Litigation Strategies for Blight Remediation in Detroit:
Curbing Property Owners' "Invest and Neglect" Scheme

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The views expressed in this paper are our own and we are responsible for any errors.

INTRODUCTION: DETROIT'S BLIGHT PROBLEM

Although anyone who has driven down a main thoroughfare in Detroit knows that abandoned property is common, the statistics on the sheer number of buildings are remarkable. In 2015, 29% of all structures in Detroit (78,000 structures) were reported vacant, unfit for occupation, and in need of demolition or rehabilitation. [1] Blighted property is a deterrent to economic investment and a threat to public safety.[2]

Some of these blighted properties in Detroit are the result of foreclosure from mortgage default and subsequent abandonment by their owners. Other properties, however, were purchased in the dilapidated state by certain entities, such as financial institutions or limited liability companies (LLCs), and are purposely unused and ignored, presumably with the plan that they will be sold at a profit once the neighborhood "turns around." In other words, these entities "invest and neglect" the property. This profit-seeking strategy allows the purchasers to buy property cheaply and then ignore it, while the blighted property remains an eyesore—and danger—in the City's neighborhoods.

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[1] Dynamo Metrics, *Policy Brief: Detroit Blight Elimination Program Neighborhood Impact* (Jul. 2015), http://www.demolitionimpact.org/#thereport (last visited Apr. 15, 2017); *see also* Detroit Blight Removal Task Force, Every Neighborhood Has a Future, And It Doesn't Include Blight, Detroit Blight Removal Task Force Plan (May 2014).

[2] There are numerous new articles that indicate the devastating effects of blight on neighborhoods. *See, e.g.*, Christina Hall, *Bodies Found May Be Tied To Missing Girl, 4 and Mother*, DET. FREE PRESS (Feb. 20, 2016), http://www.freep.com/story/news/local/michigan/detroit/2016/02/20/bodies-found-missing-girl-detroit/80658294/; Eric D. Lawrence, *Pit Bull Found Hanged in Abandoned Detroit House*, DET. FREE PRESS (Dec. 11, 2015) http://www.freep.com/story/news/local/michigan/detroit/2015/12/10/pit-bull-found-hanged-abandoned-detroit-house/77095212/; Steve Neavling, *As Detroit Breaks Down, Scourge of Arson Burns Out of Control*, REUTERS (Jul. 13, 2013) http://www.reuters.com/article/us-usa-detroit-arson-idUSBRE96C06E20130713; John Wisely, Jennifer Dixon, Kristi Tanner, *School Zone Safety Improving, But Dangers Lurk*, DET. FREE PRESS (Jul. 7, 2015), http://www.freep.com/story/news/local/michigan/detroit/2015/07/04/school-zone-safety-improving-dangers-lurk/29705427/.

Since Mayor Duggan took office in 2014, the City of Detroit has ramped up its efforts to demolish or rehabilitate blighted property. The City works closely with the Detroit Land Bank Authority (DLBA) to identify abandoned properties in the City and obtain the deed to the property either through a voluntary transfer, a nuisance abatement lawsuit against the address, or through the City's hearing process.[3] After receiving the deed to the property, the DLBA uses federal funds from the Hardest Hit Fund[4] to demolish or rehabilitate it. If demolished, the land can be sold to the neighbors, and if rehabilitated, the property is auctioned off to a buyer who must contract with the DLBA that the property will remain in productive use.

The DLBA's demolition program is the fastest operating demolition program in the country,[5] but when considering the extent of Detroit's problem, it is not moving fast enough. In the first two years of the program's operation, 10,000 (of nearly 80,000) structures were demolished.[6] Although the acquisition of deeds by the DLBA sounds elegant, several obstacles can impede the process. Because of unpaid taxes and other liens, it can often be difficult to clear the title, which makes the property unattractive to prospective buyers.[7] Moving parcel-by-parcel is also an inherently slow process that requires significant resources.

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[3] Detroit Blight Removal Task Force, Every Neighborhood Has a Future, And It Doesn't Include Blight, Detroit Blight Removal Task Force Plan 110 (May 2014).

[4] This fund is from the Troubled Asset Relief Fund (TARP) which is distributed to cities to deal with the aftermath of the 2008 foreclosure crisis. See Emergency Economic Stabilization Act of 2008, Pub. Law 110-343; *Administration Announces Second-Round of Assistance for Hardest-Hit Housing Markets*, U.S. Dept. of the Treasury (Mar. 29, 2010). As of February 2016, Detroit had spent $130 of its Hardest Hit funding on demolition. Todd J. Spangler, Detroit Blight Fight to Be Boosted by Treasury Funds, Det. Free Press (Feb. 19, 2016), http://www.freep.com/story/news/politics/2016/02/19/detroit-blight-fight-boosted-treasury-funds/80605654/ (last visited Apr. 15, 2017).

[5] An average of 75 houses were demolished per week from 2014-2016, which makes it the fastest operating demolition program in the country. City of Detroit Mayor's Office, *Detroit knocks Down 10,0000th Vacant House in 2 ½ Years, with 8,000 More to Come Down by End of 2017*, News from City Government, http://www.detroitmi.gov/News/ArticleID/919/Detroit-knocks-down-10-000th-vacant-house-in-2%C2%BD-years-with-8-000-more-to-come-down-by-end-of-2017 (last visited Apr. 15, 2017).

[6] *Id.*

[7] Detroit Blight Removal Task Force, Every Neighborhood Has a Future, And It Doesn't Include Blight, Detroit Blight Removal Task Force Plan 117 (May 2014).

