the National Center for Healthy Housing and the American Public Health Association partnered to create a National Healthy Housing Standard that includes a specific reference lead and a range of other chemical and radiological substances (National Center for Healthy Housing and American Public Health Association, 2014). As a consequence of the failure of housing codes to include specific references to a requirement to abate lead hazards, there are a range of specific local, state and federal laws that address the risks created by lead hazards in homes (Korfmacher and Hanley, 2013).

A considerable body of research addresses the question of how generally defined rules, such as housing codes, in contrast to very specific rules identifying specific obligations and penalties, influence the conduct of the targets of these rules (Scott, 2010: at pp.108-111). But the enforcement of laws concerned with the abatement of lead hazards in housing does not turn on an arcane analysis of the appropriate standard for abating the risks of harm associated with exposure to lead. As with asbestos, tobacco, and other industrially manufactured risks to human health, the enforcement of laws relating to the abatement of risks associated with exposure to lead is a small part of a much larger story. Acute lead poisoning is the “oldest and best understood environmental disease” (Markowitz and Rosner, 2013: at p.13). Throughout the much of the 20th century lead was used in a variety of household products including paint and gasoline. The widespread use of lead in many products created risks of harm for many people but particularly for children. The gradual recognition of the magnitude of the harm to human health associated with ubiquitous exposure to lead in housing

and elsewhere gave rise to conflict about how to manage or reduce these harms (Markowitz and Rosner, 2013: at pp.1-15)

While some researchers developed protocols aimed at eliminating lead as a widespread urban pollutant through its complete removal, others sought more pragmatic solutions—pragmatic, that is, from the viewpoint of the politics of the times, not from that of families whose children were at risk of permanent brain damage—seeking to remove some if not all lead from the windowsills, walls, ceilings, and woodwork of older homes (Markowitz and Rosner, 2013: at p.19)

Law-makers have predominantly adopted the “pragmatic” approach to reducing exposure to lead (Korfmacher and Hanley, 2013). Approaches to the enforcement of these laws have followed this lead and can also be described as pragmatic in their orientation.

In 1993, 52 percent of blood samples taken from children tested for lead exceeded the reference level of 10 $\mu$ g/dL (Campbell et al., 2005: at p.219). The risk of exposure to lead in the Philadelphia, for example, was, and remains, high because of its old housing stock and because of the relatively high rates of poverty in the city.

According to the U.S. Census, there are 580,000 occupied housing units in Philadelphia, of which 306,000 (53 percent) are owner-occupied and 273,000 (47 percent) are rentals. Philadelphia estimates that about 551,000 (95 percent) of these housing units have the potential of lead-based paint because they were built before 1978. Approximately 56,000 of these units house children aged 6 or under, of which a little more than half are owner-occupied and a little less than half are rentals (Philadelphia Department of Public Health, 2016: at p.3)

A prevalence of households living in poverty in the City of Philadelphia means that a very significant proportion of housing units with the potential for having lead-based are inhabited by low-income households (Campbell et al., 2013: at p.1271). In 2000, it was estimated that 60 percent of the pre-1960 houses were occupied by low-income households (Campbell et al., 2005: at p.219).

In the face of the magnitude of this problem, Philadelphia adopted a “pragmatic” approach in the 1990s to reducing the risk of exposure to lead. This approach was founded on a “prohibition” found in the Philadelphia Health Code Section on “Residential and Occupancy Hygiene” (6-403). This provision prohibited lead-based paint in housing in which the health department determines that it “creates a health hazard to children under the age of 6.” If as a result of testing there was a finding that lead was above the Centers for Disease Control reference level of 10 $\mu$ g/dL in the blood of children under the age of 6, this law specified that the Philadelphia Department of Public Health (PDPH) “shall issue an order to the owner, his agent, or occupant to eliminate the hazard” (Philadelphia Department of Public Health, 2016). There was no penalty imposed on an owner for non-

compliance with such an order. The PDHP's Childhood Lead Poisoning Prevention Program could send out its own crews to fix homes and subsequently invoice the landlord. But such invoices were not usually paid (Campbell et al., 2013: at p.1272). In 2002, the Philadelphia Lead Abatement Strike Team identified 1,400 properties for which the PDPH had made remediation orders but where there had been no satisfactory remediation (Campbell et al., 2005: at p.219).

This approach to enforcement can be described as one based on "persuasion" (Gunningham, 2010: at p.121, 124-125). The risk of harm is defined with reference to a very narrow group (children under the age of 6) and is brought to the attention of the landlord with little apparent risk of facing a penalty for non-compliance. This enforcement strategy appears to represent a "pragmatic" response to both the magnitude of the problem and to the very limited resources available to remediate the problem. This lack of resources included a lack of public resources to undertake the remediation and a lack of resources to ensure enforcement of the orders against landlords (Campbell et al., 2013: at p.1272; Philadelphia Department of Public Health, 2016: at p.4).

The City of Chicago appears to have adopted a similar "persuasion-based" model of enforcement. This city faced a lead exposure problem similar in magnitude to the Philadelphia (Korfmacher and Hanley, 2013: at p.770). The model of enforcement used in Chicago enabled inspectors to gain access to a building when it was established that children had elevated blood levels. In 2008, Chicago introduced a new regulation titled "Control and Mitigation of Lead-Bearing Substances." This provision required that any assessor who conducted a test on a person that showed elevated blood levels was required to make a report of this finding to Chicago Department of Public Health (City of Chicago, 2008). This report enabled inspectors to obtain access to the property in which that person lived (Korfmacher and Hanley, 2013: at 788-790). The practice of inspections, and the difficulties of imposing sanctions on landlords of properties that contain lead hazards, appear to have allowed many landlords to avoid compliance (Hawthorne, 2015; Benfer, 2015: at pp.293-296).

In 2002, the Childhood Lead Poisoning Prevention Program and the PDPH developed the Lead Abatement Strike Team (LAST). The LAST health and housing working group brought together the all of the resources of the City of Philadelphia that concerned health and housing. This collaboration resulted in the creation of the Lead Court and in the development of infrastructure for rapid lead hazard remediation. The Lead Court was designed to respond to non-compliance by owners with lead remediation orders. The creation of the Lead Court included increased fines and penalties for non-compliance with lead remediation orders and introduced a streamlined process for imposing those sanctions on non-compliant owners (Campbell et al., 2005: at pp.219-220). The administration of the Lead Court significantly improved the rate of compliance with orders to abate lead hazards in houses with children under the age of six. A study that compared compliance with such orders before the creation of the court

with compliance in the four years after the court's creation found that "compliance was eight times more likely in the court than the precourt period" (Campbell et al., 2013: at p.1271). In 2006, the City of Cleveland introduced a Lead Poisoning Law that sought similarly to increase the sanctions to abate lead hazards but with less successful outcomes (Korfmacher and Hanley, 2013: at pp.790-792).

In this sense, the creation of the Lead Court moved the City of Philadelphia's enforcement model from one of persuasion to one of deterrence (Gunningham, 2010: at pp.120-121, 124-125). The main weakness of the "deterrence" approach to enforcement in this context is that the use of sanctions as a form of general deterrence is undercut by the weakness in the mechanism for detecting those properties that contain lead in two different ways. Firstly, the enforcement model limited the population of houses requiring compliance to those with households that included children under the age of 6. Secondly, the mechanism for detecting which of this subset of houses would be subject to an order to abate a lead hazard was a house in which a child under the age of six had actually sustained harm by recording elevated blood levels. This approach to enforcement significantly reduces the subset of houses that could be the subject of an order to abate a lead hazard. In effect, the aim of this approach to enforcement is not to abate lead hazards in all houses that contain lead it is rather to prevent the occurrence of further harm in a particular house once a child is shown to have suffered harm from lead exposure. This is consistent with the "pragmatic" approach to lead abatement in which the actual occurrence of harm is used as a mechanism for setting priorities to determine which properties should be the subject of a lead abatement order.

This approach to enforcement is one that is concerned with secondary prevention. It abates a hazard once that hazard has caused harm. This is the approach taken by many states (Korfmacher and Hanley, 2013: at p.759; Farquhar, 1994). A number of cities have introduced lead abatement laws that seek to move to establish a system of primary prevention, that is, one that aims to encourage and nudge landlords to abate lead hazards before the occurrence of harm. Philadelphia adopted such a law in 2011, and Rochester, New York, introduced a similar law in 2005 that adopted enforcement mechanisms that successfully reduced the risk of harm to all residents in rented housing that contained lead. Both of these cities used what can loosely be called "strategic code enforcement" to move to a regulatory system that implements a form of primary prevention of harm from exposure to lead. This use of strategic code enforcement to abate lead hazards in housing will be analyzed after the following analysis of the use of use of strategic code enforcement to enforce housing codes.

