

THE TRUE COSTS OF NOT PAYING YOUR PROPERTY TAXES IN OHIO

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I. INTRODUCTION

In the current economic downturn, many homeowners are unable to make timely payment of both their mortgages and their property taxes. In many cases, homeowners are falling behind on their property taxes. To

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make matters worse, the twelve largest counties² in Ohio are putting tax liens into the hands of aggressive, private investors that seek only to turn a profit from the misfortunes of others. Effective in 1998, the tax certificate statutes allow counties to sell tax certificates to private investors, who then have tax liens with the first priority of property tax liens. These private investors are exacerbating the foreclosure crisis by aggressively foreclosing on these tax liens. Aggressive private companies push out homeowners, foreclose on the homeowners' properties, collect their profits, and leave entire neighborhoods full of abandoned properties in their wake.

Each year, these twelve counties sell tax certificates to private investors and recoup tens of millions of dollars in delinquent property taxes. The infusion of cash goes to school districts, fire departments, and public parks. However, these counties are actually engaging in practices that undermine their own tax bases because it is difficult to collect property taxes from abandoned properties.

The unintended consequences of the tax certificate statutes are that the homeowners are injured, the relationship between lenders and borrowers is disrupted, and the long-term costs to the community are far more expensive than the short-term benefits from the tax certificate sales. Under the tax certificate statutes, the tax certificates held by private investors have the same priority as property tax liens, taking priority over mortgages. In addition, homeowners are thrown into default because most mortgages require the payment of property taxes. The lender normally acts first, not the private investor holding the tax certificate.

Furthermore, counties are putting the power into the hands of private investors with no long-term interest in the community. Unlike county officials, private investors do not have to be reelected. When the money runs out, communities are left with an unsteady tax base and neighborhoods of abandoned and foreclosed properties.

Section II of this Comment looks at the language and legislative history of Ohio Revised Code sections 5721.30 to 5721.43 in an attempt to explain the purpose and the enforcement mechanisms of these tax certificate statutes. Section III of this Comment presents two issues. First, this section focuses on the ability of a county treasurer to negotiate a variety of terms including fees and a maximum interest rate of eighteen percent with private investors. Homeowners already struggling to pay off their property taxes are overwhelmed by these financial terms, especially the double-digit

² Twelve Ohio counties are eligible to sell tax lien certificates: Cuyahoga (Cleveland), Franklin (Columbus), Hamilton (Cincinnati), Montgomery (Dayton), Summit (Akron), Lucas (Toledo), Stark (Canton), Butler (Hamilton), Lorain (Elyria), Mahoning (Youngstown), Trumbull (Warren), and Lake (Painesville). See OHIO LEGIS. BUDGET OFFICE, FISCAL NOTE & LOCAL IMPACT STATEMENT, H. 122-371, Reg. Sess., at 1-2 (as reported by Senate Finance & Financial Insts. Comm. Nov. 13, 1997).

interest rates, and this frustrates any attempt to negotiate a reasonable redemption payment plan with the private investors. Second, this section focuses on the wider implications of these tax certificate statutes, specifically focusing on the problems in Lucas County (Toledo), Ohio.³ Lucas County reaped the short-term benefits of the tax certificate sales, selling over 3,000 tax liens to Plymouth Park Tax Services LLC (“Plymouth Park”) for \$14.7 million.⁴ Plymouth Park is a subsidiary of J.P. Morgan Chase & Company, and it is the largest purchaser of tax certificates in Lucas County.⁵ The short-term benefits to the county helped to balance this year’s budget but may affect long-term revenues. Moreover, the county now faces neighborhoods of abandoned and foreclosed homes, decreasing property values, and a tax base unable to meet the needs of the county.

Finally, Section IV of this Comment suggests two alternative solutions to the problems described in Section III. First, counties should reevaluate the benefits of these tax certificate statutes, taking into account the wider implications, and reduce their reliance on these tax certificate statutes. Alternatively, the General Assembly should amend the statutes to include a series of limitations on the amount of tax certificates that can be sold in any year.

