

CODE ENFORCEMENT AND COMMUNITY STABILIZATION: THE FORGOTTEN FIRST RESPONDERS TO VACANT AND FORECLOSED HOMES

*Joseph Schilling**

I. COMMUNITY AND NEIGHBORHOOD STABILIZATION OF VACANT AND FORECLOSED HOMES	105
A. <i>Observations About the Foreclosure Crisis</i>	105
1. A Tale of Two Cities	106
B. <i>Impacts of Foreclosed and Vacant Properties</i>	108
II. VACANT PROPERTY STABILIZATION AND RECLAMATION PLANS.....	112
A. <i>Real Property Information and Vacant Property Warning Systems</i>	113
B. <i>Land Banks, Urban Land Trusts, and Community Development Corporations</i>	115
III. CODE ENFORCEMENT’S CHALLENGES IN ADDRESSING COMMUNITY IMPACTS FROM VACANT AND FORECLOSED HOMES.....	120
A. <i>NVPC Code Enforcement Survey</i>	122
B. <i>Communicating and Holding the Mortgage Lending Industry Responsible for Maintaining Vacant and Foreclosed Homes</i>	124
IV. CODE ENFORCEMENT’S RECENT REGULATORY RESPONSE — VACANT PROPERTY REGISTRATION ORDINANCES	127
A. <i>The Legal and Policy Foundations of Vacant Property Registration Ordinances</i>	128
B. <i>The Classic Registration Model — Wilmington, Delaware and Cincinnati, Ohio</i>	135
Wilmington, Delaware.....	136
Cincinnati, Ohio.....	139

* Joseph Schilling is the Director of Research and Policy for the National Vacant Properties Campaign and Professor in Practice of Urban Affairs and Planning at Virginia Tech in Alexandria, Virginia.

C. <i>The Home Foreclosure Model—Chula Vista, California and Beyond</i>	141
Chula Vista, California.	141
D. <i>Mortgage Industry Responses</i>	144
E. <i>Potential Preemption of VP Registration Ordinances</i> ..	147
CONCLUSION AND NEXT STEPS -THE NEED FOR FEDERAL AND STATE LEADERSHIP	148
A. <i>Code Enforcement’s Call for Help</i>	149
B. <i>State Policy Barriers and Opportunities</i>	152
C. <i>Federal Assistance for Stabilizing Neighborhoods and Reclaiming Vacant Properties</i>	157
1. <i>Rescuing Older Industrial Cities by Revitalizing Neighborhoods and Reclaiming Vacant Properties</i>	158
2. <i>Housing and Economic Recovery Act (HERA) of 2008</i>	160

Much has been written about the macro-policy dimensions of our nation's housing and foreclosure crisis¹ regarding such topics as the impacts of subprime lending, lax or nonexistent federal and/or state regulatory actions, cumbersome foreclosure processes and the crisis's long term repercussions on financial markets and the ultimate health of our nation's economy.² Media reports dwell on the individual stories of families losing homes as direct targets of now bankrupt predatory lenders or inadvertent victims of so called exotic mortgage products.³ Examples abound of fraudulent real property schemes and overextended real property speculators who walked away from multiple mortgages leaving tenants and their families to fend for themselves.⁴

The picture throughout the country's cities and towns is not pretty, and if the economic and housing forecasters are right the crisis will likely deepen in severity, extend for several years and expand its reach. Only a handful of stories describe a foreclosure's impact on neighborhoods and the challenges that local governments face in containing the blighting influences of vacant properties.⁵

Working the frontlines of the foreclosure crisis are local government code enforcement departments as they attempt to

¹ Many media and policy experts frame the problems as a foreclosure crisis (e.g., a crisis in our foreclosure systems from the mounting number of foreclosures). See, e.g., John P. Relman, *Foreclosures, Integration, and the Future of the Fair Housing Act*, 41 IND. L. REV. 629, 629 (2008) (discussing the interaction between the foreclosure crisis and the Fair Housing Act); JULIE A. TAPPENDORF & BRIEN J. SHEAHAN, AMERICAN LAW INSTITUTE, DEALING WITH DISTRESSED PROPERTIES: LOCAL GOVERNMENT STRATEGIES TO MITIGATE THE IMPACT OF FORECLOSURES ON COMMUNITIES 1303 (2008). The foreclosure crisis, however, is a direct by-product of unchecked, and in some instances unscrupulous, activities and practices of the mortgage lending industry, which would make it a mortgage crisis. Since this article focuses on code enforcement's role in containing and confronting the impacts from mortgage foreclosure, I will use the term "foreclosure crisis."

² See Michael Orey, *Dirty Deeds: The Mortgage Crisis has Blighted the Landscape with Boarded-Up Houses*, BUS. WK., Jan. 14, 2008, at 46; ALAN MALLACH, METROPOLITAN POLICY PROGRAM AT BROOKINGS, TACKLING THE MORTGAGE CRISIS: 10 ACTION STEPS FOR STATE GOVERNMENT 1 (2008).

³ See, e.g., Eric S. Nguyen, *Fight for the Family Home*, N.Y. TIMES, Oct. 10, 2008, at A33.

⁴ See *id.*; Michael M. Grynbaum, *Bernanke Urges Flexibility in Mortgage Regulation*, N.Y. TIMES, May 6, 2008, at C5.

⁵ Scott Horsley, *Town Compels Lenders to Care for Vacant Homes* (National Public Radio broadcast Aug. 9, 2007); Grace Gagliano, *Foreclosures Burdening to Code Officers*, BRANDENTON HERALD, Sept. 2, 2008, at 1; Paul Wenske, *Their Foreclosures Delayed, Vacant Homes Fall into Disrepair*, KAN. CITY STAR, June 9, 2008.

maintain order and stabilize neighborhoods from the increasing social and economic harms of vacant and abandoned properties. When foreclosed homes become vacant, code departments are the first responders to citizen complaints often referred by mayors, city councilors, and county commissioners. Local code enforcement officials have the legal and policy responsibilities to enforce a wide array of building, housing, and property maintenance codes and to administer special nuisance abatement processes. The current foreclosure crisis, however, is draining department resources and testing the limits of code enforcement's legal authority and policy directives.

With the constant rise in foreclosures, the meltdown in the mortgage industry and, now, the financial markets, the number of vacant and abandoned properties will continue to grow for the foreseeable future. Classic research on the "Broken Windows Theory" documents that aggressive code enforcement can maintain a sense of community order, protect property values, and stabilize distressed neighborhoods.⁶ The challenge for communities and policymakers is whether the resources and capacity of their code enforcement programs can withstand the continuous wave of foreclosures and onslaught of vacant properties.

Through the lens of local code enforcement, this article will explore the neighborhood impacts of foreclosure and vacant properties and offer a three-prong community stabilization strategy that places code enforcement programs and officials right in the middle. Based on the author's work with the National Vacant Properties Campaign,⁷ the article begins with a national perspective on the community impacts from the foreclosure crisis and includes a snapshot survey of local code enforcement officials. It then focuses on the policy and political controversy over vacant property registration ordinances as it illustrates a classic battle of industry pushback and a campaign for model legislation versus local governments' authority to abate public nuisances caused by vacant properties and hold property owners accountable. It concludes with a range of state and

⁶ George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, THE ATLANTIC MONTHLY, Mar. 1982, at 38 (arguing that there is a correlation between law enforcement's failure to enforce "quality of life" laws, and the increased likelihood of violent crimes in a particular neighborhood).

⁷ National Vacant Properties Campaign, <http://www.vacantproperties.org> (last visited Nov. 11, 2008) [hereinafter Vacant Properties].

federal policy ideas and observations on how code enforcement officials can engender more political support for local code enforcement agencies.

I. COMMUNITY AND NEIGHBORHOOD STABILIZATION OF VACANT AND FORECLOSED HOMES

The complexities of the current foreclosure crisis present local governments and their code enforcement departments with a set of expanding challenges as they attempt to navigate through uncharted waters. Before focusing on the special domain of code enforcement, this article will offer a few observations about the broader policy and land use planning context of the foreclosure crisis, along with a survey of the research on the number and community costs of vacant properties.

A. Observations About the Foreclosure Crisis

Several factors suggest that the foreclosure crisis is not over. In fact, for a variety of reasons, an increasing number of borrowers may face foreclosure in coming months and years.⁸ Of all these reasons, the proliferation of underwater borrowers, adjustable rate mortgage (ARM) resets, and general financial crisis justify pessimism:

1) Underwater Borrowers: For the first time in forty years, the average American home is worth less today than it was the year before.⁹ This decline in home values has left many homeowners “underwater.” In fact, nearly 8.5 million homeowners had negative equity, if any, in their homes by the end of March 2008.¹⁰ Without the equity needed to refinance or sell their homes to cover the costs of their mortgages, these borrowers will be unable to avoid foreclosure if they cannot make monthly payments.

2) ARM Resets: Adjustable rate mortgage resets for subprime mortgages will peak this year, threatening the ability of

⁸ Breck Robinson, Assoc. Prof., Univ. of Delaware, Remarks before the Federal Reserve Bank of Richmond: Mortgage Servicers: Impediments and Possibilities 7 (June 27, 2008).

⁹ Sarah Greenberg, Housing Rehabilitation Specialist, NeighborWorks America, Community Stabilization: The Post-Foreclosure Crisis in Our Communities 7 (June 26, 2008).

¹⁰ *Homeless: People are Losing Houses, Making Late Payments at Record-High Rates*, WINSTON-SALEM JOURNAL, June 6, 2008, available at <http://www.journalnow.com/content/2008/jun/06/homeless-people-are-losing-houses-making-late-paym/business/>.

thousands of borrowers to make their mortgage payments. While the Federal Reserve has mitigated the expected impact of this peak by reducing interest rates, those borrowers that obtained interest-only or payment-option ARMs (not subprime), most of which reset between 2009 and 2011, will face large payment increases even if interest rates do not increase substantially.¹¹

3) Financial Crisis: The current global financial crisis has created a tightening of the credit markets in the United States and abroad. With tighter credit in the housing markets, banks and other lending institutions have raised their lending standards, making it harder for homeowners to refinance their mortgages or purchase new homes.¹²

1. A Tale of Two Cities

Sun Belt and Rust Belt states typically have little in common. When it comes to the foreclosure crisis, however, they now have something to share.¹³ The foreclosure crisis has different scales and impacts depending on the city and regional housing market, as well as the seriousness of the vacant property problem prior to the crisis. It does seem that older industrial cities with weak housing markets and large numbers of vacant properties are primarily found in the Rust Belt, compared with the typical boom-and-bust communities of the West, Southwest, and Sun Belt.¹⁴

Cleveland: Local government officials, nonprofits, and national experts seem to agree that Cleveland/Cuyahoga County represents ground zero when it comes to the community impacts from foreclosures caused by subprime lending.¹⁵ Cleveland and

¹¹ Greenberg, *supra* note 9, at 6.

¹² Tara Kalwarski, *Consumers: Caught in the Credit Squeeze*, BUS. WK., Oct. 1, 2008. With the federal government buyouts of financial giants such as AIG and the financial and stock markets near collapse in the last two weeks of September 2008, the credit crunch has become so severe that Congress enacted a \$700 billion bailout program for large banks in order to stabilize the global financial and stock markets. The Bush Administration and Secretary of Treasury Paulson are still figuring out the details while markets continue to rapidly fluctuate.

¹³ See MALLACH, *supra* note 2, at 5. Of the top ten foreclosure states in 2007, five are older industrial states (Ohio, Michigan, Indiana, New York, and Pennsylvania) and four are strong-market, Sunbelt states (California, Florida, Texas, and Georgia). Economically, Illinois is right in the middle.

¹⁴ Alan Greenblatt, *Two Faces of Foreclosure*, GOVERNING MAG., Apr. 2008, at 22.

¹⁵ Kermit J. Lind, *The Perfect Storm: An Eyewitness Report from Ground Zero in Cleveland's Neighborhoods*, 17 J. OF AFFORDABLE HOUSING 237 (2008)

other weak market cities, such as Detroit, Baltimore, Buffalo and Flint have been grappling with thousands of vacant properties for decades.¹⁶ As a result of their economic distress, they were prime targets for predatory lending and subprime loans.¹⁷ Within these cities, predatory and subprime lending firms targeted Black and Latino neighborhoods that were concentrated in poor urban neighborhoods and modest suburbs where working-class families were most likely to own or buy homes. Many of these loans were for refinancing homes owned by long time residents, posing a greater threat to neighborhoods that have been stable for decades. Moreover, since housing demand in these areas is traditionally weak, large numbers of foreclosed homes cannot be absorbed by the market, and properties are more likely to be abandoned or flipped by speculators.¹⁸

Phoenix and Las Vegas: These Sun Belt cities, along with San Diego, Atlanta, and Orlando, also face significant impacts from foreclosed properties. For the first time in decades, these boom-and-bust cities are grappling with a rising tide of chronically vacant properties.¹⁹ The challenge they confront is in preventing these vacant properties from remaining blighted and unmarketable during a time when cities are cutting budgets due to the decline in new building and housing permits. From a long-range land use planning perspective, these communities were probably overbuilt, and the foreclosure crisis was a cyclical market correction—prices at some point must fall. However, with the increasing number of vacant homes along with rising energy and fuel costs, it is likely that some residents will vote

(discussing the effects of home foreclosures and abandonment's on the city of Cleveland, Ohio).

¹⁶ NAT'L VACANT PROPERTIES CAMPAIGN, BLUEPRINT BUFFALO: REGIONAL STRATEGIES AND LOCAL TOOLS FOR RECLAIMING VACANT PROPERTIES IN THE CITY AND SUBURBS OF BUFFALO 1-2 (2006) [hereinafter BLUEPRINT BUFFALO]; Matt Bach, *Flint, Detroit Foreclosure Rates Soar*, FLINT J., Nov. 14, 2006, at 3; Robert J. Terry, *City's High Foreclosure Rate Spurs Hotline, Counseling*, BALTIMORE BUS. J., Sept. 27, 2006.

¹⁷ CLAUDIA COULTON, ET AL., CENTER ON URBAN POVERTY AND COMMUNITY DEVELOPMENT, FORECLOSURE AND BEYOND: A REPORT ON OWNERSHIP AND HOUSING VALUES FOLLOWING SHERIFF'S SALES, CLEVELAND AND CUYAHOGA COUNTY, 2000-2007 2 (2008); CLAUDIA COULTON, ET AL., CENTER ON URBAN POVERTY AND COMMUNITY DEVELOPMENT, PATHWAYS TO FORECLOSURE: A LONGITUDINAL STUDY OF MORTGAGE LOANS, CLEVELAND AND CUYAHOGA COUNTY, 2005-2008, at 3,14 (2008); Kathleen C. Engel & Patricia A. McCoy, *A Tale of Three Markets: The Law and Economics of Predatory Lending*, 80 TEX. L. REV. 1255, 1260.

¹⁸ Lind, *supra* note 15, at 239-40.

¹⁹ Greenblatt, *supra* note 14, at 22.

with their feet, exiting planned communities in the outer ring suburbs and exurbs and leaving behind hundreds of housing units that will eventually become dilapidated and vacant, thus perhaps signaling the official end of suburban sprawl as we know it today.²⁰

B. Impacts of Foreclosed and Vacant Properties

Most of the existing research and data focus either on the number and costs of vacant properties or the number and costs of foreclosures. There is little, if any, research that explores the relationships between the number and length of time that homes in the foreclosure process become vacant, let alone the community costs of vacant *and* foreclosed homes.

One of the challenges in researching vacant property costs is accurately determining the number of vacant properties. There are a number of reasons for this. First, we do not have a national vacant property database. Together, the U.S. Census' patchy catalogue of vacant housing units and, recently, the U.S. Postal Service's list of undeliverable addresses provide us only with a partial snapshot of potentially chronic vacant property problems. The data does not allow us to identify with certainty the condition of the structure or its potential for repair and rehabilitation. Second, property conditions change daily, so it is difficult to maintain current and reliable vacant property data. Third, only a few local governments maintain a comprehensive inventory of the number and location of vacant lands and abandoned buildings. According to the 2004 Pagano and Bowman survey, cities average about fifteen percent vacant land available for development.²¹ Many cities still rely on the windshield surveys by code enforcement officials and neighborhood groups. Without an accurate and comprehensive inventory that covers all of the vacant property types, communities struggle with selecting the appropriate strategy or efficiently targeting their limited resources to the right neighborhoods.

Foreclosures take time because they are governed by diverse sets of state laws and arcane processes (e.g., servicing notices, sheriffs' sales, bankruptcy stays, etc.) and are mostly managed by the mortgage servicing industry. All of these factors taken

²⁰ Christopher B. Leinberger, *The Next Slum?*, ATLANTIC MONTHLY, Mar. 2008, available at <http://www.theatlantic.com/doc/200803/subprime>.

