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HEALTH AND SAFETY RECEIVERSHIP:

CALIFORNIA'S CURE FOR ZOMBIE FORECLOSURES, VACANT, AND OTHER NUISANCE PROPERTIES

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I. INTRODUCTION

Zombie foreclosures are a consequence of the early 2000's mortgage crisis and a type of nuisance property. In 2013, Reuters estimated that over 300,000 zombie foreclosure properties existed.¹ To address this issue, the following law schools published journals regarding zombie foreclosures: Emory University School of Law,² UC Irvine School of Law,³ University of New Mexico School of Law,⁴ and Washburn University School of Law.⁵ These publications provided

¹ Barbara Liston, *More Than 300,000 Homes Are Foreclosed "Zombies," Study Says*, REUTERS (Mar. 28, 2013, 4:55 PM), <https://www.reuters.com/article/us-usa-housing-zombies-idUSBRE92R0YQ20130328>.

² See Amanda McQuade, *The Antidote to Zombie Foreclosures: How Bankruptcy Courts Should Address the Zombie Foreclosure Crisis*, 32 EMORY BANKR. DEV. J. 507 (2016).

³ See Linda E. Fisher, *Shadowed by the Shadow Inventory: A Newark, New Jersey, Case Study of Stalled Foreclosures and Their Consequences*, 4 U.C. IRVINE L. REV. 1265 (2014).

⁴ See David P. Weber, *Zombie Mortgages, Real Estate, and the Fallout for the Survivors*, 45 N.M. L. REV. 37 (2014).

⁵ See Andrea Boyack & Robert Berger, *Bankruptcy Weapons to Terminate a Zombie Mortgage*, 54 WASHBURN L. J. 451 (2015).

excellent scholarship regarding zombie foreclosure; however, these journals failed to provide a viable remedy for the problem. Now, with COVID-19 destroying the economy, zombie foreclosures and nuisance properties are resurfacing and must be stopped. This article seeks to accomplish three goals: (1) identify the zombie foreclosure problem; (2) explain how the zombie foreclosure problem started; and (3) introduce a solution for the zombie foreclosure problem.

Zombie foreclosures occur when a bank begins the foreclosure process but fails to finalize it.⁶ A typical zombie foreclosure story is as follows: a borrower misses a mortgage payment; the bank initiates the foreclosure process by sending a notice of default; upon receiving the notice of default, the borrower abandons the property.⁷

Borrowers abandon properties for numerous reasons. Often, borrowers cannot identify their actual lender, or mistakenly believe that receipt of a Notice of Default means their home has already been foreclosed upon.⁸ A borrower may also file for bankruptcy and assume the bank will foreclose.⁹ Another common occurrence is a bank failing to foreclose when a borrower dies with an unpaid mortgage that his or her heirs cannot afford.¹⁰ Alternatively, a borrower may, for mental health or other personal reasons, abandon the property.¹¹ These are a few ways a zombie foreclosure arises, but the main story never changes: the bank fails to foreclose.¹²

Usually, when someone hears this scenario, they think it is good that a bank fails to foreclose. However, these failed foreclosures do not benefit cities, neighborhoods, or anyone involved.¹³ It is important to realize that once an owner abandons their property, bills such as water, power, garbage, and other services, go unpaid.¹⁴ Often transients begin occupying these abandoned properties without these

⁶ Ryan Griffith, *Zombie Foreclosure: What Is It and How Can It Be Fixed?*, DAILY J. (Apr. 29, 2020),

<https://www.dailyjournal.com/articles/357444>.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

essential services.¹⁵ Once this happens, extremely unsanitary conditions surface.¹⁶ For example, if there is no running water, toilets used by transients at the property do not flush and without garbage service, substantial debris accrues.¹⁷ Furthermore, transients commonly have mental health and substance abuse issues, which often lead to criminal activity.¹⁸ These factors result in the abandoned property becoming a public nuisance.¹⁹

While these properties fall into substantial disrepair, no one takes responsibility for them.²⁰ This is because the owner believes the bank has taken possession of the property.²¹ What owners do not realize is that the bank does not want to take possession of a nuisance property, so they fail to foreclose.²² This leaves the owner on title to the nuisance property.²³ The owner can then be fined and even imprisoned by the city for failing to abate the nuisance.²⁴ Owners often want to surrender their property, but abandoning real property is illegal.²⁵

This leaves the owner to deal with abating nuisance conditions.²⁶ The owner that was missing mortgage payments is unlikely to be able to afford to fix the property or pay for a lawyer to initiate unlawful detainer proceedings to remove transients that can draft fake leases.²⁷ Meanwhile, the bank is nowhere to be found. While inconvenient for the owner, the bank's inaction is not illegal because it cannot be forced to foreclose.²⁸ This puts the owner in a nightmare scenario.

When zombie foreclosures are explained, the following question arises: why does the bank fail to foreclose?

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Pocono Springs Civic Ass'n v. Mackenzie*, 667 A.2d 233, 236 (Pa. Super. Ct. 1995).

²⁶ Griffith, *supra* note 6.

²⁷ *Id.*

²⁸ *Id.*

Various theories for this exist, but there is no answer of universal application. A few reasons banks fail to foreclose include that they do not want to pay for property maintenance and they do not want to saturate the market by foreclosing on all the properties they could.²⁹ A surprising revelation is that banks often do not even know what mortgages they own, due to the creation of the Mortgage Electronic Registration System (“MERS”).³⁰

MERS was created by Fannie Mae, Freddie Mac, Ginnie Mae, The American Association of Mortgage Brokers, and other entities.³¹ These entities never considered how the MERS system, accessible only to lenders, would impact homeowners.³² This article will explain the complex title issues caused by MERS in more detail later.

If neither the banks nor the owners are capable of dealing with the zombie foreclosure issue, what can a city, county, or state do? Cities regularly issue code enforcement citations against nuisance properties and occasionally criminally prosecute owners.³³ Other cities have enacted vacant property ordinances.³⁴ Other cities have used eminent domain to take over properties.³⁵ Despite these noble efforts, zombie foreclosures continue to terrorize cities.³⁶

A perfect illustration of how these noble efforts by cities often lead nowhere occurred in New London, Connecticut.³⁷ The City of New London utilized eminent domain to economically rejuvenate a neighborhood.³⁸ The city fought the case all the way to the U.S. Supreme Court and won the right to take over the neighborhood buildings.³⁹

²⁹ *Id.*

³⁰ Thomas Kilpatrick, *Mortgage Electronic Registration System (MERS): A Twenty First Century Creation Navigating an Eighteenth Century Legal System*, NAT'L L. REV. (Dec. 13, 2011), <https://www.natlawreview.com/article/mers-twenty-first-century-creation-navigating-eighteenth-century-legal-system>.

³¹ *Id.*

³² *Id.*

³³ Liston, *supra* note 1.

³⁴ See CCIM Institute Vacant Property Ordinances (2010).

³⁵ See *Kelo v. City of New London*, 545 U.S. 469, 473 (2005).

³⁶ Griffith, *supra* note 6.

³⁷ *Kelo*, 545 U.S. at 473.

³⁸ *Id.*

³⁹ *Id.*

Despite the city's herculean effort, the lot remains vacant and the neighborhood underdeveloped ten years later.⁴⁰ Eminent domain cases turn out this way because the remedy is too cumbersome to be effective.

Most cities do not take their issues to the U.S. Supreme Court but instead try to protect neighborhoods by issuing citations against nuisance properties.⁴¹ The citation strategy is usually effective, but zombie foreclosures are immune to citations.⁴² In zombie foreclosure situations citations issued to an owner that has abandoned their property and an absentee bank simply end up as additional litter on the nuisance property.⁴³ Vacant property ordinances also only issue fines, but as discussed, zombie foreclosures are immune from fines.⁴⁴

If fines, ordinances, and eminent domain do not work, what can be done to stop zombie foreclosures? The cure to zombie foreclosure can be found in California's Health and Safety ("H&S") receivership laws.⁴⁵ A H&S receivership is a remedy that authorizes a city to seek the appointment of an experienced court-receiver to take control of a nuisance property.⁴⁶

If a receiver is appointed, they must act in the best interests of all parties.⁴⁷ For all intents and purposes, a receiver is a hand of the court.⁴⁸ A H&S receiver has broad discretion and is empowered to sell and even demolish a nuisance property.⁴⁹ The receiver is compensated through a receiver-certificate, which takes superpriority over all other

⁴⁰ *Fort Trumbull Neighborhood Remains Vacant a Decade After City Took Land*, THE DAY (Jun. 21, 2015, 12:01 AM), <https://www.theday.com/local/20150619/fort-trumbull-neighborhood-remains-vacant-a-decade-after-city-took-land>.

