

IN THE WEEDS: HOMEOWNERS FALLING BEHIND ON THEIR MORTGAGES, LENDERS PLAYING THE FORECLOSURE GAME, AND CITIES LEFT PAYING THE PRICE

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Mired in the expansive and ever-increasing housing market crisis, financially strapped homeowners likely feel as though they are “in the weeds” and have no recourse. Lenders, many of whom played a significant role in prompting the dramatic downswing in real estate prices through loose lending standards, have become all too willing to utilize the foreclosure process to their own advantage in seemingly utter disregard for the consequences ultimately borne by homeowners and municipalities. In certain circumstances homeowners lack the wherewithal, the finances, the incentive, or maybe all three, to fight foreclosure proceedings, and so they “choose” to abandon their property. Others are evicted prior to a foreclosure sale in order for the lender to take over. If, for any number of reasons, the lender does not see the foreclosure process through to the end, record owners may wind up on the hook for maintenance and repair costs, nuisance violations, unpaid property taxes, and even demolition costs. While some foreclosing lenders warrant sympathy on account of their losses, and most ejected homeowners deserve compassion as they leave their homes facing financial hardship and grave uncertainty, municipalities, unwilling participants in an all too necessary process, shoulder the heavy burden of rebuilding their communities in spite of increased expenses and simultaneously declining revenue.

By all accounts, the market may not (and likely will not) correct this transference of responsibility and expense to municipalities without some sort of legislative or judicial intervention. As any court refraining from judicial activism will tell you, it is solely the legislature’s province to reallocate responsibility for vacant homes to one or more of the parties to the mortgage who voluntarily assented to certain contractual obligations. The judiciary, however, has an important role to play as well. Judges are in a unique position

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to educate homeowners and direct, or more appropriately, correct, lender behavior, all within the scope of the existing legal framework.

Part I of this Article discusses a few of the relevant provisions of the Illinois Mortgage Foreclosure Law and the City of Chicago Municipal Code, as well as the current state of the law with regard to title transfer during judicial sale proceedings. To the extent Illinois municipalities other than Chicago require property maintenance and enforce such with nuisance violations or other legal mechanisms (but do not make expressly clear whether a homeowner or foreclosing lender is responsible for such expenses after a foreclosure proceeding has begun) this section should, at least in theory, remain relevant to those localities. Part II explores several wide-ranging problems to which the current legal framework gives rise. Lenders and borrowers each have adopted certain behaviors to serve their own best interests. However, both parties contribute to significant problems that municipalities must bear. Part III proposes a few possible solutions to ease the burden on municipalities and correct inefficiencies in the current foreclosure process.

I. LEGAL BACKGROUND¹

A. Illinois Mortgage Foreclosure Law

In Illinois, real estate foreclosures are governed by the Illinois Mortgage Foreclosure Law (the “IMFL”). Mortgage holders must comply with the provisions of the IMFL to effectuate foreclosure of a mortgage (or judgment lien).² Judgment creditors, such as municipalities that have judgment liens against a property for, say, unpaid taxes or demolition costs, may also avail themselves of the IMFL’s provisions.³ In addition to setting forth certain

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1. Research has revealed a dearth of case law in Illinois regarding whether a foreclosing lender or an owner of record should be responsible for nuisance abatement and maintenance costs during the pendency of the foreclosure action. This result is not surprising when considered in context. An owner of record, who for one reason or another has fallen behind on mortgage payments, receives a notice of foreclosure and likely a notice of eviction. The owner then has an opportunity to oppose the foreclosure at an administrative hearing, at least in Cook County’s current system. If the lender prevails at the administrative hearing, the owner, who very well may be unrepresented and unsophisticated, particularly relative to the adversarial bank, can elect to appeal the administrative decision to the circuit court after paying appeals costs. It seems as though a party with funds to appeal may better spend that money on mortgage payments and altogether avoid the foreclosure situation. The practical result may be that the right to appeal to the circuit court is nugatory, and if so, it would seem mounting an appeal to the Illinois appellate courts is even farther out of reach.
 2. 735 ILL. COMP. STAT. 5/15-1106(a) (2008).
 3. *See id.* 5/12-101 (the judgment creditor may foreclose the judgment lien in the same manner as a real estate mortgage).

definitions and procedures relevant to foreclosure actions, the IMFL codifies requisite notice,⁴ a standard form of pleadings,⁵ sale procedures,⁶ and a right of possession.⁷

The IMFL does contain various provisions apparently designed to inform homeowners of their rights. For example, the IMFL requires that a Homeowner Notice be attached to a summons for a residential foreclosure action, and the approved form notice includes information regarding a homeowner's right to continued possession and ownership until a court rules otherwise.⁸ Continued possession and continued ownership are not always inseparable, which, as discussed in Part I.C below, may create significant problems for dispossessed homeowners. The IMFL, though it entitles a residential mortgagor to retain possession prior to the entry of a foreclosure judgment, permits a mortgagee to dispossess the homeowner upon objection and good cause, authorization by the terms of the mortgage, and a reasonable probability of success on a final hearing.⁹

Importantly, the provisions of the IMFL do not address responsibility for the subject property after the filing of a foreclosure complaint. Of course, if the rights to possession and ownership reside in one person, whether natural or legal, then it makes sense that the responsibility for upkeep and repairs should rightfully fall on that same person. However, the IMFL (and other relevant laws) are remarkably silent regarding which entity responsibility falls upon when no single individual holds possessory and ownership interests. The IMFL also neglects to provide any remedies for municipalities that take over or demolish abandoned properties. As explored throughout this article, these omissions have become increasingly problematic as foreclosures, abandonments, and evictions have spiked.

4. *Id.* 5/15-1504.5.

5. *Id.* 5/15-1504.

6. *Id.* 5/15-1507.

7. *Id.* 5/15-1701.

8. *Id.* 5/15-1504.5. Section 15-1502.5(c) of the IMFL requires lenders to mail a notice advising a homeowner who is delinquent by more than thirty days a notice advising the homeowner "that he or she may wish to seek approved housing counseling." *Id.* 5/15-1502.5(c). Importantly, no foreclosure action under the IMFL can be instituted on residential real estate before the notice has been mailed.
Id.

9. *Id.* 5/15-1701(b)(1).

