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WHO'S RESPONSIBLE? LIABILITY FOR THE DETERIORATION OF PROPERTIES ABANDONED DURING OR AFTER FORECLOSURE PROCEEDINGS

William Weber

I. THE PROBLEM

Hausman v. City of Dayton presents an intriguing story.¹ In 1981, an Ohio partnership, J.V. Properties, purchased an industrial property from Firestone Tire & Rubber Co.² The partnership utilized the property for the operations of Machinery Merchants International (MMI), an Ohio corporation wholly owned by the partners of J.V. Properties.³ In 1984, MMI granted a security interest in its personal property to BancOhio National Bank (BancOhio) to secure a debt of approximately $5.2 million.⁴ MMI soon defaulted, and as part of a liquidation agreement with BancOhio, J.V. Properties agreed to convey a mortgage in the industrial real property to BancOhio to provide additional collateral for MMI’s debts.⁵ In 1985, J.V. Properties defaulted and BancOhio filed an action in Montgomery County to foreclose on the mortgage. The court awarded a foreclosure judgment in favor of BancOhio,⁶ and BancOhio moved for the county sheriff to offer the property for sale. However, no bidders attended the December 1986 auction.⁷

The events up to this point in the case are commonplace in our legal system. Essentially, a company granted a mortgage to a creditor, the company defaulted on the mortgage, and then the creditor initiated a foreclosure action against the company. This process is used routinely throughout the United States. Unfortunately, the following chain of events is all too common for distressed properties in foreclosure.

After the MMI property failed to sell at the foreclosure auction, all parties involved essentially abandoned the property.⁸ The property was

1. The Supreme Court of Ohio’s decision can be found at Hausman v. City of Dayton, 73 Ohio St. 3d 671 (Ohio 1995). However, the preceding Second District Court of Appeal’s decision, Hausman v. City of Dayton, No. 13647, 1993 WL 541649 (Ohio Ct. App. 2d Dec. 22, 1993), contains a more detailed description of the facts.
3. Id.
4. Id.
5. Id. At the time of this conveyance, J.V. Properties was not the sole owner and had sold a ten percent interest in the property to a third party; however, that fact is not crucial to this illustration. Id.
6. Id. at *3. In a third agreement after the conveyance of the mortgage all three parties had agreed that MMI was in default, foreclosure was the appropriate remedy, and that MMI or J.V. Properties agreed not to assert a defense if a foreclosure suit was initiated by BancOhio. Id. at *2–3.
7. Id. at *3.
8. Id.
vandalized, looted, and stripped.\textsuperscript{9} Several fires occurred at the site, and an oil slick on a nearby creek was traced back to the site in 1987.\textsuperscript{10} The Environmental Protection Agency inspected the property and found environmentally hazardous contamination.\textsuperscript{11} In 1989, the City of Dayton declared the site a public nuisance and sought a determination from the local Nuisance Appeals Board that BancOhio, as mortgagee, and the other parties would be liable for the cost of abating the nuisance.\textsuperscript{12}

This story is one known all too well to many local governments in Ohio. The initiation of a foreclosure action ignites a chain reaction resulting in a property being neglected, vandalized, and abandoned. Too often, the local jurisdiction is ultimately left to pay the bill to abate the resulting public nuisance.

In the last several years, a "tsunami" of mortgage foreclosures hit courts around the country, impacting communities soon after.\textsuperscript{13} In a depressed real estate market, foreclosing banks could not sell the foreclosed homes fast enough. To avoid the liability and cost of owning these properties, foreclosing lenders looked for various ways to quickly dispose of their interest. These methods included short sales, stalled foreclosure actions, and abandonment of foreclosure actions, like in \textit{Hausman}.\textsuperscript{14} The impacts of these foreclosures were increased levels of neglect, blight, and abandonment.\textsuperscript{15} Though most of the resulting public nuisances are not as extreme as the abandoned, environmentally-contaminated industrial site involved in \textit{Hausman}, the impacts of abandoned, vandalized houses literally hit much closer to home, and the aggregate costs to local governments can be staggering.\textsuperscript{16}

This Comment will attempt to answer the questions posed by \textit{Hausman v. City of Dayton}: Under Ohio law, who is responsible for the costs associated with a property abandoned before the completion of a foreclosure, and what can be done to remedy the root of the problem?

Part II of this Comment will explore the costs of vacancy and abandonment to local jurisdictions. This Part will then analyze the link

\begin{itemize}
  \item \textsuperscript{9} Id.
  \item \textsuperscript{10} Id.
  \item \textsuperscript{11} Id.
  \item \textsuperscript{12} Id. at *2–4.
  \item \textsuperscript{14} Id. at 240.
  \item \textsuperscript{15} See id. at 238–39 (discussing the downward spiral of properties in Cleveland exacerbated by the combination of unscrupulous subprime lending and subsequent "flipping" of properties by prospectors).
  \item \textsuperscript{16} Id. at 240 (estimating that the economic impact of the foreclosure crisis in the metropolitan Cleveland area will be multibillions of dollars).
\end{itemize}
between the foreclosure actions and increased levels of abandonment in the context of the recent foreclosure crisis.

Part III will explore one avenue that local jurisdictions all over the country, including Ohio, have begun to embrace: the Vacant Property Registration Ordinance (VPRO). This Part will look to the constitutionality of these ordinances within the context of the United States Constitution and the Ohio Constitution. Additionally, Part III will analyze, under the Ohio Home Rule Amendment, the potential conflict between Ohio Revised Code § 1.63, which is a broadly-worded provision claiming state level preemption of local attempts to regulate lenders, and local VPROs that target foreclosing mortgagees.

Part IV will look to Ohio law to ascertain a mortgagee’s and lender’s liability for the effects of a foreclosure action and a foreclosing mortgagee’s duty to maintain property. This analysis will begin with the history of mortgage law and the duties owed by a mortgagee at common law. This analysis concludes that by extending the common law doctrine of “mortgagee in possession” it would be possible to find a mortgagee liable for maintenance of the property and associated nuisance abatement costs.