²¹ ANN O'M. BOWMAN & MICHAEL A. PAGANO, TERRA INCONGNITA: VACANT LAND AND URBAN STRATEGIES 7 (2004).

together equal more time. The longer it takes to get through foreclosure, the greater chance that homes will be vacant longer, and the longer they are vacant the greater opportunity for them to be vandalized, thus making it more costly for the rehabilitation and repairs necessary for eventual resale and occupancy. At its core, foreclosure is a process governed by state laws with multiple entities and institutions.²² One must understand not only the legal structures, but also the underlying the interests and motivations of these players as they move through the different stages of the foreclosure process. Moreover, each stage will generate a different set of potential community costs.

Moreover, the public data sets that cover the various stages of the foreclosure process do not indicate when the property becomes vacant and for how long it has been vacant. The mortgage industry does have proprietary data sets, but the information is not typically accessible or affordable for most local government and nonprofit entities. More research is necessary to understand the problem. Creation of a new model that can track and inventory when foreclosed properties become vacant would be particularly useful. Such a model would include important information such as: What percentage of foreclosed homes became vacant and for how long? What is the average length of time, and is that period of time increasing in certain markets? Does that vary for judicial vs. non-judicial foreclosure processes? Correlating vacancy with foreclosure is essential for future federal and state assistance to communities, especially for its code enforcement operations.

Community Costs of Vacant Properties: Vacant and abandoned properties are not a new phenomenon. A survey of 432 municipal housing directors revealed that fifty-five percent regarded vacant and abandoned properties as either a major or moderate problem in their locality, and for municipalities in the Midwest it was ranked as the third most significant housing problem.²³ This concern is most certainly on the rise, in light of the foreclosure crisis's exacerbation of the community impacts of vacant and abandoned properties. In a 2008 survey of 211 local elected officials, sixty-two percent of surveyed officials said that foreclosures had increased either a lot or some, thirty-three percent of respondents said that abandoned/vacant properties

²² See, e.g., N.Y. C.P.L.R. § 213 (McKinney 2008).

²³ CHRISTIANA MCFARLAND ET AL., NATIONAL LEAGUE OF CITIES, LOCAL HOUSING CONDITIONS AND CONTEXTS: A FRAMEWORK FOR POLICY MAKING 3 (2007).

and other forms of blight had increased, and thirty-three percent reported that city revenues and/or revenue estimates had decreased.²⁴ Likewise, in a 2008 best practices survey of mayors from twenty-seven cities, twenty-eight percent of respondents said that their efforts relating to vacant and abandoned properties had lost ground since the foreclosure crisis began, and seventy-one percent anticipated that their mortgage foreclosure problem would increase in the next year.²⁵

The municipal costs associated with vacant properties are staggering and require strategic solutions to offset the impact of abandonment on the surrounding community. The impact on adjoining property taxes and other homeowner costs are also significant.²⁶ Costs to communities imposed by vacant properties are legion:

- There is a direct correlation between crime and vacant and/or abandoned properties which results in the deterioration of housing stock and neighborhoods by spurring disinvestment.²⁷ In Austin, Texas, blocks with vacant buildings had 3.2 times as many drug calls to police, 1.8 times as many theft calls, and twice the number of calls for violent behavior as those neighborhoods without vacant properties.²⁸
- Annually, there is over \$73 million in property damage as a result of more than 12,000 fires in abandoned structures.²⁹
- The cost of demolishing and/or cleaning up vacant properties is astronomical, ranging from \$800,000 annually in Detroit to over \$1.8 million in Philadelphia.³⁰
- Studies have found that properties within close proximity to vacant structures can lose up to \$7,627 in value.³¹
- Abandoned property is often tax delinquent, which affects

²⁴ CHRISTIANA MCFARLAND & WILLIAM MCGAHAN, NATIONAL LEAGUE OF CITIES, HOUSING FINANCE AND FORECLOSURE CRISIS: LOCAL IMPACTS AND RESPONSES 1-2 (2008).

²⁵ UNITED STATES CONFERENCE OF MAYORS, VACANT AND ABANDONED PROPERTIES: SURVEY AND BEST PRACTICES 1, 3 (2008) [hereinafter U.S. CONF. OF MAYORS].

²⁶ NATIONAL VACANT PROPERTIES CAMPAIGN, VACANT PROPERTIES: THE TRUE COST TO COMMUNITIES 11 (2005) [hereinafter COST TO COMMUNITIES].

²⁷ See MCFARLAND ET AL., *supra* note 23, at 6.

²⁸ See COST TO COMMUNITIES, *supra* note 26, at 1.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

general city services, and particularly funding for schools.³²

- Homeowners within close proximity to abandoned properties are often charged higher insurance premiums or even face policy cancellations because of the unstable nature of the neighborhood created by the vacant properties.³³

Moreover, a 2008 study that examined the impacts of vacant and abandoned properties in eight Ohio cities found that these properties cost communities \$15 million annually in city service costs, including the costs of code enforcement, demolition and boarding of buildings, property maintenance, and police and fire runs.³⁴ What's more, in the seven cities for which data was available, lost tax revenue totaled nearly \$49 million.³⁵ Because schools in Ohio receive about two-thirds of property tax revenue statewide, this loss was particularly severe for the Ohio school system.³⁶

Community Costs of Foreclosed Properties: Empirical research also documents the wide variety of community costs caused by homes in the foreclosure process, many of which that are vacant. For example, a 2005 case study of Chicago found the collective costs to neighbors within a 150 degree radius of a block with a large concentration of vacant properties amounted to a \$220,000 loss in terms of capital depreciation of their houses.³⁷ A 2006 study of Chicago by Dan Immergluck found that an occupied home within 500 feet of a foreclosed home would lose close to one percent of its value each year.³⁸ Calls for service to local law enforcement and code officials have nearly doubled in some cities, while city revenues sources dwindle in light of the general economic downturn and as demand for city services increase.³⁹

³² ALAN MALLACH ET AL., NATIONAL VACANT PROPERTY CAMPAIGN ASSESSMENT REP., CLEVELAND AT THE CROSSROADS: TURNING ABANDONMENT INTO OPPORTUNITY 1 (2005).

³³ COSTS TO COMMUNITIES, *supra* note 26, at 11.

³⁴ COMMUNITY RESEARCH PARTNERS, \$60 MILLION AND COUNTING: THE COST OF VACANT AND ABANDONED PROPERTIES TO EIGHT OHIO CITIES i, v (2008).

³⁵ *Id.* at i.

³⁶ *Id.* at vii.

³⁷ WILLIAM C. APGAR ET AL., HOMEOWNERSHIP PRESERVATION FOUNDATION, THE MUNICIPAL COSTS OF FORECLOSURES: A CHICAGO CASE STUDY 28 (2005).

³⁸ See Dan Immergluck & Geoff Smith, *The External Costs of Foreclosure: The Impact of Single-Family Mortgage Foreclosures on Property Values*, 17 HOUSING POL'Y DEBATE 57, 57-58 (2006) (examining the effects of abandoned property on property values in the Chicago area based on data compiled from 1997-1999).

³⁹ See Alan C. Weinstein, *The Subprime Mortgage Crisis and Local*

II. VACANT PROPERTY STABILIZATION AND RECLAMATION PLANS

In response to the general challenges surrounding vacant properties, three national organizations launched the National Vacant Properties Campaign (NVPC) in 2003 to provide direct technical assistance to communities, primarily local governments and community development corporations, in the design of comprehensive vacant property prevention and reclamation strategies.⁴⁰ While the Campaign's field work has primarily focused on vacant properties fueled by industry dislocation, poverty and blight, its policy frameworks offer a solid foundation for stabilizing neighborhoods with vacant and foreclosed homes.

Instead of a piecemeal approach, communities must design and adopt a comprehensive "vacant properties action plan," as the long term community impacts from vacant and foreclosed homes will be with us for decades to come.⁴¹ A "vacant properties action plan" would first stabilize neighborhoods and then lay the groundwork for catalytic public and nonprofit development initiatives and eventually the return of private investment. Such a plan should include a regional or city wide inventory of vacant or abandoned properties, a neighborhood level typology based on market conditions and housing unit characteristics (e.g., physical property condition, market data, outstanding liens placed on the property, etc.), and a proposed rehabilitation (or demolition) plan, along with an implementation schedule that prioritizes the use of rehabilitation resources over a period of several years.⁴² Strategic

Government: Immediate and Future Challenges, MUN. LAW., May/June 2008, at 8-9; *see also* CENTER FOR RESPONSIBLE LENDING, SUBPRIME SPILLOVER: FORECLOSURES COST NEIGHBORS \$202 BILLION; 40.6 MILLION HOMES LOSE \$5,000 ON AVERAGE 5 (2008); CHRISTIANA MCFARLAND & WILLIAM MCGAHAN, NATIONAL LEAGUE OF CITIES RESEARCH BRIEF ON AMERICAN CITIES, HOUSING FINANCE AND FORECLOSURES CRISIS: LOCAL IMPACTS AND RESPONSES 2 (2008).

⁴⁰ Vacant Properties, *supra* note 7; BLUEPRINT BUFFALO, *supra* note 16.

⁴¹ Although not the primary focus of this article, local governments should consider using part of their neighborhood stabilization funds approved by Congress in the 2008 Housing and Economic Development Recovery Act to support the design and implementation of a vacant properties action plan. *See, e.g.*, Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, 122 Stat. 2654 (2008); *see also* 42 U.S.C § 1441 (2008).

⁴² *See* JOHN KROMER, NEIGHBORHOOD RECOVERY: REINVESTMENT POLICY FOR THE NEW HOMETOWN 40-41 (2000). NVPC Advisory Board Member John Kromer recommends including the following into neighborhood reinvestment plans: 1.) strategies to preserve existing housing stock through locally funded repair programs, 2.) strategic plans outlining the decision matrix used for determining which properties will be rehabilitated and which will be demolished, 3.) policies to repair recently abandoned properties using rehabilitation loan financing supplemented by moderate city subsidies, and 4.) plans to demolish those vacant

plans to address vacant properties based on neighborhoods with various levels of decline will ensure the right strategies are applied to the right places at the right time.

Beyond encouraging broad-based neighborhood planning, specific strategies for vacant property revitalization include: home repair/rehabilitation programs, foreclosure prevention, vacant property information systems, code enforcement, property maintenance codes, receivership, land banking, and vacant property registration ordinances.⁴³ The most successful localities have employed a variety of these strategies. Only a handful of communities, however, have launched comprehensive vacant property prevention and reclamation initiatives,⁴⁴ and even these model programs encountered problems and community push back.⁴⁵

Through field work and policy research, the NVPC has identified three core components of successful vacant property stabilization and reclamation plans: 1) real property information systems; 2) comprehensive code enforcement strategies and tools; and 3) vacant property acquisition, management, and reuse programs, such as land banks, land trusts, and partnerships with housing/community development corporations.⁴⁶ Since code enforcement is the primary focus of this article, we will now discuss the first two policy components: information systems and land banks.

A. Real Property Information and Vacant Property Warning Systems

All of the institutional players seem to share similar interests in preserving individual properties and protecting neighborhoods

properties that are either too expensive to rehabilitate or beyond the point of repair, coupled with plans to rebuild on the remaining vacant lots.

⁴³ National Vacant Properties Campaign, *Strategies & Technical Tools*, <http://www.vacantproperties.org/strategies/tools.html> (last visited Nov. 12, 2008) [hereinafter Nat'l Vacant Properties Campaign].

⁴⁴ See Joe Schilling, *Snapshots of Innovative Vacant Property Strategies*, FANNIE MAE FOUNDATION (Fannie Mae, Washington, D.C.), 2006, at 3. Former Indianapolis Mayor Bart Peterson convened a city/county vacant properties task force that produced several reports and reforms to streamline existing state and local laws; Philadelphia's Neighborhood Transformation Initiative and Baltimore's Project 5000 are good examples of comprehensive vacant property programs.

⁴⁵ See Stephen J. McGovern, *Philadelphia's Neighborhood Transformation Initiative: A Case Study of Mayoral Leadership, Bold Planning, and Conflict*, 17 HOUSING POLICY DEBATE 529, 543-44 (2006).

⁴⁶ Nat'l Vacant Properties Campaign, *supra* note 43.

from the blighting influences of vacant properties. Many investors, lenders and mortgage servicers want to preserve individual assets and prevent further vacancy and abandonment in the hope that it will stabilize neighborhood property values and protect their portfolios of properties that are not in foreclosure. Local government leaders, code officials, and community development practitioners also understand that containing the spill-over effects of vacant and foreclosed homes can create stronger neighborhoods and protect their public and nonprofit revitalization investments.⁴⁷ In order to facilitate these common goals, private, public, and nonprofit players need timely and easy access to data about foreclosures, property conditions, legal title, and vacant properties.

Most cities, however, do not have real property information systems that integrate the data from a host of public entities and provide easy access to policymakers, practitioners and the community. Critical pieces of parcel level data would include the number of foreclosure filings, assessment and judgment liens, ownership history, probate, sheriffs' sales, tax delinquency, code enforcement violations, water utility shut offs, loans, etc. Current contact information is needed for all holders with a recorded legal interest in the property. Such a data system or network would serve as an early warning system to identify property owners and neighborhoods on the verge of a foreclosure and vacant property crisis as well as target code enforcement resources to contain blight and prevent vacant properties from becoming abandoned.

The principal barrier to creating a comprehensive information system is that different levels of government and departments within cities and counties maintain independent databases and systems that are not compatible with one another. In addition, it is hard for local governments to access, let alone acquire, parcel-level data about borrowers and mortgage terms, as much of that data is proprietary.

Within the past ten years, a few pioneering cities have partnered with their local universities, who work as data intermediaries, to design these systems and negotiate with the various public entities that hold the data.⁴⁸ The City of

⁴⁷ See, e.g., Brian Boyd, *Copper Capers Hurt Homes Sales*, SOUTH COAST TODAY, Oct. 9, 2008, available at <http://www.southcoasttoday.com/apps/pbcs.dll/article?AID=/20081009/NEWS/810090334>.

⁴⁸ Schilling, *supra* note 44.

Philadelphia, through a partnership with the University of Pennsylvania, has developed a Neighborhood Information System (NIS) that provides current and comprehensive real property information to both city officials and community groups. This data ranges from properties with code violations to those with active building permits. The university works to ensure the compatibility of data from disparate databases while facilitating data sharing among government agencies and community organizations.⁴⁹ They also transfer this information into Geographic Information Systems (GIS) maps.⁵⁰ Case Western Reserve University now operates the NEO CANDO real property information that serves Cleveland and Cuyahoga County, Ohio.⁵¹ They work with city officials and community development leaders to collect, maintain, and analyze critical real property data.⁵²

B. Land Banks, Urban Land Trusts, and Community Development Corporations

Real property information systems can support code enforcement actions to stabilize neighborhoods in the short term, but the impacts of foreclosures are too wide and deep to rely exclusively on code enforcement. Communities will need to develop an array of strategies and tools to acquire and reuse vacant and foreclosed homes.

Why Acquire Vacant and Foreclosed Homes?: With all of the challenges involving information systems and code enforcement strategies, why should local governments take on the additional responsibilities of managing a program that acquires and reuses vacant and foreclosed homes? The primary concern is bulk sales of foreclosed properties by lending institutions to speculators who do not have a commitment or connection to the community. Looking at the number of late night infomercials and the foreclosure bus tours, real estate companies and individual

⁴⁹ *Id.*

⁵⁰ *Id.*; The Guide to Geographic Information Systems, <http://www.gis.com/> (last visited Nov. 13, 2008).

⁵¹ NEO CANDO, About NEO CANDO, <http://neocando.case.edu/cando/index.jsp?tPage=about> (last visited Nov. 13, 2008).

⁵² Sarah Treuhaft, *Parcel Data: Key to Healthy Community*, GIS DEVELOPMENT, Aug. 2008, available at <http://www.gisdevelopment.net/magazine/global/2008/august/44.htm> (last visited Nov. 11, 2008). See also Michael Schramm, Phyllis Betts & Kristin Dawson, Presentation at Reclaiming Vacant Properties Annual Conference, Data for Change: Property Information Systems and Equitable Revitalization (Sept. 24, 2007).

speculators seeking a fast buck will rent out the units and do the bare minimum to keep them habitable.⁵³ When the market rises they will flip them, make their money, and then go onto the next batch of vacant properties.⁵⁴ Meanwhile, property values in once stable neighborhoods decline and housing code enforcement cases increase—it is a familiar and tragic story of neighborhood transformation.

Another motivation for establishing land banks is the increasing inventories of real estate owned (REO) properties.⁵⁵ If the lending institutions acquire or reacquire the foreclosed home, its REO department manages that property and prepares it for sale. In a good housing market it might be only a few weeks or months before the REO department, with assistance from a network of local realtors, would easily find willing purchasers interested in home ownership. Under the current housing market the supply of REO properties far exceeds the number of potential buyers, even in the once strong housing markets found in the West and Sunbelt. Given the oversupply of REOs, it seems the lending industry is now more interested in negotiating deals with local government and community development corporations at reduced prices. The potential danger is if the industry does not work with these public benefit entities, they will commence bulk sales to speculators, sight unseen, including out of state and foreign investors; thus, triggering another potential wave of blight and abandonments. The challenge is the lack of institutions and staff for local governments and community development corporations (CDCs) to negotiate hundreds of individual transitions. National community development intermediaries (e.g., LISC, Enterprise Partners, and Neighbor-Works) are now working with the industry to devise new ways of putting together bulk sales.