⁴¹ Griffith, *supra* note 6.

⁴² *Id.*

⁴³ Liston, *supra* note 1.

⁴⁴ Griffith, *supra* note 6.

⁴⁵ Ryan Griffith, *How Cities Can Fix Dangerous Properties and Increase Revenue*, DAILY J. (Apr. 1, 2020), <https://www.dailyjournal.com/articles/357003>.

⁴⁶ *Id.*

⁴⁷ CAL. R. CT. § 3.1179 (West, Westlaw through June 15, 2020).

⁴⁸ *Takeba v. Super. Ct. of San Joaquin Cty.*, 185 P. 406, 408–09 (Cal. Ct. App. 1919).

⁴⁹ *City of Santa Monica v. Gonzalez*, 182 P.3d 1027, 1043–44 (Cal. 2008).

liens.⁵⁰ Additionally, to encourage cities and counties to appoint receivers, California allows cities to recover their attorney's fees and enforcement costs in a receivership case.⁵¹ This means cities can actually increase their revenue by abating nuisance properties.⁵²

II. ZOMBIE FORECLOSURE EXPLAINED

A. WHY ZOMBIE FORECLOSURE IS A PROBLEM

Foreclosures create terrible situations in any community, but they are particularly harmful in poor neighborhoods.⁵³ Cities such as Vallejo, California, that declared municipal bankruptcy and struggle with budget shortages, police, fire, and code enforcement have insufficient resources to address nuisance properties.⁵⁴ This causes zombie foreclosure issues to be exacerbated in poorer cities.⁵⁵

B. WHY HOMEOWNERS VACATE THEIR PROPERTY

The first question to ask regarding zombie foreclosure is: why do borrowers vacate their home? There are numerous factors that come into play when someone decides to vacate their property; however, when it comes to zombie foreclosures, the most common reason is the owner mistakenly believes his or her property has already been foreclosed on.⁵⁶

⁵⁰ *City of Sierra Madre v. SunTrust Mortg.*, 244 Cal. Rptr. 3d 118, 128 (Cal. Ct. App. 2019).

⁵¹ CAL. HEALTH & SAFETY CODE § 17980.7 (c)(11) & (d)(1) (West, Westlaw through Ch. 78 of 2020 Reg. Sess.).

⁵² *City and Cty. of San Francisco v. Jen*, 37 Cal. Rptr. 3d 454, 458–59 (Cal. Ct. App. 2005).

⁵³ *Id.*

⁵⁴ Carolyn Jones, *Bankrupt Vallejo Bleeding Its Police Force*, SFGATE (Aug. 12, 2008), <https://www.sfgate.com/bayarea/article/Bankrupt-Vallejo-bleeding-its-police-force-3201052.php>.

⁵⁵ *Id.*

⁵⁶ Virginia Thomas, *Zombie Attack: Group Looks to Reduce Number of Abandoned 'Zombie' Homes*, SPOKANE J. (Nov. 21, 2019),

A mortgage is supposed to be a simple agreement. A lender loans money to a borrower so they can purchase a property. In exchange, the borrower makes monthly payments with interest until the debt is paid. Mortgages have been around for centuries.⁵⁷ However, what happens when a borrower misses a payment? Hundreds of years ago if a borrower missed a payment their lender could take the property away immediately.⁵⁸ Courts thought this was unjust. This is because a borrower may be in their final year of payment, but the lender could take the property back and keep all the borrower's payments.⁵⁹ Courts of equity responded to this injustice by giving borrowers time to pay off their loans and the foreclosure process was created.⁶⁰ Today each state has its own foreclosure process.⁶¹

The mortgage system in the U.S. worked fine for years.⁶² Then, lenders wanted to make their loans easier to transfer and sell, which led them to start securitizing loans.⁶³ One thing that stood in the way of lenders securitizing their loans were county recorders.⁶⁴ To resolve the county recorder issue, in 1983 Fannie Mae, Freddie Mac, and Ginnie Mae proposed the Mortgage Electronic Registration System ("MERS").⁶⁵ MERS is an electronic database banks use to assign their loans to other banks without recording the documents.⁶⁶ MERS was originally viewed as positive for both lenders and borrowers.⁶⁷

<https://www.spokanejournal.com/special-report/zombie-attack-group-looks-to-reduce-number-of-abandoned-zombie-homes/>.

⁵⁷ *The History of Mortgages | Where They Came From & How We Got Here*, MORTG. 1 BRIGHTON (May 22, 2019),

<https://mortgageonebrighton.com/blog/the-history-of-mortgages/>.

⁵⁸ Daniel Bahls & Katherine Hunt, *Abhorring a Forfeiture: The Importance of Equitable Jurisdiction in a Foreclosure Crisis*, 41 STETSON L. REV. 779, 798-99 (2012).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *U.S. Foreclosure Laws by State*, REALTYTRAC,

<https://www.realtytrac.com/real-estate-guides/foreclosure-laws/> (last visited Aug. 13, 2020).

⁶² *The History of Mortgages*, *supra* note 57.

⁶³ Kilpatrick, *supra* note 30.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

After years of planning, MERS finally came online in 1997.⁶⁸ However, concerns quickly arose that borrowers would be unable to identify their mortgage owners.⁶⁹ County recorders were also upset that MERS essentially usurped the entire recording system.⁷⁰ Nevertheless, MERS pushed forward and at its height was involved with 60 million loans.⁷¹

MERS works by acting as a nominee for a lender.⁷² This means a lender enters into a mortgage agreement with a borrower and then transfers the interest to MERS solely as its nominee.⁷³ MERS can then assign the mortgage to other lenders on the secondary market without informing the borrower that the loan was transferred.⁷⁴ At the height of the financial crisis, MERS had around 50 employees responsible for nearly 60 million home mortgages.⁷⁵

With each employee responsible for approximately a million mortgages, oversight was minimal.⁷⁶ For example, MERS began allowing lenders to sign transfers on their databases without MERS being involved.⁷⁷ Lenders did not want to use the resources to go through the actual process, so “robo-signers” were used to sign thousands of mortgage documents a day.⁷⁸ Robo-signing became so egregious that high school students were being paid hourly to sign hundreds of mortgage documents.⁷⁹ These documents allowed mortgages to be transferred from one lender to another through MERS without the county or borrower’s knowledge.⁸⁰

Robo-signing would never have been uncovered if everything went smoothly and payments were made on time. However, the global economic collapse exposed these

⁶⁸ *Id.*

⁶⁹ Dustin A. Zacks, *Revenge of the Clerks: MERS Confronts County Clerk and Qui Tam Lawsuits*, 32 NO. 1 BANKING & FIN. SERVS. POL’Y REP. 17, 17-18 (2013).

⁷⁰ *Id.*

⁷¹ Kilpatrick, *supra* note 30.

⁷² *Id.*

⁷³ Arnold, *supra* note 65.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ Kilpatrick, *supra* note 30.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

egregious practices.⁸¹ In response to the foreclosure crisis, legislatures directed lenders to work with borrowers to stop foreclosures.⁸² Despite the legislature's good intentions, the shortcomings of MERS made banks unable to attribute loans to their borrowers.⁸³ As a result, borrowers could not contact their lenders, which caused borrowers to believe that they had been foreclosed upon.⁸⁴

C. WHY PROPERTY ABANDONMENT AND MORTGAGE CONFUSION MATTERS

The confusion caused by MERS that leads to property abandonment creates a nightmare for cities. Identifying the owner of a nuisance property is often the most difficult task a city faces.⁸⁵ When dealing with a nuisance property, a city must identify the owner and parties with a recorded interest in the property.⁸⁶ However, because of the murky MERS system, a city often cannot determine who is responsible for a nuisance property.⁸⁷

The confusion MERS causes is only one reason a homeowner vacates a property. A very common and tragic occurrence is the death of a property owner who has no heirs, or heirs that are unable to care for the property.⁸⁸ For example, if a property owner passes away in Vallejo, California, with a \$150,000 mortgage on a \$100,000 property and his or her child has moved to South Carolina and has three kids in school, the heir is likely unable or unwilling to uproot his or her life to deal with a valueless property. The

⁸¹ *Id.*

⁸² CAL. CIV. CODE § 2923.5 (West, Westlaw through Ch. 78 of 2020 Reg. Sess.).

⁸³ Gretchen Morgenson, *If Lenders Say 'The Dog Ate Your Mortgage'*, N.Y. TIMES (Oct. 24, 2009), <https://www.nytimes.com/2009/10/25/business/economy/25gret.html>.

⁸⁴ Joshua J. Card, *Homebuyer Beware: MERS and the Law of Subsequent Purchasers*, 77 BROOK. L. REV. 1633, 1648-49 (2012).