B. City of Chicago Municipal Code

The City of Chicago (the “City”), like many municipalities, uses a municipal code to ensure, among other objectives, safety and sanitation within the city limits. As a major metropolis, the City is challenged by the sometimes competing goals of providing a safe and habitable environment for its residents and simultaneously being a dependable resource that property owners can look to for support and protection. In pursuit of these goals, the City has enacted the Chicago Municipal Code (the “Code”).¹⁰ Among other things, the provisions of the Code require record owners to perform general maintenance of properties¹¹ and abate public health nuisances.¹²

Title 13 of the Code, also known as the Chicago Building Code, seeks to regulate construction and upkeep of buildings in the Chicago area. For example, section 13-13-9 addresses the demolition of open, hazardous buildings. This section expressly gives the City authority to post and publish notice of its intent to demolish qualifying structures, demolish the same, and then proceed in a foreclosure proceeding to enforce the City’s lien against the real estate in an effort to collect its costs.¹³

In practice, the Code is typically enforced only against the “owner of record” of a non-compliant property. This perhaps explains the lack of substantive discussion in Illinois case law regarding whether a foreclosing lender, rather than an evicted homeowner, should be held responsible for maintenance and repairs. To the extent a plaintiff would pursue a lender for maintenance costs accruing prior to confirmation of a judicial sale, one could reasonably expect trial courts to routinely grant dismissals of such actions, particularly given the state of the law as espoused in *Household Bank, FSB v. Lewis*.¹⁴

C. Owner of Record

One of the paramount issues underlying foreclosure is the point at which an owner of record loses title to the subject property. The opinion of the Supreme Court of Illinois in *Lewis* provides a convenient view of this

10. CHICAGO, ILL., MUNICIPAL CODE (2008), available at <http://www.amlegal.com/library/il/chicago.shtml> (follow “Municipal Code” hyperlink).

11. *Id.* tit. 13, ch. 13.

12. *Id.* tit. 7, ch. 28.

13. *Id.* tit. 13, ch. 13, § 9.

14. *Household Bank, FSB v. Lewis*, 890 N.E.2d 934 (Ill. 2008).

important issue.¹⁵ The *Lewis* Court only addressed the point in time that a third-party bidder at a judicial sale has a vested interest in an auctioned property such that the owner of record cannot legally sell the property “out from under” the highest bidder.¹⁶ The Court’s decision, however, illuminates the framework under which record owners retain legal rights to a foreclosed property through confirmation and approval of a judicial sale by a supervising court.

In *Lewis*, a homeowner defaulted on her mortgage payments.¹⁷ Household Bank instigated foreclosure proceedings, during which a default judgment was entered against Lewis and in favor of Household Bank.¹⁸ An auction sale of the property in question was held, at which Greenwich Investors prevailed as the highest bidder.¹⁹ Household Bank sought approval of the sale from the court, but subsequently asked the court to continue the approval proceeding pending Lewis’s efforts to conduct a private sale of the property.²⁰ Lewis succeeded in selling her home for approximately \$20,000 more than the price tag fetched at the auction.²¹

In accord with its interests in receiving full payment on its mortgage, Household Bank sought leave to withdraw its motion for court approval of the sale.²² Greenwich Investors intervened in an effort to protect its interest as the highest bidder in the judicial sale of the property.²³ The circuit court found that Greenwich Investors had no interest in the property, as the court had not confirmed the judicial sale, and thus Lewis still had the ability to sell the property.²⁴ The appellate court reversed.²⁵ The Illinois Supreme Court, however, disagreed with the appellate court and affirmed the circuit court’s decision.²⁶

For the purpose of this article, the *Lewis* case has one important lesson: in typical foreclosure proceedings, that is, where a bank forecloses and seeks judicial sale of a particular property, the owner of record of that property holds his or her legal interest in the property until the result of a judicial sale is confirmed by the supervising court. While this fact inured to the owner of

15. *Id.*

16. *Id.* at 935.

17. *Id.*

18. *Id.*

19. *Id.* at 936.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* at 940.

record's benefit in *Lewis*, the contrary is true in many foreclosure/nuisance abatement cases.

Continued ownership arguably disfavors mortgagors after they either have been dispossessed by way of eviction proceedings or have abandoned their properties for any number of reasons. Specifically, owners of record remain liable for nuisance abatement and maintenance costs notwithstanding their inability to return to their properties or their disinterest in returning. Furthermore, in many situations, when a homeowner has left the property and lenders are unwilling to adopt responsibility for upkeep, the municipality has four unpleasant choices: (i) leave the property to deteriorate and blight the neighborhood, (ii) perform maintenance and repairs to the property, (iii) demolish the property with little chance of recovering its costs, or (iv) expend limited resources fighting with an impoverished homeowner or a stubborn lender.

II. PRESENTATION OF THE PROBLEM

As mentioned above, the current legal framework places both owners of record and municipalities in difficult positions.²⁷ Some, if not most, owners of record facing foreclosure generally will be in financial crisis or are completely unfamiliar with their legal rights and cannot adequately protect themselves. Consequently, municipalities face a significant dilemma in that they must decide whether to fix dangerous properties with little to no likelihood of being reimbursed (remember, the lender is not responsible for maintenance prior to taking over as record owner) or ignore their responsibilities as a guarantor of public safety. When the municipality's interest in public safety outweighs its concern for the budget, properties are fixed without a significant prospect of reimbursement. Passing repair or demolition costs onto the municipality is especially unfair, as cities such as Chicago are already expending public funds to address the challenges posed by the growth in nonprime foreclosures.²⁸

27. Admittedly, lenders also face major risk and uncertainty in the current housing crisis. Concerning the particular problems addressed herein, however, lenders may be the only parties involved that have sufficient funds to correct these problems. The author is not entirely unsympathetic to the risks mortgagees face in the current housing crisis. These risks, however, are less alarming when considered in context. First, the interest rates banks charge are designed to counteract the failed loans issued, which in a typical market would mean that banks can absorb foreclosures. Second, many banks played a significant role in creating the current crisis via subprime lending and other questionable practices.

28. See William C. Apgar et al., Homeownership Preservation Foundation, *The Municipal Cost of Foreclosures: A Chicago Case Study 3-4* (Feb. 27, 2005), http://www.995hopeorg/content/pdf/Apgar_Duda_Study_Full_Version/pdf.

A. Root of the Problem

1. *An Increased Rate of Foreclosures in a Suffering Economy*

Overwhelming evidence shows a rise in subprime mortgages and a corresponding spike in foreclosures in the poor economic climate.²⁹ The state of Illinois has not been exempt from this nationwide downward spiral.³⁰ The rising home prices in Chicago, not unlike other Illinois metropolitan and suburban areas, created the façade of a stable real estate market. “Growing home prices masked the unsoundness of many mortgages that were made, since the borrowers who could afford the debt service would not walk away from the appreciating assets, while those who could not would find it easy to refinance or sell the house at a profit.”³¹ Thus, mortgage defaults were low, promising a bright future of profit for banks everywhere and creating an improper confidence that loosened banks’ purse strings.³²

At the crest of the bubble, loans were given to the most marginal borrowers, many of whom proved unable to make even the first monthly payment. As early payment defaults started to mount, and prices of lowest-rated mortgage-backed securities began to fall, market sentiment turned, dampening, and then reversing home price growth.³³

With this reversal began a “feedback loop” that further perpetuated decreasing home prices.³⁴ As banks’ losses started, they reactively (and somewhat understandably) tightened their lending standards. “With tighter credit, fewer

Innovative programs now in operation demonstrate that it is possible for government, industry, and non-profits to address the challenges posed by the growth in nonprime foreclosures, and in doing so devise solutions that are not available to any of the parties individually. For example, working in partnership with Neighborhood Housing Services of Chicago and a group of responsible nonprime lenders, the City of Chicago is helping distressed borrowers gain access to legitimate and effective credit counseling services and other foreclosure avoidance information through its 311 non-emergency call system. *Id.*

29. John Kiff & Vladimir Klyuev, International Monetary Fund, *Foreclosure Mitigation Efforts in the United States: Approaches and Challenges* 3 (Feb. 18, 2009), <http://www.imf.org/external/pubs/ft/spn/2009/spn0902.pdf>.