II. BACKGROUND

A. Legislative History of House Bill 371

On April 8, 1997, Representative Richard Hodges introduced the tax certificate bill, House Bill 371, to the Ohio House of Representatives.⁶ The bill enabled the county treasurers of the twelve counties having populations of at least two hundred thousand to collect delinquent real property taxes by selling tax certificates to private investors.⁷ County treasurers could negotiate the sale of any number of tax certificates, and the tax certificates could be sold to private investors at tax certificate sales.⁸ These tax certificates entitled the tax certificate holder to the first lien of the state, and the tax certificate holder could initiate foreclosure one year after the

³ Toledo is the largest city in Lucas County. See OFFICE OF POLICY, RESEARCH & STRATEGIC PLANNING, OHIO DEP’T OF DEV., OHIO COUNTY PROFILES: LUCAS COUNTY (2009), available at <http://development.ohio.gov/research/files/s0/Lucas.pdf>.

⁴ Tom Troy, *Lucas County May Urge Time Out on Foreclosure*, THE BLADE, Jan. 27, 2009, at B1. Plymouth Park is a New Jersey company that also operates under the name Xspand. *Id.*

⁵ *Id.*

⁶ *House Activity*, [Apr.-June 1997] 66 Ohio Rep. (Gongwer News Service) No. 66, at 1 (Apr. 8, 1997).

⁷ *House Activity*, [Apr.-June 1997] 66 Ohio Rep. (Gongwer News Service) No. 82, at 6 (Apr. 30, 1997). The large county limitation was placed in the bill after a number of small county treasurers expressed concerns about implementation when a similar bill was active in the previous session. *Senate Activity*, [Apr.-June 1997] 66 Ohio Rep. (Gongwer News Service) No. 105, at 2 (June 3, 1997).

⁸ See *infra* Part II.B.1, ¶ 1.

purchase of the tax certificate.⁹

The purpose of House Bill 371 was, as Summit County Treasurer John Donofrio said, “not to take away people’s homes and businesses,” but “to ensure schools get the property tax revenues they are due.”¹⁰ The purpose of the bill was clarified in subsequent hearings in both the House Financial Institutions Subcommittee and the Senate Finance & Financial Institutions Committee.¹¹ Montgomery County Treasurer Hugh Quill said that “the bill would spare county governments with limited resources from having to track and collect unpaid property taxes.”¹² Mr. Quill wanted to utilize the bill to sell tax liens on a number of properties with unpaid taxes in excess of the property value in an attempt to “eat away at this hard core tax delinquency.”¹³ Senator Grace Drake, one of the bill’s sponsors, agreed that the purpose of the bill was to remedy this hard core tax delinquency.¹⁴ In advocating for the sale of tax certificates in the twelve largest counties in Ohio, Senator Drake added that “it is often the case in urban areas that the amount of delinquent taxes exceeds the value of the property itself.”¹⁵

Before the bill was signed into law on November 26, 1997, a Fiscal Note & Local Impact Statement [hereinafter Statement] was issued.¹⁶ In the “Detailed Fiscal Analysis,” the Statement noted that “[t]he threat of the sale of property tax liens may reduce the number of delinquent properties,” providing increased tax revenues.¹⁷ However, because taxing districts would receive delinquent payments earlier through the sale of tax certificates, “[t]hey may receive less revenue than if the lien was redeemed, with interest, by the property holder at a later date.”¹⁸ Therefore, the Statement concluded that the effect on revenue was “indeterminate.”¹⁹ The Statement turned out to be optimistic. As counties would only later find out, the effect of selling thousands of tax certificates to private investors would in fact have a negative impact on long-term revenue.