⁸⁵ PAUL EARLY, LEAGUE OF CAL. CITIES ANN. CONF. REP., FORECLOSED PROPERTIES, TRADITIONAL CODE ENFORCEMENT, APPROACHES, (Sept. 24-27, 2008), available at:

<https://www.cacities.org/UploadedFiles/LeagueInternet/86/86f14656-1db4-4a3d-a168-6d506fe69774.pdf>.

⁸⁶ *Id.*

⁸⁷ Griffith, *supra* note 6.

⁸⁸ Thomas, *supra* note 57.

heir is not required to take responsibility for the property.⁸⁹ Therefore, the heir often assumes the bank will foreclose, unaware that a bank can delay foreclosure into perpetuity.⁹⁰ A bank may not want to foreclose on a distressed property, because foreclosure may cost more than the distressed property is worth.⁹¹ Furthermore, even if the bank wanted to foreclose, banks often lose track of their mortgages.⁹²

When a deceased owner is on title the property slowly falls into disrepair because nobody pays the water bill, electric bill, cuts the grass, or performs property maintenance. The bank, as discussed, often does not even know what mortgages it holds. The bank also has no way of knowing the owner is deceased and without a responsible heir the bank will never learn of the borrower's death.⁹³ A city may issue fines to the property but issuing fines to a deceased owner does nothing to fix the problem.⁹⁴ As a result, the property is often overrun by squatters and the zombie foreclosure situation described above comes to fruition.⁹⁵

Mental illness often plays a role in owners abandoning their property.⁹⁶ There are countless mental issues such as hoarding, clinical depression, schizophrenia, Alzheimer's, dementia, and others that can result in a property owner being unable to care for their property.⁹⁷ If a person cannot care for themselves, they are unlikely to keep up with mortgage payments.

If the mentally ill owner has a mortgage and an out-of-control situation develops at the property, the family taking care of the owner assumes the bank will foreclose.⁹⁸

⁸⁹ Kelli B. Grant, *Seriously, Sometimes It Pays to Skip Taking an Inheritance*, CNBC (Jul. 8, 2016, 9:33 AM EDT), <https://www.cnbc.com/2016/07/07/seriously-sometimes-it-pays-to-skip-taking-an-inheritance.html>.

⁹⁰ Linda E. Fisher, *Bank Walkaways and Undead Foreclosures Continue to Haunt the Economy*, COLUM. L. SCH. BLUE SKY BLOG (Jul. 10, 2015), <https://clsbluesky.law.columbia.edu/2015/07/10/bank-walkaways-and-undead-foreclosures-continue-to-haunt-the-economy/>.

⁹¹ *Id.*

⁹² Morgenson, *supra* note 83.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ Griffith, *supra* note 45.

⁹⁷ *Id.*

⁹⁸ *Id.*

However, figuring out who actually owns the loan is an issue even large banks with financial experts struggle with.⁹⁹ Therefore, a regular person dealing with the stress of caretaking assumes the bank can, and will, figure it out, but as discussed banks often have no idea what they are doing.¹⁰⁰

Once the property is abandoned by the mentally ill owner, and everyone else assumes the bank will foreclose, the zombie foreclosure situation unfolds.¹⁰¹ Transients begin occupying the property, bills are not paid, debris is strewn everywhere, and crime and substance abuse at the property can become rampant.¹⁰² The city is left with the option of imposing heavy fines or misdemeanor charges on someone with Alzheimer's, which is not a politically viable option. More importantly, punishing a disabled owner will not abate the nuisance.¹⁰³

D. WHY BANKS DO NOT FORECLOSE ON ZOMBIE PROPERTIES

Once a property owner vacates a property, the next question is: why does the bank fail to foreclose? There are several reasons banks fail to foreclose. These include a bank's hesitance to maintain a nuisance property, a desire to manipulate property prices in foreclosure, and an astonishing failure of banks to understand their own mortgage systems.¹⁰⁴

There are also legal impediments that prevent a bank from foreclosing. For example, the automatic stay of bankruptcy prevents a bank from foreclosing.¹⁰⁵ Alternatively, legislation such as California's Homeowner Bill of Rights "HBOR" designed to prevent foreclosures, makes foreclosure more difficult.¹⁰⁶ While legislation protecting homeowners

⁹⁹ Morgenson, *supra* note 83.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² Griffith, *supra* note 6.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Bank of Am. Nat'l Tr. & Sav. Ass'n v. 203 N. LaSalle St. P'ship, 526 U.S. 434, 438 (1999).

¹⁰⁶ *California Homeowner's Bill of Rights Summary: What Borrowers Need to Know*, CONSUMER REPS.: ADVOC. (Dec. 18, 2012), <https://advocacy.consumerreports.org/research/californias-homeowner-bill-of-rights-summary/#:~:text=HBOR%20requires%20all%20borrowers%20to,and%20their%20right%20to%20foreclose.>

from foreclosure is generally positive, it is disastrous in zombie foreclosure situations, because banks use it as an excuse to justify their delayed foreclosures.¹⁰⁷

Banks do not want to maintain properties that have fallen into disrepair.¹⁰⁸ If the bank takes possession, they are responsible for property taxes, property insurance, code enforcement citations, and other liabilities that may arise from the property.¹⁰⁹ Banks understandably do not want to be property managers for nuisance properties and instead keep title vested in the original owner.¹¹⁰ This causes a frustrating situation, because when the nuisance endangers the community the record property owner will say the bank owns the property, but the bank will say it is the owner's problem.¹¹¹ Legally the bank is correct and the recorded owner cannot abandon or surrender property, even to a bank that has a mortgage on their property.¹¹² While the owner and the bank blame each other, the property deteriorates and the neighborhood is terrorized. However, H&S receiverships cure this exact situation.¹¹³

Banks manipulate property values by not foreclosing on each property in their portfolio.¹¹⁴ In some neighborhoods, half the block might be in foreclosure, but if a prospective buyer sees foreclosure signs everywhere, a purchase is unlikely.¹¹⁵ Banks have the resources to hold off on taking possession of properties for long periods of time, which allows them to be selective with foreclosures and manipulate home prices.¹¹⁶

III. HOW GOVERNMENTS HAVE TRIED TO FIGHT ZOMBIE FORECLOSURES

¹⁰⁷ Griffith, *supra* note 6.

¹⁰⁸ *Id.*

¹⁰⁹ Boyack & Berger, *supra* note 5.

¹¹⁰ Griffith, *supra* note 6.

¹¹¹ *Id.*

¹¹² Pocono Springs Civic Ass'n, 667 A.2d at 236.

¹¹³ Griffith, *supra* note 45.

¹¹⁴ Boyack & Berger, *supra* note 5.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

Government agencies know about zombie foreclosures.¹¹⁷ What can these agencies do when zombie foreclosures arise? Government agencies usually issue fines, which work if a responsible owner or lender is involved.¹¹⁸ However, if no owner or lender can be identified, fining the property does nothing to abate the nuisance.¹¹⁹ Cities have also enacted vacant property registration ordinances to combat the problem.¹²⁰ However, vacant property ordinances only result in fines, which are ineffective against zombie foreclosures.¹²¹

Cities also utilize eminent domain to abate nuisance properties, but this is a difficult remedy to implement. Additionally, legislation created after the U.S. Supreme Court decision in *Kelo v. City of New London* made eminent domain even more ineffective.¹²² Currently, a city must fight a legal battle to prove eminent domain is necessary and then pay just compensation for the property.¹²³ It is worth noting that cities with numerous zombie foreclosure problems are typically in poorer areas and have less cash on hand.¹²⁴ These cities cannot afford to purchase, let alone maintain, properties acquired through eminent domain.¹²⁵ Finally, even if the city wins its legal battle and pays for the property, cities do not have property management departments and are subject to numerous regulations.¹²⁶ This means cities are

¹¹⁷ Jim Redden, *Wheeler Pauses Hales Campaign to Foreclose on 'Zombie' Homes*, PORTLAND TRIB. (Jan. 4, 2018), <https://pamplinmedia.com/pt/9-news/382786-270773-wheeler-pauses-hales-campaign-to-foreclose-on-zombie-homes->.

¹¹⁸ Dean J. Pucci, *Health and Safety Receiverships: An Effective Code Enforcement Remedy in Tough Times*, W. CITY (Oct. 1, 2011), <https://www.westerncity.com/article/health-and-safety-receiverships-effective-code-enforcement-remedy-tough-times>.

¹¹⁹ *Id.*

¹²⁰ Rachel Raskin-Zrihen, *Vallejo's Abandoned Property Owners to Be Held Accountable*, TIMES HERALD (May 31, 2013, 12:00 AM), <https://www.timesheraldonline.com/2013/05/31/vallejos-abandoned-property-owners-to-be-held-accountable/>.