Is there a way to avoid moving "property-by-property" and to adopt a more systematic approach to the "invest and neglect" strategy? This Paper suggests that the City can stop these actors by suing them for damages to make the "invest and neglect" strategy unprofitable. The goal of this litigation strategy is to discourage these actors from purchasing these properties in the first place—unless they are planning to fix them up and use them productively. This Paper suggests that the City could sue these actors under several causes of action under Michigan law: public nuisance, private nuisance, and unjust enrichment or quantum meruit.

I. A Brief Note on Standing

All of the potential causes of action we propose in Part II are state common law claims. Therefore, Michigan's law of standing will apply, as set out in *Lansing Schools Education Association v. Lansing Board of Education*.[8] Per *LSEA*, "a litigant has standing whenever there is a legal cause of action."[9] If the City can state a cause of action, standing should be satisfied. In Michigan, cities have long brought nuisance claims without standing presenting an issue or even warranting a discussion.[10] For example, in the 1893 case of *People v. Detroit White Lead Works*, Detroit brought a public nuisance suit against a corporation, and the Michigan Supreme Court stated, "The charter of the city of Detroit gives to the common council power…to prohibit, prevent, abate, and remove all nuisances in said city…. Similar powers are conferred upon municipal corporations of the state by general statute."[11] In short, a long history exists for cities

[8] 487 Mich. 349 (2010).
[9] Lansing Schs. Educ. Ass'n v. Lansing Bd. of Educ., 487 Mich. 349, 372 (2010).
[10] *See, e.g.*, City of Grand Rapids v. Weiden, 97 Mich. 82 (1893) (standing was not even discussed by the Court). The Court noted the "intolerable stench" from defendant's slaughterhouse "permeate[d] the neighborhood" and was "borne by every breeze" through an entire section of Grand Rapids, "compelling the people to shut their doors and windows to avoid it." *Weiden*, 97 Mich. at 84.
[11] 82 Mich. 471, 476–77 (1890) (like *Weiden*, this case did not even expressly discuss standing).

bringing nuisance suits and serving as "sincere and vigorous" advocates in such litigation—which standing seeks to ensure.

II. Litigation Strategies: Potential Causes of Action

We recommend pursuing several causes of action: (A) public nuisance; (B) private nuisance; and (C) unjust enrichment and/or quantum meruit—two causes of action that may or may not be identical under Michigan law. Each will be addressed in turn.

In short, we propose the following structure as a potential litigation strategy: LLCs' and other entities' practice of buying properties and then intentionally neglecting to maintain them causes large swaths of property to become and remain dilapidated. These vacant and eyesore buildings attract crime and other nefarious activity, all of which cause harm to public health and safety. As such, these neglected and depressed properties are nuisances. The City spends money and deploys services to combat these harms. Corporations benefit by avoiding the cost of compliance with building codes and leaving the City on the hook for the harm caused by their blighted property. Corporations' retention of these benefits is unjust because of their violations of the law, i.e. their non-compliance with City code and activity (or lack thereof) causing a nuisance.

A. *Public Nuisance*

This Section will outline the law of public nuisance, briefly discuss Cleveland's use of public nuisance to combat blight resulting from subprime mortgage lending, and give an overview of Michigan municipality public nuisance suits and potential remedies.

1. An Overview of Public Nuisance and *Garfield Township v. Young*

As mentioned previously, cities in Michigan have brought public nuisance claims against corporations since as early as the 1890s. The claim has become a sort of catch-all for cities; cities

(with varying degrees of success) wield public nuisance to strike at the negative effects of activities ranging from gun violence, to subprime mortgage lending, to the discharge of sewage into a public drain. Because of the growing number of ways plaintiffs have employed nuisance, the Michigan Court of Appeals has gone so far as to equate nuisance with the multi-headed mythological beast, "the Hydra."[12] We see this blight remediation proposal as avoiding "the Hydra" problem: here, the City's use of public nuisance would conform to a more traditional notion of the claim (abandoned, neglected, and depressed properties).[13]

A public nuisance is an unreasonable interference with a right common to the general public.[14] According to the Restatement of Torts, which many Michigan cases cite, an unreasonable interference with a public right includes conduct that interferes with the public health and safety or "conduct [that] is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right."[15]

In *Garfield Township v. Young*, the Michigan Supreme Court addressed a public nuisance suit by a township against an operator of a junkyard that was not in compliance with local ordinances. Citing Prosser, the Court in *Garfield Township* explained that:

> To be considered public, the nuisance must affect an interest common to the general public, rather than peculiar to one individual, or several. It is not necessary, however, that the entire

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[12] Detroit Bd. of Educ. v. Celotex Corp., 196 Mich. App. 694, 709 (1992) (rejecting the theory of nuisance as applied to asbestos contamination):

> We need not repeat the bewilderment expressed by the courts and secondary authorities concerning the exact boundaries of the tort of "nuisance." Suffice it to say that, despite attempts by appellate courts to rein in this creature, it, like the Hydra, has shown a remarkable resistance to such efforts. We therefore approach our task carefully, hopeful of an analysis worthy of Hercules, rather than his predecessors.

[13] *See* Adkins v. Thomas Solvent Co., 440 Mich. 293, 317–18 (1992).

[14] Sholberg v. Truman, 496 Mich. 1, 6 (2014); *Adkins*, 440 Mich. at 304 n. 8 (1992); Garfield Twp. v. Young, 348 Mich. 337, 342 (1957); *see also* Restatement (Second) of Torts, § 821B.