Land Banks: A comprehensive and effective approach to community stabilization will require an entity with sufficient capacity and expertise to acquire, demolish, maintain, and reuse inventories of vacant properties. Different from redevelopment authorities, land banks are typically governmental or quasi-public entities that focus on the rehabilitation of vacant,

⁵³ See Jay Fitzgerald, *Tour De Foreclosure: See Seized Homes on Toney Hub Streets*, BOSTON HERALD, Sept. 5, 2008, at 18.

⁵⁴ See Greta Guest, *Housing Slump Attractive to Investors: Some Buyers Look to Get 100 or More*, DETROIT FREE PRESS, Mar. 31, 2008.

⁵⁵ *National Coalition Urges Congress to Support \$4 Billion in Community Stabilization Funding*, BIOTECH WK., July 2, 2008, at 4276.

abandoned, and tax-delinquent properties to productive re-use.⁵⁶ They can assemble and hold multiple properties, eventually transferring legal title to responsible nonprofit and private developers. By taking the initial risk of preparing land in weak real estate markets or controlling the surplus of foreclosed properties in strong real estate markets, land banks can encourage private investment and create momentum for neighborhood revitalization.

The cities of Atlanta, Louisville, Cleveland, and St. Louis have some of the longest-running land-banking programs in the nation, dating as far back as 1971.⁵⁷ These programs vary in capacity depending on government support, market conditions, and community demands. Michigan has the nation's most comprehensive land banking legislation. It couples a fast track tax foreclosure process for vacant properties with ensuring a more efficient mechanism to transfer ownership of properties into the land bank.⁵⁸ As of this writing, ten Michigan counties have adopted special land bank authorities.⁵⁹ The state also operates its own land bank that now owns or manages more than 8,000 properties.⁶⁰

Attempting to reverse the economic misfortunes of Flint, the Genesee County Land Bank (GCLB) is emerging as the nation's most comprehensive land banking operation.⁶¹ Since 2003, the GCLB has demolished nearly 1,000 unsafe and abandoned buildings, managed the rehabilitation of ninety affordable rental units and eighty single-family homes, and sold 700 side yard lots to adjacent property owners.⁶² A 2007 study by Michigan State University's Land Policy Institute (LPI) found that the GCLB expenditure of \$3.5 million from 2002-2005 on rehabilitation and reclamation of tax delinquent properties leveraged more than

⁵⁶ FRANK S. ALEXANDER, FANNIE MAE FOUNDATION, *LAND BANK AUTHORITIES: A GUIDE FOR THE CREATION AND OPERATION OF LOCAL LAND BANKS* 5 (2005).

⁵⁷ *Id.* at 5-6.

⁵⁸ *See, e.g.*, MICH. COMP. LAWS SERV. §§ 124.751 – 124.774 (West 2008).

⁵⁹ Michigan Department of Labor and Economic Growth, http://www.michigan.gov/dleg/0,1607,7-154-34176_44777---,00.html (last visited Nov. 11, 2008).

⁶⁰ Michigan Land Bank Fast Track Authority, <http://www.mcgi.state.mi.us/mlbfta/QueryResults.aspx> (last visited Oct. 13, 2008) (click submit on keyword search with no search term to see results for all properties within the land bank).

⁶¹ ALEXANDER, *supra* note 56, at 2.

⁶² Chris McCarus, *Banking on Flint: County Treasurer Dan Kildee Collects National Attention for Land Bank Program*, DOME MAG., July 16, 2008, available at http://www.domemagazine.com/features/july08/cover_july08.html.

\$112 million in economic benefits for the city of Flint.⁶³

The GCLB relies on three primary revenue sources for the management and holding costs of land-banked properties: (1) a state tax-foreclosure fee to fund staff, overhead, and basic maintenance; (2) land-sale proceeds for mowing, cleaning, and other routine cleanup as authorized under Michigan law; and (3) Brownfields Tax Increment Finance (TIF) Revenue derived from a \$5 million land bank issuance of TIF bonds that cover the majority of demolition and site-preparation funding.⁶⁴ Pooling all of these revenue sources together, the GCLB maintains an \$8 million self-sustaining land revitalization fund.⁶⁵

The GCLB highlights how a land bank could work as part of a comprehensive plan to address the problems presented by foreclosed and vacant homes. Through the work of the NVPC policymakers in Baltimore, Cleveland, Syracuse, and even the City of San Diego and San Diego County are exploring the GCLB model.

One challenge is that only a handful of states expressly grant the authority for municipalities to create land banks (e.g., Georgia, Kentucky, Michigan, Missouri, and Ohio).⁶⁶ But as jurisdictions contend with increasing numbers of vacant properties, more advocates and policymakers have recognized the impact a dedicated authority can make. Recently, three additional states have passed land-banking legislation – Indiana, Texas, and Maryland – and now approximately twenty-five land bank entities operate throughout the U.S.⁶⁷ Even without express state authority, several cities and counties have established land banking programs through existing powers of public benefit

⁶³ NIGEL G. GRISWOLD & PATRICIA E. NORRIS, LAND POLICY INSTITUTE, ECONOMIC IMPACTS OF RESIDENTIAL PROPERTY ABANDONMENT AND THE GENESEE COUNTY LAND BANK IN FLINT, MICHIGAN 4 (2005). Griswold and Norris examined profits from the sale and redevelopment of GCLB properties, the financial assets in the community by helping keep habitable properties out of foreclosure, and the subsequent increase in the value of adjacent homes and land.

⁶⁴ *Id.* at 21.

⁶⁵ Press Release, Ash Institute for Democratic Governance and Innovation, Genesee County Land Bank Honored as Innovators in American Government Award Winner (Sept. 25, 2007).

⁶⁶ See ALEXANDER, *supra* note 56, at App. B; GA. CODE ANN. §§ 48-4-60 – 48-4-65 (LexisNexis 1999); KY. REV. STAT. ANN. §§ 65.350 – 65.375 (LexisNexis 2004); MICH. COMP. LAWS SERV. §§ 124.751 – 124.774 (West 2006); MO. ANN. STAT. §§ 92.875 – 92.920 (West 1998); OHIO REV. CODE ANN. §§ 5722.01 – 5722.21 (LexisNexis 2005).

⁶⁷ See IND. CODE ANN. § 6-1.1-24-6.7 (LexisNexis 2007); TEX. TAX CODE ANN. § 34.051 (Vernon 2008); MD. CODE ANN., TAX-PROP. § 14-808 (LexisNexis 2007).

authorities and inter-local agreements.⁶⁸ A number of redevelopment authorities (e.g., New Orleans, Pittsburgh, etc.) have broad city-wide powers that could likely take on the task of vacant property reclamation.⁶⁹

Beyond state authorizing legislation, financing the start of the land bank and its operations would also pose challenges to many cities, especially those Rust Belt cities with already weak fiscal capacity. Land banks may receive funds from a combination of bonds, foundation grants, and local funds and sometimes from federal and state housing, community, and economic development programs. The GCLB received an initial grant of \$200,000 from the C.S. Mott Foundation to design and pilot test its programs.⁷⁰ The Housing and Economic Recovery Act of 2008 (HERA) expressly gives local governments authority to spend its Neighborhood Stabilization Program grants to establish land banks.⁷¹

Community Land Trusts: Another possible strategy for the acquisition and rehabilitation of vacant and foreclosed homes is community land trusts (CLTs). Land trusts were initially formed to protect lands with natural, ecological, recreational, scenic, historic or productive value.⁷² Within the past ten years, the land trust model has been effectively used as an affordable housing strategy by retaining ownership of residential property in perpetuity while selling or leasing the building and other improvements.⁷³ Several research and policy reports sponsored by the Lincoln Land Institute have fueled the expansion of the CLT model in such areas as inclusionary housing, growth

⁶⁸ ALAN MALLACH, BRINGING BUILDINGS BACK: FROM ABANDONED PROPERTIES TO COMMUNITY ASSETS 137-140 (2006).

⁶⁹ LA. REV. STAT. ANN. § 33:4720.56 (West 2008); 35 PA. CONS. STAT. ANN. §§ 1701 – 1719.2 (West 2008).

⁷⁰ CHARLES STEWART MOTT FOUNDATION, 2006 ANNUAL REPORT 20 (2006).

⁷¹ See Housing and Economic Recovery Act (HERA) of 2008, Pub. L. No. 110-289, § 2301(3)(C), 122 Stat. 2654, 2853 (2008). The Campaign would suggest 25% is a good standard for NSP recipients to establish a land bank and keep it operating for a couple of years so there is sufficient time to institutionalize the process and pilot test land bank processes and procedures. Although local governments must file their plans with HUD by December 1, 2008, they should consider amending their local plans or seek state NSP funds to establish land banks.

⁷² Nancey Green Leigh, *Promoting More Equitable Brownfield Redevelopment*, LAND LINES (Lincoln Institute of Land Policy, Cambridge, M.A.), Sept. 2000, at 1-3.

⁷³ Rosalind Greenstein & Yesim Sungu-Eryilmaz, *Community Land Trusts: Leasing Land for Affordable Housing*, LAND LINES (Lincoln Institute of Land Policy, Cambridge, M.A.), Apr. 2005, at 8.

management, and home ownership.⁷⁴ Creating a new land trust model that focuses on vacant and foreclosed homes could provide the necessary tools for acquiring, managing and redeveloping homes for affordable and work force housing.⁷⁵

III. CODE ENFORCEMENT'S CHALLENGES IN ADDRESSING COMMUNITY IMPACTS FROM VACANT AND FORECLOSED HOMES

Code enforcement officials have curiously found themselves in the national and local media spotlight with reports about foreclosed homes with murky pool water, uncut grass, graffiti, illegal parties, vandalism, and structural stripping.⁷⁶ Articles have also covered the recent explosion of local vacant property registration ordinances designed to address the difficulties of reaching responsible mortgage servicers and the industry's general lack of responsiveness in maintaining properties in foreclosure.⁷⁷ At a congressional committee hearing in May of 2008, the code enforcement director for the city of Chula Vista, California testified about the city's policy actions to stabilize neighborhoods under stress from the growing number of foreclosures.⁷⁸ Who could have thought that a code enforcement official would have the opportunity to shape federal legislation on neighborhood stabilization?

Despite the media attention, code officials are struggling with how to adapt their code enforcement programs and remedies to address the often surreal, Alice in Wonderland-esque world of the mortgage industry and local foreclosure rules and processes.

⁷⁴ See, e.g., JOHN EMMES DAVIS & RICK JACOBUS, LINCOLN INSTITUTE OF LAND POLICY, *THE CITY-CLT PARTNERSHIP: MUNICIPAL SUPPORT FOR COMMUNITY LAND TRUSTS*, POLICY FOCUS REPORT 15 (2008).

⁷⁵ David Abromowitz & Roz Greenstein, Op-Ed., *A Foreclosure-Free Option*, BOSTON GLOBE, Jan. 23, 2008, at 15A.

⁷⁶ See, e.g., Janice Neumann, *The Growing Charge of the Blight Brigade: More Suburbs Join Chorus To Battle Vacant Eyesores*, CHI. TRIB., Sept. 28, 2008, at 1; Angela Lau, *Focus Put on Upkeep of Foreclosed Homes: City Eyes New Rules Backed by Big Fines*, SAN DIEGO UNION-TRIB., Oct. 10, 2008; George Houde, *Volunteer Group Gets Tangled in Carpentersville Political Feud*, CHICAGO TRIB., Sept. 27, 2008, at 20; *Foreclosure Fallout: A Neighborhood Eyesore*, CBS4.COM, Jan. 23, 2008, available at <http://cbs4.com/local/foreclosure.homes.real.2.842946.html> (last visited Nov. 12, 2008).

⁷⁷ See Neumann, *supra* note 76; Editorial, *Turning Empty Homes Into Opportunities*, STAR TRIB. (MINNEAPOLIS-ST. PAUL), June 27, 2008, at 14A; Opinion, *Chula Vista Takes on Vacant-Home Eyesores*, SAN DIEGO UNION-TRIB., Aug. 2, 2007, at B11.

⁷⁸ Doug Leeper, City of Chula Vista Code Enforcement Manager, Testimony before the House Subcommittee on Domestic Policy, *Neighborhoods: The Blameless Victims of the Sub-Prime Mortgage Crisis 2* (May 21, 2008).

First, traditional code enforcement strategies do not work well when the property owner leaves at some stage in the foreclosure process or does not have the financial or legal ability to maintain and repair the property; effective enforcement actions requires an economically viable and rational property owner. Remember, the code enforcement operation presumes the existence of a physical owner or on-property resident or, at worst, a readily identifiable institutional owner. In the advent of the current crisis, mortgages were divided up among a hopelessly diffuse community of investors and investment institutions which have no connection to, much less incentive to maintain, any given property. This leaves code enforcement officials with the nearly impossible task of tracking down the lender and/or its mortgage servicing company to maintain the property. In theory, the lender and its mortgage servicers have an interest in preserving the homes to avoid vandalism and waste of these real property assets. Until the mortgage company finishes the foreclosure process, obtains the property through a sheriff's sale, and then officially records title, they have limited legal responsibility as the "mortgagee in possession." Thus, the foreclosure process often places these properties in a type of legal limbo that shifts the immediate burden on code enforcement departments to maintain the property and abate public nuisances on it, as assess costs that may not be recoverable.⁷⁹

Second, the complexity of the industry makes it difficult to identify a responsible party: the lender and mortgage servicers, and especially the mysterious investors, make it nearly impossible for code officials to provide legal notice and therefore renders many typical code enforcement remedies, such as criminal prosecution, useless.⁸⁰

Third, cities can typically obtain administrative abatement orders that allow city work crews and/or their contractors to take action and file the costs as a special assessment against the property.⁸¹ Depending on state law, code agencies have varying levels of nuisance abatement powers and authority to recover the costs. In some states, a nuisance abatement lien is given the same superseding priority as a municipal tax lien, while in others

⁷⁹ *Id.* at 4.

⁸⁰ *Id.* at 3.

⁸¹ *See, e.g.*, N.Y. TOWN LAW § 64 5-a (McKinney 2008); Robert Newman, Legislative Director, New York City Council, Infrastructure Division, Testimony before the New York City Council Committee on Waterfronts, On the Waterfront: New York City's Dockmasters (Mar. 29, 2007).

it has the same force and effect as a judgment lien (prior liens have priority).⁸² Unfortunately, abatement's upfront costs act as a disincentive for code enforcement to use against foreclosed homes as they have limited budgets and the increasing uncertainty of recovering those costs against insolvent lending institutions.

Another funding problem is that many of the code departments did not budget for the dramatic increase in processing complaints and conducting proactive inspection. Most agencies do not have the capacity to address the increasing number of abatements and keep up with inspections.⁸³

A. NVPC Code Enforcement Survey

In light of the challenges confronting code enforcement officials, the National Vacant Properties Campaign (NVPC) conducted a snapshot survey to understand local foreclosure impacts in different markets, differing vacant property trends, and how code enforcement and housing officials are responding. Based on data collected from RealtyTrac and First American CoreLogic and published in the *Wall Street Journal*, the Campaign selected cities in metro areas with the highest rates of foreclosures and the highest rates of properties owned by lenders or investors to participate in the survey.⁸⁴ As of October 1, 2008, local code enforcement and housing officials from nineteen cities completed the survey, as they often have the best sense of the community impacts of foreclosures. Note that this survey only offers a snapshot of what the code officials are confronting in the field. In many respects, the survey is more of a focus group of problems and perceptions than a statistically valid method.

The following is a profile of survey responses that cover the vacant property and foreclosure increases from roughly September 2007 to September 2008 - the first wave of community impacts from foreclosure:

⁸² PALM DESERT, CAL., MUNICIPAL CODE tit. 8, ch. 8.20, § 145 (2008).

⁸³ Interview with Martin Collins, former Code Enforcement Director, Milwaukee, Wis. (Sept. 20, 2008). In Milwaukee, Wisconsin, the code enforcement agencies are proposing to share some of the foreclosure inspection responsibilities with their fire inspectors; if a vacant structure has its doors open they can at least walk around and assess what needs to be sealed and prevent potential threats of fires.

⁸⁴ Ruth Simon, *Vacant-Property Fees Add to Mortgage Firms' Woes*, WALL ST. J., July 29, 2008, at A3. The Campaign selected cities based on lists posted in the *Wall Street Journal* in February 2008. The Campaign contacted city officials first through email and telephone calls and executed the survey online.