¹²¹ Griffith, *supra* note 45.

¹²² Private Property Rights Protection Act of 2014, H.R.1944, 133d Cong. (2014).

¹²³ U.S. CONST. amend. V.

¹²⁴ Boyack & Berger, *supra* note 5.

¹²⁵ *Id.*

¹²⁶ *Fort Trumbull Neighborhood Remains Vacant a Decade After City Took Land*, *supra* note 35.

usually unable to manage and rehabilitate nuisance properties, as evidenced by the case of New London, Connecticut.¹²⁷

Cities have also tried demolishing zombie foreclosure homes.¹²⁸ Demolishing properties is effective, but expensive.¹²⁹ Coordinating mass demolitions is also challenging.¹³⁰ Additionally, the end result of a demolition is vacant land in the middle of the city, which attracts transients and other nuisance activities.¹³¹ If fines, ordinances, eminent domain, and other government actions are ineffective, what is the solution? The answer is H&S receiverships.¹³²

IV. RECEIVERSHIP: THE SOLUTION TO ZOMBIE FORECLOSURE

A. COURT-APPOINTED RECEIVERS

A court-appointed receiver is a neutral agent of the court that takes an out-of-control situation and resolves it.¹³³ The receivership remedy dates back to 1371 A.D. in ancient English when chancery courts frequently placed castles into receivership.¹³⁴ An example of this is when a king died without a son.¹³⁵ Without a king, there was no one to pay the knights, run the treasury, and maintain the farming systems.¹³⁶ To prevent a castle from falling into chaos, a

¹²⁷ *Id.*

¹²⁸ Tino Bovenzi, *Dayton Overrun with Zombie Properties*, SPECTRUM NEWS (Aug. 14, 2020, 11:00 AM ET), <https://spectrumnews1.com/oh/columbus/news/2019/10/16/dayton-overrun-with-zombie-properties>.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² Griffith, *supra* note 45.

¹³³ Ryan Griffith, *What is a Court Appointed Receiver?*, BAY AREA RECEIVERSHIP GRP. (May 6, 2020), <https://bayarearg.com/blog/index.php/2020/05/06/what-is-a-court-appointed-receiver/>.

¹³⁴ *See generally*, GREAT BRITAIN. COURT OF EXCHEQUER, ET AL.. ANCIENT PETITIONS OF THE CHANCERY AND THE EXCHEQUER: AYANT TRAIT AUX ÎLES DE LA MANCHE, CONSERVÉES AU PUBLIC RECORD OFFICE À LONDRES. ST.-HÉLIER, JERSEY: LABEY ET BLAMPIDÉ, IMPRIMEURS (1902).

¹³⁵ *Id.*

¹³⁶ *Id.*

chancery court would appoint an educated and knowledgeable person to act as a receiver over the castle.¹³⁷ The receiver would take temporary control of the castle and operate it until a new king was crowned.¹³⁸

The American legal system applies the receivership remedy in numerous ways. For example, a lumber mill in Colorado faced a shutdown due to infighting within its board.¹³⁹ A court-appointed receiver took control of the mill to save the lumber mill and the jobs associated with it.¹⁴⁰ Within a few years, the receiver had the lumber mill back on its feet and actually grew it from 80 employees to 120 employees.¹⁴¹

Another receivership example occurred in the California prison system. A receiver was appointed because the medical care in California prisons was so inadequate that independent oversight was deemed necessary.¹⁴² The receiver appointed to oversee the California prison system began increasing compensation for doctors, imposing higher standards, and ensuring access to care.¹⁴³ The receivership has been ongoing for nine years.¹⁴⁴ Thankfully, the receiver's work has improved medical care in the California prison system tremendously.¹⁴⁵

The appointment of receivers was also commonplace during the mortgage crisis.¹⁴⁶ As a result of the irresponsible

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Sawmills Get Break on Onerous Timber Contracts*, THE WATCH (Aug. 14, 2011), https://www.telluridenews.com/the_watch/news/article_5b8426f0-6a61-5db3-80aa-8053b2beb099.html.

¹⁴⁰ *Id.*

¹⁴¹ *Colorado Mill's New Lease on Life*, USNR, <https://www.usnr.com/en/content/montrosetrimline> (last visited Apr. 2, 2020).

¹⁴² David R. Shaw, *California Prison Health Care Receivership Corporation Use of State Funds for Fiscal Year 2008-2009*, STATE OF CAL. (Jun. 17, 2010), available at: <https://www.oig.ca.gov/wp-content/uploads/2019/05/California-Prison-Health-Care-Receivership-Corporation-Use-of-State-Funds.pdf>.

¹⁴³ *Id.*

¹⁴⁴ See *Plata v. Schwarzenegger*, 556 F.Supp.2d. 1087 (N.D. Cal. 2008).

¹⁴⁵ Margo Schlanger, *Plata v. Brown and Realignment: Jails, Prisons, Courts, and Politics*, 48 HARV. C.R.-C.L. L. REV. 165, 190 (2013).

¹⁴⁶ *Crisis and Response: An FDIC History 2008-2013*, FDIC, available at: <https://www.fdic.gov/bank/historical/crisis/overview.pdf>.

lending practices by numerous banks, many ended up with more debts than assets.¹⁴⁷ When one has more debt than assets, one has a problem, but what does one do with the assets on hand? One could slowly spend all his or her assets to the creditors' deprivation, but that would benefit no one. This is why many bank receivers emerged during the mortgage meltdown.¹⁴⁸ One example of this was the Washington Mutual Bank ("WAMU") receivership.¹⁴⁹ WAMU was a well-known bank that suffered during the mortgage crisis and required receivership.¹⁵⁰ The receivership then worked with JP Morgan Chase to preserve WAMU's assets.¹⁵¹ This action resulted in JP Morgan Chase's absorption of WAMU.¹⁵² These are only a few examples of receiverships bringing order to out-of-control situations.

As discussed, a property that houses numerous transients engaging in drug use and criminal activity without running water or electricity is detrimental to neighborhoods.¹⁵³ In these scenarios, appointing a receiver is an appropriate remedy, but how is a receiver appointed? Once a receiver is appointed, what can they do to abate the nuisance? The answers to these questions are found at HSC § 17980.6 and 17980.7.¹⁵⁴

B. THE HISTORY OF HEALTH AND SAFETY RECEIVERSHIP

California enacted HSC § 17980.7 in 1988 to provide cities with a remedy to address substandard properties that substantially endangered public health and safety.¹⁵⁵ The legislation was passed with little debate but went unused for years. However, in 1993, HSC § 17980.7 appeared in an

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Status of Washington Mutual Bank Receivership*, FDIC (Dec. 6, 2019), <https://www.fdic.gov/Bank/individual/failed/wamu-settlement.html> (last visited Sept. 20, 2020).

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ Griffith, *supra* note 6.

¹⁵⁴ Griffith, *supra* note 45.

¹⁵⁵ S. 2799, 1987-88 Leg. Sess. (Cal. 1988).

appellate decision for the first time.¹⁵⁶ After the HSC § 17980.7 footnote citation in 1993, it remained uncited for another twelve years. Then in 2005, the City and County of San Francisco (“CCSF”) used HSC § 17980.7 to abate a nuisance property.¹⁵⁷ The receivership was a success, and the CCSF recovered its attorney’s fees and enforcement costs.¹⁵⁸

When cities realized they could abate nuisance properties and recover their attorney’s fees and enforcement costs, the H&S receivership remedy gained traction.¹⁵⁹ In 2008, the H&S receivership remedy reached its pinnacle in the California Supreme Court.¹⁶⁰ In this case, the owner’s long-standing nuisance property had been cited numerous times, but the nuisance conditions remained.¹⁶¹ This inaction caused the City of Santa Monica to appoint a receiver over the property.¹⁶² When the matter reached the California Supreme Court, the Court granted H&S receivers extensive powers.¹⁶³ The powers H&S receivers obtained in this case included the authority to demolish properties and sell vacant land.¹⁶⁴

After the California Supreme Court granted H&S receivers broad powers, the remedy gained more traction.¹⁶⁵ Shortly after the Gonzalez decision, the mortgage crisis occurred, and cities often used H&S receivers to address zombie foreclosures.¹⁶⁶

In 2014, a California appellate court decided on two key issues regarding the powers of H&S receivers. The two issues decided by the court were: (1) whether an automatic stay could stop a city from appointing an H&S receiver, and (2) whether an H&S receiver could sell property free and

¹⁵⁶ City and Cty. of S.F. v. Daley, 20 Cal. Rptr. 2d 256, 261–62 (Cal. Ct. App. 1993).