30. *Illinois Foreclosures Rank Third Nationally*, HUFFINGTON POST, available at http://www.huffingtonpost.com/2009/11/12/illinois-foreclosures-ran_n_355225.html (last visited Apr. 19, 2010) (“Not only is the housing crisis far from over, in Illinois it may be getting worse.”).

31. Kiff & Klyuev, *supra* note 29, at 3–4.

32. *Id.*

33. *Id.* at 4.

34. *Id.* See also *id.* at 32 fig.1.

people qualif[ied] for mortgages. This reduce[d] demand for housing, pushing prices down.”³⁵ Concurrently, market participants started to develop an expectation of continued decline.³⁶ The banks’ reactions and the dim market prospects ultimately suppressed demand, and tighter credit availability raised the occurrence of delinquency and foreclosures.³⁷

In the Cook County housing courts, foreclosure proceedings are mounting. The situation is the same in every other municipality.³⁸ Courts are “ill equipped to handle the spike in abandoned homes through their overloaded dockets.”³⁹ The reality of sparse judicial resources and overwhelming caseloads amplifies the problem because lenders are allowed an even greater period of time to delay the finality of foreclosure.

It is worth noting that the burden placed on the housing courts could possibly be lessened by loan modifications. However, the likelihood of loan modification for those at risk for foreclosure is not high. “Some analysts predict that only a few consumers, less than [twenty percent] of homeowners, facing foreclosure will obtain loan modifications,”⁴⁰ which in a metropolitan area will mean the number of foreclosures will continue to rise without any hope of relief for housing courts or homeowners.⁴¹ This prediction is supported by lender response which has been nothing less than disappointing, with more and more properties going into foreclosure each day.⁴² That is not to say that other efforts have not or are not being made currently to help those faced with foreclosure. But sadly, these efforts have not yet succeeded on a large scale.⁴³ The market has not turned and a large amount of foreclosures continue to be filed.

While foreclosures certainly always pose a problem for municipalities, the proper question is perhaps one of degree. When the real estate market is

35. Kiff & Klyuev, *supra* note 29, at 4.

36. *Id.* See also *id.* at 32 fig.1.

37. *Id.*

38. *Illinois Foreclosures Surge, Double the National Rate*, HUFFINGTON POST, available at http://www.huffingtonpost.com/2009/03/12/illinois-foreclosures-sur_n_174506.html (last visited Apr. 19, 2010); *Illinois Among Leaders in 2009 Foreclosures*, CHICAGO TRIBUNE, Jan. 14, 2010, available at http://articles.chicagotribune.com/2010-01-14/news/1001140246_1_foreclosure-filings-bank-repossessions-foreclosure-activity (“A total of 131,132 Illinois homes, or one in every [forty], received a foreclosure filing last year, an increase of almost [thirty-two] percent over 2008, according to RealtyTrac, a Web site that tracks foreclosures.”).

39. Creola Johnson, *Fight Blight: Cities Sue to Hold Lenders Responsible for the Rise in Foreclosures and Abandoned Properties*, 2008 UTAH L. REV. 1169, 1237 (2008).

40. *Id.* at 1242.

41. *Id.*

42. See also Kiff & Klyuev, *supra* note 29, at 29 (“Private sector response to date has been insufficient, with too many properties going into foreclosure.”).

43. *Id.* at 20.

legitimately booming, rather than, say, propped up by false confidence in climbing prices, the sporadic foreclosure is less significant. When, as now, foreclosure numbers soar, communities face “an adverse feedback loop, resulting from and feeding into home price declines.”⁴⁴ Home price declines almost guarantee a greater number of vacant homes, either through abandonment by homeowners or by way of eviction by lenders.⁴⁵ The currently bleak outlook for the real estate market provides little hope for the sale of the increasing number of abandoned homes any time soon.⁴⁶

2. *An Increase in Foreclosures Guarantees Abandoned Property*

Illinois residents are not unaware of the negative impact of the current real estate crisis. However, one negative consequence of the high number of foreclosures in the communities of Illinois has drawn little discussion: “The surge in abandoned homes as a result of the foreclosures and its social and economic cost to cities.”⁴⁷ There is an indisputable corresponding relationship

44. *Id.* at 29.

45. JOHN PODESTA ET AL., CTR. FOR AMERICAN PROGRESS ACTION FUND, A PRACTICAL AND PROGRESSIVE ECONOMIC STIMULUS AND RECOVERY PLAN (2008), <http://www.americanprogressaction.org/issues/2008/stimulus.html> (“There is ample evidence that with each additional foreclosure in a neighborhood, house prices decline further, leading to a vicious cycle that ultimately brings our communities abandonment, blight, and crime.”); MARK SETTERFIELD, ABANDONED BUILDINGS: MODELS FOR LEGISLATIVE AND ENFORCEMENT REFORM (1997), http://www.trincoll.edu/depts/tcn/Research_Reports/resrch23.htm (“Abandonment affects other properties within a neighborhood by lowering property values. . . . The initial abandonment of some buildings may create conditions that lead to the subsequent abandonment of others.”). A decline in home prices is a typical effect of a rise in foreclosures. David Streitfeld, *Home Prices Continued Their Decline in March*, N.Y. TIMES, May 26, 2009, available at <http://www.nytimes.com/2009/05/27/business/economy/27home.html> (Standard and Poor–case Schiller Home Price Index Committee Chairman David M. Blitzer concluded that “[f]oreclosures have picked up, and that seems to be pushing prices down . . .”). A decline in home prices can create a situation where a homeowner owes more than the house is currently worth. Eric Weiner, *Why Not Just Walk Away From a Home*, NAT’L PUB. RADIO, Feb. 13, 2008, <http://www.npr.org/templates/story/story.php?storyId=18958049> (“Sometimes . . . walking away from your mortgage makes economic sense, especially for homeowners who find themselves ‘upside down.’”)

46. *Illinois Foreclosures Surge, Double the National Rate, supra* note 38; *Illinois Among Leaders in 2009 Foreclosures, supra* note 38; However, even if the real estate market does improve, certain areas will still remain afflicted with the effects of abandoned buildings. See Setterfield, *supra* note 45.