- Fifteen of the nineteen cities that responded have populations that have steadily increased over the last five years. Boston, Mass. and Shaker Heights, Ohio remained the same; Detroit, Mich. and Toledo, Ohio have been steadily decreasing.
- Over the last twelve months, local officials estimate that foreclosure filings, compared to the same time in the previous year have:
 - Increased fifty percent or more in nine cities (47%)
 - Increased fifteen to forty-nine percent in five cities (26%)
 - Remained the same in one (Dallas) (5%)
 - Decreased in one (Louisville) (5%)
 - Three cities responded that it was tough to estimate/do not have an estimate (16%)
- They estimate that vacant properties from foreclosures have:
 - Increased over forty percent: five cities (26%)
 - Increased thirty-one to forty percent: two cities (10%)
 - Increased sixteen to thirty percent: nine cities (47%)
 - Increased five to fifteen percent: two cities (10%)
 - One answered “tough to estimate” (5%)
- They estimate that calls for municipal services (inspections, complaints, etc.) have:
 - Increased over forty percent: five cities (26%)
 - Increased twenty-six to forty percent: four cities (21%)
 - Increased sixteen to twenty-five percent: two cities (10%)
 - Increased five to fifteen percent: five cities (26%)
 - Increased less than five percent: two (10%)
 - One city did not have the information (5%)
- Increase in CE cases from foreclosed properties
 - Increased over forty percent: five cities (26%)
 - Increased twenty-six to forty percent: one (5%)
 - Increased sixteen to twenty-five percent: four (21%)
 - Increased five to fifteen percent: five cities (26%)
 - Increased less than five percent: three cities (16%)
 - One city did not have the information (5%)

This snapshot report from the frontlines does not look good. Sixteen of the nineteen cities report increases in vacant

properties ranging from sixteen to forty percent or more. Municipal calls for service are increasing at a range from five to more than forty percent. One half of these nineteen cities are seeing a similar percentage increase in code enforcement cases from foreclosed properties.

B. Communicating and Holding the Mortgage Lending Industry Responsible for Maintaining Vacant and Foreclosed Homes

The number one complaint from code officials is the tremendous difficulty they have tracking down and then holding lenders and mortgage services responsible for maintaining their properties.⁸⁵ Inspectors spend countless hours wading through foreclosure records, deed registries, and other databases to identify the current mortgage holder; but even after having done this, the complexities of the foreclosure process and the national and global nature of the lending industry make it nearly impossible to do so.

Foreclosure procedures and laws vary from state to state, making it hard for code officials to compel responsible parties to action. For most states the major foreclosure milestones include the filing of the foreclosure notice, the official sheriff's sale, the recording of the deed in the name of the mortgage company, and the selling of the REO properties.⁸⁶ From the filing of the foreclosure notice to the sheriff's sale and beyond, the same property likely crosses the desks of different divisions or departments within the same mortgage company. These divisions are often found in different parts of the country or, in some cases, the globe. And even when they find a responsive person, it might take them several weeks to navigate the internal operational structure to address these problem properties. This, in turn, depends on the market and the capacity of the lenders to field these calls.

As properties go through the foreclosure process, the owners can walk away, from their property at any time, leaving it for local code enforcement officials to maintain. Depending on the strength of the market, banks are increasingly walking away

⁸⁵ *Id.*

⁸⁶ *See, e.g.*, Property Foreclosure Overview and Foreclosure Process at RealtyTrac, <http://www.realtytrac.com/foreclosure/overview.html> (last visited Nov. 12, 2008); *see also* New York Foreclosure Laws, <http://www.realtytrac.com/foreclosure-laws/New-York-Foreclosure-Laws.asp> (last visited Nov. 12, 2008) (discussing the notice, sheriff's sale, recordation of deed and the sale of REO properties as the legal milestones in the foreclosure process in New York State).

from vacant and foreclosed homes where the costs to process the foreclosure and/or the costs to eventually rehabilitate will likely exceed the property's current value; thus, leaving the home in a form of legal limbo while the property deteriorates further.

When the code officials finally reach someone within in the company, real property law may limit the type of property maintenance servicers can perform before the sheriff's sale as the "mortgagee in possession." Former tenants and/or owners have successfully sued the mortgage servicers for trespass or destruction of personal property during this early stage of the foreclosure process.⁸⁷ Even if the property is vacant, most mortgage servicers will only do the minimum to secure the property: clean the yards of only the most obvious public nuisances and conduct brief monthly inspections. Such property maintenance standards might be tenable in a neighborhood with one or two vacant and foreclosed properties. However, in the current crisis it is easy to find dozens of vacant properties within just a block or two of each other. Such clustering magnifies these vacant properties as prime targets for arson, vandals, strippers, thieves and party-goers.

The global nature of the mortgage industry adds yet another layer of complexity. The fungible nature of mortgages as financial investments encourages out-of-state lenders, such as Deutsche Bank, to purchase large loan portfolios of foreclosed properties from a collapsing lender.⁸⁸ Without warning, the code official who invested hundreds of hours to track down the right person in the original mortgage servicer must start over with representatives of an entirely different, often complex, institutional owner. Establishing lines of communication with out-of-state and now foreign lenders exceeds the legal reach and capacity of local code enforcement departments. Such bulk loan purchases also increase the chance the new owner might not even know they own the mortgage.

All of these variables converge together in such a way that creates delay and lengthens the time vacant and foreclosed homes remain vacant; the longer they remain vacant increases the likelihood the property will deteriorate, become a victim of vandalism, or be abandoned.

Given the rising tide of frustration from local officials and their constituents, a few mortgage servicers are taking a more common

⁸⁷ See, e.g., *Prince v. Brown*, 856 P.2d 589, 590-91 (Okla. Civ. App. 1993).

⁸⁸ Kate Berry & Harry Terris, *Pipeline*, AM. BANKER, Jan. 4, 2007, at 16.

sense approach to what they can or cannot do while the property winds its way through the foreclosure maze. Mortgage companies would much prefer to get a direct call from the code enforcement departments instead of fines and penalties or a notice to appear in court. Such an approach would also save the code enforcement officials resources if the mortgage services and field companies took care of their properties in the first place.

Many mortgage servicers hire field companies who essentially act as the property managers and inspectors to ensure properties are clean, secure, and well maintained throughout the foreclosure process.⁸⁹ For the past three years, one of these national field companies, Safeguard Properties, has been working with code enforcement officials to streamline communication and facilitate more direct discussions and dialogues with local code enforcement departments.⁹⁰ At the annual industry property preservation conference, Safeguard convenes special sessions with code officials and national vacant property experts from throughout the country to share frustrations about communication and coordination.⁹¹ The hope is if code officials understand how the industry operates then they will pick up the phone and call the mortgage servicer and/or its field representative. The challenge is that the capacity of the mortgage service industry, like its code enforcement counterparts, is stretched with the mounting number of foreclosures and is unprepared for numerous inquiries from code officials and community development groups.

The Mortgage Bankers Association (MBA) has posted a list of “property preservation” contacts for the major lending institutions on its web site.⁹² While a good first step, a communications tree is only as good as the commitment of the individual servicers to respond and for the MBA and companies like Safeguard to update. Ideally, the MBA or even federal regulators would establish special phone lines between local government officials and lending institutions and perhaps set some standards about call-backs within twenty-four to forty-eight

⁸⁹ See Safeguard Properties, <http://www.safeguardproperties.com/content/view/961/122> (last visited Nov. 12, 2008) (discussing the services provided by Safeguard Properties).

⁹⁰ *Id.*

⁹¹ *Id.* See also National Property Preservation Conference III, <http://www.safeguardproperties.com/content/view/1062/210> (last visited Nov. 12, 2008).

⁹² Mortgage Bankers Association, Property Preservation Contacts, <http://www.mortgagebankers.org/files/PropertyPreservationList.pdf> (last visited Nov. 12, 2008).

hours.

The MBA Vacant Properties Committee is now working on another strategy to expand access to foreclosure contact information through the national data base of Mortgage Electronic Registration Systems, Inc. (MERS).⁹³ Most mortgage companies register their properties in MERS, which typically tracks a property's mortgage history no matter how many times the financial instruments are bought and sold by different lenders and financial institutions.⁹⁴ If local government officials had access to MERS, they could save time in tracking down the lender and its servicer. The Office of the Comptroller of the Currency announced at the HUD Summit on Housing that they are working with the MBA to increase local government access to MERS.⁹⁵ While MERS does not cover all mortgages, it could go a long way to saving code enforcement officials time. The challenge will be how to take this strategy to scale so that code officials know how to use MERS and understand what it can and cannot offer and how currently the data is maintained and updated.

IV. CODE ENFORCEMENT'S RECENT REGULATORY RESPONSE— VACANT PROPERTY REGISTRATION ORDINANCES

In light of serious concerns about the blighting influences of vacant and foreclosed homes, local, city, and county officials, working with their code enforcement directors/departments, have amended existing or enacted new vacant property (VP) registration ordinances.⁹⁶ Safeguard Properties has identified over ninety communities that have either enacted or are considering new local VP registration ordinances.⁹⁷

Given this proliferation of VP registration ordinances with diverse notification and property maintenance requirements, the mortgage servicing industry has convened an official working group through the MBA that tracks proposed VP registration

⁹³ MERS, <http://www.mersinc.org/about/index.aspx> (last visited Nov. 12, 2008).

⁹⁴ MERS Products, <http://www.mersinc.org/MersProducts/index.aspx?mpid=5> (last visited Nov. 12, 2008).

⁹⁵ Barry R. Wides, Deputy Comptroller for Community Affairs, Remarks at the HUD Summit on Housing at the Office of the Comptroller of the Currency 3 (Oct. 7, 2008).

⁹⁶ See Nat'l Vacant Properties Campaign, *supra* note 43.

⁹⁷ SAFEGUARD PROPERTIES, VACANT PROPERTY REGISTRATION ORDINANCES (2008). Many of the cities are enacting these registration ordinances in response to the city of Chula Vista's ordinance adopted in July 2007. See Safeguard Properties, www.safeguardproperties.com (last visited Nov. 24, 2008).

ordinances and seeks amendments that are more compatible with industry systems and practices.⁹⁸ The industry is worried about the costs for complying with so many different requirements. These industry concerns raise several legal issues over the conflict and intersection of municipal law, nuisance abatement policies, code enforcement practices, state preemption, and the laws of foreclosure and real property.

From a policy perspective, the overall effectiveness of VP registration ordinances is an open question. Do they directly reduce the number of vacant properties? Do they reduce the number of foreclosed and vacant properties? The principle challenge is determining the right evaluation method as well as indicators. Local governments often measure success by the annual decrease in vacant properties and the amount of registration fees it collects each year; however, it is difficult to determine whether it was the ordinance that causes this overall decrease. Plus, it is difficult to inventory and track the property conditions and ownership status of each vacant and foreclosure property over a period of several years. More research is needed to devise such a tracking system and gather baseline data. Local governments, however, must establish good databases to implement these VP ordinances and diligently maintain and frequently update them.

*A. The Legal and Policy Foundations of Vacant Property
Registration Ordinances*

VP registration ordinances are regulatory tools derived from a local government's inherent authority to abate nuisances and enforce its local codes. Local governments, often through their housing and building department and/or fire marshal, have long standing powers to enjoin, prosecute, or administratively abate public nuisances associated with vacant or abandoned properties.⁹⁹ Case law from most states supports the legal authority of these local code officials to remove junk and debris, board and secure or even demolish vacant properties.¹⁰⁰

⁹⁸ See Robert Klein, *Vacant Property Ordinances: Finding Common Ground on a National Scale*, MANAGING REO, June 11, 2008, at 22.

⁹⁹ Beth Kuhles, *County Targets 8 Properties for Demolition/Dilapidated Sites Face Destruction before August*, HOUSTON CHRON., July 26, 2007, at 9; see generally U.S. CONF. OF MAYORS, *supra* note 25, at 3-5, 7.

¹⁰⁰ See *Burroughs v. Hills*, 741 F.2d 1525, 1534-35 (7th Cir. 1984); *Bakersfield v. Miller*, 410 P.2d 393, 399 (Cal. 1966); 62 C.J.S. Municipal Corporations § 173.

Most municipalities have now codified these inherent nuisance abatement powers in their local building, housing, and/or fire codes.¹⁰¹ The uniform International Building, Fire, and Property Maintenance Codes currently contain special provisions for the abatement and maintenance of dangerous buildings—those that pose threats to the public health, safety and welfare, such as structural insecurity.¹⁰²

Beyond the standard code enforcement remedies of judicial or administrative actions, local code officials can also deploy regulatory strategies to protect and preserve neighborhoods and the condition of its housing. Common regulatory approaches that apply to occupied and vacant properties include routine rental inspection, landlord licensure, residential point of sale, and VP registration.¹⁰³

Typology of VP Registration Ordinance and Common Characteristics: VP registration ordinances present code enforcement programs with a relatively simple regulatory tool that balances the rights of property owners with the overarching goal of protecting the public's health, safety and welfare. The scope and administration of the ordinances can also address the communities' specific vacant property challenges in a manner compatible with local political realities. Moreover, the diversity of legal structures, market conditions, and the foreclosure

¹⁰¹ See generally JOSEPH M. SCHILLING & JAMES B. HARE, CODE ENFORCEMENT: A COMPREHENSIVE APPROACH 20 (1994) Several states also have substandard housing codes that establish similar code enforcement remedies, like judicial or administrative abatement, and special cost recovery processes for the work performed on the property by city and country staff and work crews. See, e.g., CAL. HEALTH & SAFETY CODE §17958 (West 2008); UNITED STATES CONFERENCE OF MAYORS, COMBATING PROBLEMS OF VACANT AND ABANDONED PROPERTIES: BEST PRACTICES IN 27 CITIES 3-4 (2006) [hereinafter COMBATING PROBLEMS]; JOSEPH SCHILLING, NUISANCE ABATEMENT OF VACANT PROPERTIES: INNOVATIVE USES OF CIVIL RECEIVERSHIP 1 (2006).

¹⁰² INTERNATIONAL CODE COUNCIL, INTERNATIONAL BUILDING CODE §115 (2003); INTERNATIONAL CODE COUNCIL, INTERNATIONAL FIRE CODE § 110 (2003); INTERNATIONAL CODE COUNCIL, INTERNATIONAL PROPERTY MAINTENANCE CODE §§ 108 - 110 (2003). The International Code Council [hereinafter ICC] was formed in 1994 in response to the need for codes that had no regional limitations in the U.S.

¹⁰³ See *Adjile v. City of Wilmington*, 2004 WL 2827893, *2 (Del. Super. Ct. 2004) (discussing regulatory approaches used in Wilmington, Delaware); W. Dennis Keating, Dist. Prof., Cleveland State University, Presentation before the Joint Center for Housing Studies at Harvard University Symposium: Revisiting Rental Properties: A National Policy Summit, Preserving Properties on the Edge: Rapid Recycling of Distressed and Abandoned Properties 1-2 (2006). Note that state law can establish limits on the power of local governments to enact VP registration ordinances. Only a handful of states have state VP registration statutes, such as Virginia and Delaware.

challenges within each city, weak or strong market, creates an ideal environment for a wide range of VP registration ordinances. What works in Detroit may not work in San Bernardino or Cleveland.

Two general types of VP registration ordinances exist:

1) The Classic VP Ordinance (AKA the Wilmington Model) that regulates all types of vacant and abandoned properties (those with structures, such as residential, commercial, industrial and those without) and a myriad of property owner profiles (e.g., speculator, warehouser, landlord/slumlord, CDC, business franchisee, and the elderly)¹⁰⁴ and; 2) The Home Foreclosure Ordinance (AKA the Chula Vista Model) that focuses on the responsibilities of the lender and mortgage servicers during the mortgage foreclosure process after the former owners and/or tenants permanently leave the property.¹⁰⁵

Although variations of these two models exist, all VP ordinances contain the following common characteristics: 1) scope and definitions; 2) registration/notification process and fee structure; 3) property maintenance standards; 4) re-use activities and plan; and 5) enforcement and cost recovery.¹⁰⁶

Scope and Definition: The first threshold element for every VP registration ordinance is defining the terms *vacant* and/or *abandoned* and the type of properties. Here, state law can provide some guidance. For example, in 2005, New Jersey enacted a suite of vacant property strategies and tools to address vacant and abandoned properties, and the definition they use is probably the most clear and complete.¹⁰⁷

Part of the policy challenge is determining how long the property must be “continuously” vacant before registration applies. The classic VP ordinance seems to set six months as the minimum threshold;¹⁰⁸ this period of time is critical to separate

¹⁰⁴ Nat'l Vacant Properties Campaign, *supra* note 43.

¹⁰⁵ *See id.*; Emmet Pierce, *Blight-Prevention Law Emerges as a National Mode:*

Chula Vista Forces Lenders to Maintain Foreclosures, SAN DIEGO UNION TRIB., Oct. 12, 2008, at A1.

¹⁰⁶ *See, e.g.*, CHULA VISTA, CAL., MUNICIPAL CODE ch. 1.41 (2008); WILMINGTON, DEL., MUNICIPAL CODE § 4-27, 125.0 (2008).

¹⁰⁷ ALLAN MALLACH, RESTORING PROBLEM PROPERTIES: A GUIDE TO NEW JERSEY'S ABANDONED PROPERTY TOOLS tbl 2.1 (2005).