[15] *Id.* For a discussion on conduct proscribed by a statute, a regulation, or an ordinance (also referenced in the Restatement), see *infra* pp. 7–8 (discussing nuisance per se).

> community be affected, so long as the nuisance will interfere with those who come in contact with it in the exercise of a public right.[16]

The township's claimed failed due to a lack of evidence of a *public* harm arising out of the defendant's conduct. While the township asserted harms to individuals engaged in various commercial activities,[17] these were not interferences which might be the proper subject of an injunction for a *public* nuisance.[18] Rather, though the Court did not expressly say so, the harms alleged by the township (e.g., interference with a mink farm) seemed to be interferences with interests that were "peculiar" to a small number of individuals rather than interests of the general public. Furthermore, several junk yards were apparently in operation in the area. The Court concluded that this fact posed an issue with causation, i.e., it was uncertain whether this particular defendant's junkyard was causing the alleged odors and smoke.[19]

Garfield Township thus provides several useful principles. First, interference with particular individuals' commercial activity does not necessarily constitute a harm to a public right. (But the entire community need not be affected either.) The Court cites to several cases that outline what would qualify as interferences with a public right: an activity harmful to public health, an interference in the use of a way of travel, conduct affecting public morals (e.g., a brothel), or conduct which prevents the public from the peaceful use public land and streets.[20] Second, if there are several potential sources of the alleged effects of the nuisance (e.g., smoke, odor), then such circumstances present a causation issue. However, for present purposes, if this were an issue for this project, then the City should consider joining the several

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[16] *Garfield Twp.*, 348 Mich. at 342.
[17] *Id.* at 342–44 (defendant's conduct allegedly interfered with one individual's mink farm, another's raising of foxes, and yet another individual's trucking business).
[18] *Id.* at 344.
[19] *Id.* at 343; *see also* Section III.A.
[20] *See id.* at 342 and cases cited therein.

LLCs/corporations which own swaths of blighted property. Finally, *Garfield Township* shows that activity which is in violation of an ordinance is not, by itself and without more, a nuisance per se.

Garfield Township also noted, however, that some activities, however, may constitute a nuisance per se, particularly if an ordinance is passed pursuant to a statute that declares an activity to be a nuisance. But the fact that an activity is prohibited by an ordinance is insufficient—standing alone—to render the activity a nuisance per se.[21] Rather, the Michigan Supreme Court seems to require, in addition, that the statute or ordinance either (1) clearly state that an activity is a nuisance, or (2) specifically provide that the activity it proscribes may be stopped by an injunction.[22]

As applied to Detroit, it appears that *Garfield Township* would permit a public nuisance remedy for the "invest and neglect" strategy. One provision in the "Nuisances" section of the ordinances effectively describes vacant and abandoned buildings as nuisances that must be abated.[23] The ordinance states that it "shall be unlawful for any owner or agent thereof to keep or maintain any dwelling which shall be (1) vacant and open to trespass and (2) dilapidated or deteriorated or in a dangerous condition."[24] This ordinance, which sets up an administrative scheme for blight violations, is consistent with the requirements set out in M.C.L.A. 117.4(q),

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[21] *Garfield Twp.*, 348 Mich. at 340 (ordinance at issue provided only for a penalty for its violation); Village of Port Austin v. Parsons, 349 Mich. 629, 630–31 (1956) ("[T]he ordinance contains no provision for its enforcement by injunction. It is not claimed that it was adopted under authority of any enabling statute containing such provision."); *see also* Village of St. Johns v. McFarlan, 33 Mich. 72, 73–74 (1875).

[22] *See* Portage Twp. v. Full Salvation Union, 318 Mich. 693, 703 (1947) (the statute pursuant to which the township ordinance was passed declared the defendant's activities—erecting a building in non-conformance with the ordinance—a nuisance per se, and therefore defendant's violation of the ordinance was a nuisance per se); *see also* Farmington Twp. v. Scott, 374 Mich. 536 (1965) (same); People v. Kelly, 295 Mich. 632, 634–36 (1940) (same).

[23] Detroit City Code Sec. 37-2-3(a), this Code is under the section "Nuisances."

[24] *Id.*

which sets out the requirements for blight violation schemes for cities. Tracking the Court's decisions in *Portage Township* and *Farmington Township,* this ordinance that deems abandoned buildings a nuisance (consistent with the statute that regulates the blight violation scheme) makes Detroit's public nuisance claim straightforward. Detroit could claim that the blighted properties are a nuisance per se under the ordinance. According to *Farmington Township*, the City should win as long as the Court finds that the ordinance is itself valid one.

2. Cleveland's Public Nuisance Suit

The City of Cleveland sued numerous financial institutions and alleged that their financing of subprime mortgages constituted a public nuisance. Cleveland further alleged that the nuisance caused the foreclosure crisis, which devastated neighborhoods and the local economy. As relief, Cleveland sought lost tax revenue and recovery of municipal expenditures as damages. This argument failed on appeal for failure to demonstrate causation, with the Sixth Circuit noting that, "the cause of the alleged harms is a set of actions (neglect of property, starting fires, looting, and dealing drugs) that is completely distinct from the asserted misconduct (financing subprime loans)."[25] Moreover, the court noted it was the homeowners, not the banks, who were responsible for maintaining their property.[26] As to damages, the court stated, "[a] 'complex assessment' would be needed to determine which municipal expenditures increased and tax revenues decreased because of the ills caused by foreclosed homes" rather than other causes.[27] Ultimately, Cleveland's case failed because, "the connection between the alleged harm and the alleged misconduct [was] too indirect to warrant recovery."[28]