B. Tax Certificate Foreclosures

A tax certificate is an instrument utilized by county treasurers to collect delinquent real property taxes.²⁰ The tax certificate gives the holder

⁹ See *infra* Part II.B.2, ¶ 1.

¹⁰ *House Activity, supra* note 7, at 6.

¹¹ See *id.*; *Senate Activity, supra* note 7, at 2.

¹² *House Activity, supra* note 7, at 6.

¹³ *Id.*

¹⁴ *Senate Activity, supra* note 7, at 2.

¹⁵ *Id.*

¹⁶ OHIO LEGIS. BUDGET OFFICE, FISCAL NOTE & LOCAL IMPACT STATEMENT, H. 122-371, Reg. Sess., at 1 (as reported by Senate Finance & Financial Insts. Comm. Nov. 13, 1997).

¹⁷ *Id.* at 3.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ See OHIO REV. CODE ANN. § 5721.30(A) (West 2007).

a lien against the property in the amount of the delinquency.²¹ Tax certificates are sold by the county treasurer either at public auctions or in negotiated transactions.²² The purchase price of the tax certificate is composed of the delinquent taxes, assessments, penalties, and interest owing on the delinquent property.²³ Upon completion of the sale of the tax certificate, the superior property tax lien is conveyed by the county to the certificate holder.²⁴

1. Negotiated Sale

A county treasurer may negotiate the sale or transfer of any number of tax certificates.²⁵ Negotiated terms may include, without limitation, any of the following:

- (i) A premium to be added to or discount to be subtracted from the certificate purchase price for the tax certificates;
- (ii) Different time frames under which the certificate holder may initiate a foreclosure action than are otherwise allowed²⁶ . . . not to exceed six years after the date the tax certificate was sold or transferred;
- (iii) The amount to be paid in private attorney's fees related to tax certificate foreclosures²⁷ . . . ; [or]
- (iv) Any other terms of the sale or transfer that the county treasurer, in the treasurer's discretion, determines appropriate or necessary for the sale or transfer.²⁸

This negotiated sale gives the treasurer substantial discretion in determining the final terms of the certificate. The fourth item on the list illustrates the legislative intent to collect these unpaid taxes and to offer incentives both to tax certificate purchasers and record owners of the parcels on which the delinquent taxes are unpaid and due. Because these tax certificate statutes are relatively new, the broad nature of Ohio Revised Code section 5721.33(A) remains untested by the courts.²⁹ Under Ohio Revised Code

²¹ *Id.*

²² *Id.* § 5721.32(B)(1).

²³ *Id.* § 5721.30(D).

²⁴ *Id.* § 5721.32(E).

²⁵ *Id.* § 5721.33(A).

²⁶ *See id.* §§ 5721.30-.43.

²⁷ *Id.* § 5721.371 (West 2007 & Supp. 2010).

²⁸ *Id.* § 5721.33(A) (West 2007).

²⁹ The Ohio courts have mainly addressed the reasonableness of attorney fees under Ohio Revised Code sections 5721.37 and 5721.39. *See, e.g.,* TCF Nat'l Bank FBO Aeon Fin., LLC v. Sweat, No. 2009CA00100, 2010 Ohio App. LEXIS 1182, at *2 (Ohio Ct. App. Mar. 29, 2010) (holding that a trial court has discretion to determine the reasonableness of attorney fees filed pursuant to Ohio Revised Code sections 5731.37, *et seq.*); TCF Nat'l Bank FBO Aeon Fin., LLC v. PLL Holdings, LLC, No. 2009CA00125, 2010 Ohio App. LEXIS 1184, at *6-7 (Ohio Ct. App. Mar. 29, 2010) (rejecting the idea that Ohio Revised Code section 5721.37 indicated that attorney fees of up to \$2,500 were presumptively

section 5721.33(A), purchasers are not limited to bidding for interest rates, but can also negotiate with the treasurer to set premiums, change time frames, and set attorney fees. Meanwhile, record owners face (1) increased costs, (2) stiffer penalties, and (3) the increased risk of foreclosure.³⁰