¹⁵⁷ Jen, 37 Cal. Rptr. 3d at 458.

¹⁵⁸ *Id.* at 459–60.

¹⁵⁹ Griffith, *supra* note 133.

¹⁶⁰ Gonzalez, 182 P.3d at 1027.

¹⁶¹ *Id.* at 1031–33.

¹⁶² *Id.* at 1032–33.

¹⁶³ *Id.* at 1043–44.

¹⁶⁴ *Id.*

¹⁶⁵ Pucci, *supra* note 118.

¹⁶⁶ *Id.*

clear of existing liens.¹⁶⁷ In deciding these issues, the court ruled in favor of empowering H&S receivers by holding that a city's police power pursuant to 11 U.S.C. 362(b)(4) supersedes the automatic stay.¹⁶⁸ The court also held that H&S receivers could sell a property free and clear of existing liens.¹⁶⁹ In 2019, the California appellate court decided another important receivership issue. That issue was whether H&S receivers had super-priority over other lien holders. On this issue, the court concluded H&S receivers were entitled to super-priority.¹⁷⁰

C. THE UNIQUE NOTICE REQUIREMENTS OF A HEALTH AND SAFETY RECEIVERSHIP AND HOW A CITY OR COUNTY APPOINTS A RECEIVER

Receivership is a drastic remedy only available in exceptional circumstances.¹⁷¹ In the context of an H&S receivership, a city takes away a property owner's rights and puts them in control of a court-appointed receiver.¹⁷² The California legislature realized this and codified unique notice requirements to appoint H&S receivers.¹⁷³

The first item to obtain before pursuing a receivership is a title report. Obtaining a title report is imperative because one must identify all parties with a recorded interest in the property as they are entitled to notice of a pending receivership.¹⁷⁴ A zombie foreclosure usually has multiple liens that typically include mortgages, tax liens, and judgment liens. Each of these lienholders has an interest in the property and must receive notice of a receiver's potential appointment. Lienholders are notified of a pending

¹⁶⁷ *City of Riverside v. Horspool*, 167 Cal. Rptr. 3d 440 (Cal. Ct. App. 2014).

¹⁶⁸ *Id.* at 451–52.

¹⁶⁹ *Id.* at 453–54.

¹⁷⁰ *Id.*

¹⁷¹ Daley, 20 Cal. Rptr. 2d at 263.

¹⁷² *Id.* at 260–62.

¹⁷³ CAL. HEALTH & SAFETY CODE § 17980.6 (Deering current through Ch. 19 of 2021 Reg. Sess.); CAL. HEALTH & SAFETY CODE § 17980.7(c) (Deering current through Ch. 19 of 2021 Reg. Sess.).

¹⁷⁴ CAL. HEALTH & SAFETY CODE § 17980.7(c) (Deering current through Ch. 19 of 2021 Reg. Sess.).

receivership, so they have a chance to abate the nuisance themselves.¹⁷⁵

Once a title report is secured, the first official step to appointing an H&S receiver is an HSC § 17980.6 Notice.¹⁷⁶ A 17980.6 Notice requires that a city identify each code violation and provide a reasonable time for the owner to abate the violations.¹⁷⁷ There is no set definition for what a reasonable time is under 17980.6.¹⁷⁸ Another requirement of the 17980.6 Notice is that it must be posted and mailed to the owner and each affected residential unit.¹⁷⁹ Therefore, if the nuisance property is a four-unit apartment complex, the 17980.6 Notice must be mailed to the owner and posted and mailed to each of the four affected residential units.¹⁸⁰ The purpose of this notice is to inform anyone residing at the property of the pending receivership.¹⁸¹

Once the time cited in the 17980.6 Notice expires, the next step is to serve the HSC § 17980.7 Three-Day Pre-Petition Notice on all parties with a recorded interest.¹⁸² The parties with a recorded interest are identified in title reports.¹⁸³ The 17980.7 Notice must be served before the petition is filed.¹⁸⁴ The 17980.7 Notice is the last warning to the owner and parties with a recorded interest to fix the property, or the city will seek the appointment of a receiver.¹⁸⁵

If a landowner ignores the 17980.6 and 17980.7 Notices, then the enforcement agency can file a petition seeking to appoint a receiver over the nuisance property.¹⁸⁶ The petition itself has unique statutory requirements.¹⁸⁷ Once the petition is filed, the city is required to file a *lis*

¹⁷⁵ *Id.*

¹⁷⁶ CAL. HEALTH & SAFETY CODE § 17980.6 (Deering current through Ch. 19 of 2021 Reg. Sess.).

¹⁷⁷ Griffith, *supra* note 45.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

pendens.¹⁸⁸ Additionally, the California legislature sought to expedite receivership cases and allow a city to enter a default in ten days instead of thirty days.¹⁸⁹ To effectuate this, the California Judicial Council created a special summons for HSC § 17980.7 receivership cases.¹⁹⁰

Once a city files a receivership petition, it must prove three elements to appoint a receiver.¹⁹¹ These elements are as follows: (1) the property substantially endangers public health and safety; (2) the notice requirements were satisfied, and the parties had a reasonable time to correct the dangerous conditions; and (3) the receiver is qualified to address the situation.¹⁹²

At the actual receivership appointment hearing, it is not uncommon for parties that have ignored notices for years to show up and argue they need more time to abate the conditions.¹⁹³ Similarly, they claim that they had insufficient notice of the conditions at the property.¹⁹⁴ This scenario is where all the notices produced by the city through citations, the 17980.6 Notice, and 17980.7 Notice prove useful.¹⁹⁵ When a city issues these notices it negates any argument from an owner or lienholder that it needs more time or had insufficient notice.¹⁹⁶

The unique notice requirements to appoint a receiver are positive because they can result in voluntary compliance. However, if voluntary compliance is not achieved, then due process is satisfied before a court takes the drastic step of appointing a receiver. Once a receiver is appointed, he or she wields great powers, which will be discussed in the next section.

D. WHAT HAPPENS ONCE A RECEIVER IS APPOINTED

¹⁸⁸ CAL. HEALTH & SAFETY CODE § 17985(a) (Deering current through Ch. 19 of 2021 Reg. Sess.).

¹⁸⁹ CAL. HEALTH & SAFETY CODE § 17990 (Deering current through Ch. 19 of 2021 Reg. Sess.).

¹⁹⁰ *Summons 145*, CAL. JUD. COUNCIL (2009), <https://www.courts.ca.gov/documents/sum145.pdf>.

¹⁹¹ *City of Desert Hot Springs v. Valenti*, 256 Cal. Rptr. 3d 876, 880–81 (Cal. Ct. App. 2019).

¹⁹² *Id.*

¹⁹³ *Gonzalez*, 182 P.3d at 1033–34.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

If the city complies with all the notice requirements and successfully appoints a receiver, what happens next? California has created several rules of court with which a receiver must comply.¹⁹⁷ Upon a receiver's appointment, they must first post a bond with the court.¹⁹⁸ The receiver then files an inventory identifying the property and any assets it contains.¹⁹⁹ The receiver must also record the appointment order.²⁰⁰ Then, while not legally required to have any practical effect, a receiver records a receiver's certificate that authorizes the receiver to borrow money to abate the nuisances.²⁰¹ An H&S receivership certificate has priority over other liens.²⁰²

In the appointment order and by statute, the receiver is granted broad powers.²⁰³ For example, by statute, a receiver is authorized to sell real and personal property they are appointed over.²⁰⁴ A receiver is also authorized to borrow money with a priority lien to pay for receivership expenses.²⁰⁵ Typically a receiver's first action is to work with the police to remove anyone occupying the property.²⁰⁶ Once the police remove any occupants, the receiver hires contractors to clear out debris and other hazards.²⁰⁷ Once the hazards and occupants are cleared, the receiver pays for water, electricity, insurance, and other items to bring the property into compliance.²⁰⁸

¹⁹⁷ CAL. R. CT. §§ 3.1175–3.1184 (West, Westlaw current through June 15, 2020).

¹⁹⁸ CAL. CIV. PROC. CODE § 567 (Deering current through Ch. 19 of 2021 Reg. Sess.).

¹⁹⁹ CAL. R. CT. § 3.1181 (West, Westlaw current through June 15, 2020).

²⁰⁰ CAL. HEALTH & SAFETY CODE § 17985(b) (Deering current through Ch. 19 of 2021 Reg. Sess.).

²⁰¹ Griffith, *supra* note 45.

²⁰² SunTrust Mortg., 244 Cal. Rptr. 3d at 128.

²⁰³ CAL. CIV. PROC. CODE § 564 et seq. (Deering current through Ch. 19 of 2021 Reg. Sess.).