## **STRATEGIC CODE ENFORCEMENT**

"Strategic code enforcement" changes two elements of the deterrence enforcement model. Strategic code enforcement addresses a different set of goals and it brings more resources to bear on the problem of encouraging,

nudging, or forcing landlords to comply with housing codes. There are a number of different ways of defining the goals of “strategic code enforcement.” One narrow view is that strategic code enforcement may be concerned with “obtaining compliance from private property owners” (Center for Community Progress, 2016c). On a broader view enforcement of housing codes is concerned “to ensure that, to the extent possible, that landlords are responsible stewards of their properties, working with the municipality, to ensure clean, safe, neighborhoods” (Mallach, 2015: at p.1). In this memo “strategic code enforcement” is defined with reference to achieving the narrower set of goals, that is, to achieve compliance with the housing codes (Food and Agriculture Organization, 2006). This memo argues that when strategic code enforcement is directed towards the broader goals of ensuring “responsible stewardship” by landlords it is useful to characterize this as a different enforcement model. In the following section this is defined as enforcement by way of “meta-regulation” or as a systems approach to regulation.

The Center for Community Progress defines “strategic code enforcement” as code enforcement that “goes beyond complaint response to strategically address systemic targets and focus on bringing properties into compliance with codes” (Mallach, 2015: at p.7). Strategic code enforcement differs from a deterrence model of enforcement by broadening the goal of enforcement.

Code enforcement, defined broadly to include all of the elements involved in obtaining compliance from private owners of problem properties, is a critical element in fighting neighborhood decline, preserving sound neighborhoods and restoring distressed areas (Center for Community Progress, 2016c)

In the context of enforcement of housing codes this means a shift to a goal of bringing all housing units in the local region, or a particular subset of housing units in that region, e.g., the inner city, into compliance with the code. This marks a movement away from the use of complaints as the main mechanism for detecting non-compliance with housing codes (Mallach, 2015: at p.7)

Strategic code enforcement differs from a deterrence approach to enforcement in a second important way. It brings more resources to bear on the problem of obtaining compliance with housing codes.

To be successful, a code enforcement program must be defined broadly to weave regulation, policy, cost recovery and carrots and sticks into a comprehensive strategy to improve communities through responsible property ownership. A successful code enforcement system offers incentives for responsible ownership along with disincentives or penalties for irresponsible behavior or property abandonment (Center for Community Progress, 2016c).

Strategic code enforcement is an example of what Ian Ayres and John Braithwaite have called “responsive regulation.”

The most widely applied mechanism for resolving this challenge is ... for regulators to apply an “enforcement pyramid” which employs advisory and persuasive measures at the bottom, mild administrative sanctions in the middle, and punitive sanctions at the top. On their view, regulators should start at the bottom of the pyramid assuming virtue—that business is willing to comply voluntarily. However, where this assumption is shown to be ill-founded regulators should escalate up the enforcement pyramid to increasingly deterrence-orientated strategies (Gunningham, 2010: at p.125) .

This definition of “responsive regulation” emphasizes one significant feature of what is often referred to as strategic code enforcement. This feature is that the resources that are brought to bear to encourage or force landlords to comply with housing codes must be organized into a “comprehensive strategy.”

The following analysis considers these two elements of “strategic code enforcement.” The first section deals with the problem of moving from an enforcement model based on complaints to one that seeks explicitly to bring all properties in a defined population of properties into compliance. This section is then concerned with the established of proactive rental inspection programs. The second section will review some of the resources that local governments use to encourage, nudge or force landlords into compliance with housing codes.

### **Proactive rental inspection programs**

The move to adopt proactive inspection programs is a central part of “strategic code enforcement.” This approach to enforcement is explicitly concerned with creating context for nudging or pushing landlords into complying with housing codes.

By relieving tenants of the burden of having to force reticent landlords to make needed repairs, systematic inspections can help ensure that a locality’s rental housing stock is maintained and that residents live in healthy conditions (Ackerman, 2014: at p.5)

This use of “systematic inspections” can have a real impact of achieving the goal of ensuring that tenants live in healthy conditions. In 1998 the City of Los Angeles instituted the “Systematic Code Enforcement Program.” In the years between 1998 and 2005, “90 percent of the city’s multifamily housing was inspected and over one half million violations [were] corrected.” This resulted in landlords making an estimated investment of \$1.3 billion dollars in housing in the City (Ackerman, 2014: at p.5).

Under a proactive rental inspection program:

[M]ost covered rental units are inspected on a periodic basis ... Typically, inspections take place at designated intervals, though they may also be triggered by an event, such as a change in tenancy (Ackerman, 2014: at p.4)

A proactive rental inspection program therefore requires that a local authority define the set of housing units that will be subject to a regime of periodic inspections. This requirement marks the movement from a reactive complaints-based inspection program to one that defines the set of houses that are the target group, that is, the group of housing units that the local authority aims to bring in to compliance with the code. It can also involve a significant increase in the amount of resources devoted to enforcing housing codes. Philadelphia estimated that a proactive rental inspection program to inspect all rental properties annually would require increasing the number of inspectors responsible for code enforcement from 45 to 260 (Philadelphia City Council, 2017).

Some local authorities require that owners of a specified class of properties register their properties and pay a fee to fund the system of periodic inspections. For example, Los Angeles requires that a person who owns or manages two residential units on a single parcel of property must register their property with the City and pay a fee (Los Angeles Housing + Community Investment Department, 2016c). A number of other cities including Seattle, Washington, DC, and San Francisco have created a periodic inspection program for properties within a specified minimum number of housing units. Los Angeles aims to inspect all rental property every three years (Ackerman, 2014: at p.9), though in practice these inspections take place every five years (Healthy Homes Collaborative, 2017). Other cities apply the proactive inspection program to a defined set of housing units within specified target areas. For example, when the Sacramento in California moved to introduce a proactive inspection program for rental property it targeted “two neighborhoods, each of which contained a large number of rental properties with a high incidence of dangerous building cases, code enforcement cases, and police and fire calls for service” (Ackerman, 2014: at p.8). Durham, North Carolina, defines the target areas as those areas with the highest incidence of crime (Neighborhood Improvement Services, 2012). In addition some cities target properties whose owners have a specified number of outstanding violations of housing codes (Neighborhood Improvement Services, 2012). Portland, Oregon, combined these elements and specified that once an owner of property in a target area was subject to a notice of violation other properties rented by that owner would be subject to proactive inspections (Oregon Public Health Institute, 2012). In 2017, Philadelphia indicated that it was considering adopting this approach to implementing a proactive inspection program (Philadelphia City Council, 2017).

It is worth noting one further possible example of this kind of proactive inspection program. Korfmacher and Hanley argue that the Chicago created the potential for using its secondary prevention approach to enforcement as a “preventive strategy.” The lead abatement law in Chicago requires any physician or health care provider who is authorized to perform a test for lead is to report to the city’s Department of Public Health any child with a lead blood level of 5µg/dl (City of Chicago, 2008: at reg.16). In addition, Illinois requires that all children under the



age of six living in “high risk” zip codes be tested for lead in their blood. Korfmacher and Hanley argue that, taken together these two provisions create a “preventive strategy” by giving inspectors right of access to an increased number of housing units (Korfmacher and Hanley, 2013: at pp.788-789). It is possible that this approach to testing lead blood levels in children could reach a threshold such that it could be described as a proactive inspection program. However, a recent study of the enforcement of Chicago’s lead laws showed that “less than half of Chicago children younger than six are screened for lead each year” (Hawthorne, 2015).

A second approach to proactive inspection is to require owners of rental properties to obtain a license before renting out their properties. Allan Mallach describes a system of enforcement that is based on the obligation to obtain a license in the following way:

By establishing minimum standards that a landlord must comply with in order to operate a rental housing unit, licensing serves as the basis for a multifaceted system to improve the community’s rental housing stock. A licensing system makes it clear that a community’s landlords have a responsibility to live up to certain standards, but also that the municipality has accepted its responsibility to act proactively to enforce its standards (Mallach, 2015: at p.8)

In this way, the need to obtain a rental license triggers an obligation on the municipality to undertake an inspection of the property. For example in Washington, DC, “to obtain a license to operate a housing business, an owner must allow an inspection of the property to determine that it is in compliance with all applicable building and housing laws and regulations” (Ackerman, 2014: at p.11). Philadelphia adopts this requirement and specifies that landlords must obtain a Housing Rental License for any rental property (Petro et al., 2016: at p.4).