Finally, Part V concludes that the best solution for all parties involved is to use the extension of the mortgagee in possession doctrine in conjunction with a reasonable VPRO. This proposed solution creates a tenable system to share the cost burden of vacant properties between local jurisdictions and mortgagees, incentivize reasonable lending practices, and protect neighborhoods from the negative effects of abandoned property.

II. THE LINK BETWEEN FORECLOSURE AND BLIGHT

A. Getting to Vacant

Due to a confluence of factors, Ohio was one of the states hit hardest by the recent foreclosure crisis. Ohio ranked sixth in the number of foreclosures in 2009, with over 89,000 filed. The Ohio market conditions that attracted subprime lenders, whose practices largely contributed to the foreclosure crisis, are the same conditions that amplified the negative effects of the crisis itself. Those conditions found in Ohio’s main urban centers include an older housing stock and decades of shifting population and industry from the urban core to
surrounding suburbs or out of state. As the more economically stable or affluent populations moved to the surrounding suburbs, urban neighborhoods experienced the effects of disinvestment. This disinvestment can quickly lead to vacancy and abandonment.

Before the economic crisis, the market created a fertile breeding ground for predatory loans and property speculators. Low real estate values in distressed inner city neighborhoods provided opportunities for low-income individuals, often people of color, to purchase affordable homes with mortgages. However, frequently the terms of the loans were predatory or unsustainable. Additionally, to some these same market conditions and the available credit were seen as business opportunities. Investors would purchase low-value, dilapidated homes, undertake inexpensive cosmetic repairs, and sell the homes as if fully rehabilitated. Unwitting buyers would purchase the homes using the available credit, but the terms made default highly likely. All of these issues deepened the impact of the looming foreclosure crisis.

In Ohio, a foreclosure action can take years to wind its way through the court system from the original filing, to sale at auction, to the confirmation of the sale. The delay results from numerous factors including notice requirements, equitable mortgagor protections, and an overburdened judicial system. The longer a foreclosure takes, the more likely the property will become vacant. Even if the property does not become vacant during the foreclosure, a property owner facing loss of ownership through foreclosure is highly unlikely to invest any substantial amount of time or money in the property. After this period of neglect, the value of the home drops, and the cost of rehabilitating it increases, which makes returning the home to a pre-foreclosure state less economically feasible. If at any point in the foreclosure process the owner determines that the value of the home is not worth the debt

20. See id.
21. See id.
24. See id. at 239.
25. See id. at 238–39.
26. Rehkopf, supra note 17, at 439.
27. Lind, supra note 13, at 239.
28. For example, the statutory right of redemption in Ohio can only be foreclosed after the confirmation of a sale held by the county sheriff. OHIO REV. CODE § 2329.33 (West 2012).
30. Lind, supra note 13, at 239.
owed—also known as “underwater”—then it does not make economic sense to try to make payments on the home. Instead, abandoning the debt-laden asset becomes the most rational economic decision.31

In states requiring judicial foreclosure, the sheer number of foreclosure cases flooding the court system exacerbates the problems created by foreclosures by extending the length of time it takes to finish the suit.32 Additionally, rental properties tend to have higher rates of abandonment compared to owner-occupied properties since the tenants can move to another rental unit if the condition of the property begins to decline.33

B. The Cost

Once a property becomes vacant, its condition and value can rapidly deteriorate. Older homes are particularly susceptible to rapid deterioration since they require more maintenance. A vacant property can soon cause problems for the local jurisdiction, the entity usually responsible for nuisance abatement. Vacant properties devour local government resources by consuming more city services. One study found that in 2008, vacant and abandoned properties cost eight Ohio cities over $15 million in services, which included code enforcement costs, demolition, securing the building, property maintenance, and police and fire runs.34 Even more troubling is the loss in revenue that results from abandoned buildings, which totaled $49 million amongst the seven cities for which data was available.35 Therefore, abandoned properties eat up the government resources and undercut the revenues of the same jurisdiction.

However, the true costs of a vacant, abandoned property cannot be measured just in maintenance expenses, the costs must account for the property’s negative impact on surrounding properties.36 One study

31. See Rehkopf, supra note 17, 440. Additionally, if a home is “underwater” then this could also incentivize the owner to purposefully default on the loan. Id.


33. Id.

34. Schilling, supra note 29, at 111.

35. Id.

36. In Fifth Urban, Inc. v. Bd. of Bldg. Standards, 320 N.E.2d 727, 736–737 (Ohio App. Ct. 8th Dist. 1974), the court summarized the negative impacts that an abandoned, vacant structure can have on surrounding properties:

[If upon inspection it is determined by the Commissioner that a building no longer complies with the building code and the conditions of its occupancy permit, the occupancy permit may be
conducted in Philadelphia found that properties within a close proximity to a vacant structure lose up to $7,672 in value.37 This loss in value has multiple impacts ranging from falling property tax revenues to decreases in the ability to resell.38 Accounts of the "broken window theory" are well established, and the costs associated with a single vacant home can easily multiply when the values of surrounding homes fall to the point at which these too become vacant and require additional resources.39 Increases in criminal activity also correlate with increased vacancy, which can then influence not only property values but also community perceptions.40

A direct link between foreclosures and vacancy is difficult to document because the reasons for abandonment differ for each individual property. When a building becomes vacant, the exact reason for and time of vacancy are generally not recorded. In one study conducted in 2008, twenty-eight percent of responding mayors concluded that efforts to combat vacant and abandoned buildings had lost ground since the foreclosure crisis began.41 Even with the difficulty of producing direct evidence in individual cases, the link between the foreclosing parties and abandonment is obvious to local jurisdictions who are on the ground dealing with the effects.

revoked and the building vacated. This then places the owner in a dilemma of whether to repair the building or leave it vacant and unoccupied. If he repairs the building and then complies with the building code, it can then be occupied and an occupancy permit will be issued. If the owner does not make the repairs the building cannot be occupied and it will remain vacant. In this condition the building will then become a target for vandals and ultimately become an 'unsafe structure' and then the building will either have to be repaired or demolished . . . . Sound business practices would dictate that the owner of the building would repair it immediately upon being notified that the building does not comply with the building code. . . . However, in changing urban times buildings no longer have economic vitality or viability, the owner may decide that the costs of repairs exceed the economic value to him, and he will choose to leave the building vacant until such times as conditions change.