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[25] City of Cleveland v. Ameriquest Mortgage Securities, 615 F.3d 496, 504 (6th Cir. 2010).
[26] *Id.* at 505.
[27] *Id.* at 506. We recognize this as an issue in Detroit's case, however, as will be explained later, the City of Baltimore's complaint in their FHA case against Wells Fargo can provide a roadmap to guide a court through this "complex assessment." *See infra* Section II.C
[28] *Id.*

Cleveland's causation issue perhaps stemmed from its rather innovative use of the public nuisance claim—it perhaps suffered from "the Hydra" problem. As the Sixth Circuit noted, financing subprime loans seemed too tenuously connected to eyesore buildings and the resulting crime; after all, even though the banks were engaged in this harmful lending practice, they were not ultimately responsible for maintaining the properties. Those facts stand in direct contrast to Detroit's situation: the properties that are neglected and blighted and attracting crime are owned by the entities the City would want to sue. Lastly, the court's discussion on the "complex assessment" that would be needed to determine Cleveland's damages provides two key insights: (1) the municipal cost recovery rule was not raised as prohibiting such damages as a matter of law,[29] and (2) this does not foreclose the possibility that a better-pleaded complaint could walk the courts through this "complex assessment." As will be discussed, cities' recent complaints alleging Fair Housing Act violations are much more specific as to damages than Cleveland's complaint; these FHA complaints have been successful at getting by motions to dismiss and reaching settlement. We recommend that the City adapt Baltimore's and Memphis's strategy—described further below.

The next Section will further discuss how Michigan municipalities specifically have fared in public nuisance suits generally and the remedies they have sought.

3. Other Michigan Municipality Nuisance Suits and Remedies

Beyond *Garfield Township*, Michigan municipalities have a long history of bringing public nuisance suits. This Section will discuss some of the more pertinent cases and what

[29] Even though the free public use doctrine was not raised, it arguably was not needed to decide the case because Cleveland's claim failed on the merits. For more information about the free public services doctrine, see City of Flagstaff v. Atchinson, Topeka, & Santa Fe Railway Co., 719 F.2d 322 (9th Cir.1983).

monetary damages might be available. On the other hand, injunctions are always an available remedy for a public nuisance.

The core theme for municipalities whose public nuisance claims succeeded is that the municipality had an ordinance on the books that declared certain activities nuisances per se. The secondary theme from successful cases is that the defendant's activity was shown to cause a threat to the public health, safety, or peaceful enjoyment of land. These cases include:

- *Farmington Township v. Scott*: The Michigan Supreme Court held that a township ordinance, which made certain activity a nuisance per se (to protect the public health, safety, and welfare), was a valid ordinance; therefore, the Court ruled for the plaintiff-township and remanded for the entry of an injunction against a swimming pool supply business, which was located on residential property in violation of the ordinance.[30] Further, the Court awarded, "[c]osts to plaintiff [township]."[31]

- *City of Hillsdale v. Hillsdale Iron & Metal Co.*: The city sought to enjoin the operation of a scrap yard on land zoned for family residences (in violation of an ordinance). The city was joined by individuals who occupied neighboring homes.[32] The scrap yard's operations included the use of heavy machinery and burning of various materials, which caused vibrations and loud noises and smoke and odors offensive to neighbors.[33] The Michigan Supreme Court upheld the finding that this activity constituted both a public and private nuisance because it caused an unreasonable disturbance to the peace and quiet of the neighborhood.[34] Costs were also awarded to the plaintiffs.

- *Portage Township v. Full Salvation Union*: Once again, the township sought to enjoin the use of certain premises in violation of an ordinance—these violations included both unfit structures, i.e. "shacks" that lacked proper sanitation and other facilities, and noise violations. The trial court ordered all structures erected in violation of the ordinance to be removed within thirty days.[35] The Michigan Supreme Court affirmed, with costs again awarded to the plaintiff-township.[36]

- *Norton Shores v. Carr*: The Michigan Court of Appeals upheld a decision to require a junkyard operator (a) to build a fence around their property to block any view of the junkyard and to prevent black dust from blowing off onto others' properties; and (b) to

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[30] 374 Mich. 536, 541–42 (1965).
[31] *Id.* at 542.
[32] 358 Mich. 377, 380 (1960).
[33] *Id.* at 385–86.
[34] *Id.* at 386.
[35] 318 Mich. 693, 699 (1947).
[36] *Id.* at 706.

obtain a junkyard permit.[37] The court does not explicitly mention a public health, safety, or peaceful enjoyment of land rationale for its decision the junkyard constituted a nuisance, though it may be implicit.