¹⁰⁸ *See, e.g.*, CHICAGO, ILL., MUNICIPAL CODE OF CHICAGO § 13-12-125(e) (2008) (“[A] residential property shall not be deemed vacant if it has been used as a residence by a person entitled to possession for a period of at least three months within the previous nine months and a person entitled to possession intends to resume residing at the property.”).

properties that are in seasonal use. The threshold for the Foreclosure Model is that the property must be somewhere in the official foreclosure process.¹⁰⁹ Another critical distinction is that the Foreclose Model applies only to single family homes while the Classic Model applies to a wider range of vacant properties, such as commercial buildings and apartments.¹¹⁰

Registration/notification process and fee structure: One of the major challenges confronting code officials is identifying the person responsible for maintaining the property. This could be the owner, property manager, or another agent. Both VP registration models attempt to address this problem by requiring the responsible party to have an agent in the city or county; they require specific contact information and sometimes impose regular inspections and reports from the agent.¹¹¹ The registration process creates the foundation for a good vacant property inventory and database (assuming a good response rate) and evidentiary support in subsequent enforcement action (e.g., designating an agent for services of process).

Registration fees can range from \$70 per year (Chula Vista, California),¹¹² to \$420 per quarter (San Jose, California),¹¹³ to up to \$5,000 per year (Wilmington, Delaware).¹¹⁴ Having a graduated registration fee (which increases every twelve months or sooner) serves several policy goals. First, it offers a disincentive for the owner to warehouse the property and speculate on the market. Second, it can cover the costs to administer the program and other code enforcement activities.

¹⁰⁹ See CHULA VISTA, CAL., CHULA VISTA MUNICIPAL CODE § 15.60.020 (2008); DESERT HOT SPRINGS, CAL., MUNICIPAL CODE § 100.20 (2008).

¹¹⁰ See CHICAGO, ILL., MUNICIPAL CODE OF CHICAGO § 13-12-125(e) (“[V]acant’ means a building . . . at which substantially all lawful business or construction operations or residential occupancy has ceased”); CHULA VISTA, CAL., CHULA VISTA MUNICIPAL CODE § 15.60.010 (2008) (“[The] abandoned residential property registration program [is] . . . a mechanism to protect residential neighborhoods from becoming blighted”).

¹¹¹ See, e.g., CHICAGO, ILL., MUNICIPAL CODE OF CHICAGO § 13-12-125(a)(2) (2008); CHULA VISTA, CAL., CHULA VISTA MUNICIPAL CODE § 15.60.060 (2008).

¹¹² City of Chula Vista, Dep’t of Planning and Building, *Registration Form for Abandoned Residential Property*, http://www.chulavistaca.gov/City_Services/Development_Services/Planning_Building/PDF/RAPappform.pdf (last visited Nov. 15, 2008).

¹¹³ City of San Jose: Code Enforcement Div., *Fees Effective July 1, 2007*, <http://www.sanjoseca.gov/codeEnforcement/FEES-ADOPTED07-08.pdf> (last visited Nov. 15, 2008).

¹¹⁴ City of Wilmington, Vacant Property Registration Fee Program, *Fee Structure*, <http://www.ci.wilmington.de.us/VacantProperties/fees.htm> (last visited Nov. 15, 2008).

Another essential provision allows local code enforcement directors discretion to waive or reduce the fee, but not necessarily waive the requirement to register.¹¹⁵ Depending on the owner's profile (e.g., their attitude, physical and financial ability, the number of vacant properties they might own), the registration ordinance should give the code enforcement director authority to reduce or waive the fee and/or forgive any outstanding liens filed pursuant to this ordinance. Consider the scenario where local community development corporations or land banks own and maintain a number of vacant properties pending the design of their reuse plan or the securing of sufficient financing for a new infill affordable housing project. Waiver or reduction of a fee for a year or two could act as an incentive to complete the reuse and redevelopment of the vacant property instead of imposing the VP registration fee or enforcement penalty.

Reuse and Rehabilitation Activities: Some municipalities require that owners submit affirmative action plans to return their vacant property to productive use. For example, San Diego, California requires that when owners register their vacant properties with the City, they must also submit an action plan that includes the expected period of vacancy, a maintenance plan for the period of abandonment, and an implementation schedule for rehabilitation or demolition of the property.¹¹⁶ These affirmative requirements make it clear that the locality will not permit properties to remain vacant for extended periods of time, even if they are minimally maintained. Failure to reoccupy, rehabilitate, or demolish the vacant building by a certain deadline may result in municipal sanctions.

Enforcement actions and cost recovery: What happens if the owner fails to register or comply with any of the ordinance registration provisions or property maintenance standards? If the ordinance does not provide sufficient sanctions, the owner/property manager will not take the code enforcement department and the city officials seriously; this can affect the credibility of the entire code enforcement department, not just those administering the VP registration ordinance.

At a minimum, the VP registration ordinance should impose a civil or administrative penalty (e.g., a late fee of ten or twenty percent is imposed for each month the owner fails to register or

¹¹⁵ COMBATING PROBLEMS, *supra* note 101, at 11-12, 40.

¹¹⁶ MALLACH, *supra* note 68, at 151; SAN DIEGO, CAL., SAN DIEGO MUNICIPAL CODE § 54.0313 (e) (2006).

for each month they fail to designate a proper agent or fail to file their reuse/revitalization plan). Depending on the number of vacant properties, the code department may need one staff person to work as the program administrator to inventory and track the vacant properties, maintain a data base on file with the registration information and issue warning notices and letters for those who fail to follow the ordinance.¹¹⁷

After penalties are assessed, the city must follow through to seek collection of the outstanding registration fees and civil penalties; failure to aggressively pursue cost recovery, will send the wrong message to those who choose not to comply as well as undermine the confidence of elected officials and frustrate those owners who do register and pay the fees in a timely manner. Many municipalities send outstanding debts to a special division of their treasurer's office or water utility departments who have expertise in collecting standard debts. If the owner again fails to pay after these informal methods, local governments typically have two legal avenues to pursue: 1) a civil judgment lien; or, 2) a nuisance abatement lien and special tax assessment.¹¹⁸ If they owe only registration fees and penalties, a judgment lien against the individual is the only option. If the local government had to abate any nuisance on the property (e.g., cut the grass, drain the pool, board and secure open doors and broken windows, clean the yards of junk and debris or demolish), most localities have the power to file these costs as a special municipal tax assessment. The city or county tax collector then charges this assessment on the next annual property tax bill. If they fail to pay the special assessment, then some state laws allow these costs to become a delinquent tax bill and the city could technically foreclose on the property.¹¹⁹

Another strategic option is the criminal prosecution of the responsible party (e.g., property owner, manager or trustee) for failure to register and/or failure to file the reuse plan or properly follow the property maintenance standards. San Diego declares

¹¹⁷ San Diego has a full time vacant properties coordinator to administer their registration process. *See generally* JOSEPH SCHILLING, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, THE REVITALIZATION OF VACANT PROPERTIES: SAN DIEGO, CALIFORNIA CASE STUDY 10 (2002).

¹¹⁸ SANTA CRUZ, CAL., MUNICIPAL CODE §§ 4.24.020-4.24.060 (2000); SAN DIEGO, CAL., SAN DIEGO MUNICIPAL CODE §§ 13.0202-13.0204 (2000).

¹¹⁹ Most states allow nuisance abatement collection through the special assessment/nuisance abatement lien process. Only a handful of states, however, give the nuisance abatement liens higher priority over outstanding mortgages and the same priority as municipal taxes.

such violations as misdemeanors that can bring a maximum penalty of \$1,000 criminal fine and/or up to six months in jail.¹²⁰ Instead of using administrative or civil processes to collect the money, criminal prosecution narrows the legal issues. The municipal attorney only needs to prove the defendant is the right person (owner and/or manager) and that they failed to file the registration fee or follow the terms of the ordinance. They do not need to prove it is a public nuisance or any other substantive condition of the property. While criminal prosecution is a direct legal remedy, the defendant must personally appear before the court. With the proliferation of out of state owners and mortgage servicers, if they choose to ignore the prosecution, it is unlikely that a municipal court will have the patience or resources to extradite for such a relatively minor offense.

Effective VP Programs: Recognize that VP ordinances are only as good as the staff and leadership of the VP registration program. Experts have identified the following characteristics of successful vacant property registration programs:

- Registration programs should require that many different types of properties are subject to the registration requirements, including abandoned commercial structures.¹²¹
- Ordinances should outline, for property owners, clear standards for security and maintenance of vacant properties. Localities may consider requiring that property owners carry liability insurance coverage to protect the vacant properties against potential vandalism or other damage resulting from abandonment.¹²²
- Registration programs should require that the property owner establish a local point of contact so that municipalities can locate owners to enforce code violations.¹²³
- Registration fees should cover the costs that city departments incur when monitoring vacant properties. Localities should also consider adopting graduated fee schedules that increase annually to discourage owners from holding onto vacant property.¹²⁴

¹²⁰ SAN DIEGO, CAL., SAN DIEGO MUNICIPAL CODE § 12.0201 (2000).

¹²¹ COMBATING PROBLEMS, *supra* note 101, at 1.

¹²² MALLACH, *supra* note 68, at 149.

¹²³ *Id.*

¹²⁴ *Id.* at 146.

- Ordinances should allow localities to assess unpaid fees and/or fines as a municipal lien.¹²⁵

While registration fees and the penalties associated with non-compliance represent significant punitive sanctions (and, thus, often have a difficult time garnering political support for their adoption and use), it is important for the VP ordinance and/or program to offer incentives that further encourage owners to return their vacant properties to productive use.¹²⁶ Tax or lien waivers, however, are a cost-effective incentive that should be blended into vacant property policies. As Alan Mallach, former Research Director for the National Housing Institute, points out, “[t]he more aggressive the municipality is in putting liens on properties, . . . the more leverage it has to use lien forgiveness as an incentive.”¹²⁷ Mallach goes on to say that financial incentives, whether direct assistance or waivers, should only be used to encourage property owners to go beyond their legal obligations to rehabilitate property, not to reward them for maintaining their properties as legally required.¹²⁸

B. The Classic Registration Model—Wilmington, Delaware and Cincinnati, Ohio

A number of localities throughout the United States have extensive experience administering the Classic VP model. While it’s difficult to generate a comprehensive list of cities with VP ordinances, this article presents two brief case studies from Wilmington, Delaware, and Cincinnati, Ohio, that help illustrate the operation of the Classic VP Model.¹²⁹

¹²⁵ *Id.*

¹²⁶ Financial incentives can be grouped into three categories and can be distinguished by the impact on municipal finances: 1) direct financial incentives (grants and below-market loans), 2) tax abatement, and 3) forgiveness of municipal liens. *Id.* at 146-47.

¹²⁷ MALLACH, *supra* note 68, at 147.

¹²⁸ *Id.*

¹²⁹ These case studies were part of an independent study project prepared by Virginia Tech Masters student Elizabeth Scaggs during the fall of 2007.

Wilmington, Delaware.¹³⁰

The Vacant Property Registration Fee Program in Wilmington, Delaware, was one of eighteen innovative state and local government programs selected as a finalist for Harvard University's Ash Institute's *2007 Innovations in American Government Award*.¹³¹ The U.S. Conference of Mayors also highlighted it as a best practice program for tackling the vacant property problem.¹³² The Vacant Property Registration Fee Program was adopted by Wilmington's City Council in 2003 based on a comprehensive neighborhood conditions analysis that identified vacant properties as an area of major concern for several "problem" neighborhoods.¹³³ In fact, Wilmington's Hilltop neighborhood was found to have an eighteen percent vacancy rate, and vacant properties were harbors for drug use and other criminal activity.¹³⁴ Prior to the ordinance enacted in 2003, Wilmington's vacant property registration fee amounted to a nominal \$25 charge that was often difficult to collect and was too little to provide a real disincentive for property owners of vacant properties.¹³⁵

Wilmington revised its ordinance to establish a sliding fee schedule that correlates the amount of the fee to the number of years the property has been vacant.¹³⁶ The goal was not only to cover the costs associated with monitoring vacant properties, but to encourage abandoned property owners to either demolish or return properties to productive use.¹³⁷

Only properties that have been vacant for at least one year are charged a registration fee. The annual fee schedule for those properties that have been abandoned for at least a year is: \$500

¹³⁰ Information regarding Wilmington's Vacant Property Registration Fee Program has been derived from interviews in October 2007, conducted by Elizabeth Scaggs with Cynthia Ferguson, Administrator of the VPRF Program, and documents furnished by the City of Wilmington (including their application for the Ash Institute award).

¹³¹ Press Release, Ash Institute for Democratic Governance and Innovation, Finalists Are Named For Innovations in American Government Awards Competition (Apr. 3, 2007).

¹³² COMBATING PROBLEMS, *supra* note 101, at 40.

¹³³ Ash Institute for Democratic Governance and Innovation, Vacant Property Registration Fee Program, <http://www.innovations.harvard.edu/awards.html?id=101461> (last visited Nov. 15, 2008) [hereinafter Registration Fee Program].

¹³⁴ COMBATING PROBLEMS, *supra* note 101, at 40.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ WILMINGTON, DEL., MUNICIPAL CODE ch. 4, § 4-27 § 125.0(a) (2003).

for one year of vacancy, \$1,000 for two years, \$2,000 for three to four years, \$3,500 for five to nine years, and \$5,000 for properties that have been vacant for ten years, with an additional \$500 being assessed for every year over ten years.¹³⁸ The registration fees are determined by the years of vacancy regardless of changes in ownership.¹³⁹ This tactic was employed to keep property owners from transferring property titles to various family members or other individuals in an attempt to avoid the fee.

Because the sanctions imposed by the fee structure are substantial and the enforcement of the vacant property registration has been so successful, the City is able to effectively combine the use of the fees with an incentive program that provides fee waivers for certain property owners. A one-time waiver of the registration fee is available for those vacant property owners who intend to renovate, demolish, reoccupy, or sell their property within a one-year grace period.¹⁴⁰ Property owners must furnish documentation in order to qualify for the fee waiver, such as copies of building permits, invoices for rehabilitation work already completed, receipts from materials purchased, and other evidence of good faith efforts to return the property to productive use.¹⁴¹ The waiver particularly assists in the resale of vacant structures because it does not penalize new owners who have intentions of occupying or rehabilitating properties for occupancy. In 2006, 285 fee waivers were granted.¹⁴²

Wilmington's Mayor and City Council also successfully lobbied the Delaware State Legislature to include vacant property registration fees to the list of potential liens against real estate in an amendment to the State Code.¹⁴³ Because unpaid fees create a

¹³⁸ COMBATING PROBLEMS, *supra* note 101, at 40. The Wilmington sliding scale faces an ambiguity in the statute concerning how long a structure must be reoccupied in order to "start the clock back at zero." If a property that has been vacant for three years is reoccupied and then becomes vacant again some time later, does the vacant property registrant pay the one year rate or the three to five year rate? In other words, the City may want to make it clear as to how long a building must be occupied for later vacancy to become decoupled from prior abandonment.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ City of Wilmington Property Registration Fee Program, One Time Waiver of Registration Fee, <http://www.ci.wilmington.de.us/VacantProperties/waiver.htm> (last visited Nov. 15, 2008).

¹⁴² COMBATING PROBLEMS, *supra* note 101, at 40.

¹⁴³ WILMINGTON, DEL., BUILDING CODE ch. 4, § 4-27, § 125.0(b)(8) (2003); DEL. CODE ANN. tit. 25, § 2901 (2006).

lien on the property, owners are often more invested in resolving unpaid debt. When the registration fees remain unpaid for a significant amount of time, properties are put up on the sheriff's auction block, making them available for rehabilitation (and eventually occupancy) by community development partners or other private property owners.¹⁴⁴

While revenues have substantially increased, the administrators of the Vacant Property Registration Fee Program have made it clear that generating revenue from the fees has not been the primary goal.¹⁴⁵ Instead, their principal objective has been to encourage reinvestment in blighted areas and to strengthen neighborhoods that have historically been plagued by abandonment.¹⁴⁶ Prior to the enforcement of the new legislation in 2003, Wilmington issued 950 billing statements and only collected \$7,875 from registration fees under the prior \$25 annual charge.¹⁴⁷ In 2007, the city issued only 603 billing statements and collected \$1,050,000 in fees.¹⁴⁸ The overall number of vacant properties has decreased by twenty-two percent, from 1,455 vacant properties in 2003 to 1,135 vacant properties in 2007.¹⁴⁹ In 2005-2006, of the vacant structures on the registration rolls, 380 vacant properties became reoccupied, sixteen were demolished, and 217 were sold to new owners with the intention of returning the property to productive use.¹⁵⁰ The number of vacant properties in each category of vacancy (one year, two years, three to five years, five to nine years, and ten years and up) have decreased; however, there are still almost 300 vacant properties that have been abandoned for long periods of time (more than five years).¹⁵¹ Perhaps Wilmington's greatest measure of success can be represented by the increase in the valuation of rehabilitation building permits issued to abandoned properties. The valuation of building permits issued to vacant structures in 2005 was \$6.8 million; this figure was more than tripled to \$20.8 million in

¹⁴⁴ See Registration Fee Program, *supra* note 133.

¹⁴⁵ COMBATING PROBLEMS, *supra* note 101, at 40.

¹⁴⁶ *Id.*

¹⁴⁷ E-mail from Joseph Schilling, Director of Research and Policy, National Vacant Properties Campaign and Professor in Practice of Urban Affairs and Planning, Virginia Polytechnic Institute and State University (Oct. 10, 2008) (on file with author).