As a result, urban centers are becoming vast wastelands. Unfortunately, the remaining property owners who want to maintain their property are at a disadvantage and they become an island of despair surrounded by a sea of despair. One nuisance attracts another. When one building becomes vacant and vandalized, it is contagious and before long the entire neighborhood suffers the same fate.

40. Schilling, supra note 29, at 110.
C. The Litigation

The impacts of foreclosure and the costs of vacancy have not gone unnoticed by local jurisdictions, and several jurisdictions have been proactive in filing various claims in an effort to hold mortgage lenders responsible.

In one telling example, the State of California and the City of Los Angeles filed a joint public nuisance lawsuit against Deutsche Bank National Trust Company and its various subsidiaries (Deutsche Bank) claiming that these subsidiaries had become “two of the largest, if not the largest, slumlords in the City of Los Angeles.” The complaint argued that by purchasing mortgage loans, bundling them into securities, selling those securities to investors, and then acting as trustees for these securities, Deutsche Bank effectuated low-maintenance sources of income derived from servicing the mortgages, accepting the mortgage payments, and directing the mortgage payments to the shareholders. Though this setup functioned well when the housing market was strong and the underlying mortgagors made timely payments, the complaint claimed that the foreclosure crisis caused a spike in defaults which in turn “transformed defendants from detached investment brokers and trustees to large scale residential property owners . . . .” The complaint further alleged that Deutsche Bank took title to over 2,000 residential properties but failed to maintain the properties in compliance with state and local law and at times illegally evicted tenants to increase the market value of the properties. The suit argued that because of Deutsche Bank’s actions numerous properties became public nuisances.

The City of Cleveland, Ohio, a city that has experienced some of the worst effects of the foreclosure crisis, attacked lenders not just for neglecting property maintenance but for the underlying method of lending that led to the foreclosure crisis and ensuing vacant property issues. In City of Cleveland v. Ameriquest Mortgage Securities, Inc., Cleveland unsuccessfully attempted to hold various financial entities accountable for the foreclosure crisis by claiming the practice of subprime lending and securitization of those mortgages was a public nuisance.

43. Id. at ¶¶ 4–5.
44. Id. at ¶ 5.
45. See id. at ¶¶ 5–13.
46. Id. at ¶¶ 11–14.
47. See Lind, supra note 13, at 237.
Affected local governments around the country have used other legal tactics to try to pin liability on lenders. In Buffalo, New York, a prosecutor has successfully sought to hold lenders accountable under criminal public nuisance claims. In another example, the City of Baltimore, Maryland filed suit against Wells Fargo under the Federal Fair Housing Act claiming that the lending practices had a negative disparate impact on African-American neighborhoods.

These lawsuits illustrate the difficulty in placing responsibility on lenders that avoid taking legal title. The concept of legal title can deviate sharply from common perceptions of ownership or control. For example, an owner, untrained in foreclosure and real property law, may decide to abandon a property during the foreclosure proceeding under the assumption that the mortgagor will soon have title. The foreclosing party may continue the foreclosure but stop short of taking legal title. Furthermore, since many mortgages were bundled, securitized, and sold on secondary markets, mortgage transactions became much more complex and involved many different parties. This complex web of participants allowed individual players to shift guilt and dodge claims of legal ownership and responsibility for properties.

**D. The Results**

The connections between foreclosure and vacancy are real but often difficult to discern. At times the link is as simple as a lender foreclosing, taking title to the property, and evicting occupants. Other times, the process may resemble more of a “vacancy by a thousand pin pricks” in which a combination of hastily issued loans with unscrupulous terms and an overvalued property led an “underwater” owner to walk away from the property once served with a foreclosure suit. Not only are the connections real, but so are the costs. With demolition bills mounting, local governments began to look beyond litigation for alternative methods to deal with the crisis they faced.

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50. *Id.* at 1198–99.

51. *See id.* at 1186 (stating that a common strategy used by lenders is to buy the foreclosed property at a foreclosure sale but never record the deed).

52. *Id.* at 1184 (claiming that mortgage transactions now involve “the borrower, the mortgage broker, the intermediate bank, the investment trust, the servicer, the rating agency, investors, trustees, and the credit enhancement provider”) (internal citation omitted).

53. City of Cincinnati v. Deutsche Bank Nat'l Trust Co., 897 F. Supp. 2d 633, 638 (S.D. Ohio Oct. 10, 2012) (“[The defendants, Deutsche Bank and several subsidiaries,] concede that they act as trustees for certain residential mortgage-backed securitization trusts that do own properties in the City, but they note that any such interest is held solely in their capacity as Trustees of those trusts.”).
III. VACANT FORECLOSED PROPERTY REGISTRATION ORDINANCES

A. The Challenge

Described as "first responders," local jurisdictions' code enforcement departments are usually the ones on the front lines observing the impacts and effects of vacancy and abandonment. As the foreclosure crisis worsened and abandonment issues deepened, a groundswell of defensive activity at the local level sought to hold lenders and owners accountable for the costs of maintaining foreclosed property or abating resulting nuisances.

Local code enforcement processes are typically based on the assumption that a physical owner either lives on-site, in the best-case scenario, or is reachable by searching the county records for a mailing address, in the worst-case scenario. This assumption is exemplified by the fact that notice of a violation, the most basic and important communication between code enforcement officials and owners, frequently takes the form of a notice mailed to the owner of record or orders physically posted on the property. However, these forms of communication are not compatible with abandoned properties, partially completed foreclosures, and securitized mortgages held by shareholders scattered throughout the world. As a result, code enforcement departments are left to grapple with the difficulty of alerting the appropriate party about violations.