A licensing system operates in conjunction with a rental housing information system that is able to specify the set of landlords that need to obtain a license before renting their properties (Mallach, 2015: at pp.13-14). An effective rental housing information system enables a municipality to adopt what Mallach refers to as a “performance based regulatory system” (Mallach, 2015: at pp.13-17; Ackerman, 2014: at pp.12-13). In this schema municipalities are able to specify a less intrusive program of inspection for compliant landlords and more intensive program for landlords whose properties are in violation of the code. For example, in Sacramento, in cases where no violations are found in an initial inspection of a property to obtain a license, a landlord is thereafter entitled to renew an annual license by “self-certifying” that the property is up to code. Each year Sacramento inspects a random selection of 10 percent of self-certified properties (City of Sacramento, 2017). In contrast, a system of licensing will be ineffective if a significant minority of landlords fail to obtain a license and if there are no penalties for that failure. For example, Philadelphia has an incomplete register of rental property (Philadelphia City Council, 2017). In addition, Philadelphia has not

imposed any financial or administrative penalties for failure to obtain a license (Petro et al., 2016: at pp.4-5). In 2017, Philadelphia is considering adoption of a policy that would allow the city to deny the renewal or issuance of a rental license for any property with open code violations (Philadelphia City Council, 2017).

### **Implementing a proactive rental inspection program**

The introduction of a proactive rental inspection program creates challenges and opportunities for municipalities in implementing and enforcing housing codes. This section focuses on an important element of the implementation of a proactive rental inspection program. A shift to a proactive rental inspection program changes the relationship between the tenants in rental property being inspected and the code enforcement officers. In most complaint-based inspection programs code enforcement inspectors receive a request from a tenant to inspect a property to determine whether the housing unit is in violation of the housing code. In a proactive rental inspection scheme, code enforcement inspectors need to establish a connection with the tenants living in the property in order to obtain their consent to enter the property and conduct the inspection.

The immediate problem for code enforcement inspectors in a proactive rental inspection program is to gain entry to the property to conduct an investigation. Municipalities will therefore give the tenant in a rental property notice of an impending inspection of that property (Ackerman, 2014: at p.14). But in order to conduct the inspection the inspector will also have to obtain the consent of the tenant to gain entry to the property.

A government agent's entry into a private home without the tenant's consent is presumed to be unreasonable, unless there are emergency circumstances or a warrant to justify the intrusion. Therefore, an inspector must have affirmative consent from the resident prior to or at the time of the inspection. Programs may allow inspectors to obtain tenant consent for entry at the time of the inspection or through a pre-inspection consent form (Ackerman, 2014: at p.14).

In addition to this formal problem of gaining consent to enter the property inspectors depend on tenants to help them make arrangements to conduct the inspection. This may be complicated where tenants are wary of "government inspectors, have privacy concerns, or do not understand why an inspector has come" (Ackerman, 2014: at p.14).

When a tenant refuses entry to an inspector it is possible for the ordinance that creates a proactive rental inspection program to enable inspectors to obtain an administrative inspection warrant to gain entry to the property (Ackerman, 2014: at p.15). But the use of this legal authority to gain entry also means that the municipality loses the opportunity to enlist the support and assistance of tenants in obtaining compliance with the housing codes. Many municipalities therefore work with community and not-for-profit organizations to engage with tenants and to elicit their cooperation with inspectors. For example, when Los Angeles

encountered problems in gaining entry to properties to conduct inspections for lead hazards, the city collaborated with the Healthy Homes Collaborative (Ackerman, 2014: at p.26). This community organization arranged to visit tenants before an inspection and provided education about the program and the hazards associated with exposure to lead and helped tenants prepare for the inspection. In a pilot program that tested the viability of this initiative inspectors gained access to 80 percent of the homes that were pre-visited by the Healthy Homes Collaborative compared to 20 percent of the homes where there was no visit (Healthy Homes Collaborative, 2017).

The use of community organizations, and other institutions in civil society, to influence stakeholders to comply with the inspection process is an example of what Gunningham and Grabosky have called “smart regulation.” This is a “a term they use to refer to an emerging form of regulatory pluralism that embraces flexible, imaginative, and innovative forms of social control which seek to harness not just governments but also business and third parties” (Gunningham, 2010: at p.130). The collaboration between Los Angeles and the Healthy Homes Collaborative enables the city to achieve several goals simultaneously. It is an effective way of providing education and information to tenants and it draws tenants into the process in ways that increase the capacity of the city to implement the proactive rental inspection program. Municipalities also make use of smart regulation as part of the integrated bundle of strategies to enforce housing codes once inspectors have found a violation.

### **Strategic use of resources to enforce housing codes**

The introduction of a proactive rental inspection program is an essential part of “strategic code enforcement.” It enables municipalities to define the goal as one of bringing all housing in the local area into compliance with housing codes. Once a municipality shifts its focus to the problem of bringing a whole “population” of houses into compliance with the housing code, it must then marshal an integrated set of penalties and incentives to encourage, nudge, and force landlords to comply with housing codes. The most effective proactive rental inspection programs are ones that bring together a wide range of resources to nudge landlords to comply with housing laws. It is important for local government bodies to bring a wide range of resources to bear on this problem because the dynamics of the private rental market ensure that landlords always face significant incentives to earn high rates of return by renting out substandard properties. For example, there is some evidence in the low-cost rental market that the “average rent was the same, whether an apartment had housing problems or did not” (Desmond, 2016: at p.76). In Philadelphia, the failure to enforce the obligation to have a Housing Rental License appears to enable a significant number of landlords to rent out substandard housing to low-income households (Petro et al., 2016: at pp.4-5; Philadelphia City Council, 2017). The aim of a regulatory system is then to influence landlords to adopt business practices that are founded on renting out safe and healthy housing to low-income households.

When inspectors find that a property is in violation of the housing code they will issue a notice to comply. The preceding section that analyzed the “deterrence” enforcement model described the process by which municipalities can seek civil and criminal sanctions for failure to comply with codes (ChangeLab Solutions, 2014). When municipalities implement strategic code enforcement they seek out more effective sanctions targeting non-compliant landlords that can be applied in a timely fashion to increase their deterrent impact. But they also make strategic use of other resources to diminish conditions that facilitate non-compliance with housing codes by landlords and tenants.

If proactive rental inspection programs are to be successful there is one significant and difficult problem that local authorities must address. This problem concerns consequences for existing tenants in the house or apartment that is the subject of a violation notice. When landlords are forced to repair a property they may choose either to increase the rent (Ackerman, 2014: at p.24), or to evict and replace the tenant in residence and with a tenant who provides a more secure and dependable source of rental payments (Desmond, 2016: at pp.61-62, 72-76). Many programs address this issue by trying to identify problems early to limit the costs associated with deferred maintenance (Ackerman, 2014: at p.25). This is an indirect and in all likelihood ineffective approach to responding to this problem.

One example of an additional sanction that aims to encourage compliance with housing codes is the Rent Escrow Account Program (REAP) adopted by Los Angeles. When a code inspector finds that a property is in violation, the inspector will issue an order to correct the violations. When the owner of the property fails to comply with the order, their property may, after an administrative hearing, be entered into REAP (Los Angeles Housing + Community Investment Department, 2017a). When in REAP tenants are entitled to a reduction of between 10 percent and 50 percent of the ordinary rental payment. Tenants are also entitled to pay the rent into an escrow account. The money held in the escrow account is available for a number of uses that include completing the repairs to the building and for relocation assistance for the tenants (Los Angeles Housing + Community Investment Department, 2016d). All properties entered into REAP have a REAP notice recorded on their title. The Custodian of Records makes available a list of all properties entered into REAP (Los Angeles Housing + Community Investment Department, 2017c). The goal of REAP is to provide a timely remedy for tenants that draws a connection between the landlord’s failure to comply with the order to correct housing code violations and the loss of rent on their property (ChangeLab Solutions, 2015: at p.24)

An additional sanction that is used by some municipalities involves publishing on the local government’s website a list of properties that are subject to code violations. Code for America and San Francisco “developed a reportable, uniform data standard for housing code violations” (Ackerman, 2014: at p.28). The publication of this data aims to empower tenants to make more informed decisions but it also aims to shame owners of properties whose properties are in

violation of the housing.

