

# Vacant Property Registration Ordinances

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## Abstract

*The many cost to local governments associated with high levels unoccupied buildings is an overlooked consequence of the recent foreclosure crisis. In response to the risk of such buildings deteriorating, an increasing number of local governments are enacting vacant property registration ordinances. These ordinances seek to discourage vacancy, maintain unoccupied buildings to an acceptable community standard, keep a database of contact information of the parties responsible for unoccupied buildings, or any combination of these goals. This article analyzes the prevalence of the two primary types of ordinances: based on length of vacancy or on foreclosure status. It also discusses emerging trends in these ordinances. Then, this article addresses the legal foundation for enforcement of these ordinances. Finally, the article concludes that local governments enacting successful VPR schemes tailored such ordinances to local needs and support vigorous code enforcement. In addition to this conclusion, this article sets out recommendations regarding local government involvement with the Mortgage Electronic Registration System, state-wide registration ordinances, and federal vacant property support.*

An often-overlooked consequence of the recent foreclosure crisis is the rising level of unoccupied buildings and the burden placed on local governments if such buildings begin to deteriorate.<sup>1</sup> In a recent survey from the National Vacant Property Campaign, sixteen out of nineteen surveyed cities

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<sup>1</sup>See Creola Johnson, *Fight Blight: Cities Sue to Hold Lenders Responsible for the Rise in Foreclosures and Abandoned Properties*, 2008 UTAH L. REV. 1169, 1174 (2008) (suggesting that the rise in vacant properties is an often overlooked consequence of the foreclosure crisis).

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reported an increase in vacant properties ranging from 16% to 40% over the same time the previous year.<sup>2</sup> Unoccupied buildings with the potential to deteriorate in condition present local governments<sup>3</sup> with devastating social and economic costs.<sup>4</sup> Vacancy increases the risk of vandalism and arson in buildings, in turn increasing fire control and police costs.<sup>5</sup> Additionally, local governments often shoulder the cost of demolition and maintenance of abandoned buildings.<sup>6</sup> High levels of deteriorating unoccupied buildings also present local governments with bigger legal expenses, lost property tax revenue, and decreasing property values.<sup>7</sup> Such buildings also make it more difficult for a local government to recover from an economic downturn by encouraging increased development.<sup>8</sup> Older industrial cities in the Midwest, such as Detroit, Flint, and Cleveland, have battled the negative impacts of high levels of vacant properties for years and continue to do so today.<sup>9</sup> Now, an increasing number of local governments nationwide are facing a similar crisis and are looking for creative solutions.<sup>10</sup>

Further complicating these problems is the difficulty local governments face in figuring out who owns title to these

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<sup>2</sup>Joseph Schilling, *Code Enforcement and Community Stabilization: The Forgotten First Responders to Vacant and Foreclosed Homes*, 2 ALB. GOV'T L. REV. 101, 123–24 (2009).

<sup>3</sup>This paper uses the term “local government” in a collective sense, without differentiation between counties, municipalities, cities, and townships.

<sup>4</sup>See Johnson, *supra* note 1, at 1174 (discussing the motivation for enacting VPR ordinances); Schilling, *supra* note 2, at 124 (highlighting the increase in municipal costs imposed by high levels of vacant properties).

<sup>5</sup>Dan Immergluck, *Foreclosed: High-Risk Lending, Deregulation, and the Undermining of America’s Mortgage Market* 152 (2009).

<sup>6</sup>*Id.*

<sup>7</sup>*Id.*

<sup>8</sup>*Id.*

<sup>9</sup>See Alex Kotlowitz, *All Boarded Up*, *New York Times Magazine* Preview (March 8, 2009) (discussing problems with vacant properties in Cleveland, Ohio).

<sup>10</sup>See, e.g., Doug Leeper, *City of Chula Vista Code Enforcement Manager, Testimony before the House Subcommittee on Domestic Policy, Neighborhoods: The Blameless Victims of the Sub-Prime Mortgage Crisis* (May 21, 2008) *available at* [oversight.house.gov/images/stories/documents/20080522110137.pdf](http://oversight.house.gov/images/stories/documents/20080522110137.pdf) *last visited* December 4, 2009 (describing Chula Vista’s attempt to preempt the negative effects of vacancies resulting from the foreclosure crisis).

vacant properties. Cities like Cincinnati have seen a dramatic increase in properties owned by lenders after foreclosure, called “real estate owned” (REO) properties.<sup>11</sup> One article found that as early as 2004, banks owed Cincinnati over \$200,000 in barricade and demolition costs that the city incurred dealing with deteriorating buildings.<sup>12</sup> One problem is that lenders often do not record foreclosure actions or walk away from foreclosure actions, which makes it extremely difficult to locate the true owner of the property if the property condition starts to deteriorate.<sup>13</sup> Additionally, originating lenders regularly assign the note and security instrument into a securitization pool, which another entity then sells to investors on the secondary mortgage market.<sup>14</sup> Accordingly, simply trying to identify the responsible party for unoccupied buildings creates an immense burden on local governments.<sup>15</sup> One frustrated city code official trying to maintain vacant property stated, “Mortgage brokers and lenders buy, sell and trade mortgage loans like baseball cards and Halloween candy.”<sup>16</sup>

Lack of contact information for a party responsible for vacant property causes practical problems for local governments beyond lack of cost recovery. For example, when prosecutors in Cincinnati attempted to convict a man found breaking and entering into a vacant building, they could not find an owner to testify that the man did not have permission to enter the house.<sup>17</sup> Fannie Mae had a deed filed with the county recorder’s office, but claimed the deed was filed in error.<sup>18</sup> After finally determining that the owner was Washington Mutual Bank, it was too late for the bank to send a representative to trial and the prosecutors made a

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<sup>11</sup>Gregory Korte, City Foots Bill on Foreclosures, *Cincinnati Enquirer* (November 25, 2007).

<sup>12</sup>*Id.*

<sup>13</sup>Gregory Korte, Who Cares for Foreclosures?, *Cincinnati Enquirer* (December 14, 2007); Kermit J. Lind, *The Perfect Storm: An Eyewitness Report from Ground Zero in Cleveland’s Neighborhoods*, 17 *J. AFFORDABLE HOUS. & CMTY. DEV. L.* 237, 240 (2008).

<sup>14</sup>IMMERGLUCK, *supra* note 5, at 36–37.

<sup>15</sup>*See* Leeper, *supra* note 10, at 6 (discussing the burden on code enforcement in finding parties responsible for parties).

<sup>16</sup>*Id.* at 3.

<sup>17</sup>Korte, *supra* note 11.

<sup>18</sup>*Id.*

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deal with the man, which let him out of jail quickly.<sup>19</sup> Lack of contact information hampered the city's ability send a message deterring future criminal activity in unoccupied buildings.

In part because of these difficulties, local governments are enacting various forms of vacant property registration (VPR) ordinances.<sup>20</sup> VPR ordinances seek to create a mechanism for identifying the potentially responsible parties for unoccupied building and impose appropriate costs upon those parties by requiring registration of vacant property with the local government.<sup>21</sup> According to Safeguard Properties, a mortgage field services company that tracks VPR ordinances, over 240 local governments enacted some variation of VPR ordinances as of September 2009.<sup>22</sup> An additional 45 local governments have proposed VPR schemes.<sup>23</sup> The U.S. Congress has even taken interest in VPR plans, inviting a local VPR enforcement officer to testify before Congress about using VPR to mitigate the damages caused to neighborhoods by the subprime mortgage crisis.<sup>24</sup>

For many local governments, one purpose for VPR is to maintain contact information for responsible parties in order to help recoup the costs associated with local government expenditures to maintain or demolish unoccupied buildings.<sup>25</sup> Additionally, local governments seek to discourage vacancy, mismanagement of property, or both through fees and strict enforcement of maintenance requirements.<sup>26</sup>

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<sup>19</sup>*Id.*

<sup>20</sup>See Janice Neumann, *The Growing Charge of the Blight Brigade: More Suburbs Join Chorus To Battle Vacant Eyesores*, Chi. Trib. at 1 (Sept. 28, 2008) (describing the proliferation of VPR ordinances in Chicago and surrounding suburbs).

<sup>21</sup>Leeper, *supra* note 10, at 2 (discussing the purpose of Chula Vista's ordinance).

<sup>22</sup>Safeguard Properties, *Vacant Property Registration Ordinances Database (2009)* available at [www.safeguardproperties.com/vpr/city.php](http://www.safeguardproperties.com/vpr/city.php) (last visited September 18, 2009).

<sup>23</sup>*Id.*

<sup>24</sup>Leeper, *supra* note 10, at 2.

<sup>25</sup>See Neumann, *supra* note 20, at 1 (discussing the reasons behind requiring VPR); see also Lind, *supra* note 13, at 244 (discussing how Cleveland's demolition budget tripled).

<sup>26</sup>*Id.*

While experts at the National Vacant Property Campaign<sup>27</sup> have begun to lay groundwork to analyze VPR ordinances, the prevalence of such ordinances demands further analysis.<sup>28</sup> This Article emphasizes the importance of tailoring VPR ordinances to local needs and goals. Part I analyzes existing VPR ordinances across the country to determine where local governments have enacted such ordinances and what they seek to accomplish. Part I also describes the major forms of VPR ordinances and emerging models and trends. Part II examines the legal foundation for VPR ordinances and litigation surrounding the ordinances. Part III argues that when enacting VPR ordinances, electronic registration is important, but governments must use caution when dealing the Mortgage Electronic Registration System (MERS). Part III also advocates that local governments develop long-term goals and plans with statewide support and tailor VPR to local goals and needs.

#### I. LOCATION AND CONTENTS OF VPR PROGRAMS

VPR ordinances exist in cities as large as Chicago, Illinois, and as small as Twinsburg, Ohio, with a population around seventeen thousand.<sup>29</sup> Such ordinances are not limited to local governments; Connecticut and Texas have also enacted some form of VPR statute.<sup>30</sup> Figure 1 shows the states with

<sup>27</sup>The National Vacant Property Campaign “is a project of Smart Growth America (SGA), Local Initiatives Support Corporation (LISC), the Metropolitan Institute at Virginia Tech, and the Genesee Institute.” See National Vacant Property Campaign Website, [www.vacantproperties.org/who/campaign.html](http://www.vacantproperties.org/who/campaign.html). The campaign seeks to bring “diverse stakeholders together to create a unified coalition of organizations acting to make vacant property reclamation an attainable goal nationwide.” *Id.* A commentator associated with the campaign, Joseph Schilling, has previously written on VPR ordinances. Schilling, *supra* note 2, at 130–31.

<sup>28</sup>See generally National Vacant Properties Campaign, *Strategies & Technical Tools*, [www.vacantproperties.org/strategies/tools.html](http://www.vacantproperties.org/strategies/tools.html) (last visited September 18, 2009).

<sup>29</sup>Chicago, Ill., Municipal Code of Chicago § 13-12-125 (2008), available at [egov.cityofchicago.org/city/webportal/portalDeptCategoryAction.do?deptCategoryOID=-536883472&contentType=COC\\_\\_EDITORIAL&topChannelName=Dept&entityName=Buildings&deptMainCategoryOID=-536883465](http://egov.cityofchicago.org/city/webportal/portalDeptCategoryAction.do?deptCategoryOID=-536883472&contentType=COC__EDITORIAL&topChannelName=Dept&entityName=Buildings&deptMainCategoryOID=-536883465) (last visited December 4, 2009); Twinsburg, Ohio Ordinance 55-2009 (2009), available at <http://www.mytwinsburg.com/assets/attachments/file/Ordinance%2055-2009.pdf>. Population data comes from the 2000 U.S. Census, [www.census.gov/main/www/cen2000.html](http://www.census.gov/main/www/cen2000.html).