2. Superiority of the Tax Lien

The tax certificate vests in the certificate holder the first lien previously held by the state and its taxing districts under Ohio Revised Code section 5721.10.³¹ The impact is that the tax certificate holder has a lien superior to all other liens and encumbrances upon the parcel described in the tax certificate, “except liens for delinquent taxes . . . that attached to the certificate parcel prior to the attachment of the lien being conveyed by the sale of such tax certificate.”³² Therefore, once a private investor purchases a tax certificate from the county treasurer, the first lien of the state transfers to the private investor, granting it a lien superior to all other private party liens and encumbrances upon the parcel.

3. Redemption Period

Under the tax certificate statutes, the tax certificate holder must wait one month after the purchase of the tax certificate before initiating contact with the owner of the parcel to encourage or demand payment.³³ Penalties are imposed for tax certificate holders who initiate contact with the owner of a parcel to encourage or demand payment before one month has elapsed.³⁴ At this time, “the owner of record of the certificate parcel, or any other person entitled to redeem that parcel, may enter into a redemption payment plan with the [tax] certificate holder and all secured parties of the [tax] certificate holder.”³⁵ “If such a [redemption payment] plan is entered into,

reasonable because there was nothing in the statute that set a presumptive amount for recoverable attorney fees); *GLS Capital Cuyahoga, Inc. v. Abuzahrieh*, No. 86258, 2006 Ohio App. LEXIS 248, at *3-5 (Ohio Ct. App. Jan. 26, 2006) (holding that Ohio Revised Code section 5721.37 invalidated a local court rule that limited the amount of attorney fees that could be charged).

³⁰ Any well-drafted mortgage will contain a provision requiring the borrower to pay property taxes. See, e.g., FANNIE MAE/FREDDIE MAC, MASTER MORTGAGE FORM, § 4 (2006), available at <http://www.freddiemac.com/uniform/doc/3036-OhioMortgage.doc>. In addition to the increased risk of foreclosure, counties are selling tax certificates to private investors who have no long-term interest in the health and well-being of the community.

³¹ OHIO REV. CODE ANN. § 5721.10.

³² *Id.* § 5721.35(A) (“With respect to the priority as among such first liens . . . for different years, the priority shall be determined by the date such first liens . . . attached . . . , with first priority to the earliest attached lien and each immediately subsequent priority based upon the next earliest attached lien.”). *But see Davilla v. Harmon*, Nos. 06 MA 89 & 06 MA 91, 2007 Ohio App. LEXIS 2918, at *23-24 (Ohio Ct. App. June 22, 2007) (holding that a judgment had priority over a tax lien after the treasurer stipulated that there were no property taxes due and owing at the time of the foreclosure proceedings).

³³ OHIO REV. CODE ANN. § 5721.43.

³⁴ *Id.* The prohibition does not apply if the certificate holder is a county land reutilization corporation. *Id.*

³⁵ *Id.* § 5721.38(C)(2). In the alternative, during the period beginning on the date a tax certificate is sold and ending one year from that date, the record owner of the certificate parcel may enter into a redemption payment plan with the county treasurer. *Id.* § 5721.38(C)(1).

the time period for filing a [request for foreclosure or a] notice of intent to foreclose . . . is extended by the length of time the [redemption payment] plan is in effect and not in default.”³⁶

The redemption payment plan offers benefits to both the record owner and the tax certificate holder. First, the redemption payment plan allows the record owner to postpone or ultimately avoid foreclosure. Second, the tax certificate holder receives installment payments and avoids upfront court costs. In addition, the tax certificate holder also benefits from an extension for the filing of a request for foreclosure or a notice of intent to foreclose. Therefore, this redemption payment plan offers an incentive for the tax certificate holder to be actively involved in the negotiation process and ultimately to make an agreement with the record owner.