Sanctions alone will not be sufficient to bring housing in the private rental market into compliance with building codes. Municipalities that apply strategic code enforcement will therefore need to deploy a number of other resources to facilitate compliance with housing codes. In some instances municipalities may provide low-income landlords with assistance to complete repairs (Ackerman, 2014: at p.28). For example, many municipalities administer US Department of Housing and Urban Development programs to provide financial assistance for property owners and landlords to support the abatement of lead hazards (Community Development Agency, 2012; Philadelphia Department of Public Health, 2016). There are a number of ways that municipalities can assist tenants who are adversely affected when a property is found to be in violation of the housing code. These include programs that provide assistance to tenants to relocate when violations of the housing code are very significant and where the landlord does not take steps to comply with housing violation orders. For example, one of the uses of funds that are held in escrow accounts as part of the REAP program is to assist tenants to find new housing (Los Angeles Housing + Community Investment Department, 2016b). Another approach to helping tenants who are faced with hazardous housing conditions is to impose an immediate order to abate the hazard. For example, in Los Angeles when tenants are faced with hazardous conditions, an inspector may issue a “Two Day Order” to repair the problem (Los Angeles Housing + Community Investment Department, 2017b).

A final category of resources that local governments can use in strategically enforcing housing codes is to draw on organizations that have an interest in supporting the enforcement of housing codes. The goal of this use of “smart regulation” is to harness the power of community organizations to create the conditions that make it seem easier and more profitable for landlords to comply with housing codes (Gunningham, 2010). This can involve local governments taking steps to facilitate the emergence of good landlord practices. It can include setting up technical training and assistance programs for landlords and supporting the formation and efficacy of landlord associations. It can also include creating incentives for good landlord practices by considering ways that better communication and interaction between landlords and local governments can help landlords improve the quality of low-cost housing (Mallach, 2015: at pp.17-23). When local governments draw on these resources they are creating the conditions for the emergence of compliance systems that will guide landlords as they rent out their properties to low-income tenants (Food and Agriculture Organization, 2006).

This use of smart regulation also includes empowering associations to provide support for tenants. For example, Los Angeles connects tenants with associations that will help ensure that repair work conducted while properties are in REAP is satisfactory (Los Angeles Housing + Community Investment Department, 2016a). A second example is the work done by the Center for

Community Progress with Open Door Ministries to have Open Door Ministries assist tenants during any code enforcement inspection. As an organization with expertise in the sources of support available to tenants and the rights of tenants living in substandard housing, Open Door Ministries could be an important source of support for those tenants (Center for Community Progress, 2016b: at p.34) Support for tenants also includes provision of legal assistance for tenants who are facing eviction or harassment (The Editorial Board, 2017; New York City Housing Preservation & Development, 2016).

### **The use of strategic code enforcement to abate lead hazards**

A number of local governments use strategic code enforcement to abate lead hazards in low cost rental housing (Korfmacher and Hanley, 2013). The following are two examples of the use of strategic code enforcement to abate lead hazards. One is an example of a successful approach to enforcement and the other is an example of a program still seeking ways to overcome the problems of enforcing laws to abate lead hazards.

#### *Philadelphia's Lead Paint Disclosure and Certification Law*

In 2012, Philadelphia's Lead Paint Disclosure & Certification Law went into effect. This law added to previously existing requirements placed on landlords to disclose the existence of lead hazards. The 2012 law targets houses that are rented to households with children under the age of six. Landlords who rent these properties are required to have the property inspected for lead hazards and have them certified as "lead free" or "lead safe." Landlords are required to provide this certificate to the tenants and to PDPH (Philadelphia Department of Public Health, 2016: at p.4). Landlords who fail to provide this certificate are denied the right to collect rent for the period of non-compliance. In addition, tenants are given a private right of action to recover the costs of inspection and to claim damages for harm caused as a result of being exposed to the risk of lead poisoning. Landlords face significant penalties for failing to comply with the obligation to obtain a certificate that the property is lead free. These penalties range in magnitude from \$300 to \$2,000 but each day of non-compliance constitutes a new offence attracting the application of the specified penalty (Korfmacher and Hanley, 2013: at pp.794-797).

Philadelphia's Lead Paint Disclosure & Certification Law makes use of a proactive inspection program. The strength and the weakness of this program is that it addresses a very specific target group, that is, housing that is rented to households that include children under the age of six. The very precise targeting may expose those children to lead hazards in other houses not covered by the law, e.g., the houses of grandparents and other family members. Perhaps more importantly, this targeting of families with young children raises the problem of discrimination against households with young children (Korfmacher and Hanley, 2013: at p.796). The potential for discrimination against households with young children is framed by a context in which households with children already appear

to face greater rates of eviction from housing (Desmond and Bell, 2015: at pp.24-25).

The biggest issue facing the implementation of this law is not whether it is correctly targeted. Rather, it is the problem of obtaining compliance from landlords to undertake inspection and certification of their properties. By December 2016, the PDPH had “received approximately 1,500 Lead Free or Lead Safe certificates from landlords, of an estimated 26,000 properties for which these certificates are required” (Philadelphia Department of Public Health, 2016: at p.4). The problem of getting landlords to comply with lead certification requirements parallels problems that the city has had in enforcing the obligation to obtain a rental license as a condition for renting out homes within the city (Petro et al., 2016). In December 2016, the PDPH published a plan to prevent all children from being exposed to lead. The plan includes advertising about hazards posed by lead poisoning, education about the risks of exposure to lead, and door-to-door outreach to 400 families in neighborhoods with the highest prevalence of lead poisoning. In addition, PDPH has planned to partner with Licensing and Inspection Department to increase the number of landlords who are complying with the 2012 Law. PDPH has also proposed to increase the enforcement of the obligation to obtain certification that target houses are “lead free” (Philadelphia Department of Public Health, 2016: at pp.5-7).

The enforcement of Philadelphia’s Lead Paint Disclosure & Certification Law is an example of the potential benefits of strategic code enforcement. It identifies a target group of households that it is seeking to protect from the risk of exposure to lead. It identifies a certification requirement and it supports this requirement with both sanctions and other resources that aim to nudge, encourage and ultimately force landlords into compliance with the certification requirement. In this sense it is a good example of strategic code enforcement. But the difficulties of enforcing this law in a city where the risk of exposure to lead is very significant for many families also highlight the challenges facing many local governments in making effective use of strategic code enforcement (Hawthorne, 2015; Korfmacher and Hanley, 2013: at pp.780-790 (Chicago), pp.790-792 (Cleveland)).

#### *The City of Rochester’s Lead Poisoning Prevention Law*

By contrast, Rochester, New York, has made much more effective use of a form of strategic code enforcement. In 2002, a report by the Center for Governmental Research established that in some neighborhoods in Rochester more than one-third of children under the age of six had elevated blood levels of more than 10µg/DL. It was estimated that in 2002 1,300 children under the age of six in Rochester had elevated blood levels. The response of the community in Rochester was to enact a lead poisoning prevention law in 2005. This lead poisoning prevention law was the first law introduced in Rochester to contain a specific prohibition against the risk of exposure to lead. Prior to 2005, there were no inspections carried out by the city of Rochester to identify lead hazards until

there was evidence that a child had actually been poisoned by exposure to lead (Korfmacher and Hanley, 2013: at pp.797-798).

The 2005 lead poisoning prevention law created a number of triggers for inspections to identify lead hazards. The operation of state law in Rochester required a certificate of occupancy inspection for all rental housing. The 2005 lead poisoning prevention law added a lead hazard inspection to this certificate of occupancy inspection. In addition the city of Rochester:

[U]ses county health department data on the location of children with elevated blood lead levels at the census-block group level to establish and periodically revise geographic designations of “high risk” areas within the city (Korfmacher and Hanley, 2013: p.798)

In these high-risk areas the inspection protocol required the use of dust wipe tests in the absence of any obviously deteriorated paint. If there was deteriorated paint, or if the dust wipe test was positive for lead, the landlord was required to obtain a lead clearance from a certified inspector. The city included two further triggers for inspections to identify lead hazards. One trigger was the introduction of a lead hazard inspection into pre-occupancy inspections as part of a program aimed at publicly assisted housing carried out by Monroe County. The second trigger was a provision that allowed tenants to request a lead inspection (Korfmacher and Hanley, 2013: pp.798-799).