- *People v. Kelly*: This case is rather lacking in details, but the defendant erected a building in violation of an ordinance (it "did not conform in area and cubical content") and it was found to be a danger to the public health, safety, and welfare by the trial court.[38] The court ordered the nuisance abated and fines imposed.[39] The circuit court reversed because the township-plaintiff's complaint was ambiguous failed to state a violation of the law.[40] The Michigan Supreme Court reversed the circuit court and remanded the case to proceed to trial.[41] The ordinance appeared to provide a thumb on the scale. [42]

Finally, in the rather atypical case of *Ypsilanti Charter Township v. Kircher*, the Michigan Court of Appeals affirmed an award of attorney's fees to the plaintiff-township. The court noted that while Michigan adheres to the general rule that attorney's fees are not recoverable, there are recognized exceptions. The court stated that, "[R]ecovery has been allowed in limited situations where a party has incurred legal expenses as a result of another party's fraudulent or unlawful conduct."[43] This result was, in large part, due to the defendant's flaunting of the circuit court's order to abate the nuisance, which caused the township to incur substantial legal fees by continuing to have to go to court.[44] The defendant was also engaged in a rather egregious activity: the illegal discharge of sewage into a public drain.[45] While this may be a case of the court of appeals gone rogue, it seems more apt to characterize this case as an outlier where there was a particularly recalcitrant defendant engaged in particularly egregious and

[37] 81 Mich. App. 715, 723–25 (1978).
[38] 295 Mich. 632, 634–35 (1940).
[39] *Id.*
[40] *Id.* at 635.
[41] *Id.* at 637.
[42] *Id.* at 636 ("We think the circuit judge also erred in quashing the warrant and complaint for inadequacy in charging the offense in that it was ambiguous *and that the ordinance was not pleaded*.") (emphasis added).
[43] Ypsilanti Charter Twp. v. Kircher, 281 Mich. App. 251, 286 (2008) (internal citations and quotations omitted).
[44] *Id.* at 286–87.
[45] *Id.* at 286.

harmful activity. The attorney's fees ruling in *Kircher* has been followed in one other, unpublished, court of appeals decision.[46]

In sum, municipalities have experienced success enjoining public nuisances, particularly when there is an ordinance that deems certain activity a nuisance per se. In addition to enjoining activity, municipalities have successfully sought "affirmative injunctions"—requiring the defendant to take action and pay the costs (e.g., build a fence or remove a non-conforming structure). And in at least one case, Ypsilanti Township was awarded attorney's fees.

By contrast, the core theme for municipalities whose public nuisance claims failed is that the municipality failed to provide sufficient evidence as to the public health and safety effects of the alleged nuisance. *Garfield Township*, mentioned previously, is one such case. Other municipalities, however, have similarly failed to meet their evidentiary burdens or struggled to plead a proper complaint. Three cases in particular will be discussed.

Most recently, the City of Jackson failed on their claim of public nuisance to enjoin the operation of an asphalt plant. The court of appeals noted that, "'[A]n injunction may issue to prevent a threatened or anticipated nuisance which will necessarily result from the contemplated act, where the nuisance is a practically certain or strongly probable result or a natural or inevitable consequence.'"[47] In rather conclusory statements, the court simply noted that the trial court's conclusion that the city did not establish a prima facie case of nuisance was supported by defendant's witnesses' testimony; further, plaintiff's evidence did not establish a substantial and unreasonable interference with the use and enjoyment of property.[48] Earlier in the opinion,

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[46] Department of Environmental Quality v. Cole Tire Co., 2013 WL 195716 at *2 (January 7, 2013). This case, though not brought by a municipality, was brought by the Michigan DEQ and Attorney General.
[47] City of Jackson v. Thompson-McCully Co., 239 Mich. App. 482, 490 (2008) (quoting Keiswetter v. Petoskey, 124 Mich. App. 590, 599 (1983), and Falkner v. Brookfield, 368 Mich. 17, 23 (1962)).
[48] *Id.* at 490–91.

however, the court (discussing a Michigan Environmental Protection Act claim) notes that the extensive "expert testimony on air dispersion modeling and on *the issue of potential harm from the asphalt plant*[,]" was contradictory.[49] Oddly, the court remanded this claim back to the trial court for more specific findings of fact—perhaps because MEPA only requires "probable damage to the environment,"[50] rather than an "unreasonable and *substantial*" interference with the use of land. Given the apparent lower MEPA standard, it may be a reasonable inference that because the expert evidence on environmental harm (and via that, the potential harm to public health) was "contradictory"—perhaps in equipoise—the evidence was simply not strong enough to prove a nuisance as a matter of law. The court might have been less sure of this conclusion as to the MEPA claim, hence requiring specific findings of fact on remand.

In an older case, Kalamazoo Township failed to enjoin the operation of a piggery. In short, no showing was made that the piggery threatened public health.[51] The Michigan Supreme Court succinctly described the evidentiary deficiencies: "The health officer, who is required by statute to be an educated physician, was not sworn and no other competent witnesses were produced to testify as to the effect of this business upon the public health."[52] Simply establishing that some found the odors emanating from the piggery "disagreeable" was not enough.[53]

Finally, in *Village of Port Austin v. Parsons*, the plaintiff-village's nuisance claim failed for two important reasons. First, the complaint was entirely conclusory: "Plaintiff's bill of complaint pleads the bare conclusion 'that such structure would also be a nuisance'."[54] Second, neither the ordinance under which the village brought the action nor the statute which enabled

[49] *Id.* at 489 (emphasis added).
[50] *Id.* at 490.
[51] Kalamazoo Twp. v. Lee, 228 Mich. 117, 119 (1924).
[52] *Id.*
[53] *Id.*
[54] Village of Port Austin v. Parson, 349 Mich. 629 630–31 (1957).

the ordinance provided for an injunction for its enforcement.[55] The ordinance apparently did not declare the defendant's particular structure a nuisance per se explicitly.[56] This ordinance thus contrasts with the ordinances under which the successful municipalities pursued their nuisance claims. The Court also awarded costs to the defendant.

