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ZOMBIE MORTGAGES, REAL ESTATE, AND THE FALLOUT FOR THE SURVIVORS

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INTRODUCTION

The first generally accepted reference to zombies occurred approximately in the 18th century BCE in the Epic of Gilgamesh.[1] Now popularized, the concept of zombie has begun to infect legal scholarship.[2] Capable of a surprisingly broad application to various legal doctrines,[3] the generally accepted definitions of zombie are along the lines of the undead, walking dead or living dead.[4] In the context of foreclosures initiated but not finalized, this description is surprisingly apt. Generally in these situations a lender has initiated foreclosure proceedings and typically sent notice of eviction to the borrower. However, sometimes the lender fails to finalize the foreclosure because of a perceived defect in the mortgage, a lengthy foreclosure process, or high holding costs including maintenance. In these circumstances the title to the property remains in the borrower's name, and the corresponding property taxes, maintenance, utilities, etc., continue to accrue against the borrower. Often the bor-

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1. *See, e.g.*, THE EPIC OF GILGAMESH 54 (Maureen Gallery Kovacs trans., Stan. Univ. Press 1989) ("I will knock down the Gates of the Netherworld, . . . and will let the dead go up to eat the living! And the dead will outnumber the living!"); ZOMBIEPEDIA, http://www.zombie.wikia.com/wiki/Zombies (last visited June 13, 2013) (identifying *The Epic of Gilgamesh* as the original reference to zombies, though the text does not use the word zombie specifically); Adam Chodorow, *Death and Taxes and Zombies*, 98 IOWA L. REV. 1207, 1210 (2013) (providing that the word zombie appears to derive from Haitian voodoo traditions).

2. *See generally*, Chodorow, *supra* note 1, at 1207.

3. *See, e.g.*, Gary Lawson, *Night of the Living Dead Hand: The Individual Mandate and the Zombie Constitution*, 81 FORDHAM L. REV. 1699, 1701 (2013) (describing a zombie constitution as a "soulless shadow of the real document"); *see also* Mireille Hildebrandt, *Extraterritorial Jurisdiction to Enforce in Cyberspace? Bodin, Schmitt, Grotius in Cyberspace*, 63 U. TORONTO L.J. 196, 197 n.1 (2013) (defining zombie bots and zombie armies used in the commission of cybercrimes); David E. Pierce, *Kansas Oil and Gas Update*, 19 TEX. WESLEYAN L. REV. 335, 335 (2013) (mentioning "Perpetuities Zombies"); Chodorow, *supra* note 1 (analyzing the tax implications of zombiehood).

4. Chodorow, *supra* note 1, at 1213.

rower is already in a bankruptcy proceeding and is simply trying to escape the property as cleanly as possible.[5] It may be necessary to recognize that in some instances the borrower should be able to move on freely from the property, but at the same time care must be taken to ensure an equitable distribution of the costs of that alternative. A pathway allowing the borrower total financial absolution may ultimately be just as problematic as allowing the lender to maintain the status quo if it were to increase the cost or decrease the availability of financing for certain communities.

With both homeowners and lenders unable or unwilling to maintain the property, the longer a zombie mortgage is allowed to exist, the more destructive and costly it becomes long term.[6] In trying to get out from under their mortgages, many borrowers have attempted to tender deeds in lieu of foreclosure, compel the bank to finalize the foreclosure, or quit claim any interest in the property back to the lender unilaterally.[7] In many cases the lender is specifically attempting to avoid the outcome of holding title, and therefore none of these solutions have proven to be entirely workable. Once the homeowner has been evicted or abandons in the face of the threat of eviction, the property takes on zombie attributes in that the right to reside thereon has ostensibly been killed off, but the problems and costs the property generates live on in a zombie-like state continuing to torment the borrower. This article advocates several borrower-focused solutions to the zombie mortgage problem. Some of the proposed solutions jointly benefit the affected municipalities, allowing borrowers to co-opt the interests of the municipalities and jointly pursue these types of relief. The article also acknowledges the reality that some of the proposals will require buy-in from the lender community if they are to become widely adopted. By aligning the interests of certain constituencies, there are promising potential solutions to the zombie mortgage problem which would lessen the amount of time properties are vacant or abandoned. These solutions would limit the corresponding economic harm to each and ideally represent a Pareto optimal solution that even lenders could support. Although the best solution would be one that ben-

5. *See* In re Heck, No. 09-31512, 2011 WL 133015, at *1 (Bankr. N.D. Cal. Jan. 13, 2011) (seeking relief from HOA fees accrued post-bankruptcy as a result of zombie title).

6. *See generally* Raymond L. Pianka, *Zombie Mortgages and Zombie Titles*, CLEV. MUN. CT. HOUS. DIV., http://clevelandhousingcourt.org/zombies.html (last visited July 22, 2013) (describing zombie mortgages and their consequences).

7. In a deed in lieu of foreclosure setting, borrowers may be able to convince the lender to accept a deed to the disputed property in exchange for the lender forbearing on its rights to foreclose. BLACK'S LAW DICTIONARY (9th ed. 2009). By granting a quitclaim deed, the owner of record transfers any interest the owner has in the property to the grantee without warranty. *Id.*

efits lenders, borrowers, and municipalities, potential solutions that benefit two of those three constituencies with minor harm to the third should also be strongly considered.

Part I of this Article will briefly explain the context and scope of the problem, how it typically arises, and how the problem was exacerbated by the larger real estate crisis in the latter half of the 2000s. Zombie properties are problematic for the affected homeowners, but in many cases they are equally problematic for other individuals residing in the same neighborhood, the lenders and servicers, and the relevant municipalities who will have to face issues of negligence, blight and vandalism related to vacant properties. Part I will analyze current municipal approaches to dealing with the problem, primarily through vacant property registration ordinances (VPROs). In the search for a solution to this crisis, both lenders and borrowers will likely need to share in the financial responsibility for these properties. Part II will examine cases from both municipal-driven litigation as well as consumer-driven litigation where zombie debt has been legally extinguished. Part II will also examine several bankruptcy decisions that potentially lead to an avenue of relief for the owners of the affected properties. Part III proposes two new unique ordinances that cities could use to combat the problem, highlights owner-based solutions in bankruptcy, and mentions other attempts that have been tried in erasing zombie mortgages. This article concludes that a compromise solution that involves the municipalities, lenders and borrowers is the best route to ease the nationwide problems associated with zombie mortgages.

I. THE WALKING DEAD

A. Assessing the Problem

In March, 2013, RealtyTrac reported 301,874 "zombie" properties where the owners had vacated the property and the lender had failed to foreclose.[8] In some cases the owners walked away from their homes still unaware that the title remained in their name, and that they were responsible for taxes and other bills related to the property.[9] In some of those cases, the homeowners had received a notice from the lender of a planned foreclosure sale which would occur.[10] For those homeowners who were initially unaware or did not care about the incomplete foreclosure,

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8. Barbara Liston, *More than 300,000 homes are foreclosed "zombies," study says*, REUTERS (Mar. 28, 2013, 4:59 PM), http://www.reuters.com/article/2013/03/28/us-usa-housing-zombies-idUSBRE92R0YQ20130328.

9. *Id.*

10. *Id.*

many were surprised to find themselves billed for past due taxes, securing the structure, graffiti removal, demolition, trash removal, utilities, lawn and garden care, etc.[11] The problem rose to such a level that some towns took measures to pass laws that could lead to the homeowners serving time in jail if they were to fail to bring their properties into compliance with the municipal ordinances.[12]

One of the primary reasons banks are unwilling to complete foreclosures in the current market is carrying costs. Especially in a market saturated with foreclosed properties, banks are looking at longer holding periods and the increased costs associated with longer term ownership including taxes, insurance and maintenance.[13] Whereas borrowers have been looked at as morally dubious for strategically defaulting,[14] lenders have been engaged in ironically similar fashion in initiating foreclosures and then walking away at some point prior to the sheriff's sale to avoid the increased costs of ownership,[15] oftentimes at great expense to the borrower and community.[16] By walking away, banks take advantage of insurance, tax and accounting benefits from the monetary loss without the

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11. *Id.*

12. *Id.*; *see infra* Part I.B.

13. *See* Ilyce Glink, *"Zombie" foreclosures hit ex-homeowners*, MONEYWATCH (Apr. 2, 2013, 2:31 PM), http://www.cbsnews.com/8301-505145_162-57577375/zombie-foreclosures-hit-ex-homeowners.

14. *See generally* Brent T. White, *The Morality of Strategic Default*, 58 UCLA L. REV. DISC. 155 (2010) (discussing the moral merit behind strategically defaulting); Sean Lowe, *Their Legality and Immorality: Pro Se, Strategic Foreclosure Defense Lawsuits*, 41 REAL EST. L.J. 172 (2012) (addressing the morality behind strategic defaults).

15. *See generally The Need for Policy Tools to Address Lienholder Walkaways and Certain Vacant and Abandoned Properties: Hearing on H.B. No. 323 Before the H House and Urban Revitalization Comm.*, OH. House of Representatives (2009) (statement of Thomas J. Fitzpatrick IV, Economist, Office of Policy Analysis of Fed. Reserves Bank of Cleveland) (noting reason behind bank walkaways); Stephan Whitaker & Thomas J. Fitzpatrick IV, *Deconstructing distressed-property spillovers: The effects of vacant, tax-delinquent, and foreclosed properties in housing submarkets*, 22 J. HOUSING ECON. 79, 80, 88 (2013) (describing cases of selective foreclosures by creditors); *see also*, Pino v. Bank of N.Y. Mellon, 57 So. 3d 950, 951-52 (Fla. Dist. Ct. App. 2011) (showing a claim that the foreclosing bank held neither the note nor the mortgage).

16. Michelle Conlin, *Special Report: The latest foreclosure horror: the zombie title*, REUTERS (Jan. 10, 2013, 1:58 PM), http://www.reuters.com/article/2013/01/10/us-usa-foreclosures-zombies-idUSBRE9090G920130110. In one especially distressing case, an individual discovered that he was ineligible for social security disability benefits because of the home that remained in his name and would therefore be unable to obtain a needed liver transplant. *Id.* In at least three states, abandoned zombie homes have exploded because gas lines were never shut off. *Id.*

financial obligations of ownership, and it allows them to market the outstanding debt to collectors whether or not the borrower resides in a non-recourse state.[17]

While foreclosure procedures are governed by state law and therefore vary from state to state,[18] the procedure through which these zombie mortgages come to life is generally very similar. States generally follow two methods in regulating foreclosures: judicial foreclosure and non-judicial foreclosure by power of sale.[19] Both processes contain certain safeguards and requirements, and both generally require the lender to provide notice to the borrower at some point in the proceeding.[20] Typically, notice will be given after a grace period for a missed payment (or even several missed payments) has passed.[21] After three months of delinquency a lender will generally begin to take some action.[22]

In a judicial foreclosure state, the lender will file a lawsuit and the borrower will be served process. Only after the property is sold at auction, typically several months after the lender received judgment on the lawsuit, will the sheriff serve the eviction notice and transfer the title in the property to the purchaser at auction. Until the auction however, the title remains in the borrower's name, and the lender may unilaterally halt

17. *Id.*

18. David R. Greenberg, *Neglected Formalities in the Mortgage Assignment Process and the Resulting Effects on Residential Foreclosures*, 83 TEMP. L. REV. 253, 261, 265 (2010-2011); *see also In re* Townsville, 268 B.R. 95, 118 (Bankr. E.D. Pa. 2001) (affirming state law governs foreclosure of real property).

19. *See* JOHN RAO ET AL., NATIONAL CONSUMER LAW CENTER, FORECLOSURES 104 (3d ed. 2010) (outlining foreclosure methods). Two less common methods include strict foreclosure and foreclosure by entry and possession, though neither will be discussed herein. *Id.*

20. *Id.* (setting forth notice requirements for both judicial and non-judicial foreclosures). States vary in notice obligations, requiring anything from notice by mail to notice via registered mail, service of process and/or public notice. *Id.* Some states do not even require personal service of the foreclosure notice on the borrower. *Id.* at n. 9.

21. Nanci L. Weissgold & Morey E. Barnes, *Make My Day: States Dare Servicers to Foreclose*, K&L GATES: MORGTAGE BANKING & CONSUMER CREDIT ALERT 1, 2 (Nov. 2008), http://www.klgates.com/files/tempFiles/cdf0317d-6771-4c47-a925-577197f98eb4/11_04_08_Mortgage_Bank_Alert.pdf.

22. *Id.*; *see also Illinois Mortgage Foreclosure Timetable*, ILLINOIS LEGAL ADVOCATE, http://www.illinoislegaladvocate.org/index.cfm?fuseaction=home.dsp_content&contentID=4945 (last updated May, 2006) (outlining foreclosure timetable); FED. HOUS. FIN. AGENCY, AN OVERVIEW OF THE HOME FORECLOSURE PROCESS 5–6 (2011), http://fhfaoig.gov/Content/Files/SAR%20Home%20Foreclosure%20Process_0.pdf.

the proceedings at any time.[23] Similarly, in non-judicial foreclosures or powers of sale, the lender will generally serve the borrower a demand for payment.[24] After the required time period has passed, either by law or the mortgage, a deed of trust will be used to convey the property temporarily to a trustee who will sell the property at auction.[25] As with judicial foreclosure, the lender can halt the proceedings unilaterally. Typically, with non-judicial foreclosures, the title remains in the borrower's name until transfer to the trustee.[26]

With zombie mortgages, the lender often initiates the first step or steps after default by the borrower on the note. The lender generally provides notice to the borrower which may include a demand to vacate the premises.[27] At some time thereafter and prior to the sheriff's sale, the lender ceases any attempt to finalize the foreclosure. This is lawful conduct, and generally the lender is under no obligation to provide notice to the borrower that it is not actively completing the foreclosure process.[28] Many of the borrowers, upon receiving notice of foreclosure and/or a notice of eviction, improperly assume the title to the property has long since passed to the lender or a third party until they are served with default tax

23. *See generally* CALIFORNIA COURTS: THE JUDICIAL BRANCH OF CALIFORNIA, http://www.courts.ca.gov/1048.htm (last visited June 19, 2013) (describing options available to stop foreclosure); FED. HOUS. FIN. AGENCY, *supra* note 22, at 14–15 (providing avenues for halting a foreclosure).