[T]he economic and social impact of abandoned buildings is not distributed evenly throughout society. Even urban populations are not affected equally; the tendency of abandoned buildings to cluster in certain blighted neighborhoods is testimony to the fact that some urban dwellers are more affected by abandonment than others. As such, it is quite reasonable to contemplate that part of the reason that abandonment remains to be a problem is due to a lack of political will on the part of society as a whole to attach high priority to tackling the problem. *Id.*

47. Johnson, *supra* note 39, at 1174.

between the number of foreclosed properties in a community and the number of abandoned and vacant properties. “Thousands of abandoned homes have become so blighted that they have become public nuisances, burdening cities with the costs of bringing nuisance abatement actions.”⁴⁸ The following section will examine and explain this relationship from the perspectives of the homeowner as well as the lender.

B. Borrower Behavior

1. Homeowners Have Few Options When Faced with Foreclosure

Faced with the prospect of foreclosure proceedings, a savvy homeowner may first attempt to negotiate mortgage modifications, unless the home is an investment property.⁴⁹ As discussed above, the majority of lenders are not willing to agree to modifications. Therefore the homeowner has no choice short of selling the property to avoid foreclosure. This plan, however, has its own complications.

First, a homeowner will face the difficult process of selling a home in a saturated market. With so many choices, increased buyers’ scrutiny can be expected. A buyer will obviously be concerned with clear title. Clear title may be a problem in the context of a *lis pendens*.⁵⁰ When a lender is contemplating foreclosing on a property, the first action taken may be that of filing a *lis pendens*. For those buyers not interested in buying into a potential foreclosure problem, the owner of record now faces his or her first downfall—a limited buyer pool. For homeowners who contemplate relinquishing the property through sale, this notice may render the property un-sellable. Once a homeowner realizes he or she faces limited sale prospects, the likelihood of foreclosure becomes a factor in the decision making process. At this point, a homeowner who is already financially strapped has little incentive to throw good money after bad to maintain his or her property.

Even if a homeowner is fortunate enough to sell the property, he or she may not be able to cut his or her losses at closing. In a situation where a

48. *Id.*

49. Kiff & Klyuev, *supra* note 29, at 9 (“Also, if the home is an investment property, and its value has depreciated below the outstanding balance of the mortgage loan(s) (including subordinate liens), the borrower will have little interest in any solution short of writing the principal down to the depreciated property value.”).

50. *Lis pendens* is defined as “a notice, recorded in the chain of title to real property, required or permitted in some jurisdictions to warn all persons that certain property is the subject matter of litigation, and that any interests acquired during the pendency of the suit are subject to its outcome.” BLACK’S LAW DICTIONARY 950 (8th ed. 2004).

homeowner is, practically speaking, forced to sell his or her property, there is a strong likelihood that the homeowner will sell at a severe discount. If the final sale price does not cover the remaining indebtedness, the homeowner may face a deficiency judgment. This situation is especially true in the context of falling home prices and homeowner financial distress. Borrowers are placed in a negative equity situation when the homes are worth less than their mortgages.⁵¹

This creates an incentive for the borrower to walk away from the property, even if debt service is affordable. Such a decision is facilitated by the fact that most mortgages in the United States are *de jure* or *de facto* non-recourse, meaning that the lender cannot go after the defaulting borrower's other assets or income if the collateral is insufficient to cover the debt; and by the apparent change in societal attitudes toward default. . . . If the mortgage is not affordable, negative equity makes it impossible for the borrower to refinance or exit the market by selling the house.⁵²

In addition, the foregoing neglects to mention the distinct possibility that a homeowner in foreclosure, perhaps not apt to make the most financially sound decisions, will simply surrender under the stress of the situation. For many, short-term remedies, such as ignoring the problem as a substitute for correcting it, take far greater precedence over rationalized decision making.

2. *Overwhelmed Homeowners Literally Walk Away*

The homeowner will most likely be the first party to walk away from the property in the context of a foreclosure. The real estate investor recognizes there is little to lose by abandoning investment property when the value has depreciated so far below the outstanding balance of the mortgage.⁵³ As for other homeowners, "it can be difficult to achieve the necessary direct contact with delinquent borrowers, who may be afraid and unaware of their options, think they can get back on track without help, or just think that they are beyond help."⁵⁴

Despite the fact that Section 15-1504.5 of the IMFL requires that a Homeowner Notice be attached to a summons for a residential foreclosure action, many homeowners believe they must relinquish the property

51. Kiff & Klyuev, *supra* note 29, at 4.

52. *Id.*

53. *Id.* at 26 ("First, some borrowers are walking away from 'underwater' mortgages, particularly on investment properties, even if debt service remains manageable.").

54. *Id.* at 9.

immediately. A foreclosed property that is abandoned and vacant right from the start is truly problematic. A foreclosure in Illinois could take up to eighteen months, not including any delay the overloaded housing courts may present in the current economic climate.

Not all homeowners will neglect to read, or misunderstand, the substance of the Homeowner Notice. The homeowners who choose to stay in their home throughout the foreclosure process may still abandon their properties in the future, but not by choice. Homeowners may be evicted early into the foreclosure proceedings. As explained above, a mortgagee may seek possession when good cause is shown, the underlying mortgage or note so authorizes, and the court is satisfied that there is a high probability that the mortgagee will prevail in the final hearing.⁵⁵ In the typical foreclosure proceeding, the owners of record will not maintain possession of the property through the entire foreclosure proceedings.

Regardless of whether the homeowner abandons the property by choice or is forced to vacate the home through the eviction process, the consequence of abandoning the property remains the same. The property is not being maintained. There is one serious difference between the homeowner who elects to abandon the property and the homeowner who is evicted. When a homeowner is evicted from the property he or she is, in effect, barred from entry onto the property and barred from maintaining the property to which he or she still legally holds title. The fact that the homeowner is prohibited from entering his or her home does not alter the responsibility for maintaining compliance with the municipal code. Even when a municipality is aware of such a situation, the duty to act in the interests of public welfare does not vanish with the homeowner. Depending on the type of violation and gravity of the violation, the homeowner will continue to be cited for non-compliance and the condition of the property will continue to deteriorate until intervention by city officials is absolutely necessary to sustain a safe environment.

C. Lender Behavior

1. The Lender and the Loophole

Mortgage holders have developed certain strategies by which they avoid liability for maintenance and repair costs. Particularly troubling in today's dramatic and ongoing rise of foreclosures and home abandonments is the loophole that lenders have apparently discovered in the transfer of ownership

55. 735 ILL. COMP. STAT 5/15-1701(b)(1) (2008).

in the foreclosure process. In the typical foreclosure proceeding, the owner of record is evicted from the property. Upon eviction, the owner of record is barred from entry onto the property, but, as the owner, is still held responsible for maintaining compliance with the municipal code.