<sup>30</sup>See An Act Concerning Neighborhood Protection, Connecticut Public Act No. 09-144 (Oct. 1, 2009), available at [www.cga.ct.gov/2009/ACT/PA/2009PA-00144-R00SB-00951-PA.htm](http://www.cga.ct.gov/2009/ACT/PA/2009PA-00144-R00SB-00951-PA.htm) (last visited Dec. 10, 2009) (requir-

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the highest concentration of VPR ordinances.<sup>31</sup> These states roughly correspond to the states with the highest concentration of foreclosures.

The needs of these jurisdictions vary greatly, as do the VPR ordinances they enact. At the outset, it is important to note that these ordinances generally require one of two types of registration, or a combination of the two: the classic model, requiring registration based on length of vacancy, and the Chula Vista model, requiring registration initiated at foreclosure.<sup>32</sup> Broadly, ordinances address four key considerations: (1) a local government's VPR goals, (2) specifics of the registration process, (3) affirmative duties of potentially responsible parties, (4) enforcement mechanisms.<sup>33</sup> The last consideration, enforcement, is fairly consistent across jurisdictions: local governments impose municipal or criminal fines.<sup>34</sup> If fees remain unpaid, the local government places a lien against the property.<sup>35</sup> There is significant variation in the first three considerations, and this section addresses consideration in turn.

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ing all properties obtained after October 1, 2009 due to foreclosure to be registered with the town clerk in the local municipality where the property is registered or, alternatively, with MERS); An Act relating to municipal registration of vacant buildings; providing a penalty, Texas Local Government Code § 1, ch. 214 (2009), *available at* [www.legis.state.tx.us/tlodocs/81R/billtext/pdf/HB03065I.pdf](http://www.legis.state.tx.us/tlodocs/81R/billtext/pdf/HB03065I.pdf) (last visited Dec. 10, 2009) (expressly allowing local municipalities to enact VPR ordinances, including insurance requirements, and makes it a misdemeanor to violate a local VPR ordinance).

<sup>31</sup>It should be noted that Figures 1, 2, and 3, based on Safeguard Properties database, counts one ordinance per city, regardless of the size of the city. An ordinance in Chicago has a much broader impact than an ordinance in Twinsburg.

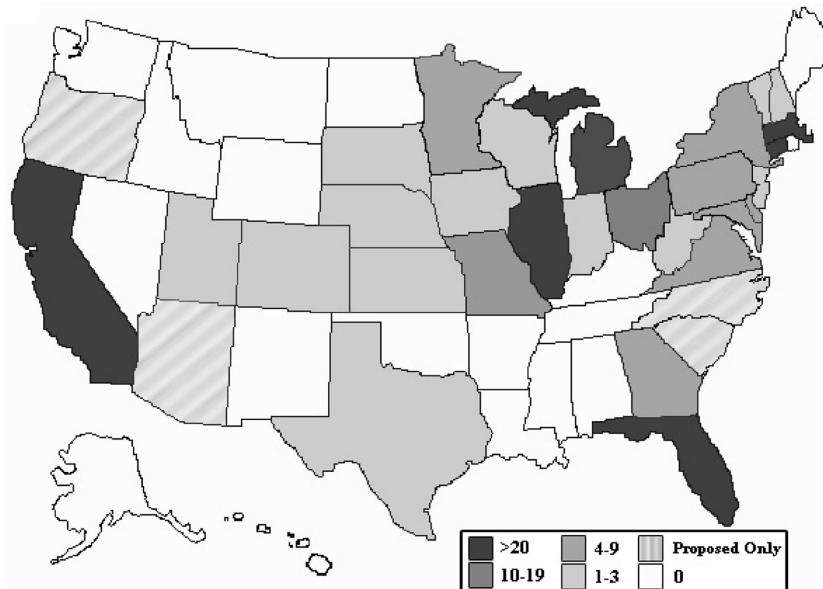
<sup>32</sup>Schilling, *supra* note 2, at 130–31.

<sup>33</sup>*Compare* Schilling, *supra* note 2, at 131 (breaking down VPR into five elements). Professor Schilling's elements track the actual statutory provisions of VPR ordinance, most closely following Chula Vista's ordinance. *Id.* His elements are: "1) scope and definitions; 2) registration/notification process and fee structure; 3) property maintenance standards; 4) re-use activities and plan; and 5) enforcement and cost recovery." *Id.*

<sup>34</sup>*See* Altoona, Pa., Ordinance 5564, § 1003.3 (2008), *available at* [www.altoonapa.gov/altoona/lib/altoona/vacant\\_\\_property.pdf](http://www.altoonapa.gov/altoona/lib/altoona/vacant__property.pdf) (requiring \$100–\$500 fines per offense); Texas Local Government Code § 1, ch. 214 (making violation of local VPR ordinances a class C misdemeanor, punishable by a fine up to \$500).

<sup>35</sup>*See* Wilmington, Del., Municipal Code ch. 4, § 4-27 § 125.00 (2003) (allowing liens against non-compliant property) *available at* [www.municod.com/resources/gateway.asp?pid=11715&sid=8](http://www.municod.com/resources/gateway.asp?pid=11715&sid=8).





**Figure 1: Number of VPR Ordinances per State in 2009.<sup>36</sup> Connecticut is counted as >20 because all cities are enabled to enforce the statewide VPR ordinance.**

#### **A. VPR Goals and Definitions**

The first key element of a VPR scheme is determining a local government’s goals, typically evident through an ordinance’s scope/purpose section or through an ordinance’s definition of “vacancy.” While VPR ordinances have the potential to produce revenue, local governments usually do not state raising revenue as a primary objective.<sup>37</sup> Local governments typically target VPR ordinances at properties with buildings without legal occupants that are at risk of degenerating if not properly maintained. Most ordinances target these buildings regardless of whether they are vacant and secured or vacant and open.<sup>38</sup> According to many local governments, these unoccupied structures are “more likely than occupied structures to become sites of . . . ordinance violations and illegal activity” which are detrimental to the

<sup>36</sup>Safeguard Properties, *supra* note 22.

<sup>37</sup>See Leeper, *supra* note 10, at 2 (describing how Chula Vista’s ordinance has raised revenue, but also describing the program’s primary objective).

<sup>38</sup>See, e.g., Smyrna, Del., Code § 18-1557 (2007) (“Registration shall be required for all vacant buildings, whether vacant and secure, vacant and open or vacant and boarded”).

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health, safety, and welfare of local governments.<sup>39</sup> Local governments often bear the burden of demolishing or maintaining these properties if they cannot find the owner, making registration an attractive option. Local governments use definitions of vacancy that generally target these properties, but are broad enough to allow the government discretion in enforcing the ordinance to meet local needs.

In foreclosure-initiated VPR ordinances, the scope section commonly describes that the ordinance seeks “to protect residential neighborhoods from becoming blighted through the lack of adequate maintenance and security of abandoned properties.”<sup>40</sup> The local government targets properties after occupants leave due to a notice of foreclosure, when the condition of vacant buildings often starts to decline due to negligence of the foreclosing entity.<sup>41</sup> To determine whether a property is vacant, after the initiation of foreclosure, the ordinance looks at if a residential building lacks legal occupants or shows “evidence of vacancy.”<sup>42</sup> The ordinance defines “evidence of vacancy” as “any condition that on its own, or combined with other conditions present would lead a reasonable person to believe that the property is vacant.”<sup>43</sup>

Classic model ordinances usually affect unoccupied commercial and residential buildings.<sup>44</sup> As an example, the city of Wilmington, Delaware, deems a building or structure occupied “if one or more persons actually conducts a lawful business or resides in all or any part of the building as the licensed business-occupant, or as the legal or equitable owner/occupant(s) or tenant(s) on a permanent, nontransient

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<sup>39</sup> Arlington, Tex. Ordinance No. 08-053 (2008).

<sup>40</sup> Leeper, *supra* note 10, at 7.

<sup>41</sup> *Id.* at 2.

<sup>42</sup> *Id.* at 10.

<sup>43</sup> *Id.* at 8. Examples of such conditions includes: “overgrown and/or dead vegetation, accumulation of newspapers, circulars, flyers and/or mail, past due utility notices and/or disconnected utilities, accumulation of trash, junk and/or debris, the absence of window coverings such as curtains, blinds and/or shutters, the absence of furnishings and/or personal items consistent with residential habitation, statements by neighbors, passersby, delivery agents, government employees that the property is vacant.” *Id.* at 9.

<sup>44</sup> Sometimes classic model ordinances target residential properties, particularly ordinances combining foreclosure initiated and classic model provisions. See Boston, Mass., An Ordinance Regulating the Maintenance of Abandoned, Foreclosing Residential Properties (2008) available at [www.safeguardproperties.com/pub/pdf/boston\\_vacant\\_ord46\\_2.pdf](http://www.safeguardproperties.com/pub/pdf/boston_vacant_ord46_2.pdf).



basis, or any combination of the same.”<sup>45</sup> Once a city begins investigating a building it believes is vacant, an owner can prove the property is occupied by showing any of the following:

regular receipt of delivery of regular mail through the U.S. Postal Service; proof of continual telephone, electric, gas, heating, water and sewer services; a valid city business license, or the most recent, federal, state, or city income tax statements indicating that the subject property is the official business or residence address of the person or business claiming occupancy; or proof of pre-rental inspection.<sup>46</sup>

As further example, when determining vacancy for purposes of VPR, Chicago considers the percentage of occupied square footage in a building, the presence of rental/for sale signs on a property, the percentage of units occupied in a multi-unit building, and the part-time residency of a property.<sup>47</sup> Along with lack of occupancy, Chicago looks at public nuisance factors (criminal activity, unkempt lawn) to identify vacant property.<sup>48</sup> The VPR ordinance in Arlington, Texas broadly covers any “structure which is built for the support, shelter, or enclosure or partial enclosure of persons, animal, chattel or moveable property of any kind,” but exempts “for sale” properties and properties issued a permit for repair/remodel.<sup>49</sup>

These definitions encompass properties that may never show signs of deterioration. Broad definitions give local officials greater flexibility in targeting enforcement of the ordinance against the parties responsible for buildings that the local government thinks have a potential for deterioration and pose the greatest threat to the health, safety, and welfare of the community. It is important to note that some local governments seek to maintain such properties to a certain community standard,<sup>50</sup> while other local governments

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<sup>45</sup>Wilmington, Del., Code for the City of Wilmington, Delaware, ch. 4 § 27, 125.00 (2003) (allowing liens against non-compliant property) available at [www.municode.com/resources/gateway.asp?pid=11715&sid=8](http://www.municode.com/resources/gateway.asp?pid=11715&sid=8).

<sup>46</sup>*Id.*

<sup>47</sup>Chicago, Ill., Municipal Code § 13-12-125 (2008).

<sup>48</sup>City of Chicago VPR Website Frequently Asked Questions, [ipi.cityofchicago.org/VacantBuildings/Help.aspx](http://ipi.cityofchicago.org/VacantBuildings/Help.aspx).