24. *See* Joseph E. Gotch Jr., *Creditors' vs. Debtors' Under Alaska Foreclosure Law: Which Way Does the Balance Swing?*, 14 ALASKA L. REV. 77, 85–89 (1997).

25. *See* PROPERTY RADAR, http://www.propertyradar.com/foreclosure-guides/foreclosure-101/non-judicial-foreclosure-process (last visited June 19, 2013) (outlining non-judicial foreclosure process).

26. FED. HOUS. FIN. AGENCY, *supra* note 22, at 14.

27. *See* U.S. Bank Nat. Ass'n v. Guillaume, 38 A.3d 570, 584 (N.J. 2012) (establishing statutory obligation of lender to provide notice to borrower).

28. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-93, ADDITIONAL MORTGAGE SERVICER ACTIONS COULD HELP REDUCE THE FREQUENCY AND IMPACT OF ABANDONED FORECLOSURES 1–2 (2010), *available at* http://www.gao.gov/new.items/d1193.pdf; Conlin, *supra* note 16; *but see* OFFICE OF THE COMPTROLLER OF THE CURRENCY, OCC 2011-49, GUIDANCE ON POTENTIAL ISSUES WITH FORECLOSED RESIDENTIAL PROPERTIES, *available at* http://www.occ.gov/static/news-issuances/bulletins/rescinded/bulletin-2011-49.pdf (providing guidance that requires OCC-supervised entities acting as mortgage services to provide certain disclosures in the event the foreclosure process is interrupted), *replaced by*, OFFICE OF THE COMPTROLLER OF THE CURRENCY, OCC 2013-20, *available at* http://www.occ.gov/news-issuances/bulletins/2013/bulletin-2013-20.html; *Other Real Estate Owned, Comptroller's Handbook* 16 (September 2013), http://www.occ.gov/publications/publications-by-type/comptrollers-handbook/a-oreo.pdf (highlighting that the lender should "notify or attempt to notify, the borrower of the decision [to forego foreclosure and release the lien]").

notices or arrested for outstanding warrants related to the failure to maintain the property.[29]

The problem of zombie mortgages may ease somewhat with an improving economy; however, even with improvement, it is estimated that it would take over five years to clear the current foreclosure inventory in judicial foreclosure states and nearly three years in non-judicial states.[30] Given that foreclosures will continue to occur and that municipalities, borrowers and homeowners near zombie properties continue and will continue to face these issues into the foreseeable future, workable solutions are needed that will allow all parties to move on.

B. Vacant Property Registration Ordinances

States and municipalities have enacted many laws and ordinances, respectively, to combat the problem of vacant properties.[31] One of the primary tools used to combat the problem is a vacant property registration ordinance (VPRO),[32] which requires lenders to register vacant properties upon the occurrence of certain triggering events.[33] Generally speaking, a VPRO requires an owner, lender, or servicer, as the case may be, to register a property as vacant with the municipality, pay a corresponding fee, and agree to abide by certain code and maintenance re-

29. *See, e.g.*, Creola Johnson, *Fight Blight: Cities Sue to Hold Lenders Responsible for the Rise in Foreclosures and Abandoned Properties*, 2008 UTAH L. REV. 1169, 1234 (2008) (discussing fallacious borrower assumption that title passed to lender); Susan Saulny, *Banks Starting to Walk Away on Foreclosures*, N.Y. TIMES, (Mar. 29, 2009), http://www.nytimes.com/2009/03/30/us/30walkaway.html?_r=2&; Conlin, *supra* note 16.

30. *See* Steve Cook, *Real Estate: Nothing to fear from zombie houses*, UPI.COM (April 2, 2013, 5:26 PM), http://www.upi.com/Business_News/Real-Estate/2013/04/02/Real-Estate-Nothing-to-fear-from-zombie-houses/2381364937924 (noting in some states it would take decades under the current legal regime to process all the foreclosures).

31. *Vacant Property Registration*, MORTGAGE BANKERS ASSOCIATION, http://www.mortgagebankers.org/VacantPropertyRegistration.htm (last visited June 15, 2013). A vacant property may or may not be a zombie depending on the circumstances and knowledge of the parties. *See Zombie Titles*, INVESTOPEDIA, http://www.investopedia.com/terms/z/zombie-titles.asp (last visited June 20, 2013) (defining zombie titles).

32. *See* Dan Immergluck, Yun Sang Lee & Patrick Terra, *Local Vacant Property Registration Ordinances in the U.S. – An Analysis of Growth, Regional Trends and Some Key Characteristics* 1 (2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2130775 (commenting on the explosive growth of VPROs beginning in the early 2000s).

33. *Id.* at 7–8.

quirements.[34] Failure to comply with the VPRO framework may result in fines and potential jail time.[35] Much has been written regarding VPROs, their importance, and their efficacy,[36] but there is a dearth of literature focusing specifically on the problem owners/borrowers have with zombie mortgages which is related to, but quite different from, the vacant property issue.

In the VPRO literature, there is a focus on two main types of statutes, the "classic model," which regulates all vacant property regardless of the reason for the vacancy, and the "foreclosure model," which only covers those properties that are in some stage of the foreclosure process.[37] Classic model ordinances would cover properties left vacant because a rental property ceases to have a tenant, or those where the homeowners moved into a new home and are attempting to sell the original, as well as those properties that are vacant because the foreclosure process resulted in an eviction of the previous owners.[38] In many of the latter cases, the home becomes property of the lender and is known in the trade as real estate owned (REO) property.[39] In contrast, as set forth by the ordinances, foreclosure model regulations do not apply to a property unless the foreclosure process has been initiated.[40]

This article focuses exclusively on the foreclosure model or the foreclosure aspect of the hybrid model since zombie mortgages generally only result from an incomplete foreclosure process. In this context, much of the previous literature focusing on VPROs, and specifically the foreclosure model, structure their analysis around the more general question of

34. *See, e.g.*, MORTGAGE BANKERS ASSOCIATION, *supra* note 31 (describing general requirements of vacant property registration ordinances).

35. Immergluck, Lee & Terra, *supra* note 32, at 7–8.

36. *See, e.g.*, Joseph Schilling, *Code Enforcement and Community Stabilization: The Forgotten First Responders to Vacant and Foreclosed Homes*, 2 ALB. GOV'T L. REV. 101, 103 (2009); Timothy A. Davis, *A Comparative Analysis of State and Local Government Vacant Property Registration Statutes*, 44 URB. LAW. 399 (2012); Immergluck, Lee & Terranova, *supra* note 32.

37. Immergluck, Lee & Terranova, *supra* note 32, at 7-8.

38. *See* CHICAGO, ILL., MUN. CODE OF CHICAGO § 13-12-125(e) (2013) (providing vacancy criteria); Davis, *supra* note 36 at 406-08; Schilling, *supra* note 36, at 130-32 (defining classic vacant property ordinance model).

39. *See Real Estate Owned - REO*, INVESTOPEDIA, http://www.investopedia.com/terms/r/realestateowned.asp (last visited June 20, 2013) (defining REO property).

40. Immergluck, Lee & Terranova, *supra* note 32, at 8 (noting that, depending on the jurisdiction, the foreclosure model is typically triggered by one of the following events: notice of default, intent to foreclose, or the initiation or advertisement of the commencement of the non-judicial foreclosure process).

whether VPROs are desirable and/or effective.[41] In answering these questions, the authors generally take into account three primary constituencies: lenders, municipalities, and the local communities.[42] Certainly there is much tension between lenders and municipalities regarding the appropriate manner in which to share costs of maintaining the vacant property, and the extent of the burden to be imposed on the party maintaining the property.[43] Also important to recognize is the ancillary problem faced by other property owners in near proximity to the vacant property. Studies have shown the deleterious financial effects of having a vacant property nearby in terms of property value depreciation, crime, and safety concerns dealing with the vacant property, including fire risk.[44]

As discussed in Section I.C. below, foreclosure model VPROs are beginning to address the municipality and community constituencies by requiring the lender to absorb greater financial responsibility for a property once foreclosure proceedings have begun,[45] yet they have not addressed the problem faced by the evicted or abandoning homeowner who is unable to escape the financial burden of the note or enjoy possession of the premises.[46] Undoubtedly focus has been placed on the municipalities, communities, and lenders as they are most often the parties dealing with the aftereffects of the abandoned property, or given the fact that the defaulting owner is not seen as a source of solution given the owner's insolvency or abandonment of the property. Yet, in many instances, the owners are left with little or no legal recourse to settle the issue and move forward.

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41. *See generally* Davis *supra* note 36 (identifying the advantages and disadvantages of VPROs); Benton C. Martin, *Vacant Property Registration Ordinances*, 39 REAL ESTATE L.J. 6 (2010) (discussing VPROs and their effectiveness).

42. *See* Martin *supra*, note 41; *see also* Immergluck, Lee & Terranova, *supra* note 32 (outlining lenders, municipalities, and local communities as the primary constituencies).

43. *Compare* MORTGAGE BANKERS ASSOCIATION, *supra* note 31 (discussing lender perspective and resulting burden), *with* Immergluck, Lee & Terranova, *supra* note 32, at 5–7 (presenting the negative municipal impact rectified by VPROs). Typically the question arises as to how secure the property needs to be (i.e., plywood versus metal over doors and windows), how often the property needs to be examined, how to respond to complaints and maintenance requests, etc. *See* Immergluck, Lee & Terranova, *supra* note 32, at 3 (presenting dispute over vacant property maintenance requirements).

44. *See, e.g.*, Johnson, *supra* note 29, at 1181–83.

45. *See infra* Part I.C.

46. *See generally* Johnson, *supra* note 29.

C. Foreclosure Model/Zombie VPROs

Many VPROs are predicated on the idea that well-maintained and occupied homes deter criminal activity, ensure more stable communities and property values, and provide more predictable tax revenue.[47] Analysts have attempted to monetize the issue, and have reported on staggering costs due to unoccupied property in the form of casualty from fire,[48] a high correlation to crime,[49] city-paid demolition costs,[50] and reduced property values.[51] These high costs are directly borne by the municipality and neighbors who were not parties to the real estate transaction that gave rise to the zombie mortgage. Thus it is unsurprising that the unstated but unequivocal goal of the municipalities in enacting these VPROs is a cost-shifting mechanism that places at least some of the associated financial burden on a more solvent party.[52] Equally unsurprising is that lenders generally oppose this type of approach.[53]

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47. *See* Schilling, *supra* note 36, at 104, 111 (explaining the traditional "Broken Windows Theory" and the challenges presented by community instability due to unoccupied homes, and the substantial costs presented by a declining tax base).

48. *Id.* at 11 (citing Nat'l Vacant Props. Campaign, VACANT PROPERTIES: THE TRUE COST TO COMMUNITIES 11 (2005) (noting annual losses over $70 million due to fire)).

49. Nat'l Vacant Props. Campaign, *supra* note 48, at 3 (finding abandoned properties as the more predicative indicator of crime in a survey of various economic and demographic variables).

50. *Id.* at 5 (noting that St. Louis had more than $15 million in demolition expenses over five years to deal with vacant properties).

51. Researchers from Philadelphia in 2001 documented significant declines in property values for properties in close proximity to vacant properties as measured by 150 foot intervals. *Id.* at 9 (citing TEMPLE UNIV. CENT. FOR PUB. POLICY & E. PA. ORG. PROJECT, BLIGHT FREE PHILADELPHIA: A PUBLIC-PRIVATE STRATEGY TO CREATE AND ENHANCE NEIGHBORHOOD VALUE (2001), *available at* http://astro.temple.edu/~ashlay/blight.pdf).

52. Even in cases where a municipality forecloses on a tax lien outside the zombie mortgage setting, it is likely to receive only pennies on the dollar at a sheriff's sale given the underlying financial difficulties that prompted the homeowner to vacate the property in the first place. *See* Sandra Livingston, *Bank 'walkaways' from foreclosed homes are a growing, troubling trend*, CLEVELAND.COM (July 19, 2009, 6:33 PM), http://blog.cleveland.com/metro/2009/07/bank_walkaways_from_foreclosed.html (indicating lenders receive as low as 15% of a property's former value at a sheriff's sale due to malignant preexisting conditions); *see also* Kate Berry, *Banks Halting Foreclosures to Avoid Upkeep*, AMERICAN BANKER (Apr. 23, 2013, 2:04 PM), http://www.americanbanker.com/issues/178_78/banks-halting-foreclosures-to-avoid-upkeep-1058558-1.html?zkPrintable=1&nopagination=1 (explaining the economical infeasibility of foreclosing for lenders, in part because the cost of back taxes and bringing the house up to code exceeds the proceed amount).