Homeowners may not understand the foreclosure process, may not know that they have a legal right to cure any defects that may give rise to nuisance violations notwithstanding an eviction, or simply cannot afford to bring their property into compliance. Lenders are very aware of the borrower's predicament and take special care to use this weakness in the law to their advantage. The current state of law in municipalities such as Chicago heavily benefits mortgage holders by permitting them to obtain possession of a property, after either owner abandonment or eviction, but avoid responsibility for nuisance abatement and maintenance costs. Although in possession of the property, the lender is not responsible for keeping the property up to code. This loophole in title transfer puts the mortgage holder in complete control. With no threat of citation for nuisance violations, and thus little incentive to maintain the premises, many lenders very well may allow the properties they control to deteriorate. Such a scenario results in significant problems. First, evicted owners are cited and fined for nuisance violations occurring on premises upon which they are legally barred from entering. Second, as homes become dilapidated, real estate values in foreclosure-rich areas inevitably will decrease.

The gap in the maintenance provisions of the municipal code regarding whether the mortgagor or mortgagee is responsible is certainly not the only manner in which mortgage holders seek to optimize their return at the expense of record owners and municipalities. Another "common strategy employed by lenders is to buy the borrower's property at a foreclosure sale but never record the deed."⁵⁶ In this way, lenders hide their identity until the sale of the property is near. Ideally, at least from the lenders' perspective, their liability for maintenance and repair costs is extinguished by the sale of the property before their identity is uncovered and collection proceedings are commenced.

2. *The Problem with MERS*

In addition to buying the borrower's property at a foreclosure sale but never recording the deed, lenders also succeed in hiding their identity through the securitization of the mortgage loan itself. "Both the structure of the modern mortgage market and tactics employed by individual lenders make it

56. Johnson, *supra* note 39, at 1186.

very difficult for interested parties to force lenders to maintain properties.”⁵⁷ The modern mortgage loan no longer resembles the simple two-party transaction our parents entered into with their local bank when they purchased their first home. “Now, a mortgage loan involves ‘the borrower, the mortgage broker, the intermediate bank, the investment trust, the servicer, the rating agency, investors, trustees, and the credit enhancement provider.’”⁵⁸ “Securitization deals ordinarily require a document custodian to keep track of ownership and servicing rights of the mortgages.”⁵⁹

Today, a borrower may not even be able to discern what lender holds the mortgage to the borrower’s property. The Mortgage Electronic Registration Systems (“MERS”), by its own admission, “eliminates the need to prepare and record assignments when trading residential and commercial mortgage loans.”⁶⁰ “MERS was originally created by lending institutions ‘to facilitate the transfer of mortgages on the secondary mortgage market and save lenders the cost of filing assignments.’”⁶¹ Today lenders are benefited by the fact that when a loan is registered on MERS, the mortgagee of record listed in the county recorder’s office is MERS rather than the actual lender. When a homeowner defaults on a mortgage, it is MERS who initiates the foreclosure proceedings on behalf of the true lender.⁶² MERS was developed by the real estate finance industry, so it is no surprise that MERS in fact conceals the identity of the actual mortgage holder from homeowners, municipalities, and the public at large. At least one commentator has argued that by concealing the identity of the true lender-mortgagee, MERS is “undermining the accuracy of the public land and court records and frustrating the ability of homeowners and their advocates to negotiate workout deals with the true mortgagee.”⁶³

3. *Lenders’ Change of Heart*

With their identity concealed, lenders sometimes choose to walk away from a property without any public consequences. The lender’s choice is not always so hard to understand. “In many cases the lender does not have recourse to the borrower’s other assets or income and is left to suffer the

57. *Id.* at 1184.

58. *Id.*

59. *Id.* at 1185.

60. MERS: Mortgage Electronic Registration Systems, <http://www.mersinc.org/> (last visited Apr. 19, 2010).

61. Johnson, *supra* note 39, at 1185.

62. MERS: Foreclosures, <http://www.mersinc.org/Foreclosures/index.aspx> (last visited Apr. 19, 2010).

63. Johnson, *supra* note 39, at 1185.

consequences of the borrower's poor investment decision."⁶⁴ Nonetheless, walkaways are still troubling given that, in these circumstances, some mortgagors have no idea of the result. Indeed,

[w]hile many buildings stuck in various stages of the foreclosure process deserve special attention, perhaps none are more deserving of special treatment than so called 'walkaways,' or situations in which both the borrower and lender abandon their interest in the property (though legal interest typically remains with the borrower as s/he is often unaware that the lender has not completed the foreclosure).⁶⁵

Additionally, the mortgagor's forgotten problem soon becomes a community concern. "Problematically for local stakeholders, walkways [sic] leave behind a vacant building with title status that can take years to resolve."⁶⁶

Adding to the problem is the fact that many lenders are unaware of the condition of the property at the time of filing foreclosure proceedings. This "file first, investigate later" approach leaves many lenders facing a choice to either continue on the foreclosure path and take over a dilapidated home or cut their losses and surrender any prospects of recovery. The lender certainly has the prerogative to pursue either alternative, but should have some obligation to correct the record owner's belief that he or she lost title.

With the owner unaware of his or her responsibility and the lender unwilling to accept the same, the property likely will remain abandoned and continue to deteriorate. In this situation, the only party both aware that the property is abandoned and also concerned with the maintenance of the property is the city. Though the mortgagor is certainly deserving of sympathy under this scenario, the municipality may be the ultimate loser. If the property sits in a neighborhood where the value of an open lot will be less than the demolition costs, a lender will not walk away from a property until it is ready to be razed, which means the mortgagor is not losing much. The city, however, is stuck footing the bill for a property it does not own or want.

Lenders have every incentive to avoid liability, but even when legal ownership is established some lenders appear to be completely indifferent to the negative consequences that surround this foreclosure game. The financial institutions creating and securing these mortgages are motivated first and foremost by profit margins. Perhaps in the area of foreclosure, the drive for producing profits outweighs any consideration of neighborhood stability or

64. Kiff & Klyuev, *supra* note 29, at 26.

65. Apgar, *supra* note 28, at 32.

66. *Id.*

revitalization. The disproportionate use of subprime mortgages in neighborhoods of color further supports this notion.⁶⁷ The indifference displayed by lenders toward building and maintaining safe neighborhoods might be a consequence of large-scale operations. Lender-mortgagees doing business nationwide have, unlike local banks, no strong ties to the smaller communities within a municipality. Outside the business center of the city, the properties for which they finance real estate transactions are nothing more than property index numbers. In fact “large national lenders have little or no investment in local communities and routinely ignore notices to appear in court to defend against municipal code violations on their properties.”⁶⁸

D. The Cost of Municipal Code Violations

The creation of the Chicago Building Code was a direct result of the Great Fire of 1871.⁶⁹ Nearly 150 years later, the importance of creating minimum standards to ensure responsible building conservation is still recognized. “The continuing process of building code review and amendment is critical to our effort to keep Chicago buildings as safe as possible, to encourage innovative design and construction and to better serve the building industry.”⁷⁰ “In interpreting and applying said provisions of this Code such provisions shall in every instance be held to be the minimum requirements adopted for the protection and promotion of the public health, safety and welfare.”⁷¹ Make no mistake, the Building Code has sharp teeth – a violation of building code provisions can come at a cost of not less than \$200 and not more than \$500 per incident, and a new incident can accrue daily for the same

67. *Id.* at 2.