<sup>49</sup>Arlington, Tex., Ordinance No. 08-053 (2008).

<sup>50</sup>*See, e.g.,* Leeper, *supra* note 10, at 2 (describing Chula Vista’s ordinance, which charges a low registration fee, as a “registration and maintenance ordinance”).

additionally seek to promote rehabilitation or demolition of the property at the cost of private owner.<sup>51</sup>

This ability to target those properties that a local government believes are at the greatest risk for deterioration is the greatest benefit of VPR ordinances over other alternatives for dealing with vacant properties. For instance, one alternative method of dealing with vacant properties is differential property tax rates, which charges higher taxes on vacant properties.<sup>52</sup> As noted by Alan Mallach, senior fellow of the National Housing Institute, fees from VPR ordinances “can be more precisely targeted [than differential property tax rates], and . . . can be more easily waived at the city’s discretion as an incentive for the owner to rehabilitate the property.”<sup>53</sup> In many jurisdictions, VPR ordinances improve maintenance of unoccupied building better than increased enforcement of existing nuisance abatement codes because many unoccupied buildings do not yet technically violate the housing codes.<sup>54</sup> Additionally, many housing codes do not deal with security or aesthetics of unoccupied buildings.<sup>55</sup> Though a local government may be able to wait until the building deteriorates to a level that would violate housing codes, the hope is that VPR will allow local governments to preempt such deterioration. Additionally, unlike VPR, housing codes do not help with the problem of tracking down responsible parties for vacant properties.<sup>56</sup>

***B. Registration Processes: The Classic Model and the Chula Vista Model***

This section discusses the two primary models of registration processes used in VPR ordinances and the nuances of each. This section first discusses the classic model, along with a variation that enacts an escalating fee schedule. Second, this section discusses the foreclosure-initiated or “Chula Vista” model. Third, this section briefly discusses the emerging trends of combination ordinances and alternative

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<sup>51</sup>See, e.g., Smyrna, Del., Ordinance Sec. 18-1557 (2007) (allowing waiver upon the owner demonstrating “he/she is in the process of demolition, rehabilitation, or other substantial repair of the vacant building”).

<sup>52</sup>Alan Mallach, *Bringing Buildings Back: From Abandoned Properties to Community Assets* 145, 149 (2006).

<sup>53</sup>*Id.*

<sup>54</sup>Daniel DeMaina, *Foreclosure crisis prompts proposed ‘vacant property’ law*, Melrose Free Press (August 13, 2009).

<sup>55</sup>*Id.*

<sup>56</sup>*Id.*

registration with the Mortgage Electronic Registration System (MERS).

**i. *The Classic Model***

In the classic model, local governments require property owners to register the property after a certain length of vacancy.<sup>57</sup> The government collects annual fees from the owner for as long as the property is vacant, even when the property remains compliant with maintenance and security provisions.<sup>58</sup> Most classic VPR ordinances seek contact information for responsible parties and require them to shoulder the burden of maintaining vacant property, charging fees to recoup costs of registration and inspection and using fines to enforce compliance.<sup>59</sup> Some impose larger fees, aimed at discouraging the existence of vacant buildings with the potential to deteriorate.<sup>60</sup> Local governments shoulder the burden of discovering vacancy and enforcing the statute, though some local governments establish phone lines for the public to report abandoned buildings.<sup>61</sup> Varying significantly amongst local governments, this model typically regulates all forms of property, including residential and commercial, and all types of property owners.<sup>62</sup> As shown in Figure 2, these simple ordinances are the most common type of VPR ordinance. Figure 3 shows that these are also the oldest form of VPR ordinance and have increased in popularity during the recent housing crisis.

The classic model contains two variations: ordinances with escalating fees and ordinances with flat fees. As of October

<sup>57</sup>See, e.g., Chicago, Ill., Municipal Code § 13-12-125 (2008).

<sup>58</sup>See, e.g., *Id.*

<sup>59</sup>Greta Guest, Vacant Home Regulations Increase, Detroit Free Press (Nov. 15, 2009) available at [www.freep.com/article/200911150300/BUSINESS04/911150351](http://www.freep.com/article/200911150300/BUSINESS04/911150351).

<sup>60</sup>Altoona, Pa., Ordinance 5564, § 1003.3 (2008), available at [www.altoonapa.gov/altoona/lib/altoona/vacant\\_\\_property.pdf](http://www.altoonapa.gov/altoona/lib/altoona/vacant__property.pdf).

<sup>61</sup>See Guest, *supra* note 59 (describing a phone line established in Southfield, MI); City of Chicago 311 Webpage, [egov.cityofchicago.org/city/webportal/portalContentItemAction.do?blockName=311+City+Services/Service+Request+Descriptions/I+Want+To&deptMainCategoryOID=-536884534&channelId=0&programId=0&entityName=311+City+Services&topChannelName=Dept&contentOID=536913580&Failed\\_\\_Reason=Session+not+found&contentTypeName=COC\\_\\_EDITORIAL&com.broadvision.session.new=Yes&Failed\\_\\_Page=/webportal/portalContentItemAction.do&context=dept](http://egov.cityofchicago.org/city/webportal/portalContentItemAction.do?blockName=311+City+Services/Service+Request+Descriptions/I+Want+To&deptMainCategoryOID=-536884534&channelId=0&programId=0&entityName=311+City+Services&topChannelName=Dept&contentOID=536913580&Failed__Reason=Session+not+found&contentTypeName=COC__EDITORIAL&com.broadvision.session.new=Yes&Failed__Page=/webportal/portalContentItemAction.do&context=dept) (describing how you can call and file a complaint regarding unoccupied buildings that are not boarded).

<sup>62</sup>Schilling, *supra* note 2, at 130–31.

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2009, twenty-eight of the cities listed in Safeguard Properties database had enacted VPR ordinances with escalating fee structures.<sup>63</sup> As seen in Figure 2, this constitutes approximately 11% of currently enacted VPR ordinances. Figure 3 shows that though the amount of escalating fee provisions are increasing, the rate of increase is less than for flat fee provisions. Though the exact amounts vary, jurisdictions with escalating fee provisions enact rigid fee schedules that outline the amount an owner can expect to pay annually. Every year that the property is vacant the annual fee increases. For example, Altoona, Pennsylvania, enacted a typical classic model escalating fee VPR ordinance.<sup>64</sup> If the property is vacant for less than one year, there is no fee.<sup>65</sup> After one year vacant, the fee is \$500, two years is \$1,000, three-four years is \$2,000, five-nine years is \$3,500, ten years is \$5,000, and every year above 10 years vacant, the fee increases \$500.<sup>66</sup> These ordinances provide a strong incentive for owners to sell, lease, or demolish the property at their own cost, ideally relieving local governments of the burden of dealing with the property once it degenerates. Wilmington, Delaware, the first city with an escalating fee provision, enacted the ordinance in the aftermath of a report showing that vacant properties contributed to the difficulties in “problem” areas of the city.<sup>67</sup> Particularly, unoccupied buildings harbored drug and other criminal activity.<sup>68</sup> Rather than desiring mere maintenance of unoccupied buildings, Wilmington wanted them demolished or rehabilitated.<sup>69</sup>

Escalating fee provisions have proven successful in certain jurisdictions. By using an escalating fee schedule, Wilmington has decreased vacant properties, along with generating substantial revenue.<sup>70</sup> Wilmington reported vacant properties decreased by 6.4% and fee collection increased by 82.5%

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<sup>63</sup>Safeguard Properties, *supra* note 22.

<sup>64</sup>Altoona, Pa., Ordinance 5564, § 1003.3 (2008), *available at* [www.altoonapa.gov/altoona/lib/altoona/vacant\\_\\_property.pdf](http://www.altoonapa.gov/altoona/lib/altoona/vacant__property.pdf).

<sup>65</sup>*Id.*

<sup>66</sup>*Id.*

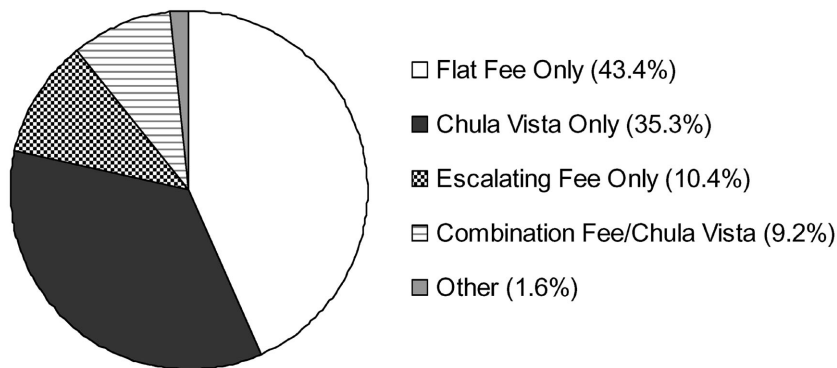
<sup>67</sup>United States Conference of Mayors, *Combating Problems of Vacant and Abandoned Properties: Best Practices in 27 Cities* 40 (2006).

<sup>68</sup>*Id.*

<sup>69</sup>Wilmington, Del., Municipal Code ch. 4, § 4-27 § 125.0(a) (2003).

<sup>70</sup>Schilling, *supra* note 2, at 139–40.

from September 2006 to September 2007.<sup>71</sup> Since the Wilmington ordinance's enactment in 2003, the number of vacant properties has decreased by 22% and in 2007 alone, the city collected \$1,050,000 in fees.<sup>72</sup> Yet Wilmington is still battling properties that have been vacant for a long time (five to ten years), where owners chose to pay high fees rather rehabilitate the property.<sup>73</sup> Similarly, Cincinnati, Ohio, after experiencing disappointing results from their flat-fee VPR ordinance, amended their ordinance to require an escalating fee.<sup>74</sup> With the new ordinance, the city increased compliance rates and recovered nearly five times more money in fees.<sup>75</sup>



**Figure 2: Percentage of Different Types of VPR Ordinances<sup>76</sup>**

<sup>71</sup>*Id.*

<sup>72</sup>*Id.* at 139.

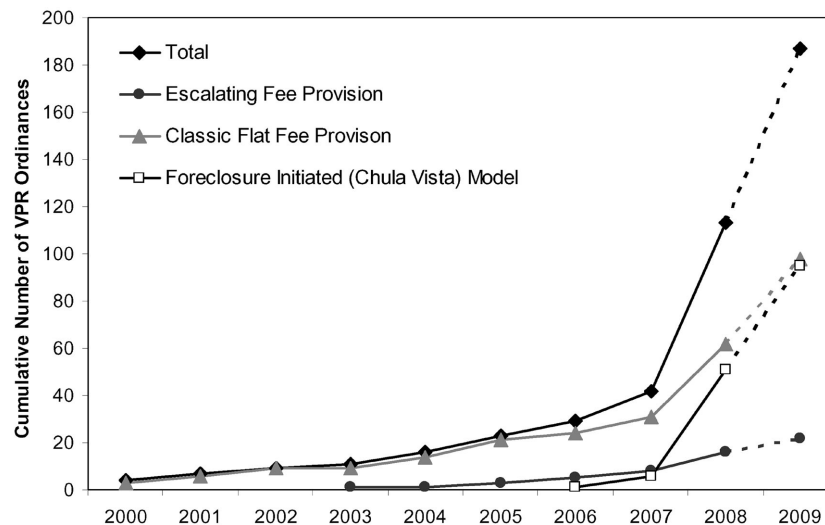
<sup>73</sup>*Id.* at 140.