While many of these unsuccessful cases are wanting in detail, some general principles emerge: First, it is not enough that an activity may cause an annoyance or be disagreeable to a few individuals;[57] rather, the City's evidence of a public nuisance must establish a "substantial" risk of interference with the use and enjoyment of land or public health and safety. Second, the ordinance under which the City pursues a nuisance claim must either explicitly declare certain activity (or a structure) a public nuisance or explicitly provide for an injunction for its enforcement. Finally, recall *Garfield Township*: alleging depreciation in property value alone is insufficient to establish a nuisance.

B. *Private Nuisance*

As a preliminary matter, at least some actions may constitute either a public or a private nuisance (for example, ground water pollution).[58] Therefore, no apparent legal obstacle exists to the City pleading both types of nuisance. Cities have apparently sued under both theories previously (and to the extent this statement is mistaken,[59] the City might find a resident-plaintiff

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[55] *Id.* at 630.
[56] *Id.*
[57] Per *Garfield Township*, however, the entire community need not be affected either.
[58] Adkins v. Thomas Solvent Co., 440 Mich. 293, 304 (1992) (citing the Restatement of Torts).
[59] *See* Norton Shores v. Carr, 81 Mich. App. 715 (1978). Based on the caption of this case, it appears Norton Shores, the municipal corporation, may have been accompanied by private residents. The court of appeals speaks about the plaintiffs collectively, so we infer that the municipality was bringing both claims. But City of Hillsdale v. Hillsdale Iron & Metal Co. may suggest that the city-plaintiff only brought the public nuisance claim, while the individual-plaintiffs brought the private nuisance claim: "we think a private nuisance was adequately pleaded and proved, as well as a *public nuisance in operations violative of the ordinance…*" (emphasis added). 358 Mich. 377, 386 (1960). Presumably, it was Hillsdale enforcing the ordinance. Alas, the opinions do not provide clear guidance.

to bring the private nuisance suit alongside the City's other nuisance claim). Private nuisance is, however, more a mechanism of dispute resolution between neighboring land owners. We raise it in this Paper because the City in fact owns a large amount of land.

The Michigan Supreme Court laid out the elements of private nuisance in *Adkins v. Thomas Solvent*. A private nuisance is a non-trespassory invasion of another's interest in the private use and enjoyment of land. A party is subject to liability for private nuisance, if:

> (a) the other has property rights and privileges in respect to the use or enjoyment interfered with, (b) the invasion results in significant harm (c) the actor's conduct is the legal cause of the invasion, and (d) the invasion is either (i) intentional and unreasonable, or (ii) unintentional and otherwise actionable under the rules governing liability for negligent, reckless, or ultrahazardous conduct.[60]

Applied to this project, the City would have to first establish that it has an interest in land which it owns. The term "interest" includes "not only the interests that a person may have in the actual present use of land for residential, agricultural, commercial, industrial and other purposes, but also his interests in having the present use value of the land unimpaired by changes in its physical condition."[61] As will be explained, however, *Adkins* (despite citing the Restatement) appears to curtail the latter half of the Restatement's definition of "interests."

The *Adkins* Court rejected a claim for private nuisance based solely on depreciation of property values. The defendant's chemicals contaminated the groundwater in the area, which caused widespread fear among third-party purchasers (hence the diminution in the plaintiffs' property values). None of the plaintiffs' properties, however, were actually contaminated by the chemical leak. Somewhat oddly, the plaintiffs' counsel stipulated to dismissing all claims except those based on property depreciation.[62] The Court suggested the case might have turned out

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[60] *Adkins*, 440 Mich. at 304 (citing the Restatement of Torts).
[61] Restatement (Second) of Torts, § 821D(b).
[62] *Adkins*, 440 Mich. at 318.

differently had they been presented with, “plaintiffs who allege[d] an increased risk of illness, threat to safety, or lack of a habitable dwelling caused by contaminants released by the defendants.”[63] *Adkins* thus appears to curtail the Restatements’ definition of “interest” as to the interest in maintaining the “present value of the land”—but this may only be so because the plaintiffs failed to plead a *risk* of “changes in [their land’s] physical condition” that would impair its present value. Indeed, it was apparently unlikely that the plaintiffs’ land would be physically affected by the chemical spill.

The 1910 case of *Kilts v. Board of Supervisors of Kent County* provides another instructive example. The Michigan Supreme Court discussed a hypothetical building so near another’s property that, for example, snow may slide or its defective walls may fall upon the adjoining property of a neighbor.[64] The Court concluded that such a building would be:

> a me[na]ce to [the neighbor’s] property…it would be a private nuisance and a breach of the owner’s duty to maintain it…. [H]e could be liable for injuries received from a fall of the snow or building, not necessarily because he was negligent, in erecting or maintaining it, but because of his wrongful invasion of the rights of…his neighbor[.][65]

The danger from such a defect in a structure, however, must be “threatening or impending” to the other’s property rights or health,[66] i.e., a defect, in and of itself, in this hypothetical structure would not be enough to constitute a private nuisance. Mere negligence is therefore neither a necessary nor a sufficient factor in the private nuisance analysis. Rather, a decrepit building (perhaps decrepit as a result of the owner’s neglecting to maintain it) in close proximity to adjoining property, which poses an actual threat to the neighbor’s use of the adjoining property, would be a highly probative factor in this analysis.

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[63] *Id.*
[64] Kilts v. Bd. of Supervisors of Kent Cnty.,162 Mich. 646, 650 (1910).
[65] *Id.*
[66] *Id.* at 651.