53. MORTGAGE BANKERS ASSOCIATION, *supra* note 31.

The Mortgage Bankers Association (MBA) has stated, "[VPROs] will further deteriorate the mortgage market by placing unreasonable requirements upon servicers."[54] The classic argument is that vacant property requirements will increase lenders' cost of business and therefore require them to restrict lending in communities with VPROs.[55] It does not appear, however, that Los Angeles for example, a city which has enacted a VPRO, is now facing a dearth of lenders willing to finance real property purchases.[56]

A better, more formalistic argument, based on contract and property rights is that lenders providing the money to purchase the property were never the owners of record. While those lenders may have taken a security interest, secured parties are not required to foreclose on the collateral and can freely elect to abandon the collateral they once deemed sufficient.[57] However, while that argument may prevail in localities without VPROs, the amendments to the law adopted by the VPROs would abrogate those more general common law principles.

The next section will explore in greater depth the ordinances that a few cities have enacted, mainly those that started earlier or took more aggressive stances, which have received the vast majority of the news coverage and legal action.[58] Chicago, IL,[59] Chula Vista, CA,[60] Cleveland,

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54. *Id.*

55. *Id.*

56. Alejandro Lazo & E. Scott Reckard, *Banks are starting to lend more freely*, L.A. TIMES, (June 22, 2013), http://articles.latimes.com/2013/jun/22/business/la-fi-mortgage-credit-20130622.

57. *See, e.g.*, TEX. BUS. & COM. CODE ANN. § 9.601 (West 2005) (indicating that while secured parties have a right to foreclose on collateral they are not required to do so).

58. Additionally, prominent towns such as Aurora, CO, Tampa, FL, Oakland, CA, Miami, FL, Long Beach, CA, Fresno, CA, Riverside County, CA, Detroit, MI, Jacksonville, FL and many others have also enacted similar ordinances. *See, e.g.,* AURORA, COLO., CODE OF ORDINANCES § 22-641 (2009); TAMPA, FLA., CODE OF ORDINANCES § 19-131-139 (2009); OAKLAND, CAL., OAKLAND MUN. CODE § 8.54.010-.620 (2012); MIAMI, FLA., CODE OF ORDINANCES § 10-61-69 (2008); LONG BEACH, CAL., LONG BEACH MUN. CODE § 18.24.010-.100 (2011); FRESNO, CAL., MUN. CODE § 10-620 (2008)*;* RIVERSIDE CNTY., CAL., ORDINANCE NO. 15.88.010-.090 (2005)*;* DETROIT, MICH., CODE OF ORDINANCES § 9-1-50 (2010); JACKSONVILLE, FLA., CODE OF ORDINANCES § 179.101-.109 (2010).

59. *See, e.g.*, CHI., ILL., CHI. MUN. CODE § 13-12-1251-28125-128 (2011); Antonio Olivo, Dahleen Glanton & William Mullen, *Bankers draw fire for letting Englewood homes become magnets for crime*, CHI. TRIB., (July 22, 2011), http://articles.chicagotribune.com/2011-07-22/news/ct-met-englewood-banks-20110722_1_foreclosure-case-foreclosure-auction-foreclosure-proceedings; Mary Ellen Podmolik, *More banks walking away from homes, adding to housing crisis*, CHI. TRIB., (January 13, 2011), http://arti

OH,[61] Las Vegas, NV,[62] Los Angeles, CA,[63] and Springfield, MA[64] are among the more prominent. The ordinances that the cities enacted generally have several shared characteristics: a definition of owner, homeowner or responsible party that includes the mortgagee and/or someone who has control over the premises.[65] Alternatively, such ordinances may have a separate provision imposing registration, maintenance and additional obligations specifically on the mortgagee;[66] inspection requirements, requirements for a local agent, obligations that are triggered prior to the lender taking title;[67] and significant penalties for failure to comply borne, at least in part, by the lender.[68]

In addition, even municipalities without VPROs are taking very active approaches in dealing with the problem.[69] In Buffalo, for example,

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cles.chicagotribune.com/2011-01-13/news/ct-biz-0113-walkaway—20110113_1_foreclo sure-process-foreclosure-filing-servicers.

60. *E.g.*, Chula Vista, Cal., Mun. Code § 15.60.010-.120 (2007).

61. *See, e.g.*, Clev. v. JP Morgan Chase Bank, N.A., 98 Ohio St. 3d 514, 2013-Ohio-1305; Clev. v. Ameriquest Mortg, Sec., Inc., et al., 621 F.Supp.2d 513 (N.D. Ohio 2009); Clev. v. Deutsche Bank Trust Co., et al., 571 F.Supp.2d 807 (N.D. Ohio 2008).

62. *E.g.*, Las Vegas, Nev., Code of Ordinances § 16.33.010-.090 (2011).

63. *See, e.g.*, L.A., Cal., Mun. Code § 164.00-.09 (2010); People v. Deutsche Bank Nat'l Trust Co., No. 11-460878 (Cal. filed May 4, 2011); Edvard Pettersson, *Deutsche Bank Settles Los Angeles 'Slumlord' Lawsuit*, Bloomberg.com (June 18, 2013, 10:01 PM), http://www.bloomberg.com/news/2013-06-18/deutsche-bank-settles-los-angeles-slumlord-lawsuit.html.

64. *See, e.g.*, Springfield, Mass., Code of Ordinances § 7.50-.60 (2011); Easthampton Sav. Bank v. Springfield, 874 F.Supp.2d 25 (D. Mass. 2012).

65. *See* Property Maintenance Code of New York State, § 202 (Int'l Code Council, Inc. 2010) [hereinafter PMCNYS] (defining owner of real property); *see also* N.Y. Comp. Codes R. & Regs. tit. 19, § 1226.1 (2010) (establishing the 2010 PMCNYS as the legal standard). The City of Buffalo contends that once a lender sends a letter to a homeowner threatening eviction for default, the lender is beginning to "assert some measure of control" over the property. *See* Michael Orey, *Dirty Deeds*, Businessweek.com, Jan. 2, 2008, http://www.businessweek.com/stories/2008-01-02/dirty-deeds (asserting that lenders effectively assert a measure of control through eviction threats).

66. *See, e.g.*, Chi., Ill., Chi. Mun. Code § 13-12-125-27 (2011); Las Vegas, Nev., Mun. Code § 16.33.010-.090 (2011).

67. *See, e.g.*, Las Vegas, Nev., Mun. Code § 16.33.010-.090 (2011).

68. *See, e.g.*, PMCNYS, *supra* note 65, §§ 106-07 (establishing liability and pertinent penalties attributable to the lender/owner); Chi., Ill., Mun. Code, *supra* note 66, § 13-12-126 (establishing liability and pertinent penalties attributable to the lender/owner).

69. *See, e.g.*, *Task Force on Vacant & Abandoned Prop.*,The U. S. Conf. of Mayors (June 2008) [hereinafter Mayors], http://www.usmayors.org/bestpractices/vacant properties08.pdf (detailing the Buffalo, NY vacant property initiatives that include enhanced policing and demolition); Summons and Compl. at 7, Buffalo v. ABN Amro

prosecutors seek compliance from all parties involved on the lending side and also threaten to place liens on the property, which would have the effect of precluding the bank from easily unloading that property in a subsequent transaction to a party who may have no desire to maintain it.[70] Additionally, in 2005, the mayor of Buffalo pledged to demolish 5,000 vacant properties in the next five years.[71] In Cleveland, lenders are put on trial in absentia if they fail to show up in court.[72] Both Buffalo and Cleveland have refused to allow a foreclosure to continue until the lender addressed code violations.[73]

In essence, with traditional code enforcement strategies or through zombie VPROs, the municipalities are engaging in a shifting of financial obligations. Oftentimes, as in the case of Detroit, the city itself is near insolvent and incapable of properly addressing the problem.[74] Furthermore, to the extent that cities enforce these new ordinances or pursue even more exotic devices to police zombie properties, lenders are going to continue to vociferously oppose them and delay any implementation for as long as possible. For the homeowner then, the zombie mortgage is a problem far from any truly functional resolution.[75]

Mortg. Grp. Inc., No. 2008002200 (N.Y. Sup. Ct. 2008); *see generally* Joseph Petti, REGIS. AND THE RE-EMPOW. OF THE BUFFALO HOUS. CT. (Partnership for the Public Good 2009), http://www.ppgbuffalo.org/wp-content/uploads/2010/06/out-of-town-defendants.pdf (outlining current and proposed vacant property action in Buffalo, NY).

70. *See* Orey, *supra* note 65, at 2 (noting that the city is seeking compliance from many lender-side parties including loan originators all the way up to the trusts who securitize and resell the pooled loans).

71. *See, e.g.*, MAYORS, *supra* note 69, at 26 (detailing the Buffalo, NY vacant property initiatives that include enhanced policing and demolition); Kevin Jolly, *Abandoned houses still a plague on the city*, TIME WARNER CABLE NEWS (Mar. 21, 2013, 6:14 PM) (detailing that as of March, 2013, the city had demolished over 4,600 homes at a cost of between $16,000-$20,000 per home).

72. MAYORS, *supra* note 69, at 26.

73. *Id.*

74. *See Mich. To get $100M To Demolish Vacant Houses*, CBS DETROIT (June 6, 2013, 7:07 PM), http://detroit.cbslocal.com/2013/06/06/mich-to-get-100m-to-demolish-vacant-houses (indicating Detroit does not have the financial means to properly address problem).

75. Given that it is one of the most important parties in real estate financing, I must note the impact and role of the Mortgage Electronic Registration System (MERS) with regard to VPROs. MERS, a privately run property registry, was created to allow for high volume transfers of mortgages and notes (securitized or otherwise) by reducing the transaction cost of public recording. *See generally* David P. Weber, *The Magic of the Mortgage Electronic Registration System: It Is and It Isn't*, 85 AM. BANKR. L.J. 239 (2011) (providing an in-depth analysis of MERS); *see also* Richard E. Gottlieb, *Litigation Concerns for the Compliance Professional Fall 2011 Update*, MORTGAGE BANKERS ASSOCIATION (Sept. 26, 2011), http://www.mortgagebankers

D. State & Local Laws

1. Localities Take Action

As cited above, localities across the United States have begun to enact sweeping ordinances to combat the blight, security risks, and financial harm brought about by vacant homes.[76] As of March, 2014, over 1,000 localities have enacted some type of VPRO.[77] The ordinances nearly universally require registration of the property based on the time of vacancy or upon the filing of a notice of default rather than some later point such as the start of judicial proceedings or the foreclosure sale.[78] Oftentimes the fees are progressive, meaning that the longer a property remains vacant, the greater the registration fees and possible fines become.[79] The

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.org/files/Conferences/2011/RegulatoryCompliance/RC11Gottlieb.LitigationConcerns.pdf (outlining and defining MERS), *About Us*, MERS (Last visited October 12, 2014), http://www.mersinc.org/about-us/about-us (defining the basics and benefits of MERS). MERS maintains a significant database for the mortgages and notes for which it is the mortgagee, nominee or servicer of record. *Id.* The Mortgage Bankers Association (MBA) would prefer to utilize MERS' database to perform the role of vacant property registration rather than a public registry. MORTGAGE BANKERS ASSOCIATION, *supra* note 31. Keeping the vacant property registration system within MERS ensures that it will remain a private issue rather than a public one, and perhaps requiring greater oversight to ensure that borrowers are able to obtain all necessary information from MERS. Immergluck, Lee & Terra, *supra* note 32, at 9; *see also* Gretchen Morgenson, *Mortgtage Registry Muddles Foreclosures*, N.Y. TIMES (Sept. 1, 2012), http://www.nytimes.com/2012/09/02/business/fair-game-mortgage-registry-muddles-foreclosures.html?ref=mortgageelectronicregistrationsystemsinc&_r=0 (describing MERS as unreliable); Michael Powell & Gretchen Morgenson, *MERS? It May Have Swallowed Your Loan*, N.Y. TIMES (Mar. 5, 2011), http://www.nytimes.com/2011/03/06/business/06mers.html?pagewanted=all (detailing the unreliable nature of MERS). Given the reported unreliability of the data, if the lender can satisfy the VPRO information requirements by listing MERS as the mortgagee and/or agent to contact, the owner may not actually receive the mandated information. *Id.*

76. *See supra* Part I.B-C.

77. Safeguard Properties maintains a thorough database of over 1,000 local VPROs on their website. SAFEGUARD PROPERTIES, http://www.safeguardproperties.com/Services/Property_Registration.aspx (last visited March 11, 2014).

78. Notable exceptions to the earlier time are Oakland, CA, which require registration when the property is sold at the foreclosure sale, and Aurora, CO, which require registration when the initial pleadings are presented in the judicial foreclosure process. *See* OAKLAND, CAL., MUN. CODE § 8.54.010-.620 (2012); AURORA, COLO., CODE OF ORDINANCES § 22-641 (2009).

79. *See, e.g.*, ALBANY, N.Y., CODE OF THE CITY OF ALBANY § 133A-3(B)(1) (2011) (requiring progressive fees in $250-$500 increments for years one through five).

clear intent of this progressive system is to motivate the owner or responsible party to find inhabitants for the property as soon as possible.[80]

Many VPROs include detailed instructions for registration, maintenance requirements, demolitions plans, fines, and potential jail time for failure to comply.[81] These efforts, as mentioned above, are largely directed toward the problem of blight and safety, though city finances also play a significant role. In addition to the traditional registration requirements, some cities have taken additional creative steps to combat the situation.

In Chicago, for example, remedies available to the city include forfeiture, forced sale, or demolition. The Chicago Department of Housing has the ability to work with the Chicago Law Department to force the owner to either rehabilitate or transfer the property.[82] Likewise, in Hackensack, New Jersey, the city has adopted a procedure that allows it, after proper notice, to take possession of a property, rehabilitate it, and resell it without becoming the owner of title.[83] In Minneapolis, Minnesota, the city established a fund to encourage the purchase of properties in a block that has at least one foreclosed or vacant and boarded building. In exchange for a five-year, $10,000 forgivable loan, the buyer must live in the home and go through a training program.[84] Minneapolis and other cities such as Detroit, Michigan and Louisville, Kentucky have also used land banks[85] (public or private), which allow property to pass to the land bank

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80. *See* Martin, *supra* note 41, at 1, 9 (identifying one purpose of VPROs as discouraging vacancies).