<sup>74</sup>*Id.* at 140–41.

<sup>75</sup>*Id.* at 131 citing Edward Cunningham, Supervisor of Inspections, City of Cincinnati, Presentation before the Reclaiming Vacant Properties Conference 2007, Vacated Building Maintenance Licensing & Registration Programs 44 (Sept. 24, 2007) and Cincinnati, Ohio, Building Code § 1101-129.3A (2006).

<sup>76</sup>This chart confines its inquiry to the cities listed in Safeguard Properties Vacant Property Registration Database. Safeguard Properties, *supra* note 22.

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**Figure 3: Increase in Total Amount of VPR Ordinances Provisions (for combination ordinances, this chart includes all provisions utilized). 2009 values are up until October 2009.<sup>77</sup>**

### ii. *The Chula Vista Model*

The Chula Vista model<sup>78</sup> seeks to require mortgage lenders and servicers foreclosing on residential buildings to maintain the buildings after the former owners vacate the property.<sup>79</sup> This model targets residential buildings vacant during the period between when the lender records notice of foreclosure and when a foreclosure sale occurs, when the building is at risk of deteriorating.<sup>80</sup> This period varies by state, from as little as sixty days in states with a non-judicial process, to up to seven months in states with judicial proceedings.<sup>81</sup> Though borrowers or tenants can stay in the home during

<sup>77</sup>This chart confines its inquiry to the cities listed in Safeguard Properties Vacant Property Registration Database. Safeguard Properties, *supra* note 22.

<sup>78</sup>For purposes of this paper, any foreclosure-initiated VPR ordinance is included under the “Chula Vista Model” umbrella. This name comes from the California city that first enacted this type of ordinance. Most foreclosure-initiated VPR ordinances simply copy the language of Chula Vista’s ordinance.

<sup>79</sup>Leeper, *supra* note 10, at 2.

<sup>80</sup>*Id.*

<sup>81</sup>See Marc C. Tow & Associates, State Foreclosure Laws, [www.cdloa.nmod.com/state-foreclosure-laws/](http://www.cdloa.nmod.com/state-foreclosure-laws/) (summarizing the details of the foreclosure processes of all 50 states).



this process, or even longer due to recent tenant protection statutes,<sup>82</sup> Chula Vista found that “approximately 1/3 of the properties in this process are vacant prior to the completion of the foreclosure.”<sup>83</sup>

In order to require property management from private lenders, Chula Vista’s ordinance first requires lenders to inspect the property for occupancy within ten days of filing a notice of foreclosure.<sup>84</sup> Then, if the property is vacant, the lender must register the property with the local government and maintain the property to a determined standard.<sup>85</sup> Lenders claimed they could not enter the property during this period.<sup>86</sup> According to Chula Vista’s code enforcement director, the city’s regulation essentially requires lenders to utilize the “Abandonment and Waste Clause” in most mortgages, which allows them to enter and maintain the property if it is vacant in order to secure the property against vandalism or decay.<sup>87</sup> This method of local governments forcing private parties to use voluntary contract provisions has gone unchallenged in the courts. At the very least, non-compliance with the VPR requirements can result in liens on the property which take priority to the mortgagees interests.

Though the mortgage industry was initially slow to respond, once Chula Vista began to charge lenders and servicers with fines for non-compliance with their VPR ordinance, the industry started to take notice.<sup>88</sup> As Chula Vista collected fees and recorded liens against non-compliant property, the program started to achieve compliance and bring in revenue.<sup>89</sup> Less than eight months after the enactment of Chula Vista’s ordinance, the city’s code enforcement officer testified before Congress that the program had already nearly paid for itself.<sup>90</sup> The city collects money partially through its relatively low registration fee (\$70), but primar-

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<sup>82</sup>See Protecting Tenants at Foreclosure Act of 2009, Pub. L. 111-22 (701), 123 Stat. 1632 (701) (giving further protections to tenants in foreclosed housing, including lease completion and 90-day notice).

<sup>83</sup>Leeper, *supra* note 10, at 14, Attachment B.

<sup>84</sup>*Id.* at 3.

<sup>85</sup>*Id.*

<sup>86</sup>*Id.* at 2.

<sup>87</sup>*Id.*

<sup>88</sup>*Id.* at 5.

<sup>89</sup>*Id.*

<sup>90</sup>*Id.* at 3.

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ily through administrative citations for non-compliance with the VPR ordinance.<sup>91</sup> For example, in the ordinance's first year of operation, the city collected \$77,000 in registration fees and \$850,000 in administrative citations.<sup>92</sup> This ability to achieve mortgage industry compliance quickly stoked the popularity of the Chula Vista model. Commentators have noted that the strength of Chula Vista's code enforcement office has largely led to its success, including "its insistence on weekly property inspections and maintenance" by the city.<sup>93</sup> Regardless, as seen in Figure 2, in a short period, the Chula Vista model has become a very common type of VPR ordinance. Additionally, many ordinances combine both the classic and Chula Vista models. Notably, Figure 3 shows that, in recent years, these types of provisions are increasing at a higher rate than the classic model, forecasting a growing preference for this model's use.

One core feature of the Chula Vista model is that initiation of the foreclosure process triggers the registration requirement, not a local government's discovery of a vacant building. In California, this initiation involves the lender filing a notice of default,<sup>94</sup> but in other states, the first step of foreclosure may differ, changing the act triggering the VPR requirement.<sup>95</sup> A second key feature of the Chula Vista model is how it obligates not only "owners," as the classic model does, but also lenders who have filed a notice of foreclosure. Typical registration language, found in ordinances enacted by the cities of Belton, Missouri,<sup>96</sup> Chula Vista, California,<sup>97</sup> and Deerfield Beach, Florida,<sup>98</sup> reads as follows:

Any [beneficiary under deed of trust covering a property OR beneficiary/trustee who holds a deed of trust on a property OR mortgagee who holds a mortgage on real property] located within the [City Name] shall cause an inspection to be

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<sup>91</sup>Schilling, *supra* note 2, at 131.

<sup>92</sup>*Id.*

<sup>93</sup>*Id.* at 144.

<sup>94</sup>Leeper, *supra* note 10, at 2.

<sup>95</sup>See Deerfield Beach, Fla., Ordinance No. 2008/020 (2008), available at [integratedservicesinternational.com/Documents/Ordinance-Deerfield-Beach\\_FL.pdf](http://integratedservicesinternational.com/Documents/Ordinance-Deerfield-Beach_FL.pdf) (requiring VPR after a trustor defaults).

<sup>96</sup>Belton, Mo., Ordinance No. 2009-3547 (2009), available at [www.safeguardproperties.com/vpr/docs/Belton\\_MO\\_Ordinance.DOC](http://www.safeguardproperties.com/vpr/docs/Belton_MO_Ordinance.DOC).

<sup>97</sup>Chula Vista, Cal., Ordinance No. 3080 (2007), available at [www.safeguardproperties.com/vpr/docs/Chula\\_Vista\\_ca\\_ordinance.pdf](http://www.safeguardproperties.com/vpr/docs/Chula_Vista_ca_ordinance.pdf).

<sup>98</sup>Deerfield Beach, Fla., Ordinance No. 2008/020.

performed of the property that is the security for the deed of trust [within fifteen (15) days of issuing a notice of default to the trustor OR upon default by the trustor, prior to recording a Notice of Default]. If the property is found to be vacant or shows evidence of vacancy, it is, by this article, deemed abandoned and the beneficiary/trustee shall, within ten (10) days of the inspection, register the property with the [code enforcement officer] or his/her designee on forms provided by the City.<sup>99</sup>

Yet not all foreclosure initiated VPR ordinances necessarily obligate lenders. Some merely require that the foreclosing entity identify a person or entity responsible for maintenance, giving them freedom to name another entity or person as the responsible party.<sup>100</sup> Under this approach, there is greater leeway for lenders to delegate responsibility for maintaining vacant properties to other entities unable to maintain the property suitably.

### **iii. *Emerging Trends: Combination Ordinances and MERS Registration***

Some local governments are starting to combine aspects of both the classic model and the Chula Vista model into their VPR ordinances. For example, a number of cities in Massachusetts, require that all owners register a vacant residential building no more than seven days after “initiation of the foreclosure process,” or if the “property has been not been legally occupied for sixty days or more, and/or not properly maintained or secured,” or both.<sup>101</sup> Similarly, Fresno, California, along with other cities in California, enacted Chula Vista’s model ordinance, but additionally enacted another classic model ordinance section dealing with *existing* vacancies that were not involved in the foreclosure process.<sup>102</sup> This model gives local governments more power to address differ-

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<sup>99</sup>The cited ordinances do not use “OR” to provide alternatives, the bracketed terms are meant to showcase alternative phrasing used by different jurisdictions.

<sup>100</sup>Lyndhurst, Ohio, Code of Ordinances Part 13, Title 5, ch. 1393 (2007).

<sup>101</sup>*E.g.*, Springfield, Mass., Title 8, ch. 7.50 (2009), Regulating the Maintenance of Vacant and/or Foreclosing Residential Properties, *available at* [www.safeguardproperties.com/vpr/docs/Springfield\\_MA\\_ordinance.doc](http://www.safeguardproperties.com/vpr/docs/Springfield_MA_ordinance.doc).

<sup>102</sup>*See* Fresno, Cal., Municipal Code and Charter of Fresno, California, Article 6, Sec. 10-617 (2008) (classic model); *see also* Fresno, Cal., Municipal Code and Charter of Fresno, California, Article 6, Sec. 10-620 (2008) (foreclosure-initiated model).

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ent types of vacancies in their effort to avoid deteriorating buildings.

A less popular type of combination ordinance imposes flat fees for some types of property (such as one to three unit properties) and an escalating fee for other types (properties with greater than three units).<sup>103</sup> This type of ordinance puts a high priority on rehabilitation or destruction of unoccupied residential multi-family housing buildings in the jurisdiction, while merely encouraging maintenance of smaller residential buildings. Another ordinance requires no fee for vacant property, but an escalating fee for blighted properties.<sup>104</sup> Accordingly, this ordinance prioritizes destruction or rehabilitation of property that is already in the worst possible condition. Local governments tailored these ordinances to the needs of their local jurisdictions.

Many local governments are also now allowing the alternative of registration with the Mortgage Electronic Registration System (MERS).<sup>105</sup> MERS is a national electronic database system set up by the mortgage industry to track mortgage ownership and servicing rights.<sup>106</sup> MERS claims that it has saved the mortgage industry more than \$1 billion and holds more than 60 million mortgages.<sup>107</sup> When VPR ordinances began to rise, MERS enhanced its system so it could track contact information for vacant property maintenance.<sup>108</sup> To be compliant with VPR schemes allowing alternative registration, the lender need only record on MERS the contact information for the entity responsible for maintaining the building at a given address. While Safeguard Properties' database only notes a little more than forty cities with access to MERS, MERS representatives estimate that approximately 250 cities have access to its database for track-

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<sup>103</sup>See Holyoke, Mass., Eighth Amendment to Chapter 18 of the Revised Code of Ordinances of the City of Holyoke, Massachusetts (1997), available at [www.safeguardproperties.com/vpr/docs/Hoyyoke\\_MA\\_ordinance\\_form\\_fees.pdf](http://www.safeguardproperties.com/vpr/docs/Hoyyoke_MA_ordinance_form_fees.pdf) (enacting this type of ordinance).