¹⁴⁸ *Id.*

¹⁴⁹ Registration Fee Program, *supra* note 133.

¹⁵⁰ COMBATING PROBLEMS, *supra* note 101, at 40.

¹⁵¹ City of Wilmington, Delaware, Vacant Property List, <http://www.ci.wilmington.de.us/pdf/VacantProperties.pdf> (last visited Nov. 12, 2008).

2007.¹⁵²

Analysis. While the number of reported vacant properties in Wilmington has decreased by 6.4 percent from September 2006 to September 2007, the revenue from collected fees has increased by 82.5 percent during the same period.¹⁵³ This may imply that even though the number of properties that have been vacant for less than, say, two years has decreased, a number of vacant properties that have been empty for more than five or ten years (and are, thus, bringing in more revenue) still remain on the vacant rolls.

Administrators of the program should consider developing an outreach strategy that will assist in the identification of long-vacant structures and will encourage property owners to meet with City officials to develop a strategic plan that will outline the steps necessary to return the vacant structure to productive use or to demolish the building. As available, the City should consider issuing direct incentives such as grants and/or low-interest rehabilitation loans to property owners that make an effort to develop an appropriate strategy, but do not have the financial means to continue paying such high registration fees.

Cincinnati, Ohio.¹⁵⁴

Cincinnati's Vacated Building Maintenance License (VBML) program has undergone dramatic revisions over the past few years.¹⁵⁵ Originally adopted in 1997 as a tool to address the growing number of abandoned properties within the central city, the VBML is targeted to "problem" properties that are generally uninhabitable.¹⁵⁶ Some have estimated that there are nearly 1,800 blighted, vacant properties in Cincinnati, costing the municipal government \$5.2 million in demolition, barricading costs, nuisance abatement, and lost tax revenue.¹⁵⁷

The 1997 VBML version required a flat licensing fee of \$300 per year; the City, however, found that the minimal fee required

¹⁵² Keith L. Rolland, *Leaders Look to Market-Rate Housing to Foster Wilmington's Revitalization*, CASCADE, Fall 2006, at 1, 4 (discussing how Wilmington's leaders have tried to revitalize the city's housing situation); E-mail from Joseph Schilling, *supra* note 147.

¹⁵³ E-mail from Joseph Schilling, *supra* note 147.

¹⁵⁴ See generally Edward Cunningham, Supervisor of Inspections, City of Cincinnati, Presentation before the Reclaiming Vacant Properties Conference 2007, Vacated Building Maintenance Licensing & Registration Programs (Sept. 24, 2007).

¹⁵⁵ *Id.* at 32; U.S. CONF. OF MAYORS, *supra* note 25, at 27.

¹⁵⁶ Cunningham, *supra* note 154, at 32.

¹⁵⁷ *Id.* at 37, 40.

not only did not offset the costs associated with operating the VBML program, but the fee was also too negligible to offer any real disincentive to holding vacant properties in perpetuity.¹⁵⁸ The VBML program was revised and new standards were adopted by City Council in March of 2006. The new ordinance requires owners of vacant buildings to maintain liability insurance on their properties (\$300,000 for residential properties and \$1,000,000 for commercial structures),¹⁵⁹ and it establishes a graduated fee structure that increases for each year that a building continues to remain blighted and vacant.¹⁶⁰

Licensing fees currently range from \$900 for properties that have been vacant for less than one year to \$3,500 for properties that have been vacant for more than five years.¹⁶¹ The new fee structure has drastically increased the compliance rates and, in turn, the revenues received by the City. In the twelve months prior the adoption of the 2006 ordinance, the VBML program received 175 licensing applications and \$53,100 in fees.¹⁶² In the first twelve months following the adoption of the new program, the City collected \$265,500 from 290 licensing applications.¹⁶³ The ordinance also enabled the City to create a lien on the property if the fees are delinquent.¹⁶⁴ These punitive policies are joined with fee and lien waivers for those owners who submit comprehensive rehabilitation plans to return their properties to productive use.¹⁶⁵ Refunds of fees are also given if the property is reoccupied in the same year as the fee was paid.¹⁶⁶ This revised licensing program is designed to increase the carrying costs of holding vacant, blighted properties and encourage either demolition or rehabilitation of problem structures.¹⁶⁷

The program has adopted a thirteen-point preservation criteria system, including standards for structural soundness and security, with which each owner must adhere in order to remain in compliance.¹⁶⁸ By the fall of 2007, the City hired five new building inspectors who utilize an individual case planning

¹⁵⁸ *Id.* at 37-38.

¹⁵⁹ CINCINNATI, OH., BUILDING CODE § 1101-77.1 (2006).

¹⁶⁰ CINCINNATI, OH., BUILDING CODE § 1101-129 (2006).

¹⁶¹ *Id.*

¹⁶² See Cunningham, *supra* note 154, at 48.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 44; CINCINNATI, OH., BUILDING CODE § 1101-129.3A (2006).

¹⁶⁵ Cunningham, *supra* note 154, at 39; CINCINNATI, OH., BUILDING CODE § 1101-77.4 (2006).

¹⁶⁶ CINCINNATI, OH., BUILDING CODE § 1101-129.4 (2006).

¹⁶⁷ *Id.*

¹⁶⁸ See Cunningham, *supra* note 154, at 34.

system to determine each property's condition, obsolescence, neighborhood impact, owner plans and progress, and intrinsic value, such as notable historic value.¹⁶⁹ The City recognizes that the licensing program is not an end in and of itself, but rather just one tool that should be combined with other neighborhood improvement strategies to create the greatest impact. Cincinnati's VBML program is coupled with a Neighborhood Enhancement Program, which targets limited rehabilitation resources into areas with the greatest need and the greatest chance of success.¹⁷⁰ This combined approach encourages cooperation among city agencies to effectively steward resources to combat the effects of vacant and blighted buildings.

C. The Home Foreclosure Model—Chula Vista, California and Beyond

Within the past year a growing number of local governments have enacted VP registration ordinances to specifically address the blighting influence of vacant homes early in the mortgage foreclosure process - after the filing of the notice, but before the lender gains title at the sheriff's sale.¹⁷¹ These ordinances attempt to clarify the responsibility of the lenders and mortgage servicers to maintain these homes. Many of these ordinances are found in California, other western cities, communities from states in fast growth, and regional housing markets, such as Arizona, Nevada, Texas, Georgia, and Florida.¹⁷²

Chula Vista, California.

Chula Vista, California has adopted an innovative approach that not only keeps track of homes in foreclosure, but also holds titleholders accountable for the upkeep of residential properties while they are vacant.¹⁷³ This policy is intended to mitigate the

¹⁶⁹ *See id.* at 43.

¹⁷⁰ *Id.* at 61.

¹⁷¹ *See* SAFEGUARD PROPERTIES, *supra* note 97; Nat'l Vacant Properties Campaign, *supra* note 43.

¹⁷² Interview with Doug Leeper, Code Enforcement Manager, City of Chula Vista, Cal. (Sept. 15, 2008) (since the enactment of the ordinance, approximately 250 cities have contacted the City of Chula Vista to get information about their VP registration ordinance and program).

¹⁷³ City of Chula Vista, Dep't of Planning and Building, Abandoned Residential Property Program, http://www.chulavistaca.gov/City_Services/Development_Services/Planning_Building/Building/Code_Enforcement/AbanRes_PropertyProg.asp (last visited Nov. 15, 2008) [hereinafter Abandoned

blight often associated with vacant properties and encourage reinvestment in the neighborhood as a whole.¹⁷⁴

In August, 2007, the City of Chula Vista, California, one of the fastest growing cities in San Diego County,¹⁷⁵ adopted a vacant property registration ordinance that is specifically targeted to address the growing number of foreclosures within its jurisdiction. Some estimates claim that foreclosures have led to more than 700 vacant residential homes in the community.¹⁷⁶ These foreclosed and vacant homes negatively impact the neighborhood and community.¹⁷⁷ Homes that are caught up in the foreclosure process are typically vacant for several months.¹⁷⁸ In those months, these properties discourage potential buyers of adjacent properties and thereby devalue them by thousands of dollars. This destabilizes neighborhoods and can lead to further blight and reduction in neighborhood-wide property values.¹⁷⁹ Chula Vista's Abandoned Residential Property Registration Program, which became effective in October, 2007, is designed "to address those properties that are vacant and financially distressed."¹⁸⁰

Chula Vista's program requires mortgage lenders to inspect defaulted properties to confirm whether they are occupied or abandoned. If a given property is found to be vacant, the program requires that the lender exercise the abandonment clause in their mortgage contract and register the property with the City, after paying a \$70 registration fee.¹⁸¹ The lender must further secure and maintain the property to comport with neighborhood standards, which typically requires that landscaped areas be maintained.¹⁸² Mortgage companies are also required to "hire a local company to inspect the property on a weekly basis."¹⁸³ On the property must be posted the name and twenty-four-hour contact number of this company.¹⁸⁴ As the city's description of the

Residential Property Program].

¹⁷⁴ CHULA VISTA, CA., MUNICIPAL CODE §§ 15.60.010-15.60.120 (2007).

¹⁷⁵ Abandoned Residential Property Program, *supra* note 173.

¹⁷⁶ Tanya Mannes, *County Foreclosures Leap Higher Chula Vista Orders Upkeep of Seized Homes*, SAN DIEGO UNION-TRIB., July 25, 2007, at 1; CHULA VISTA, CA., MUNICIPAL CODE §§ 15.60.010-15.60.

¹⁷⁷ Abandoned Residential Property Program, *supra* note 173.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ CHULA VISTA, CA., MUNICIPAL CODE § 15.60.40.

¹⁸² § 15.60.50.

¹⁸³ § 15.60.60.

¹⁸⁴ *Id.*

program states, “[i]t is hoped that the combination of observant neighbors and an accessible local responsible party will deter . . . potential deterioration of the property” and maintain existing property values.¹⁸⁵

Chula Vista’s ordinance targets homes that are in foreclosure and holds mortgage companies responsible for general landscape upkeep. The Abandoned Residential Property Program may have garnered additional political support because of the growing foreclosure crisis affecting San Diego County and the widely acknowledged need to address it.¹⁸⁶ As evidenced by the challenges faced by advocates of vacant property registration tools in cities such as Cleveland, acquiring political and community support that not only establishes a local program, but also supports enforcement policies, is essential to the success of registration programs. Chula Vista’s strength is its insistence on weekly property inspections and maintenance, as well as its requirement for local management companies to act as intermediaries. Additionally, the condition of posting a twenty-four-hour contact name and number provides the City with a valuable point of contact for maintenance concerns.

Analysis. Chula Vista’s Abandoned Residential Property Program can assess penalties for non-compliance by issuing a written warning or a citation for civil penalties of up to \$1,000 per violation, per day and/or criminal prosecution that holds a maximum fine of \$1,000 and six months in jail.¹⁸⁷ During its first year of operation (Oct. 2007 to Oct. 2008), Chula Vista has collected \$77,000 in registration fees and assessed nearly \$850,000 in administrative citations.¹⁸⁸ Over the long term, the City may want to increase the \$70 registration fee, per property, per year, as a stronger deterrent for holding vacant properties for significant periods of time. The short term goal of the ordinance is addressing the potential harm that neglected and foreclosed properties create on neighborhoods and preventing or mitigating

¹⁸⁵ Abandoned Residential Property Program, *supra* note 173.

¹⁸⁶ Lori Weisberg & Danielle Cervantes, *County Homeownership Rate Falls, Census Says: Nearly 22,000 Homeowners Lost Since ‘05*, SAN DIEGO UNION-TRIB., Sept. 23, 2008, at A1; Abandoned Residential Property Program, *supra* note 173.

¹⁸⁷ CHULA VISTA, CAL., MUNICIPAL CODE § 15.60.110 (2007) (“Any person, firm and/or corporation that violates any portion of this section shall be subject to prosecution and/or administrative enforcement under Chapters 1.20 and 1.41 CVMC.”). CHULA VISTA, CAL., MUNICIPAL CODE §§ 1.20.010(D), 1.41.110(C) (1998).

¹⁸⁸ E-Mail correspondence with Doug Leeper, Code enforcement Manager for Chula Vista, September 29th, 2008 on file with author.

the adverse impacts of vacant properties. Chula Vista's market strength ensures the property will maintain its values in excess of the nuisance abatement and maintenance costs imposed by the city; thus, making code enforcement actions more cost-effective for the local governments in similar strong market communities. The opposite holds true for weak market cities. As the foreclosure crisis progresses and the vacant property problems persist, the City of Chula Vista may want to consider the following recommendations:

- Establish a graduated fee schedule that allows abandoned property registration fees to increase each year. This may help to discourage property owners (or titleholders) from holding on to vacant homes for long periods of time.
- Amend the ordinance to eliminate the ambiguity associated with the requirement of "maintaining the property to the neighborhood standard." Since the lender or titleholder is required to complete the property inspections and there is a fair amount of subjectivity regarding "neighborhood standard," the ordinance opens the door for loosely-interpreted standards and codes that are difficult to enforce.
- Amend the ordinance to include enforcement of structural disrepair in addition to general landscape maintenance requirements.
- Combine the punitive sanctions of the registration fees with incentive programs designed to encourage property owners to return vacant property to productive use.
- While it is notable that Chula Vista's ordinance is designed to regulate the effects of the foreclosure process, the City may want to broaden the scope of the existing ordinance to include other types of vacant properties, including those held by speculators and vacant commercial buildings.

D. Mortgage Industry Responses

When homes go through the mortgage foreclosure process, a number of legal and policy conflicts arise between the interpretation of real property laws by the mortgage servicing industry and local governments' administration of vacant property registration ordinances and its inherent nuisance abatement powers.

The primary legal issue is: what can mortgage services and their field companies do to abate nuisances or maintain vacant and foreclosed homes once the foreclosure action is filed, but before the sheriff's sale delivers title and ownership to the lender? While, no doubt, there is some variation among the body of state case and statutory law, the mortgage service industry's first defense is that a mere mortgagee in possession of the property can take very little action.¹⁸⁹ Maybe they can secure the building, but they cannot remove personal effects from the interior. Some in the mortgage servicing industry world argue that they do not have the power to even cut the grass or clean junk and debris. Such a strict interpretation of their contractual duties seems at odds with two fundamental common law principles of property ownership: that property laws ought to 1) encourage productive use and discourage waste or destruction of the real property asset and 2) insulate the rights of property owners against negligent or harmful uses of nearby property.¹⁹⁰ Current state real property laws have codified these essential precepts and outline the respective duties of property owners as well as lending institutions in the foreclosure process.

Mortgage Industry's Campaign against the Chicago Ordinance: During the spring of 2008, frustrations ran high about the increase of vacant and foreclosed homes in Chicago. There had been an approximately forty-six percent increase from April 2007.¹⁹¹ Mayor Daley proposed a VP registration ordinance "to prevent the epidemic of home foreclosures from ruining entire neighborhoods."¹⁹² The mortgage service industry and their field representatives (e.g., the property maintenance and inspection companies) were extremely concerned about a number of the proposed requirements.¹⁹³ First, it would prohibit the use of

¹⁸⁹ Doug Leeper, City of Chula Vista Code Enforcement Manager, Testimony before the House Subcommittee on Domestic Policy, Neighborhoods: The Blameless Victims of the Sub-Prime Mortgage Crisis 2 (May 21, 2008).

¹⁹⁰ See Steve McKinney, *Enforcement*, 11 NAT. RESOURCES & ENV'T 66, 68 (1997) ("[O]ur legal system adapted traditional notions of English property law . . . common law doctrines of waste . . . and nuisance . . ."); see also J.B. Ruhl, *The "Background Principles" of Natural Capital and Ecosystem Services—Did Lucas Open Pandora's Box?*, 22 J. LAND USE & ENVT'L. L. 525, 531 (2007) ("[A]ny act that harmed the productive usefulness of other land could be deemed a nuisance.").

¹⁹¹ Fran Spielman, *No More Plywood on Vacant Homes? Daley Wants Steel or Alarms if Empty for 6 Months*, CHI. SUN-TIMES, Apr. 11, 2008, at 19.

¹⁹² *Id.*

¹⁹³ See *Stricter Limits Urged On Vacant Buildings*, CHI. TRIB., June 3, 2008, at 3 ("Despite the opposition of lenders . . . a . . . proposal to tighten standards

plywood on windows and doors and instead require the industry to secure vacant buildings with steel panels, or to reinstall and maintain all windows and doors.¹⁹⁴ They would also have to engage a private security firm for each house, and “[d]usk-to-dawn lighting would be required [on] all exits.”¹⁹⁵ Daley proposed to raise the registration fee of its preexisting VP registration ordinance from \$100 to \$250.¹⁹⁶ The industry was less worried about the fee than the direct cost to comply with such rigorous property maintenance standards.¹⁹⁷ The ordinance proposed by Chicago, if adopted, would certainly be, from the mortgage industry perspective, one of the most onerous vacant property registration laws around.