²⁰⁴ CAL. CIV. PROC. CODE § 568.5 (Deering current through Ch. 19 of 2021 Reg. Sess.).

²⁰⁵ SunTrust Mortg., 244 Cal. Rptr. 3d at 128.

²⁰⁶ Griffith, *supra* note 45.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

Once the receiver cleans out the property, contractor bids must be obtained.²⁰⁹ Using these bids, a receiver determines if the property should be rehabilitated, demolished, or sold as-is to a responsible owner.²¹⁰ If the receiver determines the property should be rehabilitated or demolished, they can file a motion to increase the receivership certificate.²¹¹ If the court grants the motion to increase the receiver's certificate, the receiver can borrow more funds to abate the nuisances.

During a receivership, a receiver must provide monthly reports detailing their expenses and actions.²¹² The receiver must provide these monthly reports to all parties with a recorded interest.²¹³ Any party with interest in the property can object to the monthly receiver's report.²¹⁴ Once the receiver decides to rehabilitate, demolish, or sell the property as-is, the receiver can list the property for sale.²¹⁵ The receiver has two options. First, they can sell it on the open market.²¹⁶ Alternatively, a receiver can conduct an auction pursuant to California statutory law.²¹⁷ Whether to perform a regular sale or auction is within the receiver's discretion.²¹⁸

E. HOW RECEIVERS SELL PROPERTY AND PUBLIC AGENCIES GET PAID

Once a receiver secures a buyer, the receiver must confirm the sale with the court.²¹⁹ However, before seeking

²⁰⁹ CAL. HEALTH & SAFETY CODE § 17980.7(4)(C) (Deering current through Ch. 19 of 2021 Reg. Sess.).

²¹⁰ *Id.*

²¹¹ Shawn M. Christiansen & Monique Jewett Brewster, *Introduction to California Receivership Law*, CAL. BUS. L. PRACTITIONER (2010), available at: https://www.buchalter.com/wpcontent/uploads/2010/05/BU_Practi_Spr10_Intro-CA-receivership.pdf.

²¹² CAL. R. CT. § 3.1182 (West, Westlaw current through June 15, 2020).

²¹³ *Id.*

²¹⁴ CAL. R. CT. § 3.1183 (West, Westlaw current through June 15, 2020).

²¹⁵ CAL. CIV. PROC. CODE § 568.5 (Deering current through Ch. 19 of 2021 Reg. Sess.).

²¹⁶ *People v. Riverside Univ.*, 111 Cal. Rptr. 68, 75–76 (Cal. Ct. App. 1973).

²¹⁷ CAL. CIV. PROC. CODE § 568.5 (Deering current through Ch. 19 of 2021 Reg. Sess.).

²¹⁸ *Gonzalez*, 182 P.3d at 1046.

²¹⁹ *Id.* at 930.

court confirmation of the sale, a receiver must determine how to resolve any outstanding liens. Typically, nuisance properties have more liens than value, which is problematic. However, California courts recognize the importance of bringing nuisance properties into compliance and allow receivers to strip liens to effectuate sales.²²⁰

The Honorable Learned Hand recognized lien stripping in 1935.²²¹ Lien stripping works as follows: if a property in receivership sells for \$200,000 but has \$400,000 in liens, the lien holders cannot be fully satisfied.²²² Therefore, a court will allow a receiver to obtain an order stripping the liens from the property, and then the receiver is entitled to be paid their fees first, using its super-priority certificate.²²³ The city that brought the receivership action is also statutorily entitled to super-priority of its fees and costs.²²⁴ Therefore, once the receiver and enforcement agencies' fees and expenses are satisfied, whatever remains can be distributed to the other lienholders.²²⁵ Lien stripping is not unique to receivership, and bankruptcy trustees similarly utilize it to sell properties with insufficient equity.²²⁶

If lien stripping and super-priority liens occur, the lienholders may not receive payment back in full.²²⁷ However, lienholders usually receive something from the sale.²²⁸ Of course, the court must confirm a receivership sale before approval to ensure receipt of a fair amount.²²⁹ A lienholder can object to the sale, but a court has broad discretion to approve the sale.²³⁰

²²⁰ Horspool, 167 Cal. Rptr. 3d at 453–54.

²²¹ Spreckels v. Spreckels Sugar Corp., 79 F.2d 332, 334 (2d. Cir. 1935).

²²² Ryan Griffith, *Lien Stripping: Why Does it Occur and How Does it Work?*, BAY AREA RECEIVERSHIP GRP. (Jul. 2, 2020), <https://bayarearg.com/blog/index.php/2020/07/02/lien-stripping-why-does-it-occur-and-how-does-it-work-2/>.

²²³ *Id.*

²²⁴ CAL. HEALTH & SAFETY CODE §§ 17980.7(c)(11) & (d)(1) (Deering current through Ch. 19 of 2021 Reg. Sess.).

²²⁵ Griffith, *supra* note 45.

²²⁶ 11 U.S.C.A. § 363(f) (West, Westlaw current through P.L. 116–158).

²²⁷ SunTrust Mortg., 244 Cal. Rptr. 3d at 125.

²²⁸ Griffith, *supra* note 45.

²²⁹ CAL. CIV. PROC. CODE § 568.5 (Deering current through Ch. 19 of 2021 Reg. Sess.).

²³⁰ Griffith, *supra* note 45.

Once the nuisance property is abated and sold, the receiver submits a final report and accounting.²³¹ Receiverships are undeniably a more efficient way to abate neighborhood nuisances than punishing owners who are financially or mentally unable to solve the problem.

V. HOW CITIES, COUNTIES, AND STATES CAN IMPLEMENT THE RECEIVERSHIP SYSTEM

A. RECEIVERSHIP WORKS IN CALIFORNIA AND GOVERNMENT AGENCIES ACROSS THE COUNTRY REALIZE ZOMBIE FORECLOSURE IS AN ISSUE

The H&S receivership statutory scheme works for cities in California. For example, after the City of Vallejo went through municipal bankruptcy, it handled numerous receivership cases.²³² Vallejo has approximately 120,000 residents and is small by California standards.²³³

Zombie foreclosures and vacant properties are haunting cities across the country.²³⁴ For example, a grand jury investigation from New York reported numerous issues and hazards caused by abandoned properties.²³⁵ Additionally, former Democratic presidential candidate and South Bend Mayor Pete Buttigieg created a task force to address problems caused by nuisance properties.²³⁶ Clearly, government agencies across the country are putting

²³¹ CAL. R. CT. § 3.1184 (West, Westlaw current through June 15, 2020).

²³² *Case List*, BAY AREA RECEIVERSHIP GRP., available at: <https://www.bayarearg.com/case-list/> (last visited June 3, 2021).

²³³ *Quick Facts: Vallejo, California*, U.S. CENSUS BUREAU (Jul. 1, 2019), <https://www.census.gov/quickfacts/vallejocitycalifornia> (last visited Sept. 20, 2020).

²³⁴ Robert McGarvey, *Zombie Foreclosures Are Haunting Towns Across the U.S.*, THE STREET (Oct. 13, 2014, 3:53 PM EDT), <https://www.thestreet.com/personal-finance/debt-management/zombie-foreclosures-are-haunting-towns-across-the-united-states-12911934> (last visited June 5, 2021).

²³⁵ *Final Investigative Report: Code Enf't in N.Y. State*, STATE OF N.Y. COMM. ON INVESTIGATIONS AND GOV'T OPERATIONS, FINAL INVESTIGATIVE REP.: CODE ENF'T IN N.Y. STATE (August 5, 2019), available at: https://www.nysenate.gov/sites/default/files/article/attachment/final_investigative_report_code_enforcement_senator_skoufif_igo_committee.pdf.

²³⁶ Pete Buttigieg, *Vacant and Abandoned Properties Task Force Rep.*, SOUTHBEND.GOV (2013), available at: https://southbendin.gov/wp-content/uploads/2018/05/Code_FinalVATF_Report_2_red.pdf.

substantial effort into abating nuisance properties. Unfortunately, these agencies have not reached an effective solution, but they can find the solution in California's H&S receivership laws.²³⁷

B. HOW ENFORCEMENT AGENCIES CAN ENACT HEALTH AND SAFETY RECEIVERSHIPS

The United States Constitution provides the federal government with eighteen enumerated powers, and none of these enumerated powers include a police power.²³⁸ The Tenth Amendment of the United States Constitution states, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the States respectively, or to the people."²³⁹ The United States Supreme Court interpreted the Tenth Amendment to mean that states can use their police power to enact laws that protect public safety.²⁴⁰ As an example, California enacted HSC § 17980.7 to protect its citizens from the dangers caused by nuisance properties.²⁴¹ Therefore, any state legislature could take the well-crafted statutory scheme that California has created and implement it. States such as New Jersey, Florida, and New York, with numerous zombie foreclosure properties, could implement the HSC statutory scheme and solve their zombie foreclosure problems.²⁴² The H&S receivership remedy is a way for cities to fix nuisance properties and increase revenue.²⁴³ Therefore, states should adopt California's statutory scheme to cure the zombie foreclosure problem.²⁴⁴

Though California's H&S receivership statutory scheme could solve many problems that states face, the bureaucracy of passing state legislation is difficult. However,

²³⁷ Griffith, *supra* note 45.