<sup>104</sup>Miami, Fla., Code of Ordinances Ch. 10, Art. IV (2008), available at [www.municode.com/resources/gateway.asp?pid=10933&sid=9](http://www.municode.com/resources/gateway.asp?pid=10933&sid=9).

<sup>105</sup>See Robert Klein, The MERS alternative to vacant-property registration ordinances, *Entrepreneur Magazine* (August 2009) (encouraging this dual registration system).

<sup>106</sup>Mike McIntire, *Tracking Loans Through a Firm That Holds Millions*, *NY TIMES* (April 23, 2009).

<sup>107</sup>*Id.*

<sup>108</sup>Klein, *supra* note 105.

ing vacant properties.<sup>109</sup> Not all of these 250 cities have VPR ordinances because, according to one MERS representative, some cities find the information provided by MERS adequate to achieve maintenance of vacant properties.<sup>110</sup> Typically, commercial lenders prefer registration with MERS, while smaller or unconventional lenders prefer local registration.<sup>111</sup> MERS boasts that it can lower the costs of VPR for lenders, by lowering administrative costs associated with filing with local governments, and for local governments, by providing them access to an electronic filing system.<sup>112</sup>

In addition to MERS, companies are marketing services that take care of VPR compliance for lenders. Some companies, such as Vacant Property Services in Chicago, will register the property and install security devices that they promise will keep the property compliant.<sup>113</sup> Others, such as Falcon Asset Management Group, sell access to an automated system for registration.<sup>114</sup> All a lender has to do is send a spreadsheet containing the property addresses and the company will make sure the properties are registered and in compliance.<sup>115</sup> If a party responsible for vacant property wants to do it themselves, the company will provide them access to their library of municipal forms for a fee.<sup>116</sup> However, most of these forms are available for free electronically through city websites or through a code enforcement office.

### ***C. Duties of Responsible Parties***

In addition to MERS registration, another growing trend is that local governments are requiring submission of a plan detailing how the unoccupied building will be secured, future

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<sup>109</sup>Phone Call with Kate Bonthius, MERS Business Integration Manager (October 16, 2009).

<sup>110</sup>*Id.*

<sup>111</sup>Klein, *supra* note 105.

<sup>112</sup>*Id.*

<sup>113</sup>Vacant Property Security Website, [www.vacantpropertysecurity.com](http://www.vacantpropertysecurity.com).

<sup>114</sup>Falcon Asset Management Group Website, [www.falconamg.com/vpr/](http://www.falconamg.com/vpr/).

<sup>115</sup>*Id.*

<sup>116</sup>*Id.*

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plans for the property, or both.<sup>117</sup> The responsible entity must submit the plan at the same time they register the property.<sup>118</sup> Approximately thirty cities have enacted such an approach as of October 2009.<sup>119</sup> San Francisco, California, requires registrants to describe both methods for securing the property and future plans.<sup>120</sup> The code enforcement officer must approve the plan.<sup>121</sup> This requirement helps VPR officials monitor security and rehabilitation of unoccupied building from the start. More importantly, however, this requirement gives officials key information for determining which properties should qualify for waivers of VPR fees.

Another emerging trend included in San Francisco's ordinance is mandatory insurance.<sup>122</sup> Chicago started this trend, requiring owners to purchase general liability insurance of \$300,000 on unoccupied residential buildings and \$1 million on vacant commercial buildings.<sup>123</sup> San Francisco mandates the owner maintain both fire and liability insurance on the property in an amount the code enforcement officer deems necessary.<sup>124</sup> This creates a high burden on the VPR official to determine a necessary level of insurance. More commonly, the ordinance requires registrants to submit proof of insurance that meets a minimum amount.<sup>125</sup> Typically, these provisions copy the exact same monetary values used in Chicago's ordinance.<sup>126</sup> General liability insurance is a far more common requirement than fire or other types of insurance. Liability insurance ensures the necessary funds in case injuries occur in unoccupied buildings.

Local governments are also specifically tailoring VPR ordinances to their particular circumstances by charging unique

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<sup>117</sup>See, e.g., San Francisco, Cal., Ordinance No. 194-09 (2009), available at [www.sfgov.org/site/uploadedfiles/bdsupvrs/ordinances09/o0194-09.pdf](http://www.sfgov.org/site/uploadedfiles/bdsupvrs/ordinances09/o0194-09.pdf) (requiring responsible parties to submit both types of plans).

<sup>118</sup>*Id.*

<sup>119</sup>Safeguard Properties, *supra* note 22.

<sup>120</sup>San Francisco, Cal., Ordinance No. 194-09.

<sup>121</sup>*Id.* at 103A.4.5.3.

<sup>122</sup>*Id.* at 194-09.

<sup>123</sup>Chicago, Ill., Municipal Code § 13-12-125 (2008).

<sup>124</sup>San Francisco, Cal., Ordinance No. 194-09.

<sup>125</sup>Bellwood, Ill., Code of Ordinances Title XV, § 153.31(C) (2002), available at [www.amlegal.com/nxt/gateway.dll/Illinois/bellwood\\_il/villageofbellwoodillinoiscodeofordinance?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:bellwood\\_il](http://www.amlegal.com/nxt/gateway.dll/Illinois/bellwood_il/villageofbellwoodillinoiscodeofordinance?f=templates$fn=default.htm$3.0$vid=amlegal:bellwood_il).

<sup>126</sup>*Id.*



fee structures. Local governments with flat fees are creative with how they impose fees to meet their own local needs. One example is Portsmouth, Virginia's provision that charges higher fees for building with only locked doors and windows as opposed to buildings with boarded doors and windows.<sup>127</sup> Another example is Baytown, Texas's ordinance, which charges a fee that varies based on the square footage of the vacant building.<sup>128</sup> Some local governments, such as Carbondale, Pennsylvania, exempt non-profits from their escalating fee requirement.<sup>129</sup> The preface to the Carbondale ordinance explains that the city experienced particular difficulty in gaining the compliance of "banks, mortgage companies and other investors."<sup>130</sup>

In addition to using creative fee structures to tailor VPR ordinances, local governments are imposing more maintenance and security requirements particularized to local needs. Common maintenance requirements include closing and securing windows and doors, posting of contact information on the property,<sup>131</sup> and upkeep of landscaping, pools, and spas.<sup>132</sup> Typically, local governments impose a fine, within a given range, for each non-compliance maintenance issue.<sup>133</sup> Almost all the ordinances modeled after Chula Vista's ordinance require the beneficiary to hire a local inspection agency to ensure the owner is properly maintaining the property, seeking easier access to management

<sup>127</sup> Portsmouth, Va., Code Ch. 17 § 134 (2004).

<sup>128</sup> Baytown, Tex., Code Ch. 18 Art. 15. § 18-1301-1315 codified through Ord. No. 11,030, § 2 (2008) *available at* [www.municode.com/resources/gateway.asp?pid=10022&sid=43](http://www.municode.com/resources/gateway.asp?pid=10022&sid=43) (last visited Dec. 10, 2009).

<sup>129</sup> Carbondale, Pa., File of the Council No. 14 (2008) *available at* [www.safeguardproperties.com/vpr/docs/Carbondale,\\_PA\\_ordinance.doc](http://www.safeguardproperties.com/vpr/docs/Carbondale,_PA_ordinance.doc) (last visited Dec. 10, 2009).

<sup>130</sup> *Id.*

<sup>131</sup> The director of Dayton's building services department referred to the latter requirement as an effort to shame the responsible party. MALLACH, *supra* note 52, at 175.

<sup>132</sup> Mortgage Bankers Association, Presentation, Overview of Senate Bill 896, MBA's 96th Annual Convention (October 11-14, 2009) *available at* [www.mortgagebankers.org/files/Conferences/2009/96thAnnual/96AnnualOverviewofSenateBill896.ppt](http://www.mortgagebankers.org/files/Conferences/2009/96thAnnual/96AnnualOverviewofSenateBill896.ppt).

<sup>133</sup> *See* Chicago, Ill., Municipal Code § 13-12-125 (2008) (imposing fines of \$500 to \$1000).

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agencies.<sup>134</sup> Some ordinances require the responsible party to contract with a third party to perform weekly inspections of the property,<sup>135</sup> while other jurisdictions require inspections less often. Some of maintenance requirements target specific jurisdictional needs. For example, some local governments require responsible parties to hire rodent abatement services, keep a light on in vacant buildings overnight to create the appearance of occupancy,<sup>136</sup> or fill the plumbing fixture traps with vegetable oil to prevent sewer gas from entering the building.<sup>137</sup> Additionally, aesthetic boarding requirements, pioneered by New York City housing code officials in the 1980s,<sup>138</sup> are beginning to surface in some jurisdictions. These ordinances require registrants to take additional maintenance steps, such as painting boarded windows and doors to match the exterior of the house.<sup>139</sup> Additionally, most ordinances require that a responsible party record any transfer in ownership of the property with the local government so that the government can impose these maintenance standards on the new owner.<sup>140</sup>

## II. LEGAL FOUNDATION FOR VPR ORDINANCES

This section further examines the source of authority for the fourth common element of VPR schemes: VPR enforcement. In enacting VPR ordinances, most local governments rely on their inherent authority to regulate private parties in order to protect public health, safety, and welfare

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<sup>134</sup>See Blythe, Cal., Ordinance No. 828-08 (2008), available at [www.cityofblythe.ca.gov/documents/Planning%20and%20Zoning/City%20of%20Blythe%20Ordinance%20828-08.PDF](http://www.cityofblythe.ca.gov/documents/Planning%20and%20Zoning/City%20of%20Blythe%20Ordinance%20828-08.PDF) (requiring beneficiaries to hire local property management companies).

<sup>135</sup>*E.g.*, Chula Vista, Cal., Ordinance 15.60.060 (2007).

<sup>136</sup>Guest, *supra* note 59.

<sup>137</sup>South San Francisco, Cal., Code § 8.54.415(7) (2008) available at [www.safeguardproperties.com/pub/SouthSanFranciscoCAOrdinance.pdf](http://www.safeguardproperties.com/pub/SouthSanFranciscoCAOrdinance.pdf) (last visited Dec. 10, 2009).

<sup>138</sup>MALLACH, *supra* note 52, at 175.

<sup>139</sup>City of Beaumont, California, Registration Form for Abandoned Residential Property, available at [www.ci.beaumont.ca.us/DocumentView.aspx?DID=670](http://www.ci.beaumont.ca.us/DocumentView.aspx?DID=670).

<sup>140</sup>*See, e.g.*, Chula Vista, Cal., Code § 15.60.040 (2007) (Any person, firm or corporation that has registered a property under this chapter must report any change of information contained in the registration within ten (10) days of the change”).

within their jurisdiction.<sup>141</sup> For states that abide by Dillon's Rule,<sup>142</sup> local governments only have such authority as expressly delegated by the state government.<sup>143</sup> Even in these states, a few state legislatures have expressly given local governments power to regulate nuisances through ordinances or through other means.<sup>144</sup> For example, California follows Dillon's Rule, but explicitly grants charter cities full power to enact local ordinances.<sup>145</sup> It is these charter cities, such as Chula Vista, which have enacted VPR ordinances.<sup>146</sup> Local governments often exercise their authority through local housing or building departments or through local code officials devoted to VPR enforcement.<sup>147</sup> These officials are empowered with regulatory power to preserve the area's neighborhoods and housing condition.<sup>148</sup> Though enforcement authority depends on the state, most ordinances use the same enforcement mechanisms allowed in regards to

<sup>141</sup>See, e.g., Smyrna, Del., Ordinance § 18-1557 (2007) (laying out the purpose of the ordinance).