The proposed Chicago ordinance galvanized the mortgage service and field inspection industry to launch several activities. Safeguard Properties, a national field services firm in Cleveland, and the Mortgage Bankers Association started to organize weekly conference calls to discuss inventory and track the number of proposed VP registration ordinances being considered nationwide.¹⁹⁸ More importantly, they felt the industry had to apply a full court press to defeat the extreme property maintenance provisions in Chicago, otherwise it might spread to other cities. Safeguard and others in the mortgage servicing industry made presentations at the annual conference of the U.S. Conference of Mayors.¹⁹⁹ They also testified at several public meetings before other cities that were considering similar VP ordinances.²⁰⁰ The MBA and Safeguard do not technically oppose the concept of registering vacant properties, but they would like a process and set of property maintenance requirements that would be similar to industry standards.²⁰¹ They feel industry practices

for the city’s growing number of vacant homes won the approval . . . of the City Council Buildings Committee.”)

¹⁹⁴ Spielman, *supra* note 191.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ See *Stricter Limits Urged on Vacant Buildings*, *supra* note 193 (“Lenders, however, said [the proposed Chicago ordinance] would be a burden on mortgage companies.”); Ruth Simon, *Vacant Property Fees Add To Mortgage Firm’s Woes*, WALL ST. J., July 29, 2008, at A3 (“The tougher rules are also adding to the financial burden on mortgage companies . . .”).

¹⁹⁸ See Robert Klein, *An Outbreak of Ordinances*, MORTGAGE BANKING, Aug. 1, 2008, at 46 (“Robert Klein is chief executive officer of Safeguard Properties[,] the largest privately held mortgage field services company in the United States.”).

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ See *id.* (“[W]e hope to demonstrate the benefit of collaboration to create more uniformity in ordinances, and create ordinances that serve the mutual

are sufficient to protect the assets and stabilize neighborhoods.²⁰² The field representative companies, such as Safeguard, operate as the mortgage servicing industry's property maintenance and inspection arm.²⁰³ While they do not handle all vacant and foreclosed homes, a large majority are maintained by these field representative companies during the foreclosure process.

As the Chicago ordinance slowly snaked its way through the local legislative process, Safeguard began to track consideration and the adoption of similar ordinances by other cities. The MBA and other mortgage service companies then began to develop a list of principles and industry standards that they would like included in all VP registration ordinances.²⁰⁴ Eventually, the Chicago City Council understood the industry concerns and adopted a more reasonable and less costly set of standards and processes.²⁰⁵

E. Potential Preemption of VP Registration Ordinances

After the successful lobbying effort in Chicago, Safeguard and the MBA formally chartered a Vacant Property Registration Committee.²⁰⁶ With Safeguard's assistance, the group holds regular conference calls to identify new communities proposing VP registration ordinances.²⁰⁷ The industry today seems resigned to the fact that local governments have the legal authority to enact VP registration ordinances; however, the MBA/Safeguard VP committee has also begun to evaluate the feasibility of developing a model VP registration ordinance.²⁰⁸ The tensions

interests of municipalities and mortgage servicers.”).

²⁰² See *id.* (“At the same time, by reaching out and offering the value of our industry’s experience and perspective . . .”).

²⁰³ See Robert Klein, *Communication is Key Skill for Success in Field Services*, MORTGAGE SERVICING NEWS, Nov. 1, 2005, at 4 (“When a mortgage loan servicer becomes responsible for the condition of an asset the company has loaned money against, it depends on field services vendors to protect that asset.”).

²⁰⁴ See Klein, *supra* note 198, (“The goal . . . has been to identify key provisions that raise concerns and develop consensus on a set of recommendations to address those concerns.”).

²⁰⁵ Compare Press Release, City of Chicago, Department of Buildings, Vacant Property Ordinance Passed: Stricter Requirements for Owners of Vacant Properties (July 30, 2008), with Spielman, *supra* note 191 (“The use of plywood to cover doors and windows would be prohibited on buildings vacant for at least six months But the mayor’s ordinance would more than double the registration fee – from \$100 for the first six months to \$250.”).

²⁰⁶ See Klein, *supra* note 198.

²⁰⁷ See *id.*

²⁰⁸ *Id.* The MBA and other representatives from the industry have met with

and the costs to comply with so many diverse registration processes and property maintenance standards may, at some point, motivate the mortgage industry to seek state legislation that could preempt local government powers or at least set minimum or perhaps maximum property maintenance standards; thereby restricting local government nuisance abatement authority over foreclosed homes.

Remember that code enforcement powers are derived from the state police powers to protect public health and safety and a series of state authorizing statutes; these state laws establish the parameters of local code enforcement remedies such as civil injunctions, criminal prosecution, nuisance abatement and cost recovery.²⁰⁹ In home rule states, charter cities and counties have greater flexibility and independence in addressing code enforcement cases where the courts interpret such local actions to be municipal affairs.²¹⁰ Other states still adhere to remnants of the 19th century legal doctrine called Dillon's Rule, which holds that the authority of local governments can only derive from the express delegation of it by state government.²¹¹ In either case, local government officials and industry representatives will be closely monitoring state legislative sessions in early 2009 for the introduction of possible preemptive bills.

CONCLUSION AND NEXT STEPS -THE NEED FOR FEDERAL AND STATE LEADERSHIP

Mortgage servicers and code enforcement officials can probably agree on three things. First, the foreclosure crisis will continue to deepen, and more precipitously so, in the wake of the September 2008 meltdown of the nation's financial markets. Second, more foreclosures will result in more vacant homes for the foreseeable future. In some markets the number of foreclosures might peak in another one to three years, while in other communities it could

representatives of the U.S. Conference of Mayors (USCM) to share their concerns about the burdens placed on the industry from having so many different vacant property registration ordinances, as well as the challenges that they face in attempting to comply with these ordinances.

²⁰⁹ *Festa v. N.Y. City Dep't of Consumer Affairs*, 820 N.Y.S.2d 452, 465 (N.Y. Sup. Ct., 2006) (quoting *Stringfellow's of N.Y., Ltd. v. City of N.Y.*, 694 N.E.2d 407, 414 (N.Y. 1998)).

²¹⁰ *Mayor & Bd. of Aldermen of Ocean Springs v. Homebuilders Ass'n of Miss., Inc.*, 932 So. 2d 44, 52 (Miss. 2006).

²¹¹ *See S. Constructors, Inc. v. Loudon County Bd. of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001) (quoting *Merriam v. Moody's Ex'r*, 25 Iowa 163, 170 (1868)).

be substantially longer. Plus, the cumulative impact of this influx of vacant and abandoned properties will extend far beyond the peak of foreclosures. Third, the mortgage industry, community development organizations and local officials cannot fix this crisis on their own without assistance from the federal and state government.

The article concludes with a few tactical suggestions on how local code officials can make a stronger policy case for assistance and proposes several state and federal policy interventions to address the gaps in vacant property and community stabilization strategies and tools.

A. Code Enforcement's Call for Help

Code enforcement officials nationwide are holding back the tide of blight from vacant and foreclosed properties, but they need reinforcements quickly. They can continue to promulgate VP registration ordinances in the short term, but as local government revenues decline and budgets shrink, they are struggling with implementation. Cities have relied on their code enforcement departments over the years to tackle numerous socio-economic ills, from gangs and unsafe structures, to hoarders and slumlords. The word from the code enforcement officials in the field (from both weak and formerly strong markets) is that they have never seen anything like the magnitude of the current foreclosure crisis.

Code enforcement has special legal powers to addresses blight and vacant properties that no other entity possesses. Unfortunately, policymakers and citizens often view code enforcement as a lengthy process of endless cajoling and communicating with property owners along with insufficient legal remedies and enforcement penalties. Most local policymakers do understand the code enforcement's unique powers and pivotal position in the foreclosure crisis - yet many mayors, city councilors and county commissioners still do not fully appreciate what code enforcement does and can do. For example, given the decrease in local government revenue nationwide, many code enforcement departments are preparing for substantial budget cuts at a critical time when they need additional resources.²¹²

State and federal policymakers are less likely to recognize code enforcement's special powers to stabilize neighborhoods and

²¹² See Dan Barry, *Tending the Boulevards of Broken Dreams*, N.Y. TIMES, Sept. 22, 2008, at A14.

protect federal and state investments in neighborhood revitalization. Alternatively, they see code enforcement as the domain of local governments and, therefore, do not support using state or federal funds.

Without more financial support and direct technical assistance from all levels of government (and perhaps from nonprofits and philanthropic organizations), the level of blight and abandonment in many communities will reach a point of no return. Remember that blight spreads like a wild fire or virus, so policymakers have an eighteen month window, at best, to allocate and appropriate reinforcements for these first responders.

The challenge for code enforcers is how to make their voices heard and understood. They must make stronger policy and political cases to engage policymakers at all levels in a strategic dialogue about the implications of taking action and the likely disaster if they do not. Here are a few suggestions for code enforcement officials to ponder:

- Collect more data that establishes a stronger relationship between the number of foreclosures, the number of chronically vacant properties, and their cost to the community. Identify and track the number of vacant homes and how long they have been vacant. Look for clusters of vacant and abandoned homes and evaluate the root causes and cumulative costs to the community. Track the total operational costs of each city to respond to vacant and foreclosed homes by developing standard performance measures and cost accounting for code enforcement's activities. Such additional data might offer a more powerful snapshot of the foreclosure crisis' impacts on local code enforcement.
- Develop a vacant properties policy agenda that explains how code enforcement supports community-wide actions to address foreclosure, vacant properties, and community revitalization. The VP policy agenda should include a list of reforms, new strategies, and demonstration projects that each level of government (local, state, and federal) would support. The agenda would also need a special funding strategy that balances the increased costs of handling more vacant properties with innovative ideas on how to finance the implementation of the policy reforms proposed in this article. Perhaps national and state code enforcement associations, working with national organizations, such

as the NVPC, can research, design, and tailor these policy agendas.

- Build a coalition of residents and neighborhood/community based organizations that can support code enforcement's VP policy agenda before relevant levels of government. City councils and state legislators will be more receptive to concerns and complaints from voters than code enforcement officials alone. Neighbors who live next door to vacant and foreclosed homes are the true victims in this crisis, and one would assume they would be very supportive of code enforcement proposals to stabilize neighborhoods.
- Partner with community based organizations (CBOs) and community development corporations (CDCs). Code enforcement, other city agencies, CDCs and tenant organizations often have conflicting agendas.²¹³ Each community can point to examples where code enforcement actions have supported neighborhood revitalization projects/programs; while in other cases code enforcement can become a barrier or obstacle for its failure to act or for taking aggressive actions against inappropriate owners and for unnecessarily displacing tenants.
- Create an outreach campaign and action plan to disseminate the VP policy agenda and engage policymakers, especially from the state and federal governments. The outreach campaign must craft a strong and persuasive message that explains what code enforcement does and how the foreclosure crisis has stretched its resources to the breaking point. Perhaps national and state code associations could convene a series of local and regional roundtables, hold press conferences and encourage state and federal legislators to convene more committee hearings on the community impacts. Another thought is to invite state and federal officials on code enforcement "foreclosure tours" of neighborhoods with clusters of vacant and foreclosed homes. Show these officials what code enforcement does and what it needs to do.

²¹³ JOSEPH SCHILLING & ELIZABETH SCHILLING, METLIFE FOUNDATION, LEVERAGING CODE ENFORCEMENT FOR NEIGHBORHOOD SAFETY: INSIGHTS FOR COMMUNITY DEVELOPERS 4 (2006).

B. State Policy Barriers and Opportunities

Although most media attention has focused on the role of the federal government in stemming this crisis, states have the legal powers, financial resources, and political will to mitigate its impact.²¹⁴ Given its strong legal foundations in the state police power, state policymakers should play a major role in providing additional resources and technical assistance to local code enforcement agencies. Historically, however, there are always inherent tensions between the state and local governments when it comes to code enforcement legislation. Typically state legislators seem neutral about code enforcement unless they perceive that local enforcement actions might impinge on property rights and/or business interests (e.g., apartment owners, home builders, banks, or real estate agents) or give local government enforcement officials too much discretion.

Opportunities for Potential State Policy Reforms: Alan Mallach advocates that states must mitigate the impact of foreclosures on neighborhoods and communities at risk.²¹⁵ Under this policy goal, he sets forth three proposed action steps for state policymakers (Action Steps 5-7).²¹⁶ Let's examine how code enforcement strategies and vacant property reclamation might fit within these three policy action steps:

•*Action Step Five: Establish clear responsibility for creditors to maintain vacant properties.*

One of the greatest challenges for local code officials is tracking down responsible parties. State law could require mortgage servicers to register and identify specific points of contacts within the state as part of their basic jurisdictional requirements of "doing business" in that state. Such a registration system already exists with all Secretaries of State, so it could be implemented quickly and with minimal cost.

Building on this notation of data and points of contact, states could offer assistance (resources or technical) to local governments to develop comprehensive, regional real property information systems. States should also consider commencing a series of three to five pilot projects to develop the program template.

Lenders avail themselves of the state court systems, so state laws might impose property maintenance responsibilities on

²¹⁴ MALLACH, *supra* note 2, at 1.

²¹⁵ *Id.* at 8.

²¹⁶ *Id.* at 13-16.

properties that are somewhere in the foreclosure process (pre and post sheriff's sale). Such a law could also offer legal protection for the mortgage servicers and field companies from false claims from former property owners or tenants.

On a similar note, Wisconsin has pending legislation that prohibits a lender or property owner from recording a deed unless the property conforms to local property maintenance standards.

•*Action Step Six: Make the process as expeditious as possible: reform the foreclosure process and empower municipalities to move quickly when the mortgage lenders and servicers fail.*

Throughout this article, there have been suggestions on how to reform the mortgage foreclosure process, some of which directly relate to making it easier for code officials to identify and communicate with mortgage servicers. However, states must consider ways to strengthen code enforcement authority when lenders and mortgage servicers are not responsive. A few likely code enforcement policy reforms would include: 1) nuisance abatement processes and establishing super priority liens for abatement costs; 2) authorizing state legislation for VP registration ordinances that expands local government flexibility; 3) creation of specialized housing courts with broad jurisdiction similar to Cleveland's Municipal Housing Court that can hear foreclosure cases and code enforcement cases.

•*Action Step Seven: Acquire and convey the property to responsible owners.*²¹⁷

Enacting state authorizing legislation for land banks and providing initial pilot grants/technical assistance similar to U.S. EPA's Brownfields Program would be the most powerful and effective state policy reform.²¹⁸ It could take the form of Michigan's model land banking legislation²¹⁹ or empower existing entities, such as redevelopment authorities to take on the role of acquiring and conveying vacant and foreclosed homes. A state might want to consider creation of a *state* land bank as was done in Michigan.²²⁰

Introducing and adopting state land bank legislation raises all

²¹⁷ *Id.* at 16.

²¹⁸ The Neighborhood Stabilization Plan (NSP) and funds under the federal Housing and Economic Recovery Act of 2008 states that establishing a land bank is an eligible activity and thus states could launch such a program to also support and expand the creation of land banks through the use of the state's allocation of NSP funds.

²¹⁹ Mich. Comp. Laws Ann. §§ 124.751-124.744 (West 2008).

²²⁰ *Id.*

types of competing policy and political issues. Typical land bank supporters include local government, community development corporations and housing advocates, while real estate lenders and property rights advocates are the likely opponents. For example, the city of Detroit finally enacted land banking legislation in June 2008 after a fierce five year battle with lots of political acrimony, confusion over what a land bank does and who would control it and strong opposition from community groups who equated land banking with a government strategy to start a new phase of urban renewal.²²¹

New York offers a good story of land banking and legislative politics. As a result of the Campaign's recommendations in *Blueprint Buffalo*, Assembly member Sam Hoyt (D-Buffalo, Grand Island) introduced legislation to allow counties to create and operate land banks to revitalize vacant and abandoned property.²²² The New York State Assembly and Senate passed AB 8059B on June 19th, 2008 which would essentially allow three counties to establish a regional approach to land banking.²²³ Instead of the county or city government, the legislation designated the Empire State Development Corporation as the land bank's institutional home.²²⁴ The development corporation, however, could charter no more than three land banks, thus rendering this legislation more of a pilot program. The legislation set forth a comprehensive process for operating the land bank that would start with a written vacant property inventory and include a county wide or regional vacant property reclamation strategy.²²⁵ It would give the land bank powers to control, maintain, rehabilitate, disassemble, and demolish vacant properties.²²⁶

Buffalo Mayor Bryon Brown vigorously opposed the legislation, arguing the city must adopt the land bank.²²⁷ Everyone in Buffalo is well aware of the ongoing political conflict between Brown and

²²¹ See Zachary Gorchow, *Council Votes to Create Land Bank*, DETROIT FREE PRESS, July 29, 2008; John Gallagher, *Council Remains Skeptical of Kilpatrick's Land Bank Plan: Who Would Benefit is Top Concern*, DETROIT FREE PRESS, Apr. 2, 2008.

²²² *Create the Land Bank: Region, Not Just the City, Would Benefit From a Tool to Help Process Vacant Houses*, BUFFALO NEWS, July 10, 2008, at A6.

²²³ N.Y. Assembly Bill No. 8059, Leg. 230th Sess. (2007).