81. *See* Arthur B. Axelson, Go *Directly to Jail? Las Vegas Joins Other Jurisdictions in Imposing Burden of Upkeep of Vacant Properties on Lenders*, DYKEMA (DEC. 8, 2011), http://www.dykema.com/resources-alerts-imposing-burden-of-upkeep.html (describing content and requirements of VPROs and possibility of imprisonment for noncompliance).

82. *Overview of Municipal Vacant Building Registries*, PARTNERSHIP FOR THE PUBLIC GOOD (2010), http://www.ppgbuffalo.org/wp-content/uploads/2010/06/vacant+property+registry+laws.pdf.

83. *See* MAYORS, *supra* note 69, at 22-23 (outlining vacant property procedures for Hackensack, NJ).

84. *See, e.g.*, *id.* at 18. In addition to this affirmative program, Minneapolis, charging $6,000 per year, enacted some of the country's highest fees for registering vacant properties. MINNEAPOLIS, MINN., CODE OF ORDINANCES § 249.10-.90 (2012); Maya Rao, *Vacant Minneapolis properties are assessed huge annual fees*, STAR TRIBUNE (Aug. 8, 2012, 7:18 AM), http://www.startribune.com/local/minneapolis/165370756.html?page=1&c=y. In addition to the registration fee, unpaid fees can be levied and collected as a special assessment with 8% annual interest. MINNEAPOLIS, MINN., CODE OF ORDINANCES § 249.60.

85. Land banks are generally non-profit or governmental entities designed to take title to property to allow the land bank to rehabilitate the property or limit the num-

and have its title cleared in order to rehabilitate the property or resell the property to a new purchaser.[86] Finally, St. Louis, Missouri has established a "Problem Property Court" which has resolved thousands of warrants regarding ordinance violations.[87]

All of these local ordinances provide invaluable services to the local community, and, although they are perhaps unwilling to admit it, to the lenders who hold mortgages on the vacant properties, as these measures ultimately support property values in local real estate markets.[88] A problem with the local approach, however, is the resulting patchwork of requirements and obligations that vary tremendously from locality to locality.[89] Given the potential problem of thousands of varying obligations, the mortgage industry has successfully begun to lobby for statewide legislation on the matter.[90] The next section discusses several of the laws and bills aimed at the vacant property problem. However, like the municipality driven ordinances, the laws appear to be beneficial to the

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ber of foreclosed properties on the market. *See* Schilling, *supra* note 36 at 117; *see also* Frank S. Alexander, *Land Banks and Land Banking*, SMART GROWTH AMERICA, 19–21 (2011), http://www.smartgrowthamerica.org/documents/ccp_land_banks.pdf (discussing the myriad benefits land banks can provide communities including by clearing legal impediments to clear title). Problems inevitably result, however, when land banks lack resources to acquire and/or maintain their inventory.

86. *See, e.g.*, MAYORS, *supra* note 69 at 14; *see also* MINNEAPOLIS, MINN., CODE OF ORDINANCES § 249.10–.90 (2012); DETROIT, MICH., CODE OF ORDINANCES § 9-1-50 (2010).

87. *See, e.g.*, MAYORS, *supra* note 69, at 20-21; *see also* ST. LOUIS, MO., CODE OF ORDINANCES § 25.01.010-.660 (2010); *Problem Properties Unit*, ST. LOUIS COUNTY. MISSOURI, http://www.stlouisco.com/PropertyandRoads/NeighborhoodServices/ProblemPropertiesUnit (last visited July 1, 2013).

88. By curtailing both the number of vacant properties and the amount of time that properties remain vacant, the ordinances support the value of the property at issue, and, perhaps more importantly for the municipalities, the property values of all nearby properties. Supporting the property values maintains a robust municipal tax base. In addition, many lenders, especially national ones, make numerous loans for properties in the same vicinity. Removing vacant properties positively affects the property values of those other properties on which they may hold a mortgage. *See, e.g.*, Whitaker & Fitzpatrick, *supra* note 15, at 91 (noting a 4.6% decrease in nearby property values to homes that are vacant and tax delinquent and a 4.2% to 7.5% decrease in value in high-poverty areas with vacant foreclosures that are tax-current).

89. Given this complexity, providing the maintenance support for these properties has turned into a cottage industry. Safeguard Properties, one of the largest vacant and foreclosed property managers in the United States, maintains a thorough database of local VPROs on their website. *Property Registration Ordinances*, SAFEGUARD PROPERTIES, http://www.safeguardproperties.com/Resources/Vacant_Property_Registration.aspx (last visited March 11, 2014).

90. *See infra* Part I.E.2.

communities that adopt them,[91] and usually offer no benefit to the owner of the property who often no longer resides on the property, who may believe that the property is now owned by the bank, and who only wishes to disassociate him or herself from the property.[92]

2. States Shuffle Forward

Since the 2000s, states have also begun to more actively regulate foreclosures and vacant properties. Connecticut,[93] Maryland,[94] North Carolina,[95] New York[96] and others have proposed or enacted laws specifically targeting foreclosure procedures and oftentimes vacant properties. In many instances, these laws provide a general framework and municipalities are allowed to require heightened standards, though Connecticut appears to have done the opposite.[97] The mortgage industry appears to favor the statewide approach over the local as it allows it for greater uniformity and certainty for the lenders.[98]

Like their municipal counterparts, one of the principal components of these laws is transparency. In Connecticut and Maryland, the legislatures have adopted vacant property registrations that allow the authorities to easily track properties purchased at foreclosure sales. In addition

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91. Immergluck, Lee & Terra, *supra* note 32, at 10 (stating, "[t]hus far, no studies have found negative impacts of VPROs on local housing markets").

92. In fact, several of the laws create additional burdens on the owner. *See, e.g.*, PMCNYS, *supra* note 65, §§ 301-704 (establishing additional responsibilities placed on owner); CHI. MUN. CODE, *supra* note 66, § 13-12-126 (outlining requirements for owners of vacant property); DYKEMA, *supra* note 81 (presenting burdens placed on owner of vacant property).

93. CONN. AGENCIES REGS. § 19-13-B25 (2013); CONN. GEN. STAT. ANN. § 7-148ii (West 2011). The Connecticut regulation is very limited in scope as the registration aspect only applies to those parties who have received title to a residential property through a completed foreclosure action. 2009 CONN. PUB. ACTS. 09-144 (Reg. Sess.) *available at* http://www.cga.ct.gov/2009/ACT/PA/2009PA-00144-R00SB-00951-PA.htm. Furthermore, it allows registration with MERS in lieu of registration with a public entity. *Id.*

94. MD. CODE ANN., REAL PROP. § 7-105.1 (West 2012); H.D. 1373, 2012 Leg., 430th Sess. (Md. 2012), *available at* http://mgaleg.maryland.gov/2012rs/bills/hb/hb1373e.pdf

95. N.C. GEN. STAT. §§ 45-100 to -107 (West 2008).

96. *See* PMCNYS, *supra* note 65, at § 202; *see also* N.Y. COMP. CODES R. & REGS. tit. 19, § 1226.1 (2010) (establishing the 2010 PMCNYS as the legal standard).

97. 2009 Conn. Pub. Acts. 09-144 § 2 (Reg. Sess.).

98. *See generally*, *Michael Halpern Proposes "Top-Down, Bottom-Up" Approach to Community Outreach*, SAFEGUARD PROPERTIES, http://safeguardproperties.com/News_and_Events/All_Client_Alerts/2012/04/Vacant_Property_Registration_Ordinances.aspx (last visited October 14, 2014) (presenting benefits of a statewide v. local ordinance approach).

to the registration requirements, Connecticut and Maryland have also adopted complex mediation provisions to ameliorate the foreclosure crisis.[99] In Maryland, for example, the foreclosure period is 90 days post default, and also requires a detailed "Notice of Intent to Foreclose" be sent to the borrower, record owner and the Commissioner of Financial Regulation within 45 days of the foreclosure.[100] The notice must specifically include an agent of the lender who has the authority to modify the terms of the loan as well as a detailed accounting.[101]

The laws work to provide a negotiated settlement between the defaulting owner and the creditor. Requiring mediation, lender/servicer contact information, and the ability to deal directly with an individual authorized to modify the mortgage provides owners and lenders alike a reduced cost pathway to keeping the property occupied and minimizing the loss to the lender. The process is less useful, however, when the owner lacks the financial wherewithal to make even modified payments.

In this regard as well, the state statutes dealing with vacant properties and foreclosure mediation are similar to the municipal ordinances in that they do not regulate aborted foreclosure proceedings that result in zombie mortgages. In many cases this is likely because the inconvenient situation a borrower finds himself in following an abandoned foreclosure process is not the type of ill the legislature was attempting to correct. That being said, there are a few decisions across the United States that provide more than a glimmer of hope for owners of properties encumbered by zombie mortgages.

II. JUDICIAL LANDSCAPE

In cities across the country, lawsuits have been brought challenging the ability of the lender to remain in the shadows free of financial obligation to the property. The results are split, and in some jurisdictions that uncertainty has resulted in settlement agreements rather than risking litigation.[102]

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99. *See* CONN. GEN. STAT. ANN. § 49-31k (2011), *amended by* 2013 Conn. Pub. Acts 13-136 (Reg. Sess.) *available at* http://www.cga.ct.gov/2013/act/pa/pdf/2013PA-00136-R00HB-06355-PA.pdf; H.D. 1374, 2012 Leg., 430th Sess. (Md. 2012) *available at* http://mgaleg.maryland.gov/2012rs/bills/hb/hb1374e.pdf (regulating pre and post-foreclosure filing mediation).

100. MD. CODE ANN., REAL PROP. § 7-105.1 (West 2012).

101. *Id.*

102. *See* Docket at June 17, 2013, People v. Deutsche Bank Nat'l Trust, No. BC 460878 (Cal. Superior May 4, 2011) (indicating filing of settlement notice); Edvard Pettersson, *Deutsche Bank Settles Los Angeles 'Slumlord' Lawsuit*, BLOOMBERG.COM, (June 18, 2013), http://www.bloomberg.com/news/2013-06-18/deutsche-bank-settles-

A. Municipality-Driven Litigation

The majority of the early zombie mortgage lawsuits focused on the ability of the municipality to hold the lender financially responsible for the state of the property.[103] More recently though, homeowners have sought relief from zombie mortgages on a variety of grounds including: estoppel;[104] analogizing the situation to a creditor's improper refusal to foreclose on a vehicle;[105] soliciting an order of sale in a bankruptcy hearing;[106] offering a deed in lieu of foreclosure;[107] participating in a short sale

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los-angeles-slumlord-lawsuit.html (confirming intent and proposal to settle); *see also* City of Buffalo v. ABN Amro Mortg. Grp. Inc., No. 2008002200 (Erie Co., N.Y., Sup. Ct. 2008) (remaining parties settled); Thom Weidlich, *Foreclosures Prompt Four U.S. Cities to Sue Banks for Mowing, Home Repairs*, BLOOMBERG.COM (May 11, 2011, 11:00 PM), http://www.bloomberg.com/news/2011-05-12/foreclosures-prompt-four-u-s-cities-to-sue-banks-for-mowing-home-repairs.html (reporting remaining parties to suit settled) Ellen Rosen & Elizabeth Amon, *BofA, JPMorgan, Boeing, Galleon, HealthSouth in Court News*, BLOOMBERG.COM, (May 11, 2011), http://www.bloomberg.com/news/2011-05-11/fcpa-verdict-galleon-drilling-healthsouth-tax-shelters-in-court-news.html (reporting banks strategy of settling to end investigation).

103. *See* Weidlich, *supra* note 102 (reporting municipalities judicial attempt to hold lenders financially responsible for vacant property maintenance); *e.g.*, *ABN Amro Mortg. Grp. Inc.*, No. 2008002200 (holding lenders responsible); Complaint at 10, City of Minneapolis v. TJ Waconia, LLC, No. 27CVHC08-2728, 2008 WL 925273 (D. Minn. 2008) (holding lenders responsible for vacant properties); City of Cleveland v. Ameriquest Mortg. Sec., Inc., 621 F.Supp.2d 513 (N.D. Ohio 2009) (seeking relief for vacant properties from lenders).

104. *See, e.g.*, Complaint at 1, People v. Deutsche Bank Nat'l Trust, No. BC 460878, 2011 WL 1663038 (Cal. Superior May 4, 2011) (establishing grounds for relief); *see also* Dan Levine & Edward Taylor, *Los Angeles Sues Deutsche Bank Over Foreclosure Blight*, INSURANCE JOURNAL, (May 5, 2011), http://www.insurancejournal.com/news/west/2011/05/05/197373.htm (describing homeowners estoppel claim); *see also, e.g.*, City of Memphis v. Wells Fargo, No. 09-2857-STA, 2011 WL 1706756 (W.D. Tenn. 2011) (seeking relief from lenders based on estoppel related grounds); Baltimore v. Wells Fargo Bank, N.A., 631 F.Supp.2d 702 (D. Md. 2009) (purporting relief should be granted on grounds of estoppel).

105. *See* Canning v. Beneficial Maine, Inc. (*In re* Canning), 706 F.3d 64 (1st Cir. 2013) (citing Pratt v. Gen. Motors Acceptance Corp. (*In re* Pratt), 462 F.3d 14 (1st Cir. 2006) (finding secured creditor's refusal to foreclose an impermissible attempt to coerce the payment of a discharged debt)).