The 2005 lead poisoning prevention law was enacted with the support of the community. The city also established a citizen advisory group to assist with education and implementation of the law (Ackerman, 2014: at p.17; Korfmacher et al., 2012: at p.314). One of the important features of this law was the requirement that the city conduct an annual implementation report (Korfmacher et al., 2012: at p.312) As in Philadelphia, it is possible to imagine that this well-crafted law would face difficulties with enforcement. But during the first four years of its implementation, the city carried out 50,000 lead inspections and during this period nearly every eligible unit was inspected at least once (Korfmacher and Hanley, 2013: at p.799). During the first two years there was a significant reduction in the number of children with elevated blood levels (Korfmacher et al., 2012: at pp.312-313). By 2011, the number of children in Rochester who registered elevated blood levels had fallen to 222 (Korfmacher and Hanley, 2013: at p.799). During the first two years of operation, roughly one-third of landlords spent nothing to comply with the new law while the remaining two-thirds spent an average of \$1,726 to comply with the law. In addition, a higher than expected number of properties passed both the visual inspection and the dust wipe tests. This indicated that landlords had taken steps to comply with the law prior to the time of inspections (Korfmacher et al., 2012: at pp.311-312). This enabled Korfmacher et al to conclude that the lead law “had a positive impact on children’s health” (Korfmacher et al., 2012: at p.309). Korfmacher et al also concluded that implementation of the law did not appear to have had a significant impact on the housing market (Korfmacher et al., 2012: at p.309).



The Rochester lead poisoning prevention law seems to be an effective application of strategic code enforcement. It included an effective proactive rental housing inspection program. It created a number of sanctions that nudged landlords to comply with the law by enabling lead hazard inspections. The city of Rochester used its resources to provide support and assistance for landlords seeking to comply with the law. The city also worked with contractors to improve both the testing procedures and procedures for abating lead hazards. Finally, the city harnessed citizens and community organizations to support the implementation of the law. The integration of clear testing and remediation requirements, the use of sanctions where there was a failure to comply, and the marshaling of resources from within the city and the community to facilitate and support compliance with the law made the enforcement of this law an effective example of strategic code enforcement.

### **Strategic code enforcement conclusion**

Local governments that use strategic code enforcement direct attention to the goal of bringing whole classes of housing, including rental housing, into compliance with housing codes. They bring together an integrated package of resources to encourage property owners and landlords to comply with these housing codes. But they also effectively use sanctions to push or force landlords into compliance. Strategic code enforcement provides local governments with the capacity to identify the challenges associated with bringing housing into compliance with codes. It also opens up a range of options for making it harder for landlords to avoid complying with housing codes. In this sense strategic code enforcement appears to be an effective, multi-dimensional enforcement strategy. Rochester's experience in addressing lead hazards in rental housing is an example of the effective use of this enforcement strategy.

But as the analysis of the low-cost rental housing market in the first part of this paper suggests, the problem of unsafe and unhealthy rental housing is the result of very powerful forces at work in that market. There are strong forces generating demand for low-cost housing, there is limited public investment in low-cost rental housing, and there are insufficient incentives to encourage private investment in these markets. There are great obstacles to expanding the availability of low-cost rental housing both in markets where the value of property is high, such as Los Angeles or New York, and in markets where the value of property is low. Unsafe and unhealthy housing emerges out of the dynamics of these markets. A major problem encountered by many local government authorities making use of strategic code enforcement is that this strategy does not directly address the dynamics of these markets. For example, the use of REAP in Los Angeles appears to create a very strong incentive for landlords to comply with orders to repair their properties. However, in its report on use of strategic code enforcement ChangeLab Solutions, reports that landlords with strong incentives seek out ways of avoiding compliance with violation orders issued by housing inspectors.

The money in the escrow account can be used for different activities, such as building repairs and resident relocation. Unfortunately, because the City does not mandate the reduced rent amount, owners sometimes engage in harassment tactics, strong-arming residents into paying the full rent amount directly to them. This behavior must be anticipated and countered by educating both residents and code enforcement officers (ChangeLab Solutions, 2015: at p.24).

The challenge for local governments using strategic code enforcement is to foresee and adequately respond to the unintended outcomes of the interaction between strategies that are aimed at enforcing housing codes and the dynamics of the low-cost rental housing markets.

### **META-REGULATION**

The problem of influencing the dynamics of low-cost private rental markets raises some difficult and complex problems for local governments. The third model of enforcement makes use of “meta-regulation” to offer a set of strategies that enable local governments, with the support of other stakeholders and governments, to address this problem. Gunningham suggests that meta-regulation “involves government, rather than regulating directly, risk-managing the risk management of individual enterprises” (Gunningham, 2010: at p.135). In a similar way Coglianesse and Mendelson argue that “meta-regulation refers to ways that outside regulators deliberately—rather than unintentionally—seek to induce targets to develop their own internal, self-regulatory responses to public problems “ (Coglianesse and Mendelson, 2010: at p.150). In the context of the goal of improving the safety and quality of rental housing, the use of meta-regulation focuses on influencing the dynamics of both property ownership and the low-cost rental market for housing. This approach also involves broadening the goal of regulation to include an assessment of the public good, or the public value, that is associated with responsible property ownership. This is a much broader definition of public good, or public value, than an enforcement model that has the goal of ensuring compliance with housing codes. This model of enforcement assumes that compliance with housing codes is an end in itself.

The Center for Community Progress captures both of these elements of meta-regulation in its definition of the goal of code enforcement.

Responsible property ownership and maintenance is at the heart of neighborhood stability. While property ownership confers important rights, it also confers equally important responsibilities on the owner (Center for Community Progress, 2016c).

This definition of the role of code enforcement focuses on the goal of influencing the dynamics of property ownership. This definition continues by expanding on the role of local government when owners fail to live up to these expectations.

While most owners meet their obligations – maintaining their properties and complying with codes so they do not cause harm to their occupants,

their neighbors and their communities – many do not. In those cases, local government has the task of encouraging negligent owners to carry out their responsibilities, and if they do not, take action to minimize the harm to the community (Center for Community Progress, 2016c).

In specifying that a local government has the responsibility to minimize harm to the community caused by the actions of negligent land owners, the Center for Community Progress anchors support for this form of regulation in an assessment of the public value of “responsible property ownership.” By contrast, the “strategic code enforcement” model identifies public value as being defined by compliance with housing codes.

In defining the goal of code enforcement as one of increasing public value associated with the dynamics of property ownership, the Center for Community Progress also brings into a play a wider range of resources to influence those dynamics. In particular, code enforcement becomes one step along a pathway that ultimately leads to property owners failing to pay taxes, failing to ensure that their properties are in compliance with housing codes, and losing their title to property. This approach to enforcement combines mechanisms to nudge and encourage property owners to comply with housing codes with property tax enforcement systems. Where property owners fail to pay taxes and fail to work towards ensuring that their properties are in compliance with housing codes, fair and effective property tax enforcement mechanisms are used to transfer title from the owner to a new entity that holds the title in trust for the public. The Center for Community Progress has built up expertise in, and has called upon local governments to establish land banks for this purpose (Alexander, 2015).

### **Fix it Up, Pay it Up, Give it Up**

In providing assistance to cities that are experiencing large numbers of vacant and abandoned properties, the Center for Community Progress have developed “a systems-based approach that is data driven and market informed” that aims to minimize the negative impacts of problem properties (Center for Community Progress, 2016b: at p.8). Although the Center for Community Progress is concerned with the problems of vacancy and abandonment, it is equally applicable to the practice of renting substandard properties in poor neighborhoods in cities. In the first part of this memo it was argued that the dynamics of the private rental market were closely related to the capacity for entrepreneurial landlords to purchase housing at low prices. Renting out these often, substandard properties for high rents then enabled these landlords to recoup their investments quickly and earn good returns. In these circumstances landlords ceased to have any interest in improving these properties when they fell into disrepair, or were condemned. In this sense the problem of vacant and abandoned buildings is very closely connected with the dynamics of the private rental market for low-cost housing.