²³⁸ U.S. CONST. art. I § 8.

²³⁹ U.S. CONST. amend. X.

²⁴⁰ *City of Columbus v. Ours Garage & Wrecker Serv.*, 536 U.S. 424, 439 (2002).

²⁴¹ S. 2799, 1987-88 Leg. Sess. (Cal. 1988).

²⁴² Crissinda Ponder, *The 10 States with the Most 'Zombie Foreclosures'*, BUS. INSIDER (Oct. 27, 2015), <https://www.businessinsider.com/10-states-with-most-zombie-foreclosures-2015-10> (last visited June 5, 2021).

²⁴³ Griffith, *supra* note 45.

²⁴⁴ *Id.*

cities can pass legislation to enforce their municipal codes under their police power without state approval.²⁴⁵ In fact, California cities have enacted specific municipal codes to craft the H&S receivership remedy in their respective jurisdictions.²⁴⁶

Cities, counties, and states across the country can and should do what California is doing to solve zombie foreclosures.²⁴⁷ Swift action is important because of the huge economic hit that the COVID-19 virus is having on local and state economies. Receivership can also fix nuisance properties and increase revenue.²⁴⁸ Receivership will also add housing to cities that need it by turning abandoned properties into productive properties.²⁴⁹

C. THE PRACTICAL DIFFICULTIES OF APPOINTING A RECEIVER

With all the positive things said about receivership, one may ask what the catch is. While there is no catch *per se*, the amount of work a city must put in to appoint a receiver is substantial.²⁵⁰ For a city to get a judge to appoint a receiver, a city must prove the following three elements: (1) the property substantially endangers public health and safety; (2) the property owner and recorded interests had a reasonable time to abate the nuisance conditions; and (3) the receiver that the city seeks to appoint is qualified to address the nuisances.²⁵¹

Proving these three elements is a difficult task.²⁵² Therefore, a receivership requires resources, but the California legislature recognized this and allows cities that appoint a receiver under HSC § 17980.7 to recover all their

²⁴⁵ Peter J. Egler, *What Gives Cities and Counties the Auth. to Create Charters, Ordinances and Codes?*, THOMSON REUTERS (2001), available at: <https://info.legalsolutions.thomsonreuters.com/pdf/perspec/2001-spring/spring-2001-10.pdf>.

²⁴⁶ VALLEJO, CAL., MUN. CODE § 7.54.150(c)(5).

²⁴⁷ Griffith, *supra* note 45.

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Id.*

attorney's fees and enforcement costs.²⁵³ The California legislature enacted this statute to encourage cities and counties to utilize the receivership remedy.²⁵⁴

One may ask why it is such a burden put on a city to address a nuisance property. The answer is simple: receivership is a drastic remedy only to be used in exceptional circumstances.²⁵⁵ Receivership is an extreme remedy because it results in a court taking away private property rights.²⁵⁶ Therefore, to appoint a receiver, the situation must be exceptional and must comply with due process.²⁵⁷ For these reasons, California enacted a detailed statutory notice scheme that an enforcement agency must follow in appointing a receiver.²⁵⁸ This is entirely appropriate given the fact that receivership is such a drastic remedy.²⁵⁹

D. HOW A RECEIVERSHIP CASE WORKS IN THE REAL WORLD

In the real world, a receivership case proceeds as follows: a neighbor calls code enforcement to report a nuisance property.²⁶⁰ In a worst-case scenario, a fire occurs, which puts the city on notice of the abandoned property.²⁶¹ Once the city is notified of the nuisance property, the city identifies the property owner and issues a warning notice, which may include a small fine.²⁶² In most circumstances, a property owner is present and fixes the problem once he or

²⁵³ CAL. HEALTH & SAFETY CODE §§ 17980.7(c)(11) and (d)(1) (Deering current through Ch. 19 of 2021 Reg. Sess.).

²⁵⁴ *Id.*

²⁵⁵ Daley, 20 Cal. Rptr. 2d at 263.

²⁵⁶ SEC v. Bivona, No. 3:16-cv-01386-EMC, 2016 U.S. Dist. LEXIS 142002 (N.D. Cal. Oct. 11, 2016).

²⁵⁷ Daley, 20 Cal. Rptr. 2d at 263.

²⁵⁸ Griffith, *supra* note 45.

²⁵⁹ Daley, 20 Cal. Rptr. 2d at 263.

²⁶⁰ Matthew R. Silver, *Protecting Neighborhood Livability: Code Enft, Civ. Penalties, Drug Abatements and Receiverships*, LEAGUE OF CAL. CITIES (May 7, 2014), <https://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/Library/2014/Spring-Conf/5-2014-Spring-Silver-Randolph-Mere-Protect-Nbrhood> (last visited June 5, 2021).

²⁶¹ *Id.*

²⁶² *Id.*

she receives warning.²⁶³ However, when a zombie foreclosure arises, nobody takes responsibility, which causes the notices to go unanswered, and the property deteriorates.²⁶⁴

Eventually, the property will deteriorate to such a degree that the city will seek an inspection and or abatement warrant.²⁶⁵ The abatement warrant allows a city to enter private property and address immediate nuisances, which may include clearing out debris, repairing a broken fence, or other repairs.²⁶⁶ However, once an abatement warrant is executed, the issues at a zombie foreclosure property usually resurface in a matter of weeks.

After a fine is issued and an inspection warrant is executed, the neighbors near the property will continue demanding that the city do something.²⁶⁷ This is where many cities get stuck. However, cities that utilize the receivership remedy can get unstuck and use the fines and warrants as evidence in their receivership case.²⁶⁸ If the fines and warrants do not resolve the nuisance conditions at the property, then the city will need to identify a qualified receiver.²⁶⁹

There are several quality California firms that handle H&S receivership cases.²⁷⁰ It is worth noting that a city does not pay the receiver anything because the receiver is a neutral agent of the court and must act in the best interest of all parties.²⁷¹

When a receiver determines whether to take a case, they review the title report for liens and assess the properties' value.²⁷² The liens are generally a minor concern because the receiver must be paid ahead of other lienholders by placing a super-priority lien on the property.²⁷³ Of course,

²⁶³ Griffith, *supra* note 6.

²⁶⁴ *Id.*

²⁶⁵ *Camara v. United States*, 387 U.S. 523, 526–27 (1967).

²⁶⁶ CAL. CIV. PROC. CODE § 1822.50 et seq. (Deering current through Ch. 19 of 2021 Reg. Sess.).

²⁶⁷ Silver, *supra* note 261.

²⁶⁸ Griffith, *supra* note 45.

²⁶⁹ *Id.*

²⁷⁰ See *Bringing Solutions to Complex Situations*, BAY AREA RECEIVERSHIP GRP., <https://www.bayarearg.com/> (last visited June 5, 2021).

²⁷¹ CAL. R. CT. § 3.1179 (West, Westlaw current through June 15, 2020).

²⁷² Griffith, *supra* note 45.

²⁷³ SunTrust Mortg., 244 Cal. Rptr. 3d at 125.

when moving ahead of liens owned by powerful interests, such as banks, litigation can and does ensue.²⁷⁴ Determining if sufficient equity in the property exists to take the case is usually more of a concern for the receiver.²⁷⁵ The value determination is a case-by-case determination each receiver makes.²⁷⁶ Therefore, a city may have to contact several receivers before it finds one willing to take control of the property, but excellent requests for qualifications templates are available online.²⁷⁷

Once the city identifies a qualified receiver willing to take the case, the city prepares an HSC § 17980.6 Notice.²⁷⁸ When drafting the HSC § 17980.6 Notice, the city must identify each legal violation at the property and provide the owner a reasonable time to abate the property violations.²⁷⁹ Once the city drafts the notice, a city agent must then post and mail the 17980.6 Notice to each affected residential unit.²⁸⁰

Owners rarely respond to 17980.6 Notices, but if they do, the problem is solved.²⁸¹ In most cases, the reasonable time cited in the 17980.6 Notice expires.²⁸² Once the time in the 17980.6 Notice expires, the next step for the city to take is to serve a pre-petition notice of hearing on all parties with a recorded interest.²⁸³ To identify all parties with a recorded interest, a city attorney reviews the title report to identify all the recorded interests.²⁸⁴ Often zombie properties have several lien holders ranging from tax liens to mortgagors, and all must be notified of the receivership. Therefore, once the attorney identifies all the recorded interests, they must draft a 3-Day Notice of Hearing informing all recorded

²⁷⁴ *Id.*

²⁷⁵ Griffith, *supra* note 45.