106. *See, e.g.*, *In re* Fristoe, No. 10-32887, 68 Collier Bankr.Cas.2d 1469, at *2–3 (Bankr. D. Utah Sept. 27, 2012) (requesting court issue order mandating lender complete foreclosure sale); *see also* Pigg v. BAC Home Loans Servicing, LP (*In re* Pigg), 453 B.R. 728, 729–730 (Bankr. M.D. Tenn. 2011) (petitioning court for order requiring lender to complete foreclosure process).

107. *See, e.g.*, Wells Fargo Bank, N.A. v. Young, No. 2009 CA 12, 2001-Ohio-122, at ¶ 5 (Ohio Ct. App. Jan. 14, 2011) (petitioning court for deed in lieu).

if possible;[108] and attempting to have liens stripped in bankruptcy proceedings.[109]

Given their public persona, municipalities may have slightly more tools at their disposal as they attempt to enforce maintenance requirements under standard ordinances and registration obligations under the VPROs. In fact, cities have attempted several different approaches with varying degrees of success. One trend has been for the city to sue lenders on the ground of public nuisance,[110] and another has seen cities suing lenders for violations of the Fair Housing Act ("FHA"), as shown in the cities of Baltimore, Maryland,[111] Birmingham, Alabama[112] and Memphis, Tennessee.[113] These suits, like the VPROs, have provided the municipali-

108. *See, e.g.*, Cleveland Hous. Renewal Project, Inc. v. Wells Fargo Bank, N.A., 934 N.E.2d 372, 377–378 (Ohio Ct. App. 2010) (discussing short sale requirements in stalled foreclosure action).

109. *See, e.g.*, *In re* Heck, No. 09-31512 TEC, 2011 WL 133015, at *1 (Bankr. N.D. Cal. Jan. 13, 2011) (seeking to reopen bankruptcy case to have liens removed from property); *see also In re Fristoe*, 2012 WL 4483891, at *2 (requesting court remove liens from property in bankruptcy proceeding).

110. *See, e.g.*, Easthampton Sav. Bank v. City of Springfield, 874 F.Supp.2d 25, 28 (D. Mass. 2012) (upholding a recently enacted foreclosure ordinance aimed at preventing dangerous and hazardous conditions at vacant properties and properties in the process of foreclosure); City of Cleveland v. Ameriquest Mortg. Sec., Inc., 621 F.Supp.2d 513, 516–517 (N.D. Ohio 2009) (dismissing public nuisance claim against lender); Cleveland v. Deutsche Bank Trust Co., 571 F.Supp.2d 807, 810 (N.D. Ohio 2008) (alleging public nuisance claim against multiple lenders).

111. City of Baltimore v. Wells Fargo Bank, N.A., Civil Case No. JFM-08-62, 2011 WL 1557759, at *1 (D. Md. 2011) (denying Wells Fargo's motion to dismiss FHA claim for lack of a causal connection). *See* Luke Broadwater, *Wells Fargo agrees to pay $175M settlement in pricing discrimination suit*, The Baltimore Sun (July 12, 2012), http://articles.baltimoresun.com/2012-07-12/news/bs-md-ci-wells-fargo-20120712_1_mike-heid-wells-fargo-home-mortgage-subprime-mortgages (outlining terms of settlement between Wells Fargo and Baltimore that includes a direct payment of $7.5 million to the city of Baltimore).

112. City of Birmingham v. Citigroup, Inc., No. CV-09-BE-467-S, 2009 WL 8652915, at *1 (N.D. Ala. 2009) (dismissing FHA and negligence claims for lack of standing).

113. City of Memphis v. Wells Fargo Bank, N.A., No. 09-2857-STA, 2011 WL 1706756, at *1 (W.D. Tenn. 2011) (denying Wells Fargo's motion to dismiss claim based on "reverse redlining" and race-based violations of the FHA); *see also* James O'Toole, *Wells Fargo pledges $432.5M in lending, payments to settle lawsuit*, CNN Money (May 31, 2012), http://money.cnn.com/2012/05/30/news/companies/wells-fargo-memphis/index.htm (reporting *Memphis* ultimately settled by requiring Wells Fargo to, among other things, pay the city $3 million to support economic development and provide $4.5 million in grants for mortgage down payments and home renovations).

ties with some direct remedies, but largely leave the homeowners little recourse.[114]

Public nuisance claims are potentially problematic for the municipality given that ill-advised and even discriminatory lending practices themselves may not cause the type of economic loss required in some jurisdictions to maintain the claim.[115] In *City of Cleveland v. Ameriquest Mortg. Sec., Inc.*,[116] the court concluded that the economic loss was suffered by the homeowner rather than the city and that "conduct which 'the law sanctions,' [. . .] cannot be a public nuisance."[117] Thus public nuisance claims have not been a tenable solution.

On the other hand, municipalities have had significant success with FHA claims as seen with the recent, large settlements reached with lenders and the cities of Baltimore,[118] Los Angeles,[119] and Memphis.[120] In those cases, the common denominator has been underlying improper lending patterns and/or improper evictions and foreclosures. Because of the specifically pleaded improprieties and properties involved, the cities successfully avoided motions for dismissal and summary judgment and were ultimately able to reach settlement. While these techniques are useful in combating vacant and unmaintained properties, they generally provide no avenue for relief for the borrower.

B. Borrower Litigation

1. No Requirement to Foreclose

> *Forces remained at work that could make [borrowers'] continued ownership of the real estate uncomfortable—forces like accruing real estate taxes and the desirability of maintaining liability insurance for the premises. But those forces are incidents of ownership. Though the [Bankruptcy] Code provides debtors with a surrender option, it does not force creditors to assume ownership or take possession of collateral[.]*[121]

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114. *Cf.* Broadwater, *supra* note 111 (noting Wells Fargo had agreed to direct payments to individuals who had suffered from its unlawful discrimination).

115. *City of Cleveland*, 621 F.Supp.2d at 521–26.

116. *Id.*

117. *Id.* at 531.

118. *See supra* note 111 and accompanying text.

119. *See* James R. Hood, *Bank of America Fined $1 Billion For Mortgage Fraud*, ConsumerAffairs (Feb. 10, 2012), http://www.consumeraffairs.com/countrywide-news.

120. *See supra* note 113 and accompanying text.

121. Canning v. Beneficial Maine, Inc. (*In re* Canning), 442 B.R. 165, 172 (Bankr. D. Me. 2011) (emphasis added).

Bluntly stated, borrowers have had to resort to creative attempts to successfully flee their zombie mortgages. In *Canning v. Beneficial Maine, Inc.*,[122] the First Circuit rejected attempts by a homeowner to argue that failure to release the lien amounted to coercion to pay a discharged debt.[123] In *Canning*, the owners argued that their situation mirrored that of the owner of an encumbered car who was unable to junk the essentially worthless car due to a security interest.[124] The *Canning* court held that the lender's refusal to release the lien on the real property was not based on subterfuge or an inappropriate attempt to coerce payment on several grounds.[125]

The First Circuit, citing to the Bankruptcy Code,[126] noted that even though debtors may free themselves from a prepetition lien by surrendering the encumbered property to the creditor, "the secured creditor, however, has the prerogative to decide whether to accept or reject the surrendered collateral."[127] So long as the secured creditor's refusal to accept the collateral is not "subterfuge intended to coerce payment of a discharged debt," the creditor is free to walk away from the collateral.[128] In holding there was no subterfuge, the court noted the property retained significant value,[129] the lender had solicited a settlement offer or short sale from the owners, and the lender allowed the owners to occupy the home.[130]

Although the owners failed in their petition to escape the lien in *Canning*, the case presents a clear roadmap for other homeowners whose homes do not retain significant value.[131] If the encumbered property is worthless or of very limited value, "the legitimate *raison d'être* for the . . . lien no longer [applies]."[132] Likewise, the Tenth Circuit has held

122. 706 F.3d 64 (1st Cir. 2013).

123. *See id.* at 68; *see also Debtor Can't Force Lender to Foreclose*, 23 Consumer Bankr. News 8 (Mar. 12, 2013).

124. *See Canning*, 706 F3d at 68; *see also* Pratt v. Gen. Motors Acceptance Corp. (*In re* Pratt), 462 F.3d 14 (1st Cir. 2006).

125. *Canning*, 706 F.3d at 69–70.

126. *Id.* at 69; *see* 11 U.S.C. § 521(a)(2).

127. *Canning*, 706 F.3d at 69–70.

128. *Id.* at 70.

129. *Id.* at 66–67 (noting although the owners owed over $180,000, the lender valued the property at $75,000).

130. *Id.* at 71–72.

131. Though of course, this may still prove problematic with regard to postpetition condominium fees and assessments. *See, e.g.*, *In re* Ames, 447 B.R. 680, 684 (Bankr. D. Mass. 2011) (holding debtor liable for postpetition condominium fees).

132. *See* Pratt v. Gen. Motors Acceptance Corp. (*In re* Pratt), 462 F.3d 14, 20 (1st Cir. 2006); *see also* Casarotto v. Missouri Dept. of Revenue (*In re* Casarotto), 407 B.R. 369, 377–378 (Bankr. W.D. Mo. 2009) (determining that surviving lien "serve[d]

the discharge injunction precludes otherwise permissible actions if they are designed to "'coerce,' or 'harass' the debtor improperly,'" in an attempt to "obtain payment of the discharged debt."[133] The Tenth Circuit identified the test as whether objectively the creditor's failure to release the lien had the "practical, concrete effect of coercing payment of a discharged debt, and bad faith is not required."[134] As discussed in Part B.2 below, in many scenarios where the homes are worthless or nearly so, such as has occurred in the cities of Cleveland and Detroit among others, *Canning* may ultimately come to be seen as the case that provided the necessary legal support to borrowers seeking to escape their zombie mortgages through bankruptcy.

2. Equitable Relief

> *The perfect storm of the 'Great Recession' and these unspeakable natural disasters leaves debtors such as Mrs. Pigg and other victims like her to suffer unbearable losses of their homes . . . and be denied the fresh start promised by bankruptcy. [These types of debtors] suffer a wrong without a remedy.*[135]

In addition to the arguments based on subterfuge or coercion identified above, appealing for equity is also available in bankruptcy.[136] In another case involving a zombie mortgage, the court used its equitable powers to fashion an equitable remedy for the debtor. In the case *Pigg v. BAC Home Loans Servicing, LP*,[137] the lender, although refusing to foreclose or release its lien, had actively taken possession of uninhabitable property.[138] In *Pigg*, the borrower and Chapter 7 debtor was the owner of title of a flood-damaged condominium unit that she had vacated and surrendered. As the Code does not discharge post-petition homeowners association ("HOA") fees in Chapter 7,[139] the debtor sought equitable relief based in part on the fact the mortgagee had exercised control over the property by excluding the debtor, changing the locks, and maintaining

a legitimate economic purpose"); *In re* Schlictmann, 375 B.R. 41, 97 (Bankr. D. Mass. 2007).

133. Paul v. Igelhart (*In re* Paul), 534 F.3d 1303, 1308 (10th Cir. 2008).

134. *Id.*

135. Pigg v. BAC Home Loans Servicing, LP (*In re* Pigg) 453 B.R. 728, 734 (Bankr. M.D. Tenn. 2011); *see also id.* at n.11(noting the lender's concession that the situation "appears to be a case of a wrong without a remedy") (emphasis added).

136. 11 U.S.C. § 105(a) (2010) ("The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.").

137. 453 B.R. 728 (Bankr. M.D. Tenn. 2011).

138. *See Pigg*, 453 B.R. 728, 734; *contra* In re Arsenault v. JP Morgan Chase Bank, N.A., 456 B.R. 627 (Bankr. S.D. Ga. 2011).

139. 11 U.S.C.A. § 523(a)(16) (West 2010).

and insuring the property.[140] The mortgage servicer placed notice of these actions on the front window "prohibiting entry by anyone and stating that it [was] protecting the property for the mortgage holder."[141]

In an extended footnote, the bankruptcy court noted the lender was the "unintended beneficiary of the perfect storm of natural disaster and legislative inequity."[142] The court noted the HOA fees accruing against the non-residing debtor directly benefitted the creditor through services such as landscaping, common area maintenance, and security.[143] The ongoing arrangement resulted in an incentive for the lender "to sit idle and not foreclose" while the borrower received little to no benefit.[144]

The bankruptcy court in *Pigg* noted the "nature of equity is the 'correction of the law where, by reason of its universality, it is deficient.' . . . '[E]quity will never suffer a wrong without a remedy.'"[145] The *Pigg* court ordered the trustee to sell the property and thereafter, any remaining charges against the debtor to be discharged.[146] In resolving the question of whether the court had the authority to order the sale free and clear of liens, it found the lender and HOA to have consented to the sale through inaction – noting favorably that debtor had pleaded for action and offered a deed in lieu of foreclosure.[147] "The court fashion[ed] this remedy in order to do complete justice."[148] Lastly, it should be noted the court granted equitable relief even though the property retained considerable value.[149]

While successful in *Pigg*, similar equitable claims in different jurisdictions have not been as successful. The U.S. Bankruptcy Court for the Southern District of Georgia held that bankruptcy courts' ability to utilize equitable remedies "is constrained by the provisions of the Bankruptcy Code,"[150] and that the code "does not authorize the bankruptcy courts to create substantive rights that are otherwise unavailable under applicable law, or constitute a roving commission to do equity."[151] Similarly, the U.S.