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ Phil Fairbanks, *Land Bank Could Help to Reclaim Vacant City Houses*, BUFFALO NEWS, June 21, 2008, at D5.

Assemblyman Hoyt.²²⁸ Brown opposed the lack of city representation in the bill, saying the land bank must be under city control. Hoyt noted the *Blueprint Buffalo* report recommended a city land bank first and then county.²²⁹ After more than ninety days of deliberation and lobbying, Governor Paterson vetoed the measure.²³⁰

From a distance, the legislation seemed to have two fatal flaws: 1) a lack of local government representation; and 2) using the Empire State Development Corporation framework. Hoyt's bill proposed an organizational structure that included five state appointees and two appointments each by the County CEO and the County legislative body, but not one direct appointment from the cities within a county. Since New York's upstate cities have the most vacant properties, the legislation should have given the mayors of the largest cities, within a county or two, direct appointments on the land bank board; this would have made sense both politically and practically.

State officials within the Empire State Development Corporation were luke-warm toward having this county entity become an official subsidiary corporation.²³¹ Assembly member Hoyt deserves praise for identifying an existing entity with expertise in land assembly and stronger financial support than most local governments in New York (especially given the fiscal situation of Buffalo and Erie County).²³² His choice made policy sense, but the state officials seemed concerned about the potential financial risks and liabilities for acquiring, maintaining,

²²⁸ *Id.*

²²⁹ When the NVPC Blueprint assessment team made its recommendation to start with the city land bank it was based on the city's level of interest and commitment to the idea. Phil Fairbanks, *Land Bank Supporters Say Bill Can Save Cities*, BUFFALO NEWS, July 27, 2008, at C1. During the press conference for the release of the *Blueprint* Mayor Brown made it clear that vacant properties was a regional problem that demanded regional solutions, and he looked forward to working with the suburban cities and townships. *Id.* As city interest waned, the county emerged from receivership and several members of the county legislature became extremely interested in the *Blueprint's* recommendations, especially the land bank, as a strategy the county could lead with the hope that it might foster some modest level of regional collaboration--something that historically the city and the county have been unable to do. *Id.* The Campaign did file a letter of support with Governor Paterson thinking it was best to start the land bank immediately and work out concerns later. *Id.*

²³⁰ Phil Fairbanks, *Paterson Vetoes Bill Proposing Land Banks: Wants Facilities to be Run by Cities*, BUFFALO NEWS, Sept. 27, 2008, at D1.

²³¹ Charles V. Bagli, *State Development Agency Buffeted by Slowing Economy and Internal Rifts*, N.Y. TIMES, May 18, 2008, at A27.

²³² *See Create the Land Bank*, *supra* note 222 (Hoyt's bill was based off of the land bank created in Flint, Michigan).

and reusing vacant properties primarily for community development purposes.²³³ The development corporation knows economic development, but not necessarily land banking activities that might include demolition of abandoned houses, neighborhood planning and green infrastructure that do not necessarily generate revenue or cover the costs of operation.²³⁴

Perhaps Mayor Brown and other local officials from throughout the state can soon sit across the table from state officials and legislators to draft a more consensus-based model for a regional land bank entity. They are losing valuable time as the number of vacant properties in Buffalo increases along with other older industrial cities in New York (Syracuse, Rochester, Niagara, etc.). They cannot wait another five years to get a land bank up and running. Now is the time to forget the past and focus on new models of revitalization.

State governments will also need help in funding and administering any of the potential policy reforms discussed above. In Michigan, the state land bank law authorizes the county to charge a fee on the recordation of title to support a land bank authority's operations.²³⁵ Perhaps a similar type of fee could apply to foreclosure filings initiated by lending institutions (not public or nonprofit entities). Virginia enacted its own derelict structures fund several years ago.²³⁶ While this legislation might offer a template, the legislature must be willing to appropriate new funds every year, something that Virginia has not done. State governments (and local governments as well) could in theory issue bonds for vacant property acquisition and reuse. However, the current financial crisis and severe tightening of the credit markets do not make it a viable option, at least in the short term. Therefore, the federal government must also support state and local efforts to reclaim vacant and foreclosed homes.

²³³ See ROCHESTER HOUSING DEVELOPMENT FUND CORPORATION, RENOVATING HOUSES AND REBUILDING LIVES 9, 13-14 (discussing the risks associated with community development).

²³⁴ N.Y.S. OFFICE OF THE STATE COMPTROLLER, DIVISION OF STATE SERVICES, EMPIRE STATE DEVELOPMENT CORPORATION, OVERSIGHT OF SUBSIDIARY OPERATIONS, REPORT No. 2005-S-6 3 (2006), available at <http://www.osc.state.ny.us/audits/allaudits/093006/05s6.pdf>.

²³⁵ MICH. COMP. LAWS ANN. § 124.768 (West 2004).

²³⁶ VA. CODE ANN. § 36-152 (West 2005).

C. Federal Assistance for Stabilizing Neighborhoods and Reclaiming Vacant Properties

Federal assistance will be necessary for cities to stabilize neighborhoods and stem the tide of community disinvestment caused by the rising number of vacant and foreclosed homes. The current foreclosure crisis illustrates the failures of not having a comprehensive federal housing policy.²³⁷ The current administration and congress did not appreciate or completely understand that our entire economy rests on the viability and vitality of the housing market and the stability of our neighborhoods. In light of the foreclosure crisis's mounting severity and the resulting instability of the housing and financial markets, President-elect Obama and the new 111th Congress must make housing and community development a top federal policy priority.²³⁸

Thousands of vacant properties with toxic mortgages and unmarketable titles throughout the nation serve as a major barrier to any effective housing and community development program or initiative. The new Secretary of Housing and Urban Development must first tackle the growing vacant property problem in order to ensure the long term effectiveness of any national housing policy. Three major pieces of federal legislation from the 110th Congress²³⁹ provide a good template for addressing vacant properties as part of a broader, new federal housing policy: 1) the proposed Neighborhood Reclamation and Revitalization

²³⁷ Scholars and policy experts for the past ten years have made the case as to why the federal government must take a leadership role in devising a more robust and collaborative approach to revitalizing our cities through a more modern housing policy. See generally Peter W. Salsich, Jr., *Saving Our Cities: What Role Should the Federal Government Play?*, 36 URB. LAW. 475 (2004).

²³⁸ Within weeks of his election, President-elect Obama announced that he will create a special White House Office of Urban Policy to elevate the concerns over housing and community development and more importantly to facilitate cross agency collaboration and problem solving. The Office of the President-elect, Agenda: Urban Policy, http://change.gov/agenda/urbanpolicy_agenda/ (last visited Nov. 25, 2008) ("Obama and Biden will create a White House Office of Urban Policy to develop a strategy for metropolitan America and to ensure that all federal dollars targeted to urban areas are effectively spent on the highest-impact programs. The Director of Urban Policy will report directly to the president and coordinate all federal urban programs.").

²³⁹ Coincidentally, with the convergence of the foreclosure crisis and vacant property challenges of older industrial communities, the 110th Congress probably distinguished itself as the most active on vacant property legislation and hearings.

Program Act introduced by Congressman Higgins from Buffalo;²⁴⁰ 2) the proposed Emergency Neighborhood Reclamation Act introduced by Congressman Ryan from Youngstown;²⁴¹ and 3) the recently enacted Housing and Economic Recovery Act of 2008 and its Neighborhood Stabilization Program.²⁴²

1. Rescuing Older Industrial Cities by Revitalizing Neighborhoods and Reclaiming Vacant Properties

Long before the current foreclosure crisis, older industrial cities, such as Cleveland, Detroit, Baltimore, Philadelphia, and Flint, were plagued with thousands of vacant and abandoned properties. Buffalo, New York, and Youngstown, Ohio, are two cities that have lost more than half of their populations through economic dislocation, and as a result have growing inventories of thousands of vacant and abandoned properties.²⁴³ The number of foreclosures in these cities does not compare with the volume of a place such as Phoenix, Las Vegas or Memphis. However, the community impacts may in fact be greater, given the cumulative impact of new vacant property in an already saturated housing market and resultant oversupply of available housing stock.

Understanding the seriousness of the vacant property problem in their respective communities, Congressman Higgins from Buffalo and Congressman Ryan from Youngstown each introduced legislation that would have provided additional CDBG funds for housing demolition initiatives for many shrinking cities.²⁴⁴ Their proposed formula was strictly based on the loss of population and the increase of vacant properties.²⁴⁵ Eligible uses for these funds included creating land banks, conducting vacant property inventories, decommissioning surplus public

²⁴⁰ Neighborhood Reclamation and Revitalization Program Act of 2007, H.R. 3498, 110th Cong. (2007).

²⁴¹ Emergency Neighborhood Reclamation Act of 2008, H.R. 5870, 110th Cong. (2008).

²⁴² Housing and Economic Recovery Act (HERA) of 2008, Pub. L. No. 110-289, 122 Stat. 2654 (2008).

²⁴³ See generally NATIONAL VACANT PROPERTIES CAMPAIGN, THE YOUNGSTOWN-MAHONING COUNTY VACANT PROPERTIES INITIATIVE Q & A; BLUEPRINT BUFFALO, *supra* note 16, at 1. The Campaign has strong connections to each city and many of its vacant property champions. In the fall of 2006, it released Blueprint Buffalo, a regional strategic policy and action plan. For Youngstown, the Campaign started its assessment process in June 2008 and should have a final report by the end of the calendar year that will be available on the Campaign web site.

²⁴⁴ See H.R. 3498, 110th Cong. (2007); H.R. 5870, 110th Cong. (2008).

²⁴⁵ *Id.*

infrastructure, and establishing networks of green infrastructure.²⁴⁶

Congressman Higgins's Neighborhood Reclamation and Revitalization Program Act of 2007 would have authorized \$100 million in grants to local government to demolish properties and study what could be done with the land.²⁴⁷ For cities demonstrating population loss, this bill responded to the needs of grassroots leaders by providing micro-targeted grants for vulnerable neighborhoods to help stabilize the vacant housing problem there and breathe new life into the urban context.

Congressman Ryan's Emergency Neighborhood Reclamation Act of 2008, similar to the Higgins bill, would have authorized \$1,000,000,000 in grants to local governments with substantial vacant housing problems to facilitate the following strategies and tools:²⁴⁸ It provides that,

- (1) the demolition of vacant and abandoned housing, and other vacant and abandoned structures, located in areas that are primarily residential in character, and which are within the jurisdiction of such local government, pursuant to such local government's comprehensive plan for demolition under subsection (b)(3);
- (2) prior to demolition, the abatement of any health and safety hazards in accordance with applicable State and Federal laws, within such housing or such other structures, or on the site upon which such housing or other structures are located; and
- (3) after demolition—
 - (A) the capping or removal of utility connections and public infrastructure, including street pavements and sewer lines; and
 - (B) the rehabilitation of a site for use as public open space, inclusion in a land bank, or for sale.²⁴⁹

While not driven by the foreclosure crisis, the Higgins and Ryan bills identify the need of shrinking cities for federal intervention to combat the long standing blight and decay caused by vacant properties. During the summer and fall of 2008, staff from Higgins and Ryan's offices worked hard on joint legislation that would expand the activities set forth in their previous bills and perhaps deliver a revolutionary policy model for urban revitalization.²⁵⁰

²⁴⁶ *Id.*

²⁴⁷ H.R. 3498, 110th Cong. § 5.

²⁴⁸ H.R. 5870, 110th Cong. § 3.

²⁴⁹ § 3(c)(1)-(3).

²⁵⁰ Phil Fairbanks, *Can Buffalo Lead the Way in Solving Nation's Vacant Housing Problem?*, BUFFALO NEWS, Sept. 26, 2008, at A1.

2. Housing and Economic Recovery Act (HERA) of 2008

As the foreclosure crisis deepened in early 2008, Congress began to consider supplemental legislation to the 2008 Economic Stimulus Act.²⁵¹ This new legislation would expand funding for foreclosure outreach, counseling and negotiations with lenders to forge loan workouts.²⁵² In discussions with congressional staffers, national community development groups, such as LISC and Enterprise Community Partners, made a strong case about the community/neighborhood impacts of the growing number of foreclosures.²⁵³ During the 110th Congress, a number of Senators and House members introduced housing recovery bills. Senator Dodd was the leading champion in the Senate and many of the provisions in his legislation were eventually incorporated in the July enactment of the Housing and Economic Recovery Act, sponsored by Congresswoman Waters and Congressman Frank.²⁵⁴

Title III of HERA appropriates \$3.9 billion to facilitate community stabilization to combat damage caused by foreclosed and vacant residential properties and/or blighted homes.²⁵⁵ Through a complex formula based on the number of foreclosures and vacant properties, these federal dollars flow down to state housing agencies and local government through a CDBG framework for such eligible activities as establishing land banks, demolishing blighted structures, redeveloping or demolishing vacant properties, purchasing and rehabilitating abandoned or foreclosed homes and residential properties, and establishing financing mechanisms for the purchase and redevelopment of foreclosed homes and residential properties.²⁵⁶

²⁵¹ Economic Stimulus Act of 2008, Pub. L. No. 110-185, 122 Stat. 613 (codified as amended in scattered sections of 26 U.S.C.).

²⁵² Press Release, Chris Dodd's Senate Member Office, Dodd Announces Launch of Hope for Homeowners Program (Oct. 1, 2008).

²⁵³ See Enterprise Community Partners, Inc., Save America's Neighborhoods, <http://saveamericasneighborhoods.org> (last visited Nov. 15, 2008) (advocating for Neighborhood Stabilization Funds in the Housing and Economic Recovery Act of 2008).

²⁵⁴ Press Release, Office of the Speaker of the House, Subprime Crisis Demands Action, Congress Will Protect Families Who Have Lost Their Homes (Oct. 3, 2007).

²⁵⁵ Housing and Economic Recovery Act (HERA) of 2008, Pub. L. No. 110-289, § 2301, 122 Stat. 2654, 2850 (2008); Press Release, U.S. Dept. of Housing and Urban Development, Preston Allocates Nearly \$4 Billion to Stabilize Neighborhoods in States and Local Communities Hard-Hit By Foreclosure (Sept. 26, 2008) [hereinafter HUD Release].

²⁵⁶ See HUD Release, *supra* note 255.

HUD released the funding allocations September 26th, 2008.²⁵⁷ Even within the same state, it seems the formula benefited newer cities where the impact from foreclosures arrived later (e.g., Columbus, Ohio), compared with older industrial cities that were struck earlier first by foreclosures and flipping around 2004/2005 (e.g., Cleveland and Youngstown, Ohio). Unfortunately, the statutory language was not sufficiently sensitive to the important difference between weak and strong market cities. Moreover it did not seem to recognize the variety of state foreclosure processes (e.g., judicial as opposed to administrative foreclosures), the lending industries' lag time in completing the foreclosure and/or recording documents after the sheriff's sale, and the lack of a reliable national database on vacant properties. Local governments that did not directly get funds as a Neighborhood Stabilization Plan (NSP) grant recipient can apply for state stabilization grants.²⁵⁸

HUD issued its implementation regulations that call for cities to submit Neighborhood Stabilization Plans (NSP) by December 1st, 2008.²⁵⁹ HUD did its best to stay true to the legislative language and offer communities more flexibility; however, its regulations offer some curious interpretations and definitions of foreclosure with a time table of vacant and/or abandoned and blighted structures.²⁶⁰ Conspicuously absent from this statute, however, is any direct assistance to ensure local code enforcement departments have the resources and capacity to stabilize neighborhoods despite the advocacy of national, state, and local community development organizations.²⁶¹

NSP funds represent the first drop of emergency assistance to address the community impacts from foreclosed and vacant properties. Although NSP cannot directly fund typical code enforcement activities, it seems these funds could apply to the assistance and services of code enforcement programs to support officially designated NSP uses and activities.²⁶² NSP also

²⁵⁷ *Id.*

²⁵⁸ U.S. Dept. of Housing and Urban Development, Neighborhood Stabilization Program Grants, <http://www.hud.gov/offices/cpd/communitydevelopment/programs/neighborhoodspg/> (last visited Nov 15, 2008).

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ National housing and community development groups such as Enterprise Community Partners, the National Low Income Housing Coalition and Local Initiatives Support Corporation built a Save America's Neighborhoods Coalition that ultimately persuaded Congress and the President to approve the \$4 billion in NSP grants. See Save America's Neighborhoods, *supra* note 253.

²⁶² According to HUD's proposed regulations and preliminary staff

provides opportunities for creating new partnerships and innovative models of community stabilization. Supporting local code enforcement departments will not only contain the spread of vacant properties, but will also ensure the long term success of HERA and NSP's acquisition, disposition, and reuse of vacant properties. Hopefully the next wave of federal and even state assistance will include the first responders of code enforcement.

interpretations, NSP funds could be used for the various nuisance abatement activities (boarding, securing, cleaning, demolishing) of already acquired vacant and foreclosed properties and possibly vacant, and blighted properties (not in foreclosure). All of this is subject to subsequent staff interpretations of the regulations, but we encourage HUD staff and NSP recipient cities/counties to think creatively!