4. Foreclosure Proceedings

Foreclosure proceedings begin when the tax certificate holder’s attorney “institute[s] a foreclosure proceeding . . . in the name of the certificate holder to enforce the holder’s lien, in any court or board of revision with jurisdiction”³⁷ The court or board of revision may sell or transfer the parcel, without appraisal, for not less than the amount of its finding.³⁸ However, if the true value of the parcel, as determined by the county auditor, is less than the certificate redemption price, “the court or board of revision may, as prayed for in the complaint, issue a decree transferring fee simple title free and clear of all subordinate liens to the certificate holder”³⁹ This transfer is forever a bar to all rights of redemption.⁴⁰ If any tax certificate parcel is twice-offered for sale and remains unsold for want of bidders, “[t]he court or board of revision, by entry, [will] order the parcel forfeited to the [tax] certificate holder who filed the request for foreclosure or notice of intent to foreclose”⁴¹ These tax certificate statutes impose a form of strict foreclosure, whereby after two unsuccessful sales, all rights of redemption held by the record owner are

³⁶ *Id.* § 5721.38(C)(2). “If a certificate holder files a request for foreclosure . . . , upon the filing of the request for foreclosure, any money paid under the plan shall be refunded to the person that paid the money under the plan.” *Id.* § 5721.38(D)(2).

³⁷ *Id.* § 5721.37(F) (West 2007 & Supp. 2010) (This section applies to a certificate purchased under Ohio Revised Code sections 5721.32, 5721.33, or 5721.42.).

³⁸ *Id.* § 5721.39(B).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* § 5721.40. Upon the transfer of the deed to the certificate holder, “[t]he title to the parcel is incontestable in the certificate holder and is free and clear of all liens and encumbrances, except . . . [a] federal tax lien, notice of which was properly filed . . . prior to the date that the foreclosure proceeding was instituted,” and which lien “was foreclosed in accordance with 28 U.S.C. 2410(c),” and except for the “[e]asements and covenants of record running with the land that were created prior to the time the taxes or assessments . . . became due and payable.” *Id.*

extinguished.⁴² The form of strict foreclosure imposed by these tax certificate statutes conflicts with mortgage and judgment lien foreclosure laws, which prohibit strict foreclosure and requires a public foreclosure sale to enforce a mortgage or a specific lien.⁴³

Upon the confirmation of a sale, the proceeds will first go towards fees and costs incurred in the proceeding filed against the parcel, which includes either the tax certificate holder's attorney fees or the county prosecutor's legal costs.⁴⁴ Second, the proceeds will go to the tax certificate holder that filed the notice of intent to foreclose or request for foreclosure with the county treasurer for the other terms of the tax certificate.⁴⁵ Third, the proceeds will go towards any amount due for taxes, assessments, charges, penalties, and interest that exceeds the tax certificate holder's payment, including "all taxes, assessments, charges, penalties, and interest payable subsequent to the entry of the finding and prior to the transfer of the deed of the parcel to the purchaser following confirmation of sale."⁴⁶ Fourth, the record owner will obtain any residue of money from the proceeds of the sale.⁴⁷

"[U]pon the filing of the entry of confirmation of sale, the title to the parcel is incontestable in the purchaser"⁴⁸ The tax certificate holder takes the parcel free and clear of all liens and encumbrances, with the exception of any federal tax liens⁴⁹ and any easements and covenants of record running with the land that were created prior to the time the taxes or assessments that were sold under the tax certificate became due and payable.⁵⁰

III. ISSUES

The tax certificate statutes give the county treasurer substantial discretion in determining the final terms of the tax certificate. The county

⁴² There are only two states in the United States that still follow the English practice of strict foreclosure: Vermont and Connecticut. GRANT S. NELSON & DALE A. WHITMAN, REAL ESTATE FINANCE LAW 597 (5th ed. 2007).