The Center for Community Progress outlines this enforcement strategy in the following way:

Broadly speaking, an owner has a responsibility to keep current on both property taxes and property maintenance and repair, and in the event an owner lapses in either major responsibility, a local government should have access to efficient, effective and equitable code enforcement and tax enforcement systems to ensure the property causes minimal to no harm to adjacent residents, property owners and the overall neighborhood market. These preventative systems—housing and building code enforcement systems and property tax enforcement systems—need to accommodate the occasion of individual financial hardship and the presence of vulnerable populations with practices and programs that are fair and equitable. However, once hardship programs are in place—like emergency repair programs for vulnerable homeowners to remedy simple code violations or homestead property tax exemptions for low-income or senior populations—these two key preventative systems ought to allow for an efficient and effective transfer of the property to new ownership if the current owner fails to keep a property up or stay current on property taxes, whether through willful neglect or abandonment (Center for Community Progress, 2016b: at p.8)

This systems-based approach uses the combined impact of code enforcement and property tax enforcement to reconstitute title to abandoned properties or vacant properties. By returning title to the property to an entity that holds that title in trust for the public, for example, a land bank, local governments can seek out new productive uses of the land (Alexander, 2015). It is important to emphasize that this enforcement strategy is complex because it requires reform of both code and tax enforcement mechanisms. It is also difficult because it is designed to disrupt the dynamics of the low-cost rental market. This will involve local authorities directly addressing the interests of potentially powerful interests associated with landlords.

This systems-based approach of looking backwards from the ultimate goal of regulation and enforcement enables local governments to “see” existing enforcement mechanisms in a different light.

Unfortunately, we often find that these very legal systems—rendered ineffective or inefficient by state statute, local practice, or both— can actually contribute to and exacerbate vacancy and abandonment (Center for Community Progress, 2016b: at p.8)

Code enforcement and tax enforcement can exacerbate problems of vacancy and abandonment of buildings in cities by leaving properties in a state of suspended animation. Properties that are substandard may be rented out, used for unauthorized or criminal purposes, or be abandoned. Local governments may not be able to recover unpaid taxes, charges or liens and the owners with title to those properties may be difficult to identify (Center for Community Progress, 2015: at pp.30-34; Toering and Alexander, 2014; Uzdavines, 2014: at pp.171-172).

One of the challenges for local authorities learning to “see” the consequences of code and tax enforcement is the need to collect, analyze, and present data concerning code enforcement, tax enforcement, vacancy and abandonment of properties (Lind, 2017). When the Center for Community Progress works with a City to review its code and tax enforcement mechanisms a first step involves the collection of data. One set of data is concerned with mapping out the process of code and tax enforcement (Center for Community Progress, 2015: pp.14-34). A second set of data is concerned with mapping out the presence of vacant and abandoned buildings (Center for Community Progress, 2016b: pp.13-17)

In this framework the “optimal code enforcement system” is one that “hues to the underlying logic of “Fix it Up, Pay it Up, Give it Up.”

Under this approach, property owners will be given appropriate notice of the code violation, and the opportunity to fix the problem. If the owner doesn’t fix the problem, the local government will take timely action to cure the violation, and bill the owner for costs incurred. If the owner fails to reimburse the government’s out-of-pocket expenses, the local government, on behalf of the taxpayers, will lien the property and pursue all remedies, including the option to foreclose on the lien in a timely and effective manner, to recover all costs and/or compel the transfer of the problem property to a new, responsible owner. As mentioned previously, this approach must also be equitable, with hardship programs in place to help the most vulnerable home owners (Center for Community Progress, 2016b: at p.18)

This strategy of foreclosing on liens on problem properties to compel transfer of the property to a new owner is the “give it up” part of the enforcement system. It aims to move away from criminal sanctions that attach to the person of the owner to the use of “*in rem* judicial proceedings” that attach “enforcement actions to the property” (Center for Community Progress, 2016b: at p.18; Toering and Alexander, 2014: at pp.24-30).

The “Fix it Up, Pay it Up, Give it Up” strategy provides local governments with the capacity to influence the dynamics of the private low-cost rental market for housing. It provides local governments with a potential strategy for changing the relationships between landlords and tenants. In particular, it provides a way of undercutting the capacity of landlords to earn high rates of return by renting out substandard housing. The success of this strategy depends on whether local governments are able to find ways to use title to the gained property to support the development of affordable rental housing.

### **The next step in the “Fix it Up, Pay it Up, Give it Up” strategy**

When a property owner is forced to give up title to a property that is not in compliance with housing codes and that is the subject of liens, as part of the broader strategy of “Fix it Up, Pay it Up, Give it Up,” a land bank is one possible recipient of that title. In the authoritative resource, Alexander provides the following account of the role and function of land banks.

Land banks are governmental entities that specialize in the conversion of vacant, abandoned, and foreclosed properties into productive use. The primary thrust of all land banks and land banking initiatives is to acquire and maintain properties that have been rejected by the open market and left as growing liabilities for neighborhoods and communities. The first task is the acquisition of title to such properties; the second task is the elimination of the liabilities; the third task is the transfer of the properties to new owners in a manner most supportive of local needs and priorities (Alexander, 2015: at p.10)

Local governments can use other public agencies to carry on land banking activities (Alexander, 2015: at p.23). Land banks, and other organizations that hold title to property do not act as developers or urban redevelopment authorities (Alexander, 2015: at p.44) There are other specialist bodies that have the capacity to act in this role. When a local government establishes a land bank it will set policies for the future use of properties over which the land bank has title. These purposes can include the “short-term and long-term maximization of property tax revenues, creation of new public spaces such as parks and green spaces, provision of affordable housing, or formation of new communities” (Alexander, 2015: at p.69). For example, the Atlanta Land Bank gives first priority to “neighborhood nonprofit entities obtaining the property for the production or rehabilitation of housing for persons with low-incomes,” with a second priority given to all other entities seeking to use the property for low-income housing (Alexander, 2015: at p.71).

One example of the role of not-for-profit entities working with local governments to transform vacant or unused buildings into affordable housing is provided Eric Uhfelder in a recent *New York Times* article in the Opinion pages. In this article, Uhfelder describes a model for developing affordable housing in New York City. This combines a source of funding (the luxury housing tax), with a source of land (seeking foreclosure on abandoned properties, or properties with delinquent taxes) with community not-for-profit organizations that have the capacity to “manage the entire process, from site identification and redevelopment to tenant selection and property management” (Uhfelder, 2017).

The Center for Community Progress, in its work with High Point, North Carolina, provides another example of how local governments can work with community groups to make use of vacant and abandoned properties gained through the use of the “Fix it Up, Pay it Up, Give it Up” strategy. The Center for Community Progress worked with the city of High Point to explore the possibility of collaborating with community groups to make these properties available as affordable housing. One strategy aimed at working with a non-profit organization called Open Door Ministries. This organization was part of a network of organizations that implemented federally funded housing programs in North Carolina. As a result, Open Door Ministries had expertise in working with, and in providing housing for, poor tenants. One option considered by the city of High Point was for the city to repair tax delinquent properties that were in fair to good condition and then to lease these properties to Open Door Ministries. Open Door

Ministries could then manage leases with tenants in need of affordable housing (Center for Community Progress, 2016b: at p.37). A second example involved working with High Point Community Against Violence (HPACV). This group worked to help offenders involved in violent crimes to obtain training so that they turn “their lives in a positive direction” (Center for Community Progress, 2016b: at p.38). The proposal developed was for HPACV to provide training in the building trades so that these offenders could repair vacant and dilapidated houses in High Point. Once repaired the city could lease these houses to Open Door Ministries for the purposes of providing affordable housing (Center for Community Progress, 2016b: at pp.38-39).

### **Meta-regulation**

There are two features of this strategy for enforcing housing codes that are worthy of note. Firstly, this strategy is a form of meta-regulation. The goal of this enforcement model is to influence the dynamics of the low-cost rental market for housing. It seeks to modify the way that landlord and tenants interact in this market. The goals of this enforcement model are therefore much broader than either the deterrence model or the strategic code enforcement model. The second feature of this strategy is that code enforcement is only one part of the package of mechanisms that make up the “Fix it Up, Pay it Up, Give it Up” strategy. The goal of code enforcement is to nudge landlords and other property owners to fix up their properties. If they do not comply, they can be directed to pay to fix up their properties, if they do not meet their financial obligations in the form of taxes and charges they can be forced to give up title to their property to an entity that will hold the property on behalf of the public. Much of the work of the Center for Community Progress is to encourage local governments to integrate their code enforcement activities with their property tax enforcement activities (Center for Community Progress, 2016c).