140. *Pigg*, 453 B.R. 728, 731.
141. *Id.*
142. *Id.* at 732 n.5.
143. *Id.*
144. *Id.*
145. *Id.* at 735 (citing Aristotle, 384–322 BC.; May v. Carlton, 245 S.W.3d 340 (Tenn. 2008)).
146. *Id.* at 735–736.
147. *Id.* at 736.
148. *Id.* at 737.
149. *Id.* at 731 (noting the debtor valued the property at $55,000).
150. *In re* Arsenault v. JP Morgan Chase Bank, N.A., 456 B.R. 627, 631 (Bankr. S.D. Ga. 2011).
151. *Id.*

Bankruptcy Court for the District of Utah concluded that it lacked the equitable power to approve a sale free of the liens without the creditor's consent.[152]

In *In re Fristoe*,[153] the bankruptcy court found that the equitable remedy sought was inconsistent with §§ 362 and 363 of the Bankruptcy Code.[154] The court noted the sale would contravene § 362 as the trustee had not abandoned the properties, the creditor had not sought relief from stay, and the properties were still part of the estate. Furthermore, the court concluded that a sale free and clear would contravene § 363 as, although the debtor argued that the lender had breached its duty of good faith and fair dealing, the lender had not given its consent to such a sale.[155] Although the court noted that "Congress may not have been able to foresee that lenders would have an incentive to stall foreclosure proceedings for substantial periods of time," such a problem is "an issue for Congress, not this Court, to remedy."[156]

C. National Mortgage Settlement

The National Mortgage Settlement (the "Settlement") reached in 2012 between mortgage lenders and state attorneys general was a $25 billion dollar settlement aimed at preventing new foreclosures and compensating victims for improper or illegal foreclosure tactics such as robo-signings.[157] The Settlement contained many positive aspects such as encouraging additional negotiations between lenders and borrowers, lower borrowing rates, preventing robo-signing, potentially lowering the amount of principal owed, principal forbearance for unemployed borrowers, and blight-reduction programs among others.[158] That being said, the

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152. *In re* Fristoe, No. 10–32887, 2012 WL 4483891, at *3 (Bankr. D. Ut. Sept. 27, 2012).

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.* at *4 (providing the court specifically disagreed with the *Pigg* court's conclusion that it could force a creditor or find a creditor to have consented to a sale free and clear through inaction).

157. Nat'l Ass'n. of Att'ys Gen., *State Attorneys General, Feds Reach $25 Billion Settlement with Five Largest Mortgage Servicers on Foreclosure Wrongs*, NAAG NEWS (last visited Oct. 12, 2014), http://naag.org/state-attorneys-general-feds-reach-25-billion-settlement-with-five-largest-mortgage-servicers-on-foreclosure-wrongs.php.

158. *Id.*

Settlement does not appear to cover the issue of zombie mortgages or provide any framework under which the parties would need to act.[159]

III. SOLUTIONS

As several courts have noted, zombie mortgages appear to be a wrong for which no readily identified or purposefully created remedy exists.[160] With that landscape, the borrower retains few options other than shoehorning claims into atypical settings or seeking legislative reform. It appears that the best option for the shoehorn approach will originate in bankruptcy, which may initially preclude some borrowers from seeking that type of relief. On the other hand, legislative reform is its own wildcard. While legislative reform is often proposed in law review articles and is the crutch of the academics seeking "impact," the reality is that little reform tends to come from such pieces. I believe, however, that the circumstances regarding zombie mortgages are sufficiently different that such reform is not only possible, but in fact likely in at least a few jurisdictions. The primary reason is the alignment of interests between the homeowners and the municipalities that are already combating similar types of issues through maintenance obligations and VPROs. With lawmakers and homeowners having nearly perfectly aligned interests in reducing the amount of time a property is vacant or abandoned, the opportunity for mutually beneficial legislation is strong.

A. Solutions for the Borrower in Bankruptcy – A Jurisdictionally Dependent Option

As noted in Section II.B.2 above, one potential judicial route for owners seeking to escape a zombie mortgage is found in bankruptcy.[161] While extended description is beyond the purview of this article, there are generally two types of bankruptcy available to consumers. Chapter 7, the "straight bankruptcy," discharges debt in exchange for surrendering non-exempt property, and is by far the most common type of bankruptcy

159. The monitor of the National Mortgage Settlement has stated that "[t]o [his] knowledge, the servicers' behavior [in refusing to foreclose] . . . is not covered by any standards in the Settlement." Conlin, *supra* note 16.

160. *Compare id.* (quoting various judges and their views on zombie mortgages from a judicial standpoint), *with* Pianka, *supra* note 6 (defining zombie mortgages and titles and the limited judicial remedies currently available).

161. Non-judicial alternatives such as deeds in lieu of foreclose continue to succeed on a limited basis when the property retains value. *See infra* Part III.C.

in the United States.[162] Chapter 13 is a reorganization plan and period that grants the debtor the opportunity to create a plan of up to five years in which to repay past-due and current obligations and discharge others.[163] While a Chapter 7 bankruptcy allows for complete discharge of most debt, subject to the lifting of the automatic stay it will not affect a lender's ability to foreclose on the property.[164] Chapter 13 cases would potentially allow the homeowner to keep the property provided he/she meets the ongoing financial obligations.[165]

The automatic stay is less important in zombie mortgage cases given that zombie mortgage cases are predicated on the fact that foreclosure proceedings are not imminent. However, by initiating a bankruptcy proceeding, the debtor has a judicial forum in which to argue two primary claims[166] in order to escape the mortgage: surrender of property and equity. The approach has some initial appeal, especially in those jurisdictions that have focused on the equities and the debtor's inability to receive a "fresh start," though the decisions cited below have also been criticized in other courts.

The leading case for escaping post-petition HOA fees in a zombie mortgage setting is *In re Pigg* discussed in Section II.B.2 above.[167] The debtor in *Pigg* sought relief in a Chapter 7 setting meaning she was attempting to completely discharge her debt obligations including HOA fees that arose after the Chapter 7 proceeding.[168] In *Pigg*, the bankruptcy court highlighted several factors that appeared dispositive in its decision to utilize its equitable powers including the debtor's surrender of the property, the creditor's securing the property even to the exclusion of the debtor, and the fact that on-going HOA fees continue to accrue to the

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162. Div. for Pub. Educ., *"Straight" Bankruptcy: Chapter 7*, ABA, http://www.americanbar.org/groups/public_education/resources/law_issues_for_consumers/bankruptcy7.html (last visited July 29, 2013).

163. Div. for Pub. Educ., *Chapter 13 Bankruptcy*, ABA, http://www.americanbar.org/groups/public_education/resources/law_issues_for_consumers/bankruptcy13_whatis.html (last visited July 29, 2013).

164. Stephen Elias, *Chapter 7 Bankruptcy and Foreclosure*, NOLO: LAW FOR ALL, http://www.nolo.com/legal-encyclopedia/home-chapter-7-bankruptcy-32498-2.html (last visited July 29, 2013).

165. Div. for Pub. Educ., *supra* note 163.

166. In chapter 13 cases, in limited circumstances a strip down would decrease the lender's secured claim to the actual value of the collateral, voiding the lien to the extent it exceeds that value. 11 U.S.C. § 506(a) (2005). This remedy is not applicable in chapter 7 cases, and is very limited in chapter 13 cases as it generally will not apply to a borrower's principal residence. *Id.* at § 506(a).

167. Pigg v. BAC Home Loans Servicing, (*In re* Pigg), 453 B.R. 728, 732 (Bankr. M.D. Tenn. 2011).

168. *Id.*

benefit of the creditor, which removes any incentive for foreclosure.[169] As noted in Section II.B.2., the bankruptcy court utilized § 363(f) of the Code to permit a sale free and clear of any interest in the property, though it was only able to do so by holding that the lender and HOA were deemed to "have consented to the sale by their inaction."[170]

Similar to *Pigg* though in a Chapter 13 setting, *In re Colon* also involved a debtor attempting to escape post-petition HOA fees.[171] The specific law regarding postpetition HOA fees specifically applies only to Chapter 7 cases,[172] which therefore necessitates different analysis depending on the debtor's elected pathway. In *Colon*, the court held that the postpetition HOA fees were properly dischargeable in a Chapter 13 plan.[173] The *Colon* court, as did the *Pigg* court, noted favorably that the debtor had already vacated the property and surrendered all rights in the property to the lienholder.[174] Furthermore, the court had already granted relief from the automatic stay to the creditor although the creditor then refused to foreclose.[175] Finally, in assessing the equities, the *Colon* court noted that none of the benefits of the HOA fees in question accrued to the benefit of the debtor.[176]

In re Perry is a somewhat similar decision that emerged at roughly the same time as the *Colon* case and also in a Chapter 13 context.[177] *Perry* ostensibly stands for the generally accepted proposition that a creditor cannot be forced into accepting surrendered collateral or be required to foreclose. However, the *Perry* court, citing time constraints, entered an order requiring the creditor to timely foreclosure or be forced to accept a quitclaim deed.[178] Though the record is slim, it appears that in *Perry* the creditor failed to respond to the debtor's motion for an order approving the surrender of the property.[179] In that setting, the court granted the lender 60 days in which to commence the foreclosure, or, failing that, the debtor would be authorized to record a title conveyance to the lender via

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169. *Id.* at 732–33.
170. *Id.* at 736. The court noted that while most cases would not merit deemed consent, given the lender's inaction, the debtor's surrender of the property and offer of a deed in lieu the court believed the equities lay in favor of a fresh start for the debtor. *Id.* at 735.
171. 465 B.R. 657 (Bankr. D. Utah 2011).
172. 11 U.S.C.A. § 523(a)(16) (West 2005).
173. 465 B.R. at 661–663.
174. *Id.* at 663.
175. *Id.*
176. *Id.*
177. *In re* Perry, 2012 WL 4795675 (Bankr. E.D.N.C. 2012).
178. *Id.* at *2.
179. *Id.* at *1.

quitclaim deed.[180] It may be that the lender was willing to initiate to the foreclosure proceeding regardless, in which case this decision would not be as important to those debtors facing zombie mortgages. However, in the event the lender opposed foreclosing, the debtor appears to have found an avenue to be able to force the creditor to accept the quitclaim deed and have it recorded.[181]

To the extent the *Pigg*, *Colon*, and *Perry* cases represent successes for debtors challenging zombie mortgages in bankruptcy (especially in the context of HOA fees), other cases have come out exactly opposite. *In re Fristoe*, discussed in Section II.B.2 above, specifically declined to follow the reasoning in *Colon* (while also specifically noting the differing contexts of *Fristoe* being a Chapter 7 case and *Colon* a Chapter 13 case).[182] Likewise, the *Fristoe* court criticized the *Pigg* decision as being "in direct contravention of the Bankruptcy Code."[183] In *In re Langenderfer*, as in *Fristoe*, relying on § 523(a)(16), the court held a Chapter 7 debtor liable for all postpetition HOA fees until such time as the real property was sold at a sheriff's sale and title transferred out of the debtor's name.[184] Even with more favorable statutory language in the Chapter 13 setting, the issue is not free from conflict.

The district court in the Eastern District of Michigan held in the case of *In re Spencer* that the rationale behind Chapter 7 exceptions regarding the nondischargeability of postpetition HOA fees applied equally in Chapter 13 cases.[185] The court so held even though § 523(a)(16) exceptions relating specifically to HOA fees are not included in §1328(a) (the statutory section for a Chapter 13 discharge of debt with a completed payment plan).[186] The court's conclusion was ultimately not based on § 523, but rather on whether an HOA claim is a pre or postpetition claim. The court held that, in Michigan at least, HOA fees are covenants that run with the land.[187] As a covenant running with the land, the court found the recurring debt originated postpetition, and the debtor could unilaterally avoid the HOA debt at any time by divesting its ownership interest – though it noted somewhat paradoxically that the debtor's continued own-

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180. *Id.* at *2.

181. *Id.*

182. *In re* Fristoe, 2012 WL 4483891 at n.6 (Bankr. D. Utah 2012) (noting, "to the extent this decision is inconsistent with Colon, Colon is found to be non-persuasive and the Court elects not to follow that reasoning").

183. *Id.* at *4.

184. *In re* Langenderfer, 2012 WL 1414301 (Bankr. N.D. Ohio 2012).

185. *In re* Spencer, 457 B.R. 601 (E.D. Mich. 2011).

186. *Id.*; 11 U.S.C. §§ 523(a), 1328(a).

187. *Spencer*, 457 B.R. at 611.

ership of the property "[was] not by choice, apparently, but rather as a result of the upside down nature of his mortgages . . . ."[188]

Even in *Spencer*, however, the court recognized that bankruptcy courts *may* have the ability to require lenders to accept a surrender of the affected property in certain circumstances.[189] Strategically, in order to avail itself of the court's equity power, the debtor should surrender the property and relinquish possession, including potentially offering a deed in lieu of foreclosure.[190] In short, Chapter 7 or Chapter 13 bankruptcies may provide debtors a judicial avenue of relief from zombie mortgages based on the inherent equitable powers of the court depending on the jurisdiction.

B. Municipally Created Solutions – VPROs are Only a Starting Point

VPROs are a decent starting point for a municipality beginning to address the vacant/abandoned property situation. However, given the prevalence of zombie mortgages, it is clear the ordinances, while serving as a statistical tool, have not been entirely effective.[191] Based in part on the maintenance obligations under its VPRO, Los Angeles aggressively pursued Deutsche Bank, threatening penalties of $2,500 per day per violation.[192] While this litigation and other similar lawsuits resulted in favorable settlements for the cities involved, they do nothing to address owners affected by zombie mortgages. States and/or cities (depending on the proposal) should adopt one of the following two proposals as standalone regulations or to supplement their existing VPROs or foreclosure statutes: notice of failure to foreclose, or foreclosure or else.