⁴³ ROBERT M. CURRY & JAMES GEOFFREY DURHAM, OHIO REAL PROPERTY LAW AND PRACTICE § 19.01[3] (6th ed. 2010); OHIO REV. CODE ANN. § 2323.07 (West 2004 & Supp. 2010).

⁴⁴ OHIO REV. CODE ANN. §§ 5721.39(D)(1), 5721.37(B)(3), (F) (West 2007 & Supp. 2010).

⁴⁵ *Id.* § 5721.39(D)(2).

⁴⁶ *Id.* § 5721.39(D)(3) ("If the proceeds available for distribution . . . are insufficient to pay the entire amount of those taxes, assessments, charges, penalties, and interest, the proceeds shall be paid to each claimant in proportion to the amount of those taxes, assessments, charges, penalties, and interest that each is due, and those taxes, assessments, charges, penalties, and interest are deemed satisfied and shall be removed from the tax list and duplicate.").

⁴⁷ *Id.* § 5721.39(D)(4).

⁴⁸ *Id.* § 5721.39(E).

⁴⁹ In order to qualify for the exception, notice of the federal tax lien must be properly filed prior to the date that a tax certificate foreclosure proceeding is instituted and the federal tax lien must be foreclosed in accordance with 28 U.S.C. § 2410(c). *Id.* § 5721.40.

⁵⁰ *Id.* § 5721.39(E).

treasurer can negotiate interest rates, premiums, and attorney fees.⁵¹ Homeowners already struggling to pay off their property taxes are overwhelmed by these financial terms, especially the potential interest rate of eighteen percent. By acquiring tax certificates that have been padded with fees and large amounts of interest and then pursuing the tax certificates to foreclosure, aggressive, private investors are exacerbating the foreclosure crisis.⁵² The negative effects of these tax certificate sales are not limited to the owners of delinquent parcels, and many unintended consequences, such as lowered property values, swaths of abandoned and foreclosed homes, and an unsteady tax base for counties, have occurred.⁵³

The current economic climate is far from that envisioned by the proponents of House Bill 371 in 1997. At the time the bill was passed, as Joanne Limbach, a representative of Capital Assets Research Corporation of West Palm Beach, Florida, described, “many homeowners and business owners [did] not pay their tax obligations because of an inability to pay, but because they [were] taking a calculated risk by using county resources as a low-interest loan.”⁵⁴ While the original purpose of House Bill 371 was to remedy hard core intentional tax delinquency, these tax certificate statutes are currently being used to generate short-term revenue for counties from taxpayers unable to pay their property taxes.⁵⁵ Now, the residents and communities of those counties must suffer the consequences of their treasurers’ rash actions. The use of these tax certificate sales should be reevaluated in light of its many unintended consequences, and action should be taken either by the county treasurers or by the Ohio General Assembly to limit the counties’ use of these tax certificate sales for generating revenue.⁵⁶

A. Fees and Interest

1. Problems with Fee Structure

Owners of delinquent tax parcels, who are willing to cooperate in paying back their property taxes, are finding that the fees and interest charged by private investors on top of the owners’ pre-existing tax debts are overwhelming. Even without court approval, attorney fees alone can range as high as \$2,500.⁵⁷ In Lucas County (Toledo), debts of \$3,300 quickly grew to \$6,800 after one private investor, Plymouth Park, added on fees and

⁵¹ See *supra* Part II.B.1, ¶ 1.

⁵² See *infra* Parts III.A.1, ¶ 1, III.B.1, ¶ 4.

⁵³ See *infra* Part III.B.3, ¶¶ 1-3.

⁵⁴ *House Activity*, *supra* note 7, at 6.

⁵⁵ See *infra* Part III.B.2.

⁵⁶ See *infra* Part IV, ¶ 1.