Moreover the focus on credit impaired and higher risk borrowers leads to a natural tendency for nonprime foreclosures to cluster in lower-income and largely minority distressed urban areas. Given that foreclosures tend to concentrate in low-income and/or minority neighborhoods, many of these ‘external’ costs are incurred by some of the nation’s most vulnerable households. *Id.* at 10.

See also, Community Outreach Strategies That Work, NeighborWorks America 1 (2009), http://neighborworks.issuelab.org/research/listing/community_outreach_strategies_that_work (“Extensive documentation has demonstrated that communities of color, including South Asian immigrants, were disproportionately affected by subprime and predatory lending practices and are thus at the greatest risk of losing their homes.”).

68. Johnson, *supra* note 39, at 1185.

69. CHICAGO, ILL., BLDG. CODE, MAYOR’S MESSAGE (2008), available at <http://www.amlegal.com/library/il/chicago.shtml> (follow “Building Code and related excerpts of the Municipal Code of Chicago” hyperlink; click on the “+” sign next to “Building Code and related excerpts of the Municipal Code of Chicago” to open the folder; click on “Mayor’s Message.”).

70. *Id.*

71. CHICAGO, ILL., MUN. CODE tit. 13 ch. 12 § 010 (2008).

conditions.⁷² However, when a homeowner is judgment proof (and many homeowners being foreclosed upon are), the City is not likely to see either the monetary penalty or, as discussed above, compliance.

It can safely be said that the Building Code, at least in part, helps to prevent some of the serious consequences that flow from the abandonment of buildings.⁷³ Without impetus from the Building Code's penalty provisions, unrepaired defects may continue to deteriorate without attention. In addition, lot maintenance will be neglected.⁷⁴ Once picturesque neighborhood streets become tainted by the presence of vacant, dilapidated homes, and the presence of these eyesores contributes to at least two undesirable results. First, as discussed elsewhere, such dismal additions to a particular street negatively impact surrounding property values. Second, abandoned homes bring with them health and safety hazards that pose a more immediate concern for municipal officials. Not only is the structure itself perhaps a threat to the health and safety of neighbors, but also neglect slowly but surely makes the vacant nature of the home more apparent to onlookers. As the abandonment of these properties becomes more obvious, the homes serve as a beacon for future problems.⁷⁵ For example, advantageous squatters may utilize the homes for shelter, increasing the risks of property damage and perhaps death as they burn fires inside to stay warm. Or, commonly, the vacant homes become headquarters to illicit gang and drug activities.⁷⁶

Moreover, abandoned properties are a haven for standing water, overgrown grass, weeds, and unwanted rubbish, all of which facilitate health hazards. For example, standing water, aside from its foul odor, is a breeding ground for bacteria and disease-carrying insects, such as mosquitoes. Also, overgrown grass and weeds, along with piles of rubbish, provide harborage for rodents, especially rats. "It has been said that the black rat . . . carr[ies] up to [thirty-five] diseases (especially plague). . . . [I]f the rat is a host for communicable diseases, poor sanitation practices (dumps, inadequate storage, litter, and so on) certainly make the rats' job easier."⁷⁷ Rats communicate both diseases and parasites. An increase in abandoned properties in neighborhoods

72. *Id.* § 040.

73. *See, e.g., id.* tit. 13, ch. 11, § 030.

74. Johnson, *supra* note 39, at 1242.

75. Rosemary Thompson, *Sheriff Dart Outlines His Initiatives*, CHI. B. FOUND. REP., June-July 2009, at 22.

76. Apgar, *supra* note 28, at 10.

77. Alfred J. Sciarrino, *The Grapes of Wrath & the Speckled Monster (Epidemics, Biological Terrorism and the Early Legal History of Two Major Defenses – Quarantine and Vaccination)*, 7 MICH ST. U. J. MED. & L. 117, 155 (2003) ("The rat loves garbage, and the harborage provided by trash heaps and dumps serves as super rat condos.").

already suffering from economic downturn presents these specific health and safety concerns in increased numbers.⁷⁸

For these reasons alone, municipalities like the City of Chicago do not have the luxury of standing idle until either the property is resold or the foreclosure process is complete. However, taking action is not without costs.⁷⁹ Depending on the severity of the hazard, the municipality must pay to repair, enclose, or in the worst situations, demolish the structure. These costs are recoverable from the owner of the real estate.⁸⁰ However, if the property falls into such disrepair that action on the part of the municipality is necessary to protect the safety and health of the public before the foreclosure process is complete (and it may never be complete), the municipality will be hard-pressed to recover the money.

In some circumstances, particularly when health and safety are at issue, municipalities cannot make decisions based on budget constraints. Blighted properties, decreasing real estate values, spreading drug and gang activity, and other similar hazards associated with increasing foreclosures must be remedied if a municipality is to serve its citizens. Thus, few, if any, of the foregoing costs can or will be avoided.

E. Lost Revenue

For municipalities, foreclosures bring with them lost revenue in a variety of forms. The most notable of these losses stems from diminishing tax revenues, which slump as foreclosures increase. Perhaps the most obvious cause of lost tax income is simply nonpayment from homeowners facing

78. Hudson Hayes Luce, *The Meaning of Blight: A Survey of Statutory and Case Law*, 35 REAL PROP. PROB. & TR. J. 389, 431, 435, 459 (2000).

79. Apgar, *supra* note 28, at 10–11.

Though there is some variation from one city to the next due to local ordinances and state-level legislation governing the foreclosure process, direct costs to municipalities and local courts typically include some or all of the following: increased policing; increased burden on fire departments (due to vandalism and/or arson); demolition costs; building inspections; legal expenses; costs associated with managing the foreclosure process or resulting from it (e.g., record keeping/updating); and increased demand for city social service programs. . . . These costs accrue during the foreclosure process and in some cases afterwards as well. Especially in cases where the property has little or no economic value, the city inherits the responsibility for securing and/or demolishing the unit, removing trash from the lot, mowing the lawn, and a range of other activities intended to keep the unit from becoming a dangerous eyesore.