For example, the securitization of mortgages exacerbates this problem through frequent transfer of ownership and servicing rights which usually requires a document custodian. The Mortgage Electronic Registration Systems, Inc., along with other affiliated entities, (MERS) provides this service for many securitized mortgages. The MERS system facilitates the transfer of mortgages on the secondary market by allowing lenders to list MERS as the mortgagee in the local county records as opposed to the actual mortgagee. This practice relieves lenders of the need to file mortgage assignments for each transfer. Unfortunately, the identity of the actual lender is not recorded, which leaves local code enforcement with little direction in the local property

54. Schilling, supra note 29, at 103–04.
56. Schilling, supra note 29, at 121.
57. E.g. CAL. HEALTH & SAFETY CODE § 17980.6 (West 2013); ILL. COMP. STAT. ANN. 810/2 (West 2013); Wis. Stat. Ann. § 62.17 (West 2013).
59. Id.
60. Id.
61. Id.
records.62

B. A Solution?

In response to the issues arising from vacant, foreclosed properties, local jurisdictions are increasingly turning to Vacant Property Registration Ordinances (VPRO) for assistance.63 Local governments commonly use registration or licensing schemes to assist in the regulation and enforcement of their police powers.64 For example, many jurisdictions require some sort of rental property registration to ensure that rental accommodations are safe and sanitary.65 Ohio jurisdictions are increasingly enacting VPROs. According to one comprehensive online database, at least sixty-five Ohio jurisdictions have VPROs, and approximately half of those have been enacted or revised since 2006.66

VPROs come in two general types: (1) the classic VPRO that regulates all vacant structures and (2) the VPRO that targets properties involved in a foreclosure.67 This Comment will focus primarily on the second type: the VPRO that targets foreclosure properties. Though significant variation exists at the local level, most VPROs contain a registration process, a violation notification system, minimum property maintenance standards, a fee schedule, and penalties for violations.68

Chula Vista, California, one of the fastest growing cities in San Diego County was one of the first local governments to adapt the VPRO to the problems presented by the foreclosure crisis.69 Adopted in 2007, Chula Vista’s VPRO attempts to maintain existing property values by requiring mortgage lenders to inspect defaulted properties to determine if the property is occupied.70 If unoccupied, the mortgage lender must adequately maintain the property and landscaping, hire a local company to perform weekly inspections, post a telephone number on the property for a twenty-four hour contact at the company, and pay a seventy-dollar registration fee.71 In the last several years, Ohio jurisdictions have

62. Id.
64. See Schilling, supra note 29, at 129-30.
65. Id.
69. Schilling, supra note 29, at 142-43.
70. Id.
71. Id.
followed suit by either amending their existing VPROs or enacting new ordinances that target foreclosing lenders. Whether this new type of local ordinance is constitutional remains an open question in Ohio.

C. Constitutionality of VPROs

1. Ohio Police Powers

The Tenth Amendment reserves all powers not delegated to the federal government for the states. Without question, the police power to protect the health and safety of its citizens was reserved for the states.

In Ohio, for an ordinance to be a constitutional use of the police powers, it must have a real and substantial relation to the health, safety, morals, or general welfare of the public and cannot be unreasonable or arbitrary. Additionally, legislative enactments exercising the police powers enjoy a presumption of constitutionality.

VPROs primarily focus on regulations protecting public health and safety, which are at the heart of the police powers. The Supreme Court of Ohio has held that the police powers may be used to justify the destruction or abatement of a public nuisance. Building codes are some of the oldest and most widely accepted products of the police powers. VPROs take preventative measures by strictly enforcing building codes and requiring additional actions for buildings that are dangerously close to becoming public nuisances.

2. Ohio Home Rule

Traditionally, states are given wide latitude to exercise these police powers because health and safety are matters of primarily local concern. Ohio, along with a majority of other states, is a home rule state. The Ohio Home Rule Amendment grants to Ohio municipalities...
the "authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws." Therefore, a local government is granted the sovereignty to exercise the state's police power, subject to conflicting state laws and constitutional limits.

Courts resolve conflicts under the Home Rule Amendment using a three-part, conjunctive test. A state statute takes precedence over a local ordinance when (1) the ordinance is an exercise of the police power, rather than of local self-government; (2) the ordinance is in conflict with the statute; and (3) the statute is a general law.

The first step is to determine whether the local ordinance is related to self-governance or is an exercise of the police power. If the ordinance relates solely to self-governance, the analysis goes no further, since the Ohio Constitution authorizes a municipality to exercise all powers of local self-government within its jurisdiction. Ordinances relating to self-government must "relate solely to the government and administration of the internal affairs of the municipality." Conversely, ordinances related to the police powers do not demand the same deference. Instead, while local governments may enact regulations to protect the health, safety, morals, and the general welfare of the public, these police-power ordinances must yield to state law if a conflict exists.

The second step of the Home Rule analysis is to determine if a conflict exists between the state law and the local ordinance or, in other words, whether "the ordinance permits or licenses that which the statute forbids and prohibits, [or] vice versa." The Supreme Court of Ohio has also developed a "conflict-by-implication test." This test holds that if state law determines and states specific illegal behavior, then the...
implication that behavior not offending the state statute is legal arises.9¹
Therefore, if a local ordinance prohibits this implicitly legal behavior
then the local ordinance is in conflict with the state law.9²

The third step of the Home Rule Amendment test is to determine if
the state statute is a general law. This analysis includes a four-part
test—the Canton test—that requires a statute meet all the following
criteria:

(1) [B]e part of a statewide and comprehensive legislative enactment, (2)
apply to all parts of the state alike and operate uniformly throughout the
state, (3) set forth police, sanitary, or similar regulations, rather than
purport only to grant or limit legislative power of a municipal corporation
to set forth police, sanitary, or similar regulations, and (4) prescribe a rule
of conduct upon citizens generally.9³

3. The Potential Conflict and Analysis

Any municipality enacting a VPRO could potentially create a conflict
with Ohio Revised Code (ORC) § 1.63. The pertinent part of the
provision reads as follows:

(A) The state solely shall regulate the business of originating, granting,
servicing, and collecting loans and other forms of credit in the state and
the manner in which any such business is conducted, and this regulation
shall be in lieu of all other regulation of such activities by any municipal
corporation or other political subdivision.