Adkins cited *Kilts* throughout its opinion. The *Adkins* Court clarified the "geographic" component of private nuisance: the structure that is a nuisance must be close enough to the adjoining land to pose an actual threat.[67] Because the "invasion" in private nuisance is "nontrespassory," however, no actual physical harm needs to have occurred. *Adkins* further clarified that, while property value depreciation often serves as a basis for calculating damages, property value depreciation may *not* serve as the sole basis for a cognizable claim of private nuisance.[68]

Lastly, *Adkins* provides support, albeit in dicta, for the use of litigation to remedy Detroit's blight problem. The Court stated, in response to a vigorous dissent (the case was 5-2), that, "We do not deal with a situation here in which plaintiffs have alleged that *the character of the neighborhood has changed for the worse*. Nor have plaintiffs asserted that *an unusual number of abandoned, neglected, and otherwise depressed properties in the neighborhood* interfered with their use and enjoyment of land."[69] This dicta appears to fit squarely with the City's current situation. This language also seemingly applies to public nuisance.

In short, if the City could show that the blighted structures owned by various LLCs and other entities were causing significant harm or imposed a dangerous threat to the City's use of its own land, then an actionable claim for private nuisance might be available. Further, the diminution in property value, per *Adkins*, could serve as a basis for calculating damages. While no actual physical damage needs to be done to the land, the City must at least allege that the nuisance poses a significant risk to the physical condition of the City's land. A final point is

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[67] *Adkins*, 440 Mich. at 307.
[68] *Id.* at 314; *see also* Capitol Properties Group, LLC v. 1247 Ctr. State Street, LLC, 283 Mich. App. 422, 432 (2009) (applying this principle to an apartment complex owner alleging the operation of a nightclub caused him not to obtain market rental rates for his apartments).
[69] *Id.* at 317–18 (emphasis added) (citations to the dissent and internal quotations omitted).

worth repeating: private nuisance is appropriate where the City's use *of its own property* is threatened.

Alternatively, the City might seek out individual homeowners, or homeowners' associations, to sue these corporations for private nuisance. The homeowners' associations may have to establish organizational/associational standing to sue on behalf of its members.

C. *Unjust Enrichment & Quantum Meruit*

Detroit could argue, under a theory of unjust enrichment and/or quantum meruit, that it is entitled to recover its expenses for managing the effects of the blighted property owners. Although there are some potential obstacles in proving the elements of this claim, we think that they are viable, especially if the recovery is carefully modeled on the list of damages for Fair Housing Act claims from Baltimore and Memphis. In this Section, we will define unjust enrichment and quantum meruit in Michigan law, point out the potential difficulty in establishing all the elements for Detroit's claim, and conclude that the claim is viable, especially using the Fair Housing Act complaints as a model.

The theories of unjust enrichment and quantum meruit are often used interchangeably in Michigan courts. Courts will often cite cases with unjust enrichment claims to support quantum claims and vice versa, or draw the same conclusion under both theories without specifying which theory led to that conclusion. But in the instances in which the courts have parsed the two theories, the definitions are as follows. The elements of unjust enrichment as defined in Michigan common law are: "(1) the receipt of a benefit by the defendant from the plaintiff, and (2) an inequity resulting to plaintiff from defendant's retention of the benefit." [70] Quantum meruit

[70] *See, e.g.*, Bellevue Ventures v. Morang-Kelly, 302 Mich. App. 59, 63 (2013) (holding that although there was no contract between the parties, "inequity would result if plaintiff were allowed to retain the benefit of the unpaid goods and services, and these facts alone are sufficient to establish both a theory of unjust enrichment and, by extension, plaintiff's capacity to recover damages"); Dumas v. Auto Club Ins.

is defined as "[t]he reasonable value of services; damages awarded in an amount considered reasonable to compensate a person who has rendered services in a quasi-contractual relationship."[71] In other words, the Court will find a cause of action under an unjust enrichment theory where the plaintiff can show that they conferred a benefit to the defendant and the defendant's retention of the benefit was unjust, generally because there was not adequate compensation. A successful claim of quantum meruit, on the other hand, will be found when the court determines that the plaintiff should be awarded damages for uncompensated services rendered to the plaintiff.

For an argument under unjust enrichment and quantum meruit, Detroit would argue that the owners of the blighted property are benefiting by avoiding the legally mandated cost of the blight violations and the abatement of the blighted property, and that this is unjust to the City, because they are avoiding a cost that they are required to pay by law. This reasoning is lifted from *Independence County v. Pfizer, Inc.*,[72] a federal case in the Eastern District of Arkansas. In that case, the plaintiff argued unsuccessfully that the defendant drug companies unjustly benefitted from city services spent to mitigate the effects of abuse of the company's products. The court held that the plaintiff's unjust enrichment claim failed because the defendants did not violate law or policy by selling their products.[73] This reasoning implies that if the defendants' actions were against law or policy, the unjust enrichment claim could have moved forward.

Ass'n, 437 Mich. 521, 546, 473 N.W.2d 652 (1991) (holding that a change in a compensation scheme did not involve an inequity to the plaintiff).

[71] Roznowski v. Bozyk, 73 Mich. App. 405, 409 (1977) (holding that the plaintiff could make a claim to her ex-husband under quantum meruit for services rendered, even though the parties did not have an implied contract).

[72] Independence County v. Pfizer, Inc., 534 F. Supp. 2d 882, 890 (E.D. Ark. 2008).

[73] *Id.* at 890.