²⁷⁶ *Id.*

²⁷⁷ *2017 Request for Qualifications- Receivers for Substandard and Public Nuisance Properties*, CITY OF VALLEJO (2017), available at: <http://www.pbvallejo.org/common/pages/DisplayFile.aspx?itemId=6469178>.

²⁷⁸ *Id.*

²⁷⁹ CAL. HEALTH & SAFETY CODE § 17980.6 (Deering current through Ch. 19 of 2021 Reg. Sess.).

²⁸⁰ Gonzalez, 182 P.3d at 1036.

²⁸¹ Griffith, *supra* note 45.

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ *Id.*

interests of the pending receivership petition.²⁸⁵ This notice must then be served on the recorded interests before filing the petition.²⁸⁶

Once all parties with a recorded interest receive service of the 3-Day Notice of Hearing, the city must wait three days from the date the last party receives service.²⁸⁷ During this period, one of the recorded interests may come forward to address the issues at the property.

Once the three days cited in the Notice of Hearing expire, the attorney can file the receivership petition.²⁸⁸ Once the receivership petition is filed, a hearing will be set.²⁸⁹ A receivership is held as a noticed motion where live testimony is not required.²⁹⁰

If a receiver is appointed, he or she becomes the property owner that is authorized to abate the nuisance conditions for all intents and purposes.²⁹¹ The receiver then must draft monthly reports regarding his or her progress.²⁹² Any party, including the city, can review and object to the receiver's actions if they wish.²⁹³ Eventually, the receiver will choose to fully rehabilitate, demolish, or sell the property as-is.²⁹⁴ To take any of these paths, a receiver needs to bring a motion for court approval, which cities typically support.²⁹⁵

Once the property is demolished, sold as-is, or rehabilitated, it is almost always sold to a new owner.²⁹⁶ When a new owner purchases the property, the receiver must file a motion to confirm the sale of the property.²⁹⁷ Once the price is set, often banks that have sat on the sidelines for years come out to fight the city and receiver regarding the sales price.²⁹⁸ Once the court confirms the property sale, the

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ *City of Crescent City v. Reddy*, 215 Cal. Rptr. 3d 351, 356–57 (Cal. Ct. App. 2017).

²⁹¹ Griffith, *supra* note 45.

²⁹² CAL. R. CT. § 3.1182 (West, Westlaw current through June 15, 2020).

²⁹³ CAL. R. CT. § 3.1183 (West, Westlaw current through June 15, 2020).

²⁹⁴ Griffith, *supra* note 45.

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ CAL. CIV. PROC. CODE § 568.5 (Deering current through Ch. 19 of 2021 Reg. Sess.).

²⁹⁸ *See generally*, SunTrust Mortg., 244 Cal. Rptr. 3d

city can bring an attorney fee and enforcement cost motion.²⁹⁹ This process is how the city recovers its fees and enforcement costs.³⁰⁰

Once the nuisances are abated, the property is sold, and the sale is confirmed, the receivership concludes when the receiver files their final report and accounting.³⁰¹ The receiver's final report and accounting documents everything the receiver did at the property and shows the distribution of receivership funds.³⁰² The city and any party can review the final report, which must be filed with the court as a motion that can be opposed.³⁰³ Of course, once the final report and accounting are filed and approved by the judge, the receiver is discharged.

Receiverships clearly require a significant amount of work. However, receiverships fix nuisance properties, increase revenue, and add housing stock to a city.³⁰⁴ The receivership remedy requires substantial collaboration between city departments, but once achieved, receivership can be an extremely useful tool for cities. For example, the City of Vallejo has performed numerous receiverships, which have all turned out extremely well.³⁰⁵ This shows that while receivership can be a difficult process the benefits of receivership far outweigh its burdens.

E. NEIGHBORHOOD LAW PROGRAMS AND LAW SCHOOLS ARE EFFICIENT WAYS TO IMPLEMENT THE RECEIVERSHIP REMEDY

People reading this may think receivership sounds ideal, but their agency cannot handle additional litigation. This concern is fair, because most public agency attorneys are overworked and underfunded. However, both Oakland and Vallejo created Neighborhood Law Programs to handle

²⁹⁹ CAL. HEALTH & SAFETY CODE §§ 17980.7(c)(11) and (d)(1) (Deering current through Ch. 19 of 2021 Reg. Sess.).

³⁰⁰ Griffith, *supra* note 45.

³⁰¹ CAL. R. CT. § 3.1184 (West, Westlaw current through June 15, 2020).

³⁰² *Id.*

³⁰³ *Id.*

³⁰⁴ Griffith, *supra* note 45.

³⁰⁵ *Case List*, *supra* note 232.

code enforcement litigation in 2002³⁰⁶ and 2013, respectively.³⁰⁷

The next question a reader may ask is what a Neighborhood Law Program is. A Neighborhood Law Program is a program that allows recent law school graduates to obtain two-year terms within a city attorney's office.³⁰⁸ The pay range for these positions is below average.³⁰⁹ However, recent law graduates are eager to find their first job.³¹⁰ Therefore, obtaining experience in a city attorney's office right after graduation is very beneficial.³¹¹

Neighborhood Law Programs are a great way to recruit ambitious law students at a very low cost to handle code enforcement litigation. City attorneys and assistant city attorneys do not have time to handle additional litigation. However, letting young and motivated attorneys handle code enforcement matters benefits everyone. The recent graduate gets experience, and the cities code enforcement issues receive proper attention.

In addition to utilizing Neighborhood Law Programs, local agencies could work with law schools to implement receivership programs. In California, for example, a law student can appear in court under a lawyers' supervision.³¹² Government agencies could collaborate with law schools to create receivership clinics and use law students to handle

³⁰⁶ John A. Russo, *Neighborhood Law Corps Attorneys Ready to Hit the Streets*, OAKLAND CITY ATTORNEY (2002), available at: https://www.oaklandcityattorney.org/PDFS/law_corps_february_2002.pdf.

³⁰⁷ *Neighborhood Law Program*, CITY OF VALLEJO COMMUNITY REPORT & ANNOUNCEMENT (June 2012), available at: http://www.ci.vallejo.ca.us/UserFiles/Servers/Server_13423/File/News/Neighborhood%20Law.pdf.

³⁰⁸ *Id.*

³⁰⁹ *Id.*

³¹⁰ Amir Efrati, *Hard Case: Job Market Wanes for U.S. Lawyers*, WALL STREET JOURNAL (Sept. 24, 2007), <https://www.wsj.com/articles/SB119040786780835602> (last visited June 5, 2021).

³¹¹ Noam Schieber, *An Expensive Law Degree, and No Place to Use It*, NY TIMES (Jun. 17, 2016), <https://www.nytimes.com/2016/06/19/business/dealbook/an-expensive-law-degree-and-no-place-to-use-it.html> (last visited June 6, 2021).

³¹² *Practical Training of Law Students*, CALIFORNIA BAR ASSOCIATION, <https://www.calbar.ca.gov/Admissions/Special-Admissions/Practical-Training-of-Law-Students> (last visited Aug, 15, 2020).

receivership cases.³¹³ The city and the school could then recover attorney's fees and costs for their respective institutions and simultaneously allow law students to obtain valuable legal experience.³¹⁴

Public agencies could create Neighborhood Law Programs to implement receivership programs. Alternatively, public agencies could turn to law schools to bring receivership actions. A school working with a public agency would be a positive collaboration beneficial to everyone.

VI. CONCLUSION

Zombie foreclosures and nuisance properties plague every city in the country. However, California H&S receiverships laws are the solution.³¹⁵ The remedy requires substantial work on the part of government agencies, but the government can delegate that work to young lawyers and law students that are eager for their first real-world experience.

Collaboration between young lawyers and government agencies should work well to revitalize neighborhoods, increase revenue, and decrease crime. Then as icing on the cake for doing this, the agency does not pay anything.³¹⁶ In fact, the city is entitled to recover its attorney's fees and enforcement costs.³¹⁷ The only thing stopping the receivership remedy from being utilized more frequently is public agencies' fear of the unknown, but hopefully, this article sheds some light on the receivership remedy.

³¹³ *Id.*

³¹⁴ Griffith, *supra* note 45.

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ *Id.*