(B) Any ordinance, resolution, regulation, or other action by a municipal
corporation or other political subdivision to regulate, directly or
indirectly, the origination, granting, servicing, or collection of loans or
other forms of credit constitutes a conflict with the Revised Code,
including, but not limited to, Titles XI, XIII, XVII, and XLVII, and with
the uniform operation throughout the state of lending and other credit
provisions, and is preempted.

(C) Any ordinance, resolution, regulation, or other action by a municipal
corporation or other political subdivision constitutes a conflict with the
Revised Code, including, but not limited to, Titles XI, XIII, XVII, and
XLVII, and is pre-empted, if the ordinance, resolution, regulation, or
other action does either of the following:

(1) Disqualifies a person, or its subsidiaries or affiliates, from doing
business with such municipal corporation or other political subdivision

91. See id.
92. See id.
93. Canton v. State, 94 Ohio St. 3d 149, 153 (Ohio 2005).
based upon the acts or practices of such person, or its subsidiaries or affiliates, as an originator, grantor, servicer, or collector of loans or other forms of credit;

(2) Imposes reporting requirements or other obligations upon a person, or its subsidiaries or affiliates, based upon such person’s, or its subsidiaries’ or affiliates’, acts or practices as an originator, grantor, servicer, or collector of loans or other forms of credit.94

The first step in the analysis is to determine if the ordinance is related to local self-government or is an exercise of the police powers. If passed by a local government, a VRPO will be purely an exercise of police powers for the safety and health of the local government’s citizens. The principle rationale behind VRPOs is to mitigate or avoid the harm that vacant properties can cause to neighborhoods and people.95

The second step is to determine if a conflict exists between the local ordinance and the state law. In order to understand the conflict with ORC § 1.63, it is necessary to look to the provision’s genesis.

In February 2002, the Ohio Legislature passed House Bill 386 (HB 386).96 The bill added two new sections to the Ohio Revised Code, ORC § 1.63 and ORC §§ 1349.25 to 1349.37.97 The bulk of the bill incorporated the federal Home Ownership and Equity Protection Act of 1994 (HOEPA) into state law.98 HOEPA requires lenders to make disclosures to mortgagors on certain loans and prevents certain specific terms, like balloon payments, which make repayment especially difficult.99 HOEPA is part of the Truth in Lending Act, a broad consumer protection law that regulates various forms of consumer credit by requiring meaningful disclosure of credit terms.100 Ironically, the impetus for HB 386 did not come from a groundswell of consumer protection activists but instead from the mortgage industry itself.101 In fact, at one of the early hearings on the bill, several mortgage industry

94. OHIO REV. CODE § 1.63 (West 2013) (emphasis added).
95. Even the preservation of property values is a valid reason to exercise the police powers. Fifth Urban, Inc. v. Bd. of Bldg. Standards, 320 N.E.2d 727, 733 (Ohio Ct. App. 8th Dist. 1974).
98. Id.; OHIO REV. CODE § 1349.32 (West 2013).
99. S. Rep. No. 103-169, at 21 (1993) ("The bill amends the Truth in Lending Act. . . . To ensure that consumers understand the terms of such loans and are protected from high pressure sales tactics, the legislation requires . . . disclosure [of terms] three days before consummation of the transaction. The bill also prohibits . . . including certain terms such as prepayment penalties and balloon payments that have particularly problematic.").
groups spoke in favor of the bill while a representative from the Legal Aid Society of Dayton, Ohio spoke against it. The reason for this paradox is that as introduced, HB 386 contained only the ORC § 1.63 amendment and none of the consumer protections.

Since consumer protection was obviously not the original driving force behind the bill, what was the driving force? The real story behind the bill likely starts when the City of Dayton, Ohio enacted Ordinance No. 29990-01 in July 2001. The ordinance prohibited certain lending practices deemed predatory, placed restrictions on predatory lenders operating in Dayton, and provided a cause of action for injured parties to bring civil actions to avoid or correct predatory loans. With this knowledge, the reasoning behind the original introduction of HB 386 just three months later becomes clear: The mortgage industry sought to insulate itself from liability under predatory lending ordinances similar to those enacted in Dayton. However, the story does not end there. HB 386 passed in the House of Representatives unamended; however, when the bill reached the Senate committee stage, it underwent a drastic reformation. It began to take the form of the bill that was actually passed and which has since been called Ohio's Predatory Lending Act. After passing in the Senate, the substituted bill returned to the House and was passed again in its new form. It should be noted that though the bill originally introduced and the one eventually adopted by the Legislature are completely different, the language in ORC § 1.63 did not materially change, and therefore, we are left wrestling with a code provision written for one purpose, but endorsed and passed for another:

102. Id. ("Representatives from the Ohio Consumer Finance Association, the Ohio Bankers Association, Ohio Association of Mortgage Brokers, the Ohio Mortgage Bankers, Ohio Credit Union League, and the Ohio League of Financial Institutions testified as proponents. . . . Speaking in opposition to the bill were Stanley Hirtle, Legal Aid Society of Dayton . . .").


105. Dayton, 813 N.E.2d at 711.


108. Dayton, 813 N.E.2d at 711.

the protection of Ohio residents from predatory lending. To fully understand the potential conflict, it is important to take a scrupulous look at the statute’s language. The statute is written in very broad terms, and the potential conflict for requiring a license for a vacant foreclosed property arises from the language, “[t]he state solely shall regulate the business of... collecting loans...” or alternatively, “[a]ny ordinance... by a municipal corporation... is pre-empted, if the ordinance... imposes reporting requirements or other obligations upon [a lender]...” Despite being very broad, the language of the statute does have some limits. For instance, the provision does not free lending institutions from the need to obey local zoning ordinances or building codes. However the question remains: Where is the line?