80. CHICAGO, ILL., MUN. CODE tit. 13 ch. 12 § 130 (2008).

foreclosure.⁸¹ But foreclosures also reduce tax revenues in other ways. For example, the value of the property subject to foreclosure may decrease as a result. To the municipality, “when the foreclosure leads to the demolition of the structure judged to be unsecured and a public nuisance[,] . . . the tax base is diminished by the assessed value of the structure demolished.”⁸² In other words, the municipality is no longer able to collect taxes based on the raw land as well as the “improvement” to that land.⁸³

Foreclosures also drive down the value of surrounding properties, which, in turn, reduces those properties’ taxable value.⁸⁴ “Various studies put the negative impact of foreclosure on nearby home values between [one] and [nine] percent.”⁸⁵ This negative impact “translates into slower growth (or potentially a decline) in the municipal property tax base.”⁸⁶ Decreased home values necessarily equate to decreased real estate taxes, but the general market decline can also hurt the municipality’s tax receipts from local businesses. “The blight associated with a neighborhood littered with vacant and boarded homes will limit the willingness of customers to shop at nearby stores, and make it more difficult for local area employers to attract workers.”⁸⁷ “This same phenomenon may also adversely impact business location decisions as well as reduce the profitability of existing business in the city. This in turn can impact sales and income tax receipts in municipalities where they exist.”⁸⁸

While a municipality can place a tax lien on the property, doing so takes both time and money—neither of which the municipality may have. Additionally, enforcing the tax lien may be problematic in a situation of financial distress and low real estate value, and the city may have to settle for less than full repayment.⁸⁹

81. Apgar, *supra* note 28, at 11 (“A borrower in financial distress often simply stops paying their property tax.”).

82. *Id.*

83. *Id.* at 21.

84. Kiff & Klyuev, *supra* note 29, at 4–5 (“Foreclosure sales and forced sales by distressed borrowers occur at steep discounts further undercutting market prices.”); *see also* Apgar, *supra* note 28, at 11 (“Indirect costs to municipalities occur mostly through the impact that foreclosures, especially concentrated foreclosures, can have on house price appreciation. Because homes often deteriorate and/or become vacant during the foreclosure process, they often become associated with crime and general unsightliness, and act as a deterrent for prospective homebuyers.”).

85. Kiff & Klyuev, *supra* note 29, at 5.

86. Apgar, *supra* note 28, at 11.

87. *Id.* at 28–29.

88. *Id.* at 11.

89. *Id.* at 11.

III. SOLUTIONS

A. Why Should Changes Be Made? Who Should We Care About the Most?

Reforming the foreclosure process raises an important question about which party should bear the costs of inefficiencies or gaps in the law. It is true that borrowers are not always without fault in the foreclosure situation. “While people generally sympathize with the victims of predatory lending, they are reluctant to help those who lived beyond their means by accumulating mortgage debt, or those who got burned gambling on house price increases. Unfortunately, it is very hard to differentiate clearly between various groups.”⁹⁰ When developing sound policy and practices for all, it would be nearly impossible to carve out an exception for only those homeowners experiencing a life-altering event (*i.e.*, job loss) and not for those who have made bad decisions. But even if some homeowners are responsible for their own demise, one can safely say that homeowners are the least sophisticated party in most foreclosure proceedings.

Lenders, on the other hand, are generally represented by sophisticated counsel and likely understand their rights and obligations, especially relative to borrowers. Setting aside the fact that predatory and subprime lending contributed greatly to the current state of crisis, which may justify placing the burden of abandoned properties on lenders going forward, lenders are better situated than borrowers to utilize contractual provisions and market strategies to absorb increased expenses. In fact, lenders already do this by differentiating interest rates based on borrower risk. As the problems addressed in this article suggest, lenders know how to leverage the legal environment in their favor.

The municipality is not a party to the lender-borrower agreement and is not a direct beneficiary of that agreement, but in some situations, the municipality endures steep costs. Absent more heavy regulation on banking and borrowing practices which would likely encounter heavy opposition from both lenders and borrowers, the municipality can protect itself and its citizens by holding either the homeowner or lender responsible for vacant or abandoned homes. As discussed above, holding the homeowner responsible has not ended well for municipalities. Perhaps the time has come to shift the burden to lenders.

90. Kiff & Klyuev, *supra* note 29, at 14.

B. Local Governments

Local officials are best suited to implement changes specific to their communities to address the problems on a local level. The high likelihood that a homeowner will abandon a property subject to foreclosure and the problems that accompany such a decision suggest that the current legal framework should be amended to alter the status quo. Out of deference to municipalities and their more intimate knowledge about their communities and the problems that need to be addressed there, perhaps amendments to local ordinances should be considered before more broadly applicable state law changes.

One commentator has proposed a solution that, at least theoretically, will help insulate true owners from maintenance costs and code violation fines. “[A] comprehensive nuisance law should require that, upon sending the borrower a letter declaring the borrower’s default, accelerating the debt owed, or threatening foreclosure, lenders must register the property with the city and pay a registration fee.”⁹¹ This registration system, coupled with the levying of significant fines for non-compliance, would help to reduce the municipality’s difficulty in connecting properties with their mortgagees.

First, municipalities will be in a much stronger position to address problems resulting from abandoned homes the earlier local officials know of such properties. Part of the problem with the current system is that municipalities may not learn of vacant homes until immediate action is required and continued deterioration has made the property unsalvageable. Currently in Chicago, the responsibility of registration of a vacant structure lies with the owner of the property.⁹² As previously explained, owners are simply walking away from their former homes out of frustration, ignorance of their rights, or any number of other reasons. For those same reasons, it seems unrealistic to expect those homeowners will notify local officials, if at all, in a timely manner. Accordingly, foreclosing lenders are a natural substitute for homeowners because lenders are in an ideal position to know the particular property of concern, know that the homeowner is not fighting the foreclosure process, know whether the homeowner has abandoned or been evicted from the property, and know whether the homeowner has already implicitly consented via the original lender-borrower agreement to be involved in the foreclosure process.

Second, a shift in the burden of vacant building registration from the financially strapped borrower to the lender-mortgagee can simultaneously shift

91. Johnson, *supra* note 39, at 1243.

92. See, e.g., CHICAGO, ILL., MUN. CODE tit. 13, ch. 12, § 125(a)(1) (2008).

the burden of maintenance and repair costs.⁹³ The charging of a registration fee will reduce the impact that lost revenues as a result of foreclosure have on a municipality's bottom line. This "replacement" revenue will at least aid the locality in offsetting foreclosure costs.

Third, the registration process will serve as notice to the municipality, the borrower, and any other interested parties as to the identity of the foreclosing lender. As discussed, lenders currently use MERS as a mechanism to hide their identity, but foreclosing this option may instigate lender accountability. It seems reasonable that a bank involved in far more foreclosures than its market counterparts or responsible for the continued deterioration and blighting of properties may find itself subject to market pressures, such as reduced business, and thus may have incentive to renegotiate mortgages or repair and maintain vacant homes.