As applied to Detroit's case, the prospective defendants were acting in violation of the law by not abating their blighted property. Michigan law does not address this issue specifically, but unjust enrichment is defined very similarly in Arkansas (as "an action . . . where a person has received money or its equivalent under such circumstances that, in equity and good conscience, he or she ought not to retain"). We recommend that Detroit imitate the claim of Independence County and argue that it would be unjust for the defendant property owners to retain the benefit of city service spent to abate their illegal, blighted properties.

A potential obstacle to this unjust enrichment claim is two unpublished opinions holding—in apparent contradiction of precedent that they themselves cites—that the benefits must be conferred directly from plaintiff to defendant.[74] In both *Smith v. Glenmark Generics, Inc.* and *A & M Supply v. Microsoft Corp.*, the Michigan Court of Appeals held in unpublished opinions that an unjust enrichment claim can only be successful if the benefit is directly conferred from the plaintiff to the defendant. Both cases seem to contradict the main authority that they cite—the published case, *Kammer Asphalt v. East China Township Schools*—in which the court found an unjust enrichment claim for the subcontractor plaintiff, even though the benefit was conferred to the defendant indirectly (from the plaintiff/subcontractor to the contractor to the school board/defendant). [75] Because the benefits Detroit has conferred upon the defendant are city services to abate the nuisances directly benefit the neighbors who live near the

[74] Smith v. Glenmark Generics, Inc., USA, 2014 WL 4087968, at *1 (Mich. App. 2014) (holding that unjust enrichment requires a benefit directly conferred from plaintiff to defendant, even though the decisions cited to support this holding do not specifically state that the benefit must be direct); A & M Supply v. Microsoft Corp., No. 274164, 2008 WL 540883, at *2–3 (Mich. Ct. App. Feb. 28, 2008) (concluding that the unjust enrichment doctrine requires "direct receipt" of a benefit, and was therefore inapplicable to "indirect purchasers").
[75] Kammer Asphalt v. East China Township Schools, 443 Mich. 176, 187 (1992) (holding that the defendant was unjustly enriched and explaining the benefit was *indirectly* conferred from subcontractor/plaintiff to the contractor to the defendant/school board).

blight, and not the defendant property owners, it seems like it would be difficult to make out the claim if directness is required. But if the City is able to rely on *Kammer*, and not the unreported cases of *Smith* and *A&M Supply*, they should be able to move forward with their argument. Because Michigan Court Rule requires that, "an unpublished opinion is not precedentially binding under the rule of stare decisis,"[76] we think that Detroit's claim of arguing that the benefit does not need to be direct is viable.

Alternatively, Detroit could argue that unjust enrichment and quantum meruit should be treated as separate legal theories. Under a quantum meruit theory, there is no directness requirement—the court will just look for an equitable payment of services rendered. Although the theories of unjust enrichment and quantum meruit are often used interchangeably in Michigan, Detroit could point to dicta in which judges state that using the two theories interchangeably is incorrect, and they should be treated as distinct legal theories.[77] Detroit could also point to cases in which the two theories are brought as separate claims which implies that they should be treated differently.[78] If Detroit is able to argue that unjust enrichment and quantum meruit are distinct legal theories, Detroit could argue a theory of quantum meruit instead, and avoid the potential directness hurdle.

The Fair Housing Act lawsuits from Baltimore and Memphis provide an excellent model for how the City could document their claim of recovery.[79] In the complaints for both lawsuits

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[76] MCR 7.215(C)(1).
[77] National Concrete Construction Associates v. Walbridge Aldinger Co., No. 269482, 2006 WL 3103045, at *6 (Mich. App. Ct. Nov. 2, 2006) (Schuette, J., concurring) ("The two doctrines are defined differently.").
[78] In both Quality Product and Concepts Co. v. Nagel Precision, Inc., 469 Mich. 362 (2003) and Keywell and Rosenfeld v. Bithell, 254 Mich. App. 30 (2002), the plaintiffs bring both quantum meruit and unjust enrichment claims.
[79] Complaint at ¶142-198, City of Memphis v. Wells Fargo, No. 09-2857-STA, 2011 WL 1706756 (W.D. Tenn. May 4, 2011); Third Amended Complaint ¶¶ 96-295, Mayor and City Council of Baltimore, No. JFM-08-62, 2012 WL 9545322 (D. Md. May 22, 2011).

(both filed by the law firm Relman, Dane and Colfax, PLLC), the plaintiffs included 50 addresses and meticulously listed the resources spent by the city, including building inspections, police and fire, and lawn maintenance. Detroit could include such a list with its complaint, including the amount of unpaid blight violations. An approach like this would signal to the court that actual benefits, with an ascertainable value, were retained.

Thus, although Detroit's unjust enrichment claim is novel, we suggest that the claim is potentially viable—both because the defendant's conduct is against public policy, and therefore likely to be viewed by the court as inequitable, and because it seems possible to overcome the potential directness requirement.

III. CONCLUSION

In conclusion, lawsuits in public nuisance, private nuisance, and quantum meruit and/or unjust enrichment against the negligent property owners may be the needed solution to combat blight in Detroit. Well-planned complaints that adequately show that the abandoned properties are a danger to the health and welfare of the public, and are also in violation of Detroit's ordinances, should be enough to show a cause of action for nuisance under Michigan law and lead to injunctions to force defendants to rehabilitate their properties. Furthermore, a meticulous showing of the expenditures the City spent to mitigate the harm caused by the abandoned properties may also lead to awards of damages to the City under a quantum meruit and/or unjust enrichment theory. The fear of litigation and potential damages may be enough to discourage the "invest and neglect" strategy of these property owners, leaving an opening in Detroit's neighborhoods for growth without blight.