<sup>142</sup>See Floyd B. Olson et al., *The Future of Impact Fees in Minnesota*, 24 WM. MITCHELL L. REV. 635, 641 (1998) (defining Dillon's Rule as "a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers and not others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third those essential to the accomplishment of the declared objects and purposes of the corporation,—not simply convenient, but indispensable.") (emphasis omitted).

<sup>143</sup>See League of Women Voters of the Fairfax Area Education Fund, *Dillon's Rule: Good or Bad for Local Governments?* (October 2004) ("31 states operate under Dillon's Rule while 10 states do not abide by it. In addition, 8 states practice Dillon's Rule for certain types of municipalities and the one remaining state (Florida) has conflicting authority.") [hereinafter *Dillon's Rule*] citing J. Richardson, Jr. et al., *Is Home Rule the Answer? Clarifying the Influence of Dillon's Rule on Growth Management*, THE BROOKINGS INSTITUTION CENTER ON URBAN AND METROPOLITAN POLICY (Jan. 2003).

<sup>144</sup>See *Dillon's Rule*, *supra* note 143 (discussing Virginia's grant of authority to local governments abate nuisances).

<sup>145</sup>Cal. Const. art. 11, § 5.

<sup>146</sup>See *The California Planner's Book of Lists 1999*, List of California Charter Cities (1999), available at [ceres.ca.gov/planning/bol/1999/charter.html](http://ceres.ca.gov/planning/bol/1999/charter.html).

<sup>147</sup>See Leeper, *supra* note 10, at 6 (describing the number of officials devoted to VPR enforcement in Chula Vista).

<sup>148</sup>Chula Vista, Cal., Code § 15.60.070 (2007).

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nuisance abatement, usually criminal or municipal fees.<sup>149</sup> If fees remain unpaid, the local government can levy a lien against the property.<sup>150</sup> Priority of VPR liens differs among states. In some states, “a nuisance abatement lien is given the same superseding priority as a municipal tax lien, while in others it has the same force and effect as a judgment lien (prior liens have priority).”<sup>151</sup> Local governments could gain greater control over vacant properties by permitting liens against such property to take “super-priority” over other liens on the property.<sup>152</sup>

Litigation over VPR ordinances is sparse so far, but when litigation has occurred, courts have upheld the authority of local governments to enact and enforce such ordinances. In Wilmington, Delaware, property owners have unsuccessfully challenged the city’s escalating fee classic model ordinance as beyond the city’s constitutional power to enact.<sup>153</sup> Delaware courts have consistently upheld the city’s ordinance as authorized by the City’s Charter and general police powers.<sup>154</sup> Similarly, the Minnesota Court of Appeals held that denial of an indefinite waiver of registration fees under St. Paul’s classic model VPR ordinance did not constitute an unconstitutional taking, since the “city merely refused to allow [the plaintiff] to continue an unreasonable use” of his property.<sup>155</sup>

In another case, plaintiffs challenged Wilmington’s ordinance as unconstitutionally *ex post facto* because it assessed the escalating fee based on years of vacancy, even if

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<sup>149</sup>See, e.g., Leeper, *supra* note 10, at 6 (describing how the city records unpaid fines with as special assessments with the County Tax Assessor’s Office).

<sup>150</sup>*Id.*

<sup>151</sup>Schilling, *supra* note 2, at 122 citing Palm Desert, Cal., Municipal Code tit. 8, ch. 8.20, § 145 (2008).

<sup>152</sup>See Frank S. Alexander, Land Banking as Metropolitan Policy, Metropolitan Policy Program at Brookings 14 (October 2008) (suggesting super-priority status for liens from “government expenditures on behalf of vacant or abandoned properties” could promote greater local control).

<sup>153</sup>See *Adjile, Inc. v. City of Wilmington*, 2004 WL 2827893 at \*2 (Del. Super. 2004) (“The constitutionality of this kind of ordinance has been attacked in at least three separate cases which have all held the ordinance constitutional and a proper exercise of the authority granted by the City Charter.”).

<sup>154</sup>See *id.*

<sup>155</sup>*Evenson v. City of St. Paul Bd. of Appeals*, 467 N.W.2d 363, 365 (Minn. App. 1991).

vacancy began before enactment of the ordinance.<sup>156</sup> The court rejected this argument, since “the prohibition against *ex post facto* laws applies exclusively to criminal or penal statutes, [whereas Wilmington’s ordinance] creates a valid regulatory scheme that calls for a reasonable fee based upon the detrimental effect of property left vacant for long periods of time.”<sup>157</sup> The criminal sanction portion of the ordinance only applied to those who currently refused to comply with the ordinance.<sup>158</sup> The opinion also highlights the idea that registrants are owed basic due process through notice of action and an opportunity to be heard.<sup>159</sup> The Delaware Supreme Court upheld on the opinion on appeal.<sup>160</sup> Though court have upheld these ordinances, local governments should enact severability clauses, stating that if any portion of VPR ordinance is rejected, the rest of the ordinance still stands.<sup>161</sup>

Additional issues arise over whether VPR ordinances are taxes or fees. This distinction is often important in determining the priority of liens placed on the property<sup>162</sup> and can affect the permissible enforcement mechanism against non-compliant parties.<sup>163</sup> While the elements that distinguish taxes and fees vary by jurisdiction, most jurisdictions have

<sup>156</sup> *Adjile, Inc. v. City of Wilmington*, 2004 WL 2827893 at \*3 (Del. Super. 2004).

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Adjile, Inc. v. City of Wilmington*, 875 A.2d 632, 2005 WL 1139577, (Del. Supr. 2005).

<sup>161</sup> See Blythe, California Ordinance No. 828-08, available at [www.cityofblythe.ca.gov/documents/Planning%20and%20Zoning/City%20of%20Blythe%20Ordinance%20828-08.PDF](http://www.cityofblythe.ca.gov/documents/Planning%20and%20Zoning/City%20of%20Blythe%20Ordinance%20828-08.PDF) (utilizing a severability clause).

<sup>162</sup> See, e.g., Keith Bonchi, A Review of Municipal Liens, New Jersey Municipalities (October 2009) (discussing how municipal charges do not automatically have the same high priority as tax liens).

<sup>163</sup> See *City of Wilmington v. McDermott*, 2008 WL 4147580 at \*2 (Del. Super. 2008) (assessing whether VPR fees were taxes for purposes of the type of enforcement mechanism allowed against the non-compliant owner). The distinction between taxes and fees may be very important to requiring action on HUD-owned properties. Congress granted HUD full discretion in dealing with properties it owns. 12 U.S.C. § 1710(g). HUD has argued it does not have to comply with local housing code because the Supremacy Clause dictates that Congress’s grant of discretion to HUD in dealing with HUD-owned properties preempts local government action against HUD as a federal entity. See *U.S. v. City of St. Paul*, 258 F.3d 750 (8th Cir. 2001) (agreeing with HUD’s argument that it did not have to fol-

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held that annual registration fees are taxes. In a recent opinion concerning Wilmington's ordinance, a Delaware superior court held that VPR fees were *either* taxes or special assessments, thus allowing the city to collect the fees through monition and Sheriff's sale.<sup>164</sup> According to the court, taxes "are public burdens imposed generally upon the inhabitants of the whole state, or upon some civil division thereof, for governmental purposes, without reference to peculiar benefits to particular individuals or property."<sup>165</sup> In comparison, the court defined assessments as "special and local impositions upon property in the immediate vicinity of municipal improvements which are necessary to pay for the improvement, and are laid with reference to the special benefit which the property is supposed to have derived there from."<sup>166</sup> The Delaware court decided that VPR fell into at least one of these definitions and accordingly permitted fee collection through monition, yet other states have very different definitions.

Applying a different definition of taxes, the Washington Supreme Court evaluated a Seattle ordinance analogous to VPR ordinances, requiring owners of multi-unit rental buildings to pay registration fees.<sup>167</sup> Under Washington law, a city can impose a regulatory fee, but not a tax.<sup>168</sup> In making the distinction, the Court held "if the primary purpose of legislation is regulation rather than raising revenue, the legislation cannot be classified as a tax even if a burden or charge is imposed."<sup>169</sup> While Seattle designed the legislation primarily to recoup the costs of registration and inspection, the Court noted the legislation had the potential to produce revenue, and accordingly, remanded the case for further deter-

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low local housing code). However, the National Housing Act explicitly allows states to tax HUD owned properties. *See* 12 U.S.C. § 1714 ("Nothing in this subchapter shall be construed to exempt any real property acquired and held by the Secretary under this subchapter from taxation by any State or political subdivision thereof, to the same extent, according to its value, as other real property is taxed."). Accordingly, if VPR fees are taxes, local government may be able to collect VPR fees from HUD for non-compliant HUD-owned properties.

<sup>164</sup>City of Wilmington, 2008 WL 4147580 at \*1.

<sup>165</sup>*Id.* at \*2 citing Black's Law Dictionary 1307 (5th ed. 1979).

<sup>166</sup>*Id.*

<sup>167</sup>*Margola Associates v. City of Seattle*, 121 Wash.2d 625, 630, 854 P.2d 23 (Wash. 1993).

<sup>168</sup>*Id.* at 634.

<sup>169</sup>*Id.* at 635.



mination of whether it was a fee or tax.<sup>170</sup> To preempt potential complications, local governments should examine carefully their local authority to charge VPR fees and file liens for non-compliance when enacting VPR ordinances.

### III. CONTINUING ISSUES SURROUNDING VPR ORDINANCES

While VPR ordinances prove to be a useful tool in preemptively addressing the financial burden put on local governments by deteriorating vacant buildings, a local government must deal with several issues when considering VPR scheme. These issues revolve around how a local government tailors VPR to meet their local needs. First, local governments must decide whether to allow alternative registration with MERS. Second, local governments must work with community organizations and state governments to develop long-term strategies and goals. Finally, local governments will need to assess local needs and determine local goals.

#### A. MERS and the Need for a Electronic System

The mortgage services industry argues against VPR ordinances that require a higher maintenance burden than industry standards, arguing that such provisions are too expensive.<sup>171</sup> In the spring of 2008, Chicago attempted to enact an ordinance, prohibiting plywood on doors and windows and requiring overnight lighting and security, that the mortgage industry felt was burdensome.<sup>172</sup> The Chicago ordinance propelled Safeguard Properties and the Mortgage Bankers Association (MBA) into a more unified position of organized advocacy on behalf of the mortgage industry against VPR regulations.<sup>173</sup> These two groups have formed the Vacant Property Registration Committee to lobby local governments to enact more lender-friendly ordinances.<sup>174</sup>

One of the industry's primary objections is that local registration is "cost prohibitive."<sup>175</sup> Local counties charge an estimated \$10 to 20 to record the registration documents.<sup>176</sup> Another objection to local registration is that diversity in

<sup>170</sup>*Id.* at 640–41.