The statutory language itself offers several clues that point toward the conclusion that HB 386 and its addition of ORC § 1.63 was solely intended to prohibit ordinances, like the City of Dayton’s, that attempt to specifically regulate loan terms issued within a local government’s boundaries. First, the statute explicitly mentions pre-emption in “Titles XI, XIII, XVII, and XLVII.” Title IX covers financial institutions generally and regulates their operation within the State. Title XIII contains regulations for consumer transactions, including the Ohio Uniform Commercial Code, which excludes real property and consumer protection laws. Title XVII regulates corporations and partnerships. Finally, Title XLVII regulates occupations. Though

110. Id.
111. OHIO REV. CODE § 1.63(A), (C) (West 2013).
112. CITY OF DAYTON, OHIO, REV. CODE OF GEN. ORD., § 112.40 (2013). The ordinance, before being struck down by the Supreme Court in Am. Financial Servs. Assn. v. Cleveland, 112 Ohio St. 3d 170, (Ohio 2006), attempted to regulate high cost loans defined as the following:

A loan that is secured by residential real property located within the City of Dayton on which there is situated a dwelling for not more than four families or a condominium unit, if:

(1) At any time over the life of the loan, the annual percentage rate of the loan equals or exceeds by more than nine percentage points, or the current annual percentage rate limitation included within the Home Ownership and Equity Protection Act ("HOEPA"), whichever is less, the yield on Treasury securities having comparable periods of maturity to the loan maturity as of the fifteenth day of the month immediately preceding the month in which the application for the extension of credit is received by the creditor; or,

(2) The total points and fees financed in such loan equal or exceed the: (a) Points and fees limitation included with the Home Ownership and Equity Protection Act ("HOEPA"), or, (b) Five percent of the total loan amount; or, six percent of the loan amount if the total transaction amount is $20,000.00 or more and the loan is a purchase money loan guaranteed by the Federal Housing Administration or the Veterans Administration, whichever is less.

Id.

113. OHIO REV. CODE § 1.63(B), (C) (West 2013).
116. See OHIO REV. CODE § 1349 (West 2013).
117. See OHIO REV. CODE §§ 1701–1785 (West 2013).
ORC § 1.63 includes language not limiting the pre-emptive effect to these titles alone, it provides clues as to what the law ultimately intended to regulate. For example, noticeably absent from this list is Title XXXVI, which allows the state to regulate health, safety, and morals. Under this title, the state provides significant guidance and regulation to local jurisdictions in exercising the police powers. ORC § 1.63(C) also provides direction by specifically enumerating the type of local ordinance that would be in conflict with the provision. ORC § 1.63(C)(1) prohibits a municipality from disqualifying a lender from doing business with the municipality because of its other acts as a lender. This subsection is no doubt a direct answer to a provision in the Dayton ordinance that prohibited city contracts from being awarded to predatory lenders. Another provision prevents local jurisdictions from implementing reporting requirements or “other obligations” for lenders. Reporting requirements in consumer protection legislation generally involve required disclosures to a regulating government entity to improve and facilitate enforcement. The modifying phrase “or other obligations” should then be cabined to similar reporting requirements.

Finally, the story of the bill in its entirety clearly shows the legislative intent behind ORC § 1.63. By the time it was signed into law, ORC § 1.63 had gone from being the entire bill to simply being an affirmation that Ohio’s Predatory Lending Act would preempt local attempts to regulate predatory lending. Though this may not be clear from ORC § 1.63 in isolation, “the [] sections of HB 386 do not exist in a vacuum. They must be considered in conjunction with the rest of HB 386. And once that occurs, the applicable test requires that the state statute be compared with the local ordinance to see whether conflict exists.” As the Supreme Court of Ohio stated in American Financial Services Association v. Cleveland, the legislative intent behind HB 386 was to “preempt municipal regulation and occupy the field of regulation of predatory lending as an issue of statewide concern.” The intent was not to prevent local jurisdictions from enacting an ordinance requiring registration by a party filing a foreclosure on a vacant property, and

118. See OHIO REV. CODE §§ 4701-4799 (West 2013).
119. See OHIO REV. CODE §§ 3701-3798 (West 2013).
120. See OHIO REV. CODE § 1.63(C) (West 2013).
121. OHIO REV. CODE § 1.63(C)(1) (West 2013).
122. CITY OF DAYTON, OHIO, REV. CODE OF GEN. ORD., § 112.43(B) (2013).
123. OHIO REV. CODE § 1.63(C)(2) (West 2013).
therefore, no conflict should exist between ORC § 1.63 and local VRPO.

The third and final step in the Home Rule analysis is to determine if ORC § 1.63 is a general law. The Supreme Court of Ohio has already decided that through HB 386, the legislation that produced ORC § 1.63, the Ohio legislature expressed its intent to “preempt municipal regulation and occupy the field of regulating of predatory lending as an issue of statewide concern.” Therefore, the court determined that HB 386, as a whole, was a general law for purposes of the Home Rule analysis of local predatory lending regulations. However, VPROs focus on local concerns, which vary greatly from the context in which HB 386 was previously interpreted. Though the analysis of ORC § 1.63 may not change drastically for three of the factors required by the Canton test for general laws, the analysis does change for the remaining factor which requires that a general law set forth police, sanitary, or similar regulations “and not statutes which purport only to grant or to limit the legislative powers of a municipal corporation to adopt or enforce police, sanitary or other similar regulations.” To read ORC § 1.63 to preempt local jurisdictions from enacting VPROs is contradictory to this requirement. Neither ORC § 1.63 nor any other part of HB 386 provides any mechanism at the state level for registration of vacant properties going through foreclosure. Therefore if read to preempt local VPROs, ORC § 1.63 would solely limit the legislative powers of local governments without providing a state level solution to the problem. As a result, in relation to VPROs, ORC § 1.63 should not be read as a general law and therefore should not preempt local jurisdictions from enacting vacant property registration ordinances targeting foreclosures.

D. Conclusion

ORC § 1.63, as enacted, was intended to clarify that the predatory lending protections passed concurrently in ORC § 1349 were meant to preempt local jurisdictions from passing similar local ordinances. ORC § 1.63 was part of a compromise to provide consumers protections from predatory lending while at the same time keeping lenders from having to navigate a patchwork of local ordinances in order to do business in the State of Ohio. However, ORC § 1.63 was not meant to preempt local jurisdictions from passing VPROs. Preemption of VPROs by ORC § 1.63 fails under a Home Rule analysis because ORC § 1.63 cannot be a general law when state law does not provide for a state-level VPRO.