1. Notice of Failure to Foreclose

Of the two proposals, this one is likely to be the easier to implement in terms of transaction costs and political opposition, and, as a direct result, is probably fairly characterized as more pro-lender in that it more closely follows current law regarding lien priority and lenders' foreclosure rights and obligations. The proposal is simple and would require two essential elements: 1) a notice of intent to desist in the foreclosure process;

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188. *Id.* at 604.

189. *Id.* at 615.

190. *See, e.g.*, *id.* at 614-15; *In re* Canning, 442 B.R. 165, 171 (Bankr. D. Me. 2011); *In re* Cormier, 434 B.R. 222, 232-33 (Bankr. D. Mass. 2010).

191. Georgia law, for example, only requires banks to register vacant properties after foreclosure is completed. *See* Conlin, *supra* note 16.

192. Edvard Pettersson, *Deutsche Bank Must Face Los Angeles Slumlord Claim Suit*, BLOOMBERG (Apr. 24, 2013), http://www.bloomberg.com/news/2013-04-24/deutsche-bank-must-face-los-angeles-suit-over-slumlord-claim-1-.html.

and 2) some period of time following the notice during which the lender would be unable to reinitiate foreclosure proceedings.

The proposal would not alter the lien priority, would not force the lender to foreclose and discharge its lien, and would at most inconvenience the lender only if circumstances changed rapidly and the lender sought again to initiate foreclosure proceedings. Both elements are necessary to this proposal in order for it to work equitably as designed. The time period in the second element does not have to be overly long, but it should be of sufficient length to allow homeowners the opportunity to assess their legal options and determine the current state of affairs regarding the property. It would also prevent additional information problems from developing if the owner were to receive multiple notices of foreclosure in a shortened time period with conflicting dates.

Notice will solve many of the problems regarding those owners who were, or claimed to be, unaware of the fact their property continued to be listed in their name. Furthermore, information regarding lenders' ability to unilaterally halt the foreclosure process at any time should be required in the initial notice to foreclose, and in that notice, the lender should direct the owner to provide contact information at which the lender could advise the owner of the change of circumstance in the event the owner quits the premises.

This proposal would be a minimalist approach that incrementally increases lenders' obligations in foreclosures in terms of time and transaction costs, and would not resolve the underlying problem of owners unable to escape their mortgages. It would be a marginal improvement over the current legal landscape as it would provide greater knowledge of the foreclosure process so that individuals were not caught unaware of their continued ownership of the property and suddenly finding themselves subject to fines, tax liens, and even imprisonment.[193] This proposal will certainly be more palatable to lenders, but the municipalities and especially the homeowners may seek greater change.

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193. *See, e.g.*, Mem. & Aff. for Petitioner at 18, New York v. HSBC Bank, No. 2013-1660, 2013 WL 2409007 (N.Y. Sup. Ct. May 31, 2013) (discussing N.Y. legislation, CPLR § 3408, which would require lenders to give notice of foreclosure ninety days prior, which notice is to include information about the foreclosure process and possible remedies. When borrowers are unaware of foreclosure remedies, expenses such as taxes, interest, fines, and other miscellaneous fees, are allowed to accrue, often to unmanageable levels, frustrating the settlement process.); *see also* Conlin, *supra* note 16.

2. Foreclose or Else

The second proposal would take as a starting point the notice requirement in the first proposal above. Lenders initiating foreclosure proceedings would be required to notify the owners of their unilateral right to cease the foreclosure process at any time in their initial foreclosure notice. If in fact, lenders were to halt the foreclosure process, notice would likewise be required. However, in addition to the notice requirements, following a certain time period after the cessation of the foreclosure (e.g., two years) the lien would be statutorily stripped from the property if a second foreclosure were not initiated and subsequently completed in due course.[194] Initially, such a proposal sounds harsh and, to the extent the first proposal was pro-lender, this proposal is certainly pro-borrower. On closer inspection, however, the proposal would likely result in minimal loss to lenders, considerably fewer zombie mortgages, real solutions for affected homeowners, and greater certainty in the marketplace.

As mentioned above, failure to initiate a second foreclosure proceeding within the two year example would result in the lender losing its lien on the property. Anytime someone writes in a proposal the phrase "would result in the lender losing its lien on the property" it is safe to assume there will be significant opposition to the proposal. However, in the real world how likely would a lender be to suffer this consequence? No one is saying that the lender would be forced to foreclose on the collateral securing the money owed them, and, in fact, the proposal would make lenders act with considerably more care in both foreclosure proceedings.

If the lender knew it had a two-strike rule, and that the time frame of the entire process was constrained to twenty-four months, the most likely outcome is that the lender would be much more cautious in initiating foreclosures in the first place, and would likely only do so in those cases they believed they would in fact see the foreclosure through. Second, even if the lender decided to halt the foreclosure, it would still have twenty-four months from that date in which to initiate a second foreclosure. Only after the time period had lapsed, or the second foreclosure been halted, would the lender face financial repercussions.

194. A similar program was proposed in Ohio in 2011, though apparently the bill died in committee. H.B. 56, 129th Geb. Assemb., Reg. Sess., (Oh. 2011-2012). The bill would have required banks to transfer the lien to the county or land bank. H.B. 56, 129th Geb. Assemb., Reg. Sess., at § 2308.06(B), (C)(Oh. 2011-2012). *See* Joanne Huist Smith & Lynn Hulsey, *Many owners of abandoned homes escape responsibility*, DAYTON DAILY NEWS (June 30, 2012, 8:24 p.m.), http://www.daytondailynews.com/news/news/local/many-owners-of-abandoned-homes-escape-responsibili/nPwRY/.

This proposal should be appealing to the affected states, municipalities and homeowners as one outcome should be that fewer zombie mortgages are brought to life in the first place. With fewer zombie mortgages, there should be fewer abandoned and vacant homes in need of maintenance, and hopefully a more robust tax base. So long as the homeowner owns the property, the obligation to pay property taxes continues. Even if homeowners have stopped making their mortgage payments, they may continue to pay their tax obligations to avoid any resulting tax liens.

Finally, to the extent that the nuclear option of lien stripping were to be used, it is likely to occur only in those situations where the property has little or no market value, or in those cities already facing a glut of similar properties. Stripping the lien would allow as near a clean escape for the affected homeowner/borrower as possible given ongoing property tax and maintenance issues.

Whereas the first proposal was modest, this one would require significant changes to a state's foreclosure laws. By making the proposal a statewide proposal, the overwhelming support for VPROs and similar ordinances that may be found in municipalities facing crippling vacancy problems may not be shared by the rest of the state. In addition, lenders, although preferring statewide solutions for uniformity, have had significant success in lobbying to reduce requirements and obligations states had sought to impose on them through VPRO type legislation.

3. Home Foreclosure Procedures Act

A drafting committee of the Uniform Law Commission (ULC), also known as the National Conference of Commissioners on Uniform State Laws (NCCUSL) has been working since 2012 on proposed legislation to regulate residential mortgage foreclosures.[195] The proposal is in the drafting stage, but contains several proposals similar to those suggested above in the case of abandoned property.[196] For the purposes of this article, the sections on abandoned property of most interest relate to the foreclosure process and maintenance obligations.[197] The proposal would create a legal presumption of abandonment when a certain minimum of indicia exist.[198]

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195. *Report of the January 13 Stakeholder meeting and the January 14 meeting of the Study Committee Regarding a Uniform Mortgage Foreclosure Procedures Act*, UNIFORMLAWS.ORG (July 2011), http://www.uniformlaws.org/shared/docs/mortgage%20foreclosure/2012may_RREMFPP_Report%20to%20Scope_FINAL.pdf.

196. HOME FORECLOSURE PROCEDURES ACT §§ 601–6 (Meeting Draft Nov. 6, 2014).

197. *Id.*

198. *Id.* at § 601(a)(1)–(8) (noting the presumption of abandonment would apply in the event that at least three of the eight conditions had been satisfied).

The proposed law would allow either the plaintiff creditor or a governmental subdivision to move for or seek a determination of abandonment depending on the type of proceeding.[199]

Once a property is determined abandoned under the proposed legislation, a streamlined foreclosure process is to commence.[200] Under the streamlined approach, the foreclosure sale should occur between 30 and 60 days of entry of the public sale order depending on the procedure utilized.[201] If, however, the court in a judicial foreclosure proceeding finds there is insufficient equity in the property to satisfy the interests of junior creditors, the court would order the transfer of the property to the creditor without public sale, and, upon transfer, all junior liens would be extinguished.[202] One of the key components of this statute is that once a property is determined abandoned, the creditor or servicer must see that the foreclosure is completed within a reasonable time unless it is willing to release its mortgage and file that release with the proper register.[203] Under this section, the creditor would not be able to avoid maintenance obligations on the property by dismissing or terminating the foreclosure proceeding, but only by releasing its mortgage.[204]

In the Drafters' Notes following the section, the drafters stated their attempt to reconcile the differing preferences of the creditors, debtors and municipalities "by offering the lender a choice of how it wishes to proceed."[205] While not as draconian in its approach as requiring a relinquishment of the mortgage or outright prohibiting multiple bites at the foreclosure process apple, the proposal would unquestionably impose affirmative obligations of maintenance on the lender similar to what many municipalities have attempted through VPROs.[206] The maintenance obligation would only be triggered when the streamlined foreclosure process is utilized with respect to the abandoned properties.[207] In many cases, the creditor will be able to control that outcome through its litigation strategy; however, as stated above, § 601 would allow the municipality to also seek the determination of abandonment.[208] In those cases, creditors would be forced to confront the dilemma of releasing their mortgages or

199. *Id.* at §§ 601(b), 602.
200. *Id.* at § 605(a).
201. *Id.* at § 605(a), (b).
202. *Id.* at § 605(a)(2).
203. *Id.* at § 605(c).
204. *Id.*
205. *Id.* at § 605, Drafters' Notes.
206. *Id.* at § 606.
207. *Id.*
208. *Id.* at § 601.

deal with ongoing maintenance obligations – exactly the outcome the municipalities and debtors are seeking.

C. Deed in Lieu to Bank / Short Sales

I include a brief mention of the deed in lieu of foreclosure and short sale options here because, although they are rather obvious ones, it would be an oversight to omit them. In fact, although I have only anecdotal evidence, these two options (sometimes along with an attempt to quit claim a deed to the lender) are among the first and last of the solutions sought on behalf of the zombie mortgagor. They deserve brief mention because occasionally they are successful; however, they are often of limited utility for a variety of reasons relating to short sale program qualification requirements.[209]

A short sale, as the name implies, requires a sale. In order for a sale to take place, a buyer needs to appear with an offer. Clearly lenders now are much more willing to work with owners to facilitate short sales than they were six or even three years ago.[210] However, for some properties, whether because of the state of disrepair, the location, or a declining population base, a buyer will not appear to make an offer, or, the type of buyer that appears is the investor looking to scoop up portfolios of properties cheap, with no intention to rehabilitate the homes, and flip for a quick profit.[211] Cities suffer equally in the situation where the house is abandoned or purchased by the absentee investor with no intent to renovate, though in some cases at least some tax payments may be forthcoming from the investor. Sellers should pursue short sales and propose any such transaction to the lender as that, coupled with a lender's refusal to

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209. *Home Affordable Foreclosure Alternatives (HAFA) Program*, U.S. Dep't of Hous. and Urban Dev., http://www.makinghomeaffordable.gov/programs/exit-gracefully/Pages/hafa.aspx (last visited Nov. 9, 2014); *see also Wells Fargo Home Affordable Foreclosure Alternatives (HAFA) Matrix*, WellsFargo.com, https://www08.wellsfargomedia.com/downloads/pdf/homeassist/hafa.pdf (last visited Nov. 12, 2014).

210. *See Contact Your Mortgage Company,* U.S. Dep't of Hous. and Urban Dev., http://www.makinghomeaffordable.gov/get-assistance/contact-mortgage/Pages/default.aspx (last visited Nov. 9, 2014) (noting over 100 lenders participating in the Making Home Affordable Program).

211. Some lenders have taken steps to prevent this by including specific provisions within the short sale deed, such as those prohibiting sale of the property within 30 days of purchase, or sale of the property for more than 120% of the purchase price within 90 days of purchase. *See, eg.*, Gwen Muse-Evans, *Standard Short Sale/HAFA II and Deed-in-Lieu of Foreclosure Requirements*, Fannie Mae 13 (August 22, 2012), https://www.fanniemae.com/content/announcement/svc1219.pdf.

entertain the short sale, has been seen as a positive equity in bankruptcy cases.[212]

The deed in lieu route and the quit claim deed route appear to be less appealing when the property has relatively little value with which to entice the lender to accept the deed.[213] One way to potentially overcome that resistance is to include an anti-merger clause[214] that would preserve the value of the lenders' liens on the property, though that is unlikely to sway a lender who is opposed to the deed because of maintenance and/or property tax grounds. As noted, however, the main problem with using a deed in lieu is that lenders believe they will not realize sufficient payment for the soon to be REO property.