<sup>171</sup>*See* Leeper, *supra* note 10, at 3 (describing how lenders protested to the cost associated with maintaining vacant properties).

<sup>172</sup>Schilling, *supra* note 2, at 146–47.

<sup>173</sup>*Id.* at 147–48.

<sup>174</sup>*Id.* at 148.

<sup>175</sup>Leeper, *supra* note 10, at 3 (May 21, 2008).

<sup>176</sup>*Id.*

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registration procedures between local governments causes an unnecessarily high administrative burden for national lenders.<sup>177</sup> Electronic registration could lower the cost of registration and produce more standardized registration, but local governments may be unable to create an efficient electronic registration system from scratch.

The mortgage industry, pushing these objections, has been successful in lobbying local governments to make MERS registration an alternative to local registration.<sup>178</sup> Due to the rise in local VPR ordinances, MBA has worked with MERS to allow for storage of “property-preservation contact information.”<sup>179</sup> As part of the “MERS Initiative” promoted at the U.S. Conference of Mayors in both 2008 and 2009, MERS grants local government access to its database of contact information in order to track parties responsible for vacant properties, if the party chose to register with MERS instead of the local government.<sup>180</sup>

Starting in five pilot cities in fall 2008, including Chula Vista, the MERS Initiative officially launched nationwide in spring 2009.<sup>181</sup> Local governments agree to allow MERS registration because it is convenient for them to access an existing electronic database, especially one that allows access to information about lenders registered with the system, often the responsible party for vacant properties.<sup>182</sup> Additionally, MERS access is offered for free to local government entities after they fill out an application to subscribe to MERS.<sup>183</sup> Typically, MERS charges a fee to private lenders and servicers, based on the size of the organization, to

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<sup>177</sup>Mortgage Bankers Association, *Vacant Property Registration Web-page*, [www.mbaa.org/VacantPropertyRegistration.htm](http://www.mbaa.org/VacantPropertyRegistration.htm).

<sup>178</sup>See Klein, *supra* note 105 (promoting the MERS registration system).

<sup>179</sup>*Id.*

<sup>180</sup>*Id.*

<sup>181</sup>*Id.*

<sup>182</sup>A lender that is already a member of the MERS will not need to do anything but give contact information for their preservation companies (entrusted with property maintenance). If a responsible party is not already a member of MERS, they can become a member for VPR purposes.

<sup>183</sup>Kate Bonthius, Online Presentation, *MERS: The National Solution for Jurisdictional Property Preservation Registry Requirements*, available at [www.mersinc.org/ppc/index.aspx](http://www.mersinc.org/ppc/index.aspx). It should be noted that the subscription terms include that all disputes will be settled through mediation, or binding arbitration if mediation fails. MERS® Link Terms and Conditions, available at [www.mersinc.org/ppc/index.aspx](http://www.mersinc.org/ppc/index.aspx).

become a MERS member with full access to MERS's system.<sup>184</sup> As of October 2009, according to Safeguard Properties database, over 16% of the cities enacting VPR ordinances, approximately forty-one cities, allow compliance with their VPR ordinance by registration with MERS.<sup>185</sup> A manager at MERS estimates that close to 250 cities have access to the database.<sup>186</sup>

The new MERS enhancements require a servicer to provide contact information for a list of Property Preservation Companies (PPCs) that it plans to use to maintain the property.<sup>187</sup> Local governments can find the contact information for the servicer and PPCs simply by searching the MERS database for the property address.<sup>188</sup> They can also search using a mortgage identification number (MIN), the borrower's name, or the borrower's social security number.<sup>189</sup> Yet lenders must voluntarily record PPCs and the local government must take initiative to contact the PPC and require their compliance with VPR maintenance standards.

MERS may be too closely associated with the mortgage industry. Some charge MERS has shown itself to be beneficial to the mortgage industry to the detriment of the American consumer.<sup>190</sup> One commentator even called it a "corporate cloak" for the mortgage industry, because of the way the system often conceals the actual owner of mortgages.<sup>191</sup> MERS has caused much of the confusion surrounding who owns mortgages in the first place.<sup>192</sup> MERS permitted an entity to record a mortgage with MERS even if it did not own the mortgage, as long as it was a nominee of the actual

<sup>184</sup>MERS Frequently Asked Questions, [www.mersinc.org/why\\_mers/faq.aspx#8](http://www.mersinc.org/why_mers/faq.aspx#8) (last visited November 2, 2009).

<sup>185</sup>Safeguard Properties, *supra* note 22.

<sup>186</sup>Phone call with Kate Bonthius, *supra* note 109.

<sup>187</sup>See MERS System Release 17 Bulletin Effective December 8, 2008, available at [www.mersinc.org/ppc/index.aspx](http://www.mersinc.org/ppc/index.aspx) (allowing servicers/lenders to name up to four PPCs).

<sup>188</sup>MERS Link Terms and Conditions, available at [www.mersinc.org/ppc/index.aspx](http://www.mersinc.org/ppc/index.aspx).

<sup>189</sup>Bonthius, *supra* note 183.

<sup>190</sup>McIntire, *supra* note 106.

<sup>191</sup>*Id.*

<sup>192</sup>See Gretchen Morgenson, *The Mortgage Machine Backfires*, NY TIMES (Sept. 26, 2009) (highlighting the confusion in ownership caused by MERS).

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owner.<sup>193</sup> The actual note would trade hands, without the seller recording the deal with MERS. These developments alone should give rise to hesitation of the part of code enforcement officers considering the enactment of MERS alternative VPR ordinances.

As an even more troubling development, MERS executives sometimes actively engage in concealing the actual responsible party for mortgages. MERS acted as nominee for many lenders, becoming the mortgagee of record for many loans.<sup>194</sup> As a result, MERS has begun to attempt foreclosures in its own name, though it does not hold the promissory note to the mortgage.<sup>195</sup> This allows the lender to shield itself from the foreclosure process while still holding the note. While owners facing foreclosure have had some success in challenging this practice in states with judicial foreclosure processes,<sup>196</sup> in states with non-judicial foreclosure, MERS can act as a buffer between the lender and the foreclosure process.<sup>197</sup> Even judges have commented on how MERS allowed the industry to act sloppily with paperwork.<sup>198</sup> In one often-cited New York case, an executive claimed in a loan assignment that she was Vice President of MERS, but later claimed to be an officer of Deutsche Bank, the assignee.<sup>199</sup> Additionally, discovery uncovered that the original lender, MERS, and the assignee all shared office space at the same business address.<sup>200</sup>

Though MERS may help local governments find responsible parties, voluntary self-reporting of PPCs is likely inadequate; especially at a time when mortgages are bought and sold frequently, bundled together in mortgage pools, and

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<sup>193</sup>*Id.*

<sup>194</sup>John Rao, Odette Williamson & Tara Twomey, National Consumer Law Center, *Foreclosures: Defenses, Workouts, and Mortgage Servicing 2008 Supplement*, The Consumer Credit and Sales Legal Practice Series 30–31(2008).

<sup>195</sup>*See Id.* (discussing defenses to MERS initiated foreclosures).

<sup>196</sup>*See* Morgenson, *supra* note 192 (discussing disapproval of MERS as nominee).

<sup>197</sup>*See* John Rao *et al.*, *supra* note 194, at 30–31(discussing the problems caused by MERS as nominee).

<sup>198</sup>*See* McIntire, *supra* note 106 (discussing times when courts have been wary of MERS).

<sup>199</sup>*Deutsche Bank Nat. Trust Co. v. Maraj*, 2008 WL 253926 at \*1 (N.Y. Sup. 2008)

<sup>200</sup>*Id.* at \*2.

sold on the secondary market. The motivating factor for MERS enhancing its system was the convenience of servicers, not the needs of local governments. It may not be long before lenders are listing MERS as the responsible party for property maintenance, just as lenders have nominated MERS as an entity enabled to foreclose. Even if the abuse is not that blatant, MERS does not have a good record for keeping clear contact information for responsible parties. It may be telling that Doug Leeper, the code enforcement officer for Chula Vista, a pilot city for the MERS initiative, noted in his 2008 testimony before Congress that “[l]ocating the current beneficiary of the mortgage on a property that was in violation . . . remains one of the single largest obstacles in dealing with financially distressed properties.”<sup>201</sup> He noted that the “time spent in research and phone calls attempting to track down the current beneficiary is crippling.”<sup>202</sup>

MERS executives argue that the current crisis would be much worse without MERS, since lenders would have simply gone bankrupt and no one would have known their contact information.<sup>203</sup> One could also argue that mortgage industry compliance is more likely if a local government plays by the industry’s rules. Accordingly, this article does not advocate that MERS officers stop doing all that they can to promote lender registration of vacant property and PPCs. Yet, as noted above, often it is the unregulated nature of MERS that permits lenders to easily name new beneficiaries without recording the transfer. Local governments should consider carefully whether to trust VPR initiatives to MERS.

While the MERS Initiative proved the benefit of a *national* electronic platform for VPR, a federally generated system would provide the same benefit while minimizing the dangers associated with the industry-run MERS. The federal government should develop a standard internet-based platform for registering and tracking vacant properties and then maintain a webspace where local governments can use the platform to create individualized webpages for their VPR officials to use while registering and tracking properties within their jurisdiction. The federal government would not keep a nationally available list of vacant properties, but merely establish a standard platform local governments can use to register properties within their jurisdiction. This type

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<sup>201</sup>Leeper, *supra* note 10, at 6.

<sup>202</sup>*Id.*

<sup>203</sup>McIntire, *supra* note 106.

of standardized system would eliminate the mortgage industry's objection to compliance with varied local procedures. This type of system would also allow local governments to retain control of the contents and enforcement mechanisms of VPR ordinances, since local governments have a better understanding of local markets and conditions.<sup>204</sup> Additionally, a federal system would make it easier for the federal government to establish special programs utilizing the database. For example, Joseph Schilling suggests that the federal government "establish special phone lines between local government officials and lending institutions and perhaps set some standards about call-backs within twenty-four to forty-eight hours."<sup>205</sup> Of course, such a system would require political will since the public would view it as a federal endorsement of VPR. It would also require initial funding to establish the system and continuing funding to monitor that the system is working properly.

**B. *Developing Long-term Plans at the State and Local Level***

Commentators note that VPR ordinances are often short-term tools in a long-term battle.<sup>206</sup> VPRS ordinances focus on requiring action on unoccupied buildings from private property owners and lenders.<sup>207</sup> As noted by Kermit Lind, an attorney at the Urban Development Law Clinic in Cleveland, Ohio, while strict code enforcement against violators "is an important deterrent to future abuse, . . . it does not rebuild neighborhoods."<sup>208</sup> Local governments that rebound quickly may be able to cover the costs of maintaining vacancies as homeowners and tenants repopulate the jurisdiction. However, in local governments where industries have crumbled or moved, fees collected from a growing number of unoccupied buildings will not support a local government or VPR program indefinitely. Local governments must investigate and enact other programs aimed at rehabilitation. Proposed solutions include federal, state, and community-based support for code enforcement officials and utilization of VPR along with landbanks and other community redevelop-

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<sup>204</sup>See IMMERGLUCK, *supra* note 5, at 218 (discussing the need for measures addressing vacant housing to be developed at the local level).

<sup>205</sup>Schilling, *supra* note 2, at 126.

<sup>206</sup>Schilling, *supra* note 2, at 150–51.