C. Legislative Action

If local ordinance changes fail to remedy the systemic issues in the current foreclosure process, then it may be appropriate for state legislators to consider amending the IMFL. The IMFL requires that "[f]or all residential foreclosure actions filed, the plaintiff must attach a Homeowner Notice to the summons."⁹⁴ Section 1504.5 also provides a sample to which the actual notice used must "substantially" conform. As part of that notice, homeowners must be notified that "lawful occupants of a home have the right to live in the home until a judge enters an order for possession" and that homeowners "continue to own [their] home until the court rules otherwise."⁹⁵ Though this notice seems clear enough, the practical reality remains that many homeowners abandon their properties after their lenders file foreclosure complaints. If homeowners understood this right, why would they not remain in the property until the foreclosure process is complete?

It may help to inform homeowners of their rights in the event of foreclosure when they enter into a mortgage rather than when they have

93. Johnson, *supra* note 39, at 1244–45.

Unlike Columbus, city leaders in Chula Vista, California, passed an ordinance with a registration requirement that is triggered upon the first notice of default. Charging lenders a registration fee is necessary to cover the city's cost of monitoring abandonment and cost of hiring additional staff to bring enforcement proceedings. While some lenders have resisted compliance with the registration ordinance, some are complying, and Chula Vista has generated \$31,500 in revenue from its \$70 per-property registration fee. *Id.*

94. 735 ILL. COMP. STAT. 5/1504.5 (2008).

95. *Id.*

defaulted. A homeowner may be better equipped to process this information on the front end rather than when financial difficulties overwhelm all other thoughts. Another suggestion may be to require the judge in the foreclosure action to explain these rights to the borrower. Face-to-face explanation may better inform the typical unsophisticated borrower than a Homeowner Notice arriving in the mail along with other complex legal documents informing him or her that he or she will soon lose his or her home. However, this solution would only work if the homeowners appeared in court proceedings. Any solution that requires active participation by the homeowner is likely to fail, because the origin of the problem is some homeowners' inability to understand and exercise their legal rights in foreclosure proceedings.⁹⁶

Unfortunately, it very well may be that nothing can be done to better inform borrowers. The problem may simply be one of sophistication, for which the solution is beyond the scope of this article.

Furthermore, the IMFL should be amended to (1) prohibit listing MERS as the mortgage holder on the county recorder of deeds register, (2) require lenders to notify borrowers within a short period of time after the lenders have withdrawn from the foreclosure process, and (3) hold lenders liable for municipal code compliance during foreclosure proceedings once the homeowner abandons the property or the lender-mortgagee evicts the homeowner.

A municipality's inability to identify the lender undercuts the right to seek redress. For this reason, lender identity is a vital piece of information. Having the ability to recover costs from a particular party without knowing its identity is, as a practical matter, meaningless. As a result, forcing lenders to disclose themselves rather than listing a mortgage registration company as a foreclosure plaintiff is a prerequisite to any legitimate enforcement against lending institutions.

Next, borrower notification and lender liability serve overlapping functions. If lenders are required to notify borrowers when the lenders elect to withdraw from the foreclosure process, borrowers would, at a minimum, have a second opportunity (in addition to the section 1504.5 notice) to realize they remain responsible for the property rather than accruing violations and fines that likely will never be paid. Likewise, placing liability on the lenders upon abandonment or eviction will similarly shield homeowners from such exposure. In addition, both of the foregoing will relieve the municipality of

96. For example, a right of entry to cure a defect for which a homeowner is being held responsible is meaningless in light of the fact that an unsophisticated homeowner is unlikely to be aware of this remedy.

the burdens associated with upkeep and maintenance. Lenders will begin to maintain and repair otherwise dilapidated homes or face financial penalties.⁹⁷

At least one jurisdiction has implemented a statute to persuade lenders to care for properties in lieu of maintenance by the record owners. The New Jersey legislature passed the Save New Jersey Homes Act of 2008 to require creditors to abate nuisances after the owner of record vacates a residential property.⁹⁸ The statute requires as follows:

If a residential property becomes vacant after the filing of the notice of intention but prior to completion of foreclosure, and the property is found to be a nuisance or in violation of any applicable State or local code, the local public officer or municipal clerk shall notify the creditor which shall have the responsibility to abate the nuisance or correct the violation. If the creditor fails to do so, and the municipality expends public funds in order to abate a nuisance or correct a violation, the public officer or municipal clerk shall have the same recourse against the creditor it would have against the owner, including but not limited to the recourse provided under N.J.S.A. 55:19-100 and placing a lien on the property.⁹⁹

An important part of such provisions is the municipality's ability to assess penalties against the lenders in addition to recouping maintenance and repair costs. If the statute merely provides for reimbursement of actual costs, then lenders will have little incentive to remain proactive in the monitoring and repair of abandoned homes. The lender has nothing to lose (actual maintenance costs are the same) and something to gain (avoiding transaction costs) by ignoring the issue until receiving a bill from the municipality.¹⁰⁰ But, stiff penalties can either provide the necessary incentive to lenders to bring properties into compliance or at least reimburse municipalities for funds expended.

97. Of course, assessing penalties in an amount greater than the repair and maintenance costs will create greater incentive for lenders to adopt a proactive approach for caring for vacant or abandoned homes. If, as in the New Jersey statute discussed, the penalty is simply one of reimbursement of expenses, lenders will still have little incentive to exercise what additional effort is needed to repair or maintain properties in the first instance.

98. 30 MYRON C. WEINSTEIN, *LAW OF MORTGAGES, NEW JERSEY PRACTICE SERIES* § 29B.36 (2009) (citing N.J. STAT. ANN. 46:10B-51b, c (West 2009)).

99. *Id.* The New Jersey Foreclosure Fairness Act, S-2777 § 17 (2010), which is pending in the New Jersey legislature, amends the Save New Jersey Homes Act of 2008 to provide for creditor responsibility after the "filing" of the foreclosure complaint.

100. It is worth noting that a lender may also decide to forgo property maintenance when the expense outweighs the value of the property. Undertaking repairs under such circumstances would only mean throwing good money after bad, since the lender could have no reasonable hope of recovering its expenditures.

IV. CONCLUSION

Mortgage defaults in American municipalities are inevitable. The accompanying foreclosures and the widespread problems they bring are not neighborhood-specific concerns. Although metropolitan neighborhoods characterized by color are at the present time the most notably affected areas, the problem of abandoned, dilapidated buildings subject to foreclosure is a concern for all city residents. Municipalities are currently struggling with both increased direct monetary costs as well as increased non-pecuniary costs of foreclosure. A municipality must fulfill its duty to secure the health and safety of its residents. Therefore, municipalities have little choice but to devote already scarce resources to maintain and secure vacant or abandoned buildings. When these issues are not addressed, a host of social ills arise. City residents at large suffer because the monetary costs expended to remedy safety, health, and fire hazards usually cannot be recovered. The current mortgage crisis and the overwhelming public concern provide a perfect backdrop upon which to consider amending local ordinances and state law. Such revision is necessary to better inform and protect borrowers, increase lender accountability, and insulate municipalities from the costs thrust upon them by the current foreclosure process.