127. Id.
128. Id.
Nor was preemption the legislative intent, as shown by the legislative history. VPRO ordinances are a powerful defensive tool for local jurisdictions and are crucial to assisting local governments in their fight on the front lines of abandonment, blight, and vacancy. Taking away this tool when no state-level solution to deal effectively with the problem exists would do great harm to local governments and neighborhoods.

IV. FORECLOSING MORTGAGEE’S LIABILITY FOR NEGLECT UNDER OHIO LAW

Though a functioning VPRO may assist local jurisdictions in minimizing the damage caused by vacant and foreclosed properties, it may be possible under the common law doctrine of mortgagee in possession, recognized in Ohio, to hold mortgagees accountable for the full cost of their foreclosure actions and incentivize lenders to consider alternatives to foreclosure.129

A. The Common Law History

The term and concept of a mortgage developed in English law, but the term is actually comprised of two French words, mort gage.130 The literal translation of this phrase is the “dead pledge,” and its opposing phrase, vif gage translates to “live pledge.”131 These terms derive from the basic idea in early mortgages that the land underlying the transaction would generate income to pay back the debt.132 Under a live pledge, the creditor took possession and was required by contract to pay down the principal of the debt with the income earned from the land.133 However, under the dead pledge there was no such obligation. Instead, creditors had a right to collect the full amount of the debt owed from the land’s income—income generated from the debtors’ labor.134 Therefore, the pledge was dead to the debtor.135 Furthermore, if the debtor did not pay

129. The modern mortgage lending industry is much more complex than just the mortgagee and mortgagor. There are many parties involved including mortgage servicers, brokers, and trustees among others; however, this comment, for the sake of argument and simplicity, will refer to all of these parties as mortgagees.
131. Id. at 71.
132. Id.
133. Id.
134. Id.
135. See id.
back the full amount of the loan at the appropriate time, the debtor essentially forfeited the property to the creditor. Creditors obviously preferred the *mortgage* as it was the dominant form found in early mortgage transactions. However, the English courts of equity challenged the harshness of this system and developed equitable doctrines to protect debtors, or the mortgagors. One development was the right of redemption, which granted the mortgagor the right to avoid a forfeiture by paying off the debt owed within a given period after default. In the 17th century, another such development placed a mortgagee who took possession of property from the mortgagor in the position of a trustee. As trustee for the property, the mortgagee had certain fiduciary duties including reasonable operation of the estate to generate profits and a requirement to keep the mortgaged property in a proper state of repair to prevent deterioration. As with many other English legal concepts, the doctrine of mortgagee in possession surfaced in the common law of the United States, including in Ohio.

**B. Ohio Law**

Under Ohio law, legal title to a mortgaged property remains in the mortgagor until a condition of the mortgage is broken. At that time, legal title, as between the mortgagor and mortgagee, vests with the mortgagee subject to the equity of redemption. However, as to the rest of the world, title remains in the mortgagor until (1) the mortgagee forecloses on the mortgage and the sale is consummated, (2) the mortgagee recovers possession of the property by ejectment proceedings, or (3) the mortgagee otherwise extinguishes the right of the mortgagor to redeem the property. If any of these conditions occur,

136. Id. at 72.
137. Id. at 70.
138. Id. at 72.
139. Id. at 75.
140. E. ST. CLAIR HARNET, A HANDBOOK ON THE LAW OF MORTGAGES 22 (Stevens & Sons, 1909).
141. Id. at 25.
142. Levin v. Carney, 161 Ohio St. 513, 519 (Ohio 1954) (“When a mortgagee goes into possession by sufferance or consent he becomes a trustee for the mortgagor and those claiming under the mortgagor. In such case the mortgagee is required to handle the mortgaged property in a provident manner and to handle the income therefrom and apply the proceeds to the debts in the order of their priority.”).
143. Hausman v. Dayton, 73 Ohio St. 3d 671, 676 (Ohio 1995); See Levin, 161 Ohio St. at 520.
144. Hausman, 73 Ohio St. 3d at 676. The Supreme Court of Ohio is rephrasing the framework initially laid out in *Levin v. Carney* which originally states the second option as “may maintain ejectment or take other legal steps to obtain possession.” *Levin*, 161 Ohio St. at 519.
both equitable title and legal title are deemed to be in the hands of the mortgagee.\footnote{145}

In reality, the last two options are almost never exercised by mortgagees. Mortgagees try to avoid becoming a mortgagee in possession, because this position carries the duties of ownership as a trustee but is still subject to the right of redemption.\footnote{146} This right of redemption effectively prevents a mortgagee from disposing of the property since theoretically the mortgagor could show up and redeem the property at any time. Additionally, the mere extinguishing of the right of redemption, standing alone, does not automatically allow for the sale of the property, because no other liens or encumbrances are extinguished, as in a foreclosure and sale. However, a mortgagee, represented by competent counsel, is able to walk the tight rope of avoiding liability for properties even if its foreclosure is the cause of vacancy and abandonment. For example, a mortgagee can begin a foreclosure and walk away before the sale so that legal title does not pass and the property is left in a legal limbo.\footnote{147}

To ground the impacts of these doctrines and practices in reality, a return to the case of \textit{Hausman v. City of Dayton} is appropriate. When analyzing the facts of \textit{Hausman}, the Second District Court of Appeals of Ohio (Second District) made one crucial assumption that the Supreme Court of Ohio refused to recognize. The Dayton ordinance in question included "mortgagees" in its definition of parties responsible for the cost of nuisance abatement.\footnote{148} The Second District found that holding a mortgagee \textit{not in possession} liable for the costs of abating a nuisance would be an unconstitutional use of the police powers.\footnote{149} The Supreme Court of Ohio agreed with this conclusion stating that a "mortgagee has no ability to create or prevent a nuisance from arising on the mortgaged property."\footnote{150} This conclusion was based on the fact that a mortgagee, prior to default, had no right of possession.\footnote{151} However, the Second District went a step further and attempted to interpret the Dayton ordinance so that it would be constitutional by reading "mortgagee" to be "mortgagee in possession."\footnote{152} The Supreme Court of Ohio disagreed with this construction, but did state that the ordinance could "have very easily" included "mortgagee in possession" in its definition of parties

\begin{footnotes}
\footnote{145. See \textit{Hausman}, 73 Ohio St. 3d at 676.}
\footnote{146. \textit{Levin}, 161 Ohio St. at 520.}
\footnote{147. Lind, \textit{supra} note 13, at 240.}
\footnote{149. \textit{Id.} at *25.}
\footnote{150. \textit{Hausman}, 73 Ohio St.3d at 679.}
\footnote{151. \textit{Id.}}
\footnote{152. \textit{Hausman}, 1993 WL 541649, at *26.}
\end{footnotes}
liable for the cost of nuisance abatement.153 By implication, the Supreme Court of Ohio left unanswered the question of whether holding mortgagees in possession liable for maintaining the property is constitutional.