This strategy for enforcing housing codes holds out the very real prospect for influencing the dynamics of the low-cost market for rental housing in ways that enable poor tenants to live in safe and healthy housing. It opens up the possibility of local governments, and other regulators, working with landlords to develop compliance systems to ensure that affordable housing is safe and healthy (Food and Agriculture Organization, 2006). But it is dependent on co-operation between local, state and federal governments and between those governments and local communities. It is also dependent on the capacity of state governments and the federal government to be responsive to the needs of local governments as they implement this strategy. In this sense, the use of a meta-regulation strategy to enforce housing codes reinforces the importance of the Five Essential Public Health Services. It reinforces the importance of the interaction between each of these services in strategies that are aimed at improving public health.

## Conclusion

The models for enforcing housing codes analyzed in this memo can be summarized on two dimensions. The first dimension is the breadth of goals. The narrowest goal is that of the deterrence model. It is directed towards ensuring that when inspectors receive a complaint about unsafe or unhealthy housing landlords abide by the terms of the housing code. The threat of sanctions is the motive force used to encourage compliance. The strategic code enforcement model is somewhat broader bringing a cluster of houses in a local area into compliance with the housing code. Making use of meta-regulation, the enforcement model pursues the broadest goal by directing attention to modifying the dynamics of market for low-cost rental housing. It seeks to influence the framework that defines the relationships between landlords and tenants in this market.

The second dimension concerns the resources brought to bear on achieving these goals. The deterrence model combines the narrowest goal of enforcement with the most limited bundle of resources used to achieve this goal. Strategic code enforcement broadens the goal of code enforcement and brings a much weightier bundle of resources to bear in encouraging and nudging landlords to comply with housing codes. Code enforcement that uses meta-regulation broadens the goal further and brings a larger bundle of resources to bear on achieving this goal. This approach to enforcement integrates enforcement of housing codes with property tax enforcement mechanisms. It aims to have title in vacant or tax delinquent properties pass to a public entity that is then able to find ways to make productive use of that land. One of those uses lies in working with community organizations and other entities to provide affordable housing.

The deterrence model of enforcement has clear weaknesses in achieving the goal of enabling poor tenants to live in safe and healthy housing. The case referred to in the Introduction in this memo is evidence of these weaknesses. In contrast, the enforcement approach that makes use of meta-regulation holds out hope of improving the conditions of housing in the low-cost rental market. But this approach is explicitly dependent on collaboration between communities and each level of government. It is in particular dependent on the capacity of communities and governments to make effective use of, and making effective contributions to, the Five Essential Public Health Law Services.

It is important to draw attention to one final problem. The history of the disparate impact of substandard housing, and many other public services, on communities of color has a direct effect on the capacity of local governments to ensure that poor tenants live in safe and healthy housing. The development of effective enforcement strategies may seem to be a technical problem. But the process of developing effective strategies for enforcing housing codes to ensure that housing in the low-cost rental market is safe and healthy requires that local governments and other regulators engage with these sustained historical inequities. One of the important contributions of regulatory theory is that it



highlights the connection between improving the effectiveness of enforcement of housing codes and of addressing these sustained historical inequities.

## Bibliography

- Ackerman A. (2014) A Guide to Proactive Rental Inspection Programs. ChangeLab Solutions.
- Alexander FS. (2015) Land Banks and Land Banking. 2nd ed ed.: Center for Community Progress.
- Ayres I and Braithwaite J. (1992) *Responsive Regulation: Transcending the Deregulation Debate*, Oxford, UK: Oxford University Press.
- Benfer EA. (2015) Health Justice: A Framework (and Call to Action) for the Elimination of Health Inequity and Social Injustice. *American University Law Review* 65.
- Berwick D. (2014) Mont Sainte-Victoire. In: Berwick DM (ed) *Promising Care: How We Can Rescue Health Care by Improving It*. San Francisco, CA: Jossey-Bass, 67-86.
- Bodley M, Ravani S and Cabanatuan M. (2017) 3 people killed as fire burns troubled Oakland building. *SFGATE*. San Francisco.
- Bradley EH and Taylor LA. (2013) *The American Health Care Paradox: Why Spending More is Getting Us Less*, New York, NY: Perseus Books Group.
- Campbell C, Gracely E, Pan S, et al. (2013) Public Health and Law Collaboration: The Philadelphia Lead Court Study. *American Journal of Public Health* 103: 1271-1277.
- Campbell C, Himmelsbach R, Palermo P, et al. (2005) Health and Housing Collaboration at LAST: The Philadelphia Lead Abatement Strike Team. *Public Health Reports* 120: 218-223.
- Carr S. (2008) Editor's Notebook: A Quotation with a Life of Its Own. *Patient Safety & Quality Healthcare*.
- Center for Community Progress. (2015) Building a Strategic, Data-Driven Code Enforcement Program For Gary, Indiana. *Technical Assistance Report*.
- Center for Community Progress. (2016a) Alternative Strategies for an Equitable, Efficient, and Effective Code Enforcement System in Mobile, Alabama. *Technical Assistance Report*.
- Center for Community Progress. (2016b) Implementing a Coordinated Approach to Address the Systemic Causes of Vacancy and Abandonment in High Point, North Carolina. *Technical Assistance Report*.
- Center for Community Progress. (2016c) *Strategic Code Enforcement: What is code enforcement?* Available at: <http://www.communityprogress.net/read-more---strategic-code-enforcement-pages-265.php>.
- Center for Public Health Law Research. (2016) Making the Case for Laws that Improve Health.
- Centers for Disease Control and Prevention. (2014) *Leptospirosis*. Available at: <https://www.cdc.gov/leptospirosis/>.
- ChangeLab Solutions. (2014) Healthy Housing Laws that Work: Creating effective Implementation & Enforcement Clauses. ChangeLab Solutions.
- ChangeLab Solutions. (2015) Up to Code: Code Enforcement Strategies for Healthy Housing. ChangeLab Solutions.

- City of Chicago DoPH. (2008) Control and Mitigation of Leading-Bearing Substances. *Municipal Code of the City of Chicago*. Chicago, IL.
- City of Sacramento. (2017) *Rental Housing Inspection Program*. Available at: <http://www.cityofsacramento.org/Community-Development/Code-Compliance/Programs/Rental-Housing>.
- Coates T-N. (2014) The Case for Reparations. *The Atlantic*. Atlantic Media, Inc.
- Coffee JC. (1981) "No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment. *Michigan Law Review* 79: 386-459.
- Coglianesi C. (2015) *Listening, Learning, Leading: A Framework for Regulatory Excellence*. Philadelphia, PA: Penn Program on Regulation.
- Coglianesi C and Mendelson E. (2010) Meta-Regulation and Self-Regulation. In: Baldwin R, Cave M and Lodge M (eds) *Oxford Handbook on Regulation*. Kindle ed. Oxford, UK: Oxford University Press.
- Community Development Agency. (2012) *Healthy Homes Department: Including the Lead Poisoning Prevention Program*. Available at: <http://www.achhd.org/healthyhome/components.htm>.
- Corbett A. (2016) A Systems Approach to Regulatory Excellence. In: Coglianese C (ed) *Achieving Regulatory Excellence*. Washington, DC: Brookings Institution Press.
- Dekker S. (2011) *Patient Safety: A Human Factors Approach*, Boca Raton: CRC Press.
- Desmond M. (2016) *Evicted: Poverty and Profit in the American City*, New York, NY: Crown Publishers.
- Desmond M and Bell M. (2015) Housing, Poverty, and the Law. *Annual Review of Law and Social Science* 11: 15-35.
- East Bay Times Editorial Board. (2017) Emails show Ghost Ship fire due to greed, indifference. *East Bay Times*.
- Farquhar D. (1994) *Lead Poisoning Prevention: A Guide for Legislators*. National Conference of State Legislatures in cooperation with the
- U.S. Environmental Protection Agency.
- Fields D. (2014) The Rise of the Corporate Landlord: The Institutionalization of Single-Family Rental Market and Potential Impacts on Renters. Right to the City Alliance.
- Food and Agriculture Organization. (2006) *International Code of Conduct on the Distribution and Use of Pesticides: Guidelines on Compliance and Enforcement of a Pesticide Regulatory Programme*.
- Gafni M. (2017) Oakland Fire: Landlord moved to evict tenants from 'deathtrap' after Ghost Ship blaze. *East Bay Times*.
- Gunningham N. (2010) Enforcement and Compliance Strategies. In: Baldwin R, Cave M and Lodge M (eds) *The Oxford Handbook of Regulation*. Kindle ed. Great Clarendon Street, Oxford: Oxford University Press, 119-145.
- Hawthorne M. (2015) Lead paint poisons poor Chicago kids as city spends millions less on cleanup. *Chicago Tribune*. Chicago.
- Healthy Homes Collaborative. (2017) *LA City Lead Poisoning Prevention Pilot Program*. Available at:

- <http://healthyhomescollaborative.org/Information/Lead/LACityLeadPoisoningPreventionPilotProgram/tabid/67/Default.aspx>.
- Hollnagel E. (2013) Making Health Care Resilient: From Safety I to Safety II. In: Hollnagel E, Braithwaite J and Wears R (eds) *Resilient Health Care*. Aldershot, England: Ashgate.
- Huising R and Silbey S. (2011) Governing the gap: Forging safe science through relational regulation. *Regulation and Governance* 5: 14-42.
- Institute of Medicine. (2013) *U.S. Health in International Perspective: Shorter Lives, Poorer Health*, Washington, DC: National Academies Press.
- International Code Council. (2015) 2015 International Property Maintenance Code.
- Joint Center for Housing Studies at Harvard University. (2016) The State of the Nation's Housing.
- Korfmacher K and Hanley ML. (2013) Are Local Laws the Key to Ending Childhood Lead Poisoning? *Journal of health, Politics, Policy and Law* 38: 757-813.
- Korfmacher KS, Ayoob M and Morley R. (2012) Rochester's Lead Law: Evaluation of a Local Environmental Health Policy Innovation. *Environmental Health Perspectives* 120: 309-315.
- Law Partnership. (2015) The Five Essential Public Health Law Services Framework. In: ChangeLab Solutions, Network for Public Health Law, Public Health Law Center, et al. (eds).
- Lind K. (2017) Model Practices & Policies for Strategic Code Enforcement. *VPRN Research & Policy Brief No. Five*, 5.
- Los Angeles Housing + Community Investment Department. (2016a) *I need help with REAP!* Available at: <http://hcidla.lacity.org/Help-with-REAP-for-owners>.
- Los Angeles Housing + Community Investment Department. (2016b) *Requesting Funds From REAP*. Available at: <http://hcidla.lacity.org/Requesting-funds-from-REAP-owners>.
- Los Angeles Housing + Community Investment Department. (2016c) *Required Inspections, Fees, and Standards*. Available at: <http://hcidla.lacity.org/Required-Inspection-of-Rental-Housing>.
- Los Angeles Housing + Community Investment Department. (2016d) *What is REAP?* Available at: <http://hcidla.lacity.org/What-is-REAP-for-owners>.
- Los Angeles Housing + Community Investment Department. (2017a) *Are There Any Required Inspections and Fees to be Paid?* Available at: <http://hcidla.lacity.org/Inspections-and-Fees>.
- Los Angeles Housing + Community Investment Department. (2017b) *Avoid Liens-Urgent Repair Program (URP)* Available at: <http://hcidla.lacity.org/Urgent-Repair-Program>.
- Los Angeles Housing + Community Investment Department. (2017c) *Custodian of Records*. Available at: <http://hcidla.lacity.org/Custodian-of-Records>.

- Mallach A. (2015) *Raising the Bar: Linking Landlord Incentives and Regulation through Rental Licensing: A Short Guide for Local Government Officials*. Center for Community Progress.
- Markowitz G and Rosner D. (2013) *Lead Wars: The Politics of Science and the Fate of America's Children*, Berkeley and Los Angeles, CA: University of California Press.
- Meadows DH. (2008) *Thinking in Systems: A Primer*, White River Junction, VT: Chelsea Green Publishing Company.
- Mitchell K. (2015) Like Magic? ("Every system is perfectly designed ..."). In: Improvement IfH (ed) *IHI Improvement Blog: Useful insights, practical advice, and inspiring stories from IHI*. Cambridge, MA.
- National Center for Healthy Housing and American Public Health Association. (2014) National Healthy Housing Standard. Washington, DC.
- National Safe and Healthy Housing Coalition. (2015) There's No Place like Home ... to Cause Serious Illnesses and Fatal Injuries. *National Healthy Housing Coalition Case Statement*.
- Neighborhood Improvement Services. (2012) *Proactive Rental Inspection Program*. Available at: <http://durhamnc.gov/604/Proactive-Rental-Inspection-Program-PRIP>.
- New York City Housing Preservation & Development. (2016) *Legal Assistance*. Available at: <http://www1.nyc.gov/site/hpd/renters/legal-assistance.page>.
- Oregon Public Health Institute. (2012) Rental Housing and Health Equity in Portland, Oregon: A Health Impact Assessment of the City's Rental Housing Inspections Program.
- Parker C and Braithwaite J. (2003) Regulation. In: Cane P and Tushnet M (eds) *The Oxford Handbook of Legal Studies*. Oxford University Press, 120-145.
- Petro J, Farrell G, Brandolph D, et al. (2016) Strategies to Address Unsafe and Unhealthy Housing in Philadelphia. *Regulatory Enforcement Practicum*. Philadelphia, PA: Temple University Beasley School of Law.
- Philadelphia City Council. (2017) Testimony of Rebecca Swanson, Director of Planning, Department of Licenses & Inspections,. In: Services CCJCoLlaPHH (ed). Philadelphia, PA.
- Philadelphia Department of Public Health. (2016) Lead-Free Kids: Preventing Lead Poisoning in Philadelphia. Philadelphia Department of Health.
- Reason J. (1997) *Managing the Risks of Organizational Accidents*: Ashgate Publishing.
- Rittel H and Webber M. (1973) Dilemmas in a general theory of planning. *Policy Sciences* 4: 155-169.
- Rose K and Miller TK-N. (2016) Healthy Communities of Opportunity: An Equity Blueprinting to Address America's Housing Challenges. PolicyLink.
- Ross HL. (1995) Housing Code Enforcement as Law in Action. *Law & Policy* 17.
- Samara T. (2014) The Rise of the Renter Nation: Solutions to the Housing Affordability Crisis.
- Santora M and Remnick N. (2017) Rare Disease Strikes a Bronx Area All Too Familiar With Rats. *New York Times*. New York, NY, A24.

- Schneider V. (2012) Governance and Complexity. In: Levi-Faur D (ed) *Oxford Handbook of Governance*. Kindle ed. Oxford, UK: Oxford University Press, 129-142.
- Scott C. (2001) Analysing Regulatory Space: Fragmented Resources and Institutional Design. *Public Law*: 329-353.
- Scott C. (2010) Standard-Setting in Regulatory Regimes. In: Baldwin R, Lodge M and Cave M (eds) *Oxford Handbook on Regulation*. Kindle ed. Oxford, UK: Oxford University Press.
- Serna J and Rocha V. (2016) Oakland residents mourn victims in deadly warehouse fire. *Los Angeles Times*. Los Angeles, CA.
- Thaler RH and Sunstein CR. (2008) *Nudge - Improving Decisions About Health, Wealth, and Happiness*. A Caravan Book.
- The Editorial Board. (2017) A Housing Solution: Lawyers for Tenants. *New York Times*. New York, NY.
- Toering S and Alexander F. (2014) Judicial In Rem Code Enforcement and Judicial In Rem Tax Sales: Optimum Tools to Combat Vacancy and Abandonment in Atlanta. *Technical Assistance Report*. Center for Community Progress.
- Uhfelder E. (2017) How Cities Should Take Care of Their Housing Problems. *New York Times*. New York, NY.
- Uzdavines M. (2014) Barking Dogs: Code Enforcement is all Bark and No Bite (Unless the Inspectors Have Assault Rifles). *Washburn Law Journal* Fall.
- Wallace-Wells B. (2016) What Happened, Exactly, in Oakland's Ghost Ship Fire? *The New Yorker*. New York, NY.
- Woods D. (2006) Essential Characteristics of Resilience. In: Hollnagel E, Woods D and Leveson N (eds) *Resilience Engineering: Concepts and Precepts*. Aldershot, England: Ashgate, 21-33.
- Yentel D, Aurand A, Emanuel D, et al. (2016) *Out of Reach 2016*. National Low Income Housing Coalition.