⁵⁷ OHIO REV. CODE ANN. § 5721.371 (West 2007 & Supp. 2010).

interest.⁵⁸ Plymouth Park, a subsidiary of J.P. Morgan Chase & Company, is the largest purchaser of tax certificates in Lucas County, purchasing many of the over three thousand tax certificates sold by Lucas County since the county began selling tax certificates in 2006.⁵⁹ Ed Marks, litigation director for Legal Aid of Western Ohio, described paying off these tax certificates (with their added on fees and high interest rates) as “out of reach” for many homeowners.⁶⁰ Moreover, the upfront costs of one thousand dollars or more prevent many homeowners from entering into Plymouth Park’s redemption payment plan.⁶¹

In a traditional mortgage foreclosure proceeding, a mortgage-holder seeking to foreclose must pay its own legal costs.⁶² However, these tax certificate statutes allow private investors in tax certificate foreclosures to collect attorney fees and other court costs from those owing taxes.⁶³ Ohio Revised Code section 5721.371 allows for the collection of reasonable private attorney fees, which may be contracted in excess of \$2,500 (any fee over \$2,500 must be authorized by a court order).⁶⁴

While attorney fees above \$2,500 must be authorized by a court order, the reasonableness of attorney fees set at or below the statutorily authorized level are frequently left for the courts to decide. Ohio courts have developed three approaches regarding these statutorily authorized fees. First, Ohio courts have been reluctant to uphold local limitations on attorney fees charged in these tax certificate foreclosures.⁶⁵ For example, the Eighth District Court of Appeals (Cuyahoga County) reversed and remanded a decision that allowed a local court rule to limit attorney fees collected under Ohio Revised Code section 5721.37.⁶⁶ The local court rule was held invalid because it conflicted with Ohio Revised Code section 5721.39’s provision that “the court shall enter a finding . . . including, without limitation, the fees and costs of the prosecuting attorney represented by the fee paid under division (B)(3) of section 5721.38 of the Revised Code or the fees and costs of the private attorney representing the certificate holder.”⁶⁷ It should be no

⁵⁸ Jack Healy, *Homeowners Could Lose Over Taxes*, N.Y. TIMES, Aug. 18, 2009, at B1. Plymouth Park Tax Services LLC (“Plymouth Park”), a New Jersey company, also operates under the name Xspand. Troy, *supra* note 4.

⁵⁹ Troy, *supra* note 4.

⁶⁰ Alex M. Parker & Erica Blake, *Debt Collector Drowns Lucas County Court with Tax-Lien Foreclosures*, THE BLADE, Dec. 25, 2008, at A1.

⁶¹ Healy, *supra* note 58.

⁶² 69 OHIO JUR. 3D *Mortgages and Deeds of Trust* § 358 (2004) (“In Ohio, attorney’s fees, as a general rule and in the absence of statute, are not properly a part of the costs, and therefore the judgment in a mortgage foreclosure action should not allow attorney’s fees to be deducted as costs out of the proceeds of the sale.”).

⁶³ Parker & Blake, *supra* note 60.

⁶⁴ OHIO REV. CODE ANN. § 5721.371 (West 2007 & Supp. 2010).

⁶⁵ GLS Capital Cuyahoga, Inc. v. Abuzahrieh, No. 86258, 2006 Ohio App. LEXIS 248, at *8 (Ohio Ct. App. Jan. 26, 2006).

⁶⁶ *Id.*

⁶⁷ *Id.* at *5-6.

surprise that the plaintiff in the case, GLS Capital Cuyahoga, Inc., seeking to charge more in attorney fees than the local court rule allowed, is the successor in interest to Plymouth Park.⁶⁸

Second, Ohio courts have been reluctant to presume that a \$2,500 attorney fee—the maximum attorney fee allowable without court approval under Ohio Revised Code section 5721.371—is reasonable. For example, the Fifth District Court of Appeals (Stark County) rejected the idea that Ohio Revised Code section 5721.371 implicated that attorney fees of up to