While the Supreme Court of Ohio stopped, the Second District continued with the analysis.154 Citing a First District of Ohio Court of Appeals case, the Second District explored the doctrine of mortgagee in possession under Ohio law.155 The court found that since a mortgagee cannot acquire physical control of property in Ohio without the consent of the mortgagor, the only possession that a mortgagee can have is constructive or virtual possession.156 The Second District found that if, based upon the circumstances, a mortgagee acted in a way that “removes from the hands of the mortgagor the management and control of the estate,” then the mortgagee has taken constructive possession and therefore is a mortgagee in possession.157

In the case of residential foreclosures, the mortgagor is generally not aware of all the legal intricacies of the foreclosure process and legal doctrines of property ownership. In cases in which the mortgagee begins foreclosure but fails to transfer the property’s title, the original mortgagor may not know that legal title is still in his name.158 In a situation where the actions of the mortgagee—e.g., initiating legal proceedings or aggressive collection efforts—cause a mortgagor to abandon a property, one could reason that the mortgagee has removed from the hands of the mortgagor the management and control of the estate and has become a mortgagee in possession. Therefore, at the point of abandonment, a mortgagee becomes a trustee for the property and is responsible for the cost of maintenance.

This extension of the common law doctrine of mortgagee in possession is not unheard of. In fact, Judge Henry J. Nowak in Buffalo, New York, is using nearly this exact same extension to confront the vacancy issues arising from lenders’ irresponsible foreclosure practices.159

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153. Hausman, 73 Ohio St. 3d at 678.
155. Id. at 30 (citing Hyde Park Sav. & Loan Co. v. Cowles, 168 N.E.2d 602 (Ohio Ct. App. 1st Dist. 1960)).
156. Id. (citing Hyde Park Sav. & Loan Co., 168 N.E.2d at 350).
157. Id. at 31.
158. Lind, supra note 13, at 252 (“In fact, owners frequently think that the bankruptcy or foreclosure proceeding terminates their ownership when, in fact, only a confirmed sale terminates their ownership.”).
159. Johnson, supra note 49, at 1195 (“... Nowak contend[s] that by sending letters threatening eviction or foreclosure against defaulting homeowners, the lenders have asserted control over the property, triggering a responsibility to maintain the home after the homeowner vacates.”).
In conclusion, by extending the common law doctrine of mortgagee in possession to cover foreclosing lenders whose suit or collection practices lead to abandonment of the property, courts could provide local jurisdictions with a tenable claim to hold lenders liable for the costs of nuisance abatement arising from the property.

V. PROPOSED SOLUTION

The serious problem of foreclosed, vacant homes negatively affects neighborhoods across the country. The burden of dealing with the problem cannot fall on any single party. On one hand, mortgage lenders provide the financing necessary for many to have an opportunity for home ownership, which can stabilize and improve neighborhoods. On the other hand, local jurisdictions cannot be expected to shoulder the costs of abandoned homes decaying in residential neighborhoods while mortgage lenders dance around legal ownership to avoid liability.

This Comment discussed two separate paths to sharing the cost burden of addressing vacant, foreclosed properties between mortgagees and local jurisdictions. However, standing alone, neither fully solves the problem. An extension of the common law doctrine of mortgagee in possession would hold lenders accountable but would introduce much uncertainty into the lending industry. In order to operate effectively and efficiently from a business perspective, mortgage lenders must have confidence in the expected costs associated with a loan. One of the main sources of uncertainty with extension of the doctrine of mortgagee in possession is that lenders are generally far removed from the property undergoing foreclosure and often do not know if the property is vacant or when it becomes vacant. A fair solution to this issue may lie in the conjunctive use of a VPRO with reasonable maintenance requirements and enforcement of lender liability under the doctrine of a mortgagee in possession.

Under this proposed solution, a foreclosure could play out similar to the following hypothetical. First, a lender would register with a local jurisdiction before filing a foreclosure. The local jurisdiction would inspect the property and determine the occupancy. If the property is vacant, the local jurisdiction would notify the lender and require compliance with the local VPRO by enforcement under the doctrine of mortgagee in possession. If the property was occupied, the local jurisdiction would be on alert to monitor the occupancy of the home as it undergoes foreclosure. The local jurisdiction would be responsible for alerting the lender if the property becomes unoccupied during the foreclosure, which would trigger the lender’s liability to maintain the property according the VPRO maintenance standards. This would
reduce the onus on lenders to determine vacancy before filing foreclosures and would remove ambiguity concerning when liability for property maintenance begins.

Additionally, the added burden of maintenance would incentivize lenders to invest in upfront minor maintenance before costs snowball, finish foreclosure actions through the sale to the next property owner, and perhaps even renegotiate underwater loans or unmanageable loan terms.

In conclusion, mortgagees need to contribute their fair share to stemming the havoc their foreclosure practices have created in neighborhoods across the country. In Ohio, which has felt the impacts of those practices, this could be accomplished through a good faith extension of the common law doctrine of mortgagee in possession or through the enactment of local vacant property registration ordinances targeting foreclosing lenders. However, a system with both of these solutions working together could create a plausible resolution to the problems of blight that would satisfy the legitimate demands of both local governments and the mortgage lending industry.