If the owner is able to convince the lender to accept a deed in lieu, the owner should be careful to ensure the owner is released in writing from any possible deficiency, and the original note should be cancelled and returned to the owner following the filling of the deed in lieu.[215] It is also important to note that certain lenders have their own requirements before considering a deed in lieu of foreclosure. In many cases, the lender

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212. *See, e.g.*, *In re* Pigg v. BAC Home Loans Servicing, LP, 453 B.R. 728, 736 (Bankr. M.D. Tenn. 2011). The Making Home Affordable (MHA) program, introduced in 2009 and extended to December 31, 2013, incentives short sales in a number of ways. For example, MHA offers relocation assistance to the owner, and cash payments to second lien holders. *See also*, *Need to Leave Your Home?*, U.S. Dep't of Housing and Urban Development (last visited July 29, 2013), http://www.makinghomeaffordable.gov/programs/exit-gracefully/Pages/default.aspx (stating availability of $3,000 in relocation assistance). In connection with MHA, through the Home Affordable Foreclosure Alternative (HAFA) program, the federal government has succeeded in increasing the number of short sales. The programs continue to be updated, notably through Treasury Update 10-18 and 11-08, which further facilitate short sales; though it should be noted that institutional lenders such as Fannie Mae continue to maintain their own requirements.

213. *See* John C. Murray, *Deeds in Lieu: Subsequent Foreclosure of Mortgage*, Dirt, 1 (2006), dirt.umkc.edu/attachments/DeedsinLieu.doc (describing lenders reluctance to accept deeds in lieu for low-value properties).

214. *See generally id.* (discussing anti-merger clauses in a foreclosure context).

215. Owners should also take care regarding any potential cancellation of debt income that could be taxable depending on a variety of factors including whether the home is the primary residence, the canceled amount was legitimately contested and doubtful, etc. *See* Olney Trust Bank v. Pitts, 200 Ill.App.3d 917, 924-26 (Ill. App. Ct. 1990) (noting that mortgagee may still be personally liable for mortgage debt, even after signing a deed in lieu).

will require an attempted short sale first,[216] others require occupancy for a stated period of time,[217] and others require the home be habitable.[218]

D. "Quick Take" and Seizing Mortgages – Affirmative Use of Eminent Domain

These two alternatives, quick take and mortgage seizure through eminent domain, fall on the more exotic end of the scale and are unlikely to apply to many zombie properties. "Quick Take" statutes are generally those that authorize a public entity to acquire property through its powers of eminent domain in a more expeditious fashion than traditional condemnation acquisitions.[219] The City of Baltimore had successfully used quick take actions to rapidly acquire property in a procedure that provided the owner with fewer procedural defenses.[220] After beginning an aggressive program to repurchase abandoned or vacant properties in the early 2000s, Baltimore suffered legal setbacks that provided constraints on its ability to utilize the quick take mechanism. Following a 2007 Maryland Supreme Court ruling, it is only allowed to use its quick take power in cases of "immediate necessity."[221] Baltimore's Office of the Comptroller currently provides contact information for individuals wishing to donate the property to the city, and includes a brief description of the city's acquisition process.[222]

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216. *Wells Fargo Home Affordable Foreclosure Alternatives (HAFA) Matrix*, *supra* note 209.

217. *See* Occupancy Affidavit, JAMES B. NUTTER & COMPANY, MORTGAGE BROKERS, http://www.jamesbnutter.com/wp-content/uploads/lossmit/FHAShortSalesAnd-Deeds-In-LieuOfForeclosure/OccupancyAffidavit.pdf (requiring owner to attest to occupancy of the property within last 18 months); *Wells Fargo Home Affordable Foreclosure Alternatives (HAFA) Matrix*, *supra* note 209 (noting prior requirement of occupancy for borrower and non-borrower occupant).

218. *See* MUSE-EVANS, *supra* note 211, at 3 (requiring property not be condemned).

219. BLACK'S LAW DICTIONARY (9th ed. 2009) (referring to quick-take as "quick condemnation" or "the immediate taking of possession of private property for public use" where compensation follows at a later date).

220. *See generally*, Jill Rose, *Judges attack 'quick take'*, THE BALTIMORE SUN (Apr. 13, 2007), http://articles.baltimoresun.com/2007-04-13/news/0704130107_1_eminent-domain-bdc-court-of-appeals.

221. Mayor & City Council of Baltimore City v. Valsamaki, 397 Md. 222, 248, 916 A.2d 324, 339 (2007).

222. *See Department of Real Estate*, CITY OF BALT. OFFICE OF THE COMPTROLLER (Oct. 8, 2014), http://www.comptroller.baltimorecity.gov/REALESTATE.html (identifying the department as the entity in charge of acquiring real property in the City of Baltimore).

A more radical approach is currently underway in California[223] where cities are contemplating using their power of eminent domain on the mortgages, but not the properties themselves.[224] As noted in a proposal by Professor Robert Hocket of Cornell Law School,[225] this plan would allow cities to acquire underwater mortgages at present market value and then work through a friendly third-party investor to provide the property owners a lower cost mortgage.[226] The benefits of the plan are that it could be quickly implemented and would avoid the typical barriers to write-downs when the mortgages have been securitized, pooled and held by specialized trusts. Structured properly, the owners and municipalities would be the clear winners as the mortgages could be seized without any needed cooperation from the securitization trusts, the properties remain occupied, the owners continue paying real estate taxes, and they would have reduced principal amounts and lower monthly payments. However, as the municipalities and owners would benefit, the lenders would foot the bill, either voluntarily by working with the municipality or involuntarily forced by the power of eminent domain. This type of exercise of the power of eminent domain has been challenged in the press,[227] and will likely face legal challenges once implemented.[228]

The mortgage seizure route is presently extremely limited and unlikely to see widespread adoption unless and until it survives legal challenge. Further, even if it survives legal challenge, it is unlikely to be of much help to owners of zombie properties in its current incarnation as it

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223. *See, e.g.*, City of Richmond, Cal., Minutes for City Council (April 2, 2013) http://www.ci.richmond.ca.us/ArchiveCenter/ViewFile/Item/5138 (approving city plan to purchase certain mortgages affected by the mortgage crisis in order to preserve home ownership, equity, and stabilize the community).

224. *See* Nick Timiraos, *Cities Take Fresh Look At Mortgage Seizures*, Wall St. J. (June 20, 2013, 7:04 PM), http://online.wsj.com/article/SB10001424127887323300004578557670146742366.html; Peter Dreier, *To Rescue Local Economies, Cities Seize Underwater Mortgages Through Eminent Domain*, Huff Post (July 18, 2013, 8:20 AM), http://www.huffingtonpost.com/peter-dreier/to-rescue-local-economies_b_3614326.html.

225. *See generally*, Robert Hocket, *Paying Paul and Robbing No One: An Eminent Domain Solution for Underwater Mortgage Debt*, 19 Fed. Reserve Bank of N.Y. 1, 5 (2013).

226. *See* Timiraos, *supra* note 224.

227. *See* Editorial, *The Fed's Eminent Mistake,* Wall St. J., June 12, 2013, at A16 (disagreeing with the proposal).

228. *See* Peter Dreier, *To Rescue Local Economies, Cities Seize Underwater Mortgages Through Eminent Domain*, The Nation (July 12, 2013), http://www.thenation.com/article/175244/rescue-local-economies-cities-seize-underwater-mortgages-through-eminent-domain# (identifying threatened, costly litigation from banking and real estate trade groups).

is reported that it would be limited to homeowners current on their payment and without a government-backed mortgage with a likely requirement the property be occupied.[229] As with the quick take route, both of these would require affirmative city involvement in order to initiate the eminent domain proceeding.

E. Homeowner Responsibility and Miscellaneous Remedies

At some point, the role of the homeowner also needs to be addressed in dealing with the zombie mortgages.[230] In many situations, the lack of financial resources was what occasioned the owner's default. In others the plummeting value of the real estate itself or the neighborhood in which the real estate is located may have precipitated the default. In any event, the owners are still legally responsible for the property whether they abandoned it or not, and are simply looking for any type of solution. Given that it is a lack of resources coupled with ownership of a low value property that places the owner into the zombie mortgage scenario, the owner will generally lack resources to pay his/her way out of trouble. However, the owner can provide some collaboration that could potentially benefit the lender and municipality whether through maintaining residence of the property or transferring it to the county or land bank in exchange for a full release of any liens.

1. Stay in the Home

One solution that is commonly recommended is for the owner to simply stay in the home until the sheriff or a court issues eviction papers.[231] The upside of remaining in the property is that it will not become vacant and subject to additional vandalism and neglect. Additionally, provided that the owner makes the tax payments and there are no other liens, no other party will seek to evict the owner. In that sense, the owner can remain in the home for an extended period of time and very little cost. In the absence of any regulatory reform as suggested in Part III.B above, this option may be the one preferred by the owner, the municipal-

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229. *See* Joaquin Palomino, *Foreclosure Prevention Program May Not Assist Those Most in Need*, RICHMOND CONFIDENTIAL, (November 18, 2013), http://richmondconfidential.org/2013/11/18/foreclosure-prevention-program-may-not-assist-those-most-in-need/.

230. In Buffalo N.Y., for example, the prosecutor brings charges against both the owner and lender, threatening the owner with traditional fines as well as non-monetary obligations such as community service. *See* Orey, *supra* note 65 (asserting that the owner, as well as the lender, is responsible).

231. Tom Beres, *'Zombie' mortgages/titles: Foreclosure horror stories*, WKYC.COM (Apr. 24, 2013, 11:47 PM), http://www.wkyc.com/news/story.aspx?storyid=296177.

ity and the lender in that the house remains occupied, the homeowner ensures that the property is maintained in accordance with applicable ordinances, and the home is less likely to be subject to vandalism and other improper use which could decrease its value further.[232]

2. Land Banks

Land banks, either public or private, generally obtain the majority of their inventory after foreclosure auctions in which no bidder won the property.[233] Additionally, lenders are the largest donors of properties to the land banks after they have foreclosed on the property and are unable to otherwise dispose of it.[234] Even though lenders are the primary sources of property donations, owners may also be able to transfer title in their property to a local land bank given that certain criteria are met.[235] Given the priority accorded to lenders' liens, land banks will sometimes accept donations with the limitation that there be no liens other than tax liens on the property.[236] Other land banks will not accept donations and instead only acquire properties through foreclosure proceedings or governmental or non-profit transfers which can make this option limiting.[237]

The benefit to the homeowner, as discussed above, is that some land banks have the ability to cleanse a title of tax liens which can make the program very useful in reintegrating the property back into the market-

232. *See* Conlin, *supra* note 16 (noting multiple cases in which the home owner's absence from the vacant property led to an accumulation of vandalism and code violations, resulting in a diminished property value).

233. Sage Computing, Inc., *Revitalizing Foreclosed Properties with Land Banks*, U.S. Dep't. of Hous. and Urban Dev. 1, 2 (2009), http://www.huduser.org/portal/publications/landbanks.pdf; *see also*, HousingPolicy.org, http://www.housingpolicy.org/toolbox/strategy/policies/abandoned_properties.html (last updated Sept. 04, 2012) (noting that Michigan land bank acquired majority of its holdings from tax foreclosures); Jack Spencer, *Kent County Land Bank Circumvents Market to Fund Operations*, Capcon (July 30, 2013), http://www.michigancapitolconfidential.com/18931 (noting that Michigan statute prohibits land banks from acquiring properties until after they have failed to sell at auction).

234. In at least a few jurisdictions, lenders have teamed up with the land banks and municipalities to donate some of their low value properties with cash donations to defray some of the costs of demolition. *Wells Fargo, Bank of America donating properties to Cuyahoga Land Bank*, Cuyahoga Land Bank (June 28, 2011), http://www.cuyahogalandbank.org/articles/20110628_boa_wf.php.

235. *See supra* notes 85-86 and accompanying text.

236. Property Donation Application, Lucas County Land Bank, http://co.lucas.oh.us/documents/463/Property%20Donation%20Application_201401021443518955.pdf (last accessed Nov. 9, 2013 at 5:57 p.m.) (stating that properties encumbered by liens or other clouds of title may be denied).

237. *See* Sage Computing, Inc., *supra* note 233, at 5 (noting that funds from Neighborhood Stabilization Program were only for purchasing foreclosure property).

place to the benefit of the municipality and the owner.[238] For those owners that would like to donate but are unable because their lenders refuse to foreclose, transferal of title to a land bank is an attractive option. If a short sale and/or a deed in lieu of foreclosure have already been unsuccessfully attempted and the property retains very little worth, the lender may be willing to relinquish its lien with the knowledge the property is being transferred to a land bank. In that case, the transfer with the release of the lien will sever all remaining financial obligations the owner has with the property and act, in essence, as a foreclosure. This remedy is of course limited to those jurisdictions with land banks, and, to the extent the lender is unwilling to foreclose, that it be at least amenable to the possibility of transferring the land to the land bank.

CONCLUSION

Home owners affected by zombie properties have not been able to flee the corresponding obligations as easily as those whose homes went through the entire foreclosure process. This inability to get a fresh start has hampered owners and municipalities alike albeit with different ends in mind. Fortunately, borrowers seeking to escape zombie mortgages share goals and interests with municipalities which should increase the probability of mutually beneficial legislation. By co-opting municipal interests, borrowers are able to obtain an improved strategic position vis a vis the lenders as the proposed solutions provide legislative relief for their situation. Municipal ordinances or state laws that impose greater notice obligations on the lenders, or that require lender action in a definite time frame will represent strong steps toward alleviating the current crisis. Barring any such change, the affected owners' best opportunity to escape the ongoing burden of the property may involve surrender of the property or a plea for equitable relief in bankruptcy. Yet as long as the affected properties have essentially no value, lenders will have no incentive to accept deeds in lieu or go through a foreclosure sale. As always, the question will be to what extent action is needed to alleviate the problem, even when that action imposes costs on the lending community. The proposed solutions represent an opportunity for the owners and municipalities to cut losses, reduce the blight on communities, and allow all parties to move on cleanly from zombie properties.

238. *See id*. at 9 (citing the Fulton County/Atlanta Land Bank as having the power to waive tax liens and clear titles).