<sup>207</sup>See MALLACH, *supra* note 52, at 143, 145 (including VPR ordinances in a Chapter entitled "Getting Action on Privately Owned Properties").

<sup>208</sup>Lind, *supra* note 13, at 253.



opment strategies. Local governments should seek cooperation with and among important players in the community, including state agencies, local non-profits, and community development corporations.<sup>209</sup>

State governments should explicitly enable local governments administer successful VPR schemes. State governments could enact legislation that enables local governments to enact specifically enact VPR ordinances, as Texas has done,<sup>210</sup> or states could merely enable local governments to impose VPR fees. For example, the mayor and city council of Wilmington, Delaware successfully lobbied the Delaware state legislature to “include vacant property registration fees to the list of potential liens against real estate in an amendment to the State Code.”<sup>211</sup> If states do not enable local government to enforce harsh penalties against delinquent properties, many local governments’ VPR programs will stagnate. Another challenge for state governments is their role in assisting local governments in obtaining the necessary resources to efficiently administer VPR schemes. Local governments need resources for code enforcement, for tracking down property owners, and for creating registration systems that effectively use modern technology. Additionally, the state has a hand in helping bring responsible owners to fill vacant property through economic incentives and job creation.

A few states are considering enacting or have enacted statewide VPR statutes, yet only Texas and Connecticut have actually passed such statutes.<sup>212</sup> Connecticut actually mandates statewide foreclosure-initiated registration of unoccupied one to four family dwellings.<sup>213</sup> Enacted in June 2009, the Texas statute allows local governments to enact

<sup>209</sup>See generally MALLACH, *supra* note 52 (promoting cooperation in dealing with vacant property).

<sup>210</sup>An Act relating to municipal registration of vacant buildings; providing a penalty, Texas Local Government Code § 1, Chapter 214 (2009), available at [www.legis.state.tx.us/tlodocs/81R/billtext/pdf/HB03065L.pdf](http://www.legis.state.tx.us/tlodocs/81R/billtext/pdf/HB03065L.pdf) (last visited Dec. 10, 2009).

<sup>211</sup>Schilling, *supra* note 2, at 138 citing Wilmington, Del., Building Code ch. 4, § 4-27, § 125.0(b)(8) (2003); Del. Code Ann. tit. 25, § 2901 (2006).

<sup>212</sup>Texas Local Government Code § 1, Chapter 214; An Act Concerning Neighborhood Protection, Connecticut Public Act No. 09-144 (Oct. 1, 2009), available at [www.cga.ct.gov/2009/ACT/PA/2009PA-00144-R00SB-00951-PA.htm](http://www.cga.ct.gov/2009/ACT/PA/2009PA-00144-R00SB-00951-PA.htm) (last visited Dec. 10, 2009).

<sup>213</sup>*Id.*



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classic model VPR ordinances.<sup>214</sup> Enacted in June 2009, the Connecticut statute prohibits local governments from creating new registration provisions outside the bill's parameters, but leaves enforcement of the state's provisions up to the local governments.<sup>215</sup> The statute also explicitly allows registration with either the town clerk or MERS.<sup>216</sup> Connecticut's model of leaving enforcement in the hands of local governments decreases the burden of trying to administer a VPR scheme from the state government level. States could also decrease the administrative burden by using standardized internet technology to record responsible parties.

The Nevada and Florida legislatures both proposed legislation that failed to pass. Florida's provision requiring statewide foreclosure-initiated VPR failed in committee in May 2009.<sup>217</sup> The bill sought to modernize registration by requiring the state Department of Financial Services to create an internet registration system.<sup>218</sup> The proposed system required lenders to specify information about foreclosed and vacant property and required local governments to establish e-mail accounts to receive such information.<sup>219</sup> Even if the resulting legislation did not pass, such efforts at modernization are important to improving VPR. The proposed Nevada ordinance was similar to the Texas ordinance; it sought to enable local governments to enact classic model ordinances, provided for fees against violators, and allowed mandatory insurance coverage provisions.<sup>220</sup>

Massachusetts currently has four pending VPR bills, two in the House and two in the Senate.<sup>221</sup> They all incorporate the Chula Vista model and one of the bills also incorporates a classic model approach to address currently vacant

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<sup>214</sup>Texas Local Government Code § 1, Chapter 214.

<sup>215</sup>*Id.* at § 2(e).

<sup>216</sup>*Id.* at § 2(a).

<sup>217</sup>*Id.*

<sup>218</sup>H.R. 119 (Fla. 2009), *available at* [flhouse.gov/Sections/Documents/loaddoc.aspx?FileName=\\_\\_h0119\\_\\_.xml&DocumentType=Bill&BillNumber=0119&Session=2009](http://flhouse.gov/Sections/Documents/loaddoc.aspx?FileName=__h0119__.xml&DocumentType=Bill&BillNumber=0119&Session=2009).

<sup>219</sup>*Id.*

<sup>220</sup>Nevada Assembly Bill No. 66 (Nev. 2008), *available at* [www.leg.state.nv.us/75th2009/Bills/AB/AB66.pdf](http://www.leg.state.nv.us/75th2009/Bills/AB/AB66.pdf).

<sup>221</sup>*See* Safeguard Properties, *supra* note 22 (listing all four bills, S. 785, S. 1828, H.R. 3522, H.R. 3571).

property.<sup>222</sup> Another of the proposed bill incorporates protections for tenants of foreclosed properties.<sup>223</sup> The primary difference between the bills, aside from fee amounts and other minor variations, is whether to allow local governments to enact a model ordinance, require local governments to enact an ordinance, or enact and enforce vacant property registration at the state level. As vacant properties increase, more states are likely to wrestle with these questions.

### ***C. Tailoring VPR Ordinances to Local Needs***

One important development that local governments should consider is the advent of combination ordinances. These ordinances give local governments a mechanism to attempt to hold lenders responsible for properties they have initiated foreclosure against and address vacant properties already existing in the jurisdiction that are not facing foreclosure. Depending on the local government's specific needs and goals, the local government can include specific maintenance provisions, insurance requirements, or special fees for unoccupied residential or commercial buildings.

If a local government's goal is to get rid of vacant buildings through occupancy or demolition, the government should consider escalating fee schedules. Governments facing irreversible economic decline may find this a preferable option, since private parties will shoulder the cost of demolishing buildings with less promising rehabilitation potential. Governments also can and should utilize waivers to negotiate with landowners who have plans to renovate promising properties. Yet one issue local governments must consider in enacting VPR ordinances is political feasibility. The mortgage industry is a powerful lobbying force, as seen above in the discussion about opposition to Chicago's ordinance, and burdensome provisions are likely to attract attention and resistance. If faced with political opposition to escalating fees, a local government could enact specific waiver provisions for landowners who contract with local preservation companies and submit a plan to either demolish or repair the property. Another problem with combining escalating fees with a foreclosure-initiated model is that encouraging demolition of vacant buildings prior to foreclosure sale may enable lawsuits by homeowners against lend-

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<sup>222</sup>*Id.*

<sup>223</sup>H.R. 3571 (Mass. 2009).

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ers for destructions of private property.<sup>224</sup> According, local governments need to study local foreclosure law carefully when enacting foreclosure-initiated models, especially if their goal is to get rid of vacant buildings.

If a local government is more concerned with maintenance of unoccupied buildings than with elimination of unoccupied buildings, the government should set a low registration fee to encourage lenders to register upon foreclosure, but then charge a steep penalty for non-compliance, as Chula Vista has done. As Chula Vista's VPR official has noted, "elimination of visual blight and attractive nuisances" is a higher priority under this type of ordinance than collecting registration fees.<sup>225</sup> Such ordinances may work well for local government anticipating future economic renewal that will fill unoccupied buildings. The local government can enact whatever specific type of maintenance provisions it thinks are important, including specific boarding regulations and lawn care. This type of ordinance encourages lender registration and requires strict code enforcement and inspections in order to promote maintenance.

No matter what type of provisions a local government enacts, the best solution to the difficulties involved with VPR ordinances is robust code enforcement, requiring motivated code enforcement officials and proper funding. Chula Vista has become a flagship model of VPR compliance largely because of the self-motivation of its code enforcement office. Until local governments start to collect money from registration fees and penalties, they will need seed money to initiate vigorous code enforcement. Among other sources, local governments should consider using money granted in the recent round of Neighborhood Stabilization Program Grants to establish VPR programs. The federal government granted this money, either directly to local governments or to state governments to distribute in the state's discretion, in order to "stabiliz[e] communities that have suffered from foreclosures and abandonment."<sup>226</sup> VPR ordinances align well with this purpose. The federal government should continue to as-

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<sup>224</sup>See, e.g., *Prince v. Brown*, 856 P.2d 589, 590–91 (Okla. Civ. App. 1993).

<sup>225</sup>Leeper, *supra* note 10, at 6.

<sup>226</sup>U.S. Department of Housing and Urban Development, *Neighborhood Stabilization Program Grants*, [www.nls.gov/offices/cpd/communitydevelopment/programs/neighborhoodspg/](http://www.nls.gov/offices/cpd/communitydevelopment/programs/neighborhoodspg/)

sist local governments with vigorous code enforcement as they deal with the rise in vacant properties.<sup>227</sup>

### Conclusion

As local governments continue to face increasing levels of foreclosure and vacant property, VPR ordinances are an important tool for government entities to gain the cooperation of the parties responsible for vacant and abandoned buildings in their jurisdiction. VPR helps local governments establish who the responsible party is for a given vacant property, provides local governments with a mechanism for enforcement of property maintenance and security, and gives local governments an advantage in negotiating rehabilitation plans with responsible parties.

When enacting VPR ordinances, local governments should consider carefully their particular goals, community environment, and enforcement authority. Steep registration fees discourage the prevalence of unoccupied building and prevent local governments from having to expend funds to improve or demolish such building, but such ordinances are also controversial. Lower fees, combined with steep fines for non-compliance, encourage upkeep of a local government's stock of unoccupied buildings as local governments seek economic development. Local governments should examine different forms of registration as well. While foreclosure-initiated registration has become vital in the current crisis, a local government may want to additionally enact a classic model registration system to address vacant homes not in foreclosure.

State governments should support local efforts for VPR. In states where VPR is common, state governments can help through financial resources for code enforcement. In these states with many VPR ordinances, state law establishes the legality of VPR to an extent that enables local governments to utilize VPR against unoccupied buildings at risk of deterioration. In states where VPR ordinances are less common, or non-existent, state governments should consider explicitly enabling local governments to enact such ordinances without being overly restrictive of local government's freedom to tailor the ordinance to their community's specific needs. In those states, local government officials seeking to enact VPR should be active in petitioning for such legislation. Additionally, both types of state, those with many VPR ordi-

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<sup>227</sup>See Schilling, *supra* note 2, at 162 (suggesting the federal government continue to support code enforcement).

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nances and those without, would benefit from clearly defining whether VPR is a tax for purposes of liens against the property.

As the deterioration of unoccupied buildings increasing becomes a national problem, the federal government should assist states and local governments with VPR. Congress should consider assisting local governments by establishing a standardized electronic system for local governments to utilize as they seek compliance from parties responsible for unoccupied buildings. The federal government should also continue to grant funds to local governments that they can use to promote vigorous code enforcement. Even with federal involvement, effective VPR schemes must be tailored to local needs and goals and require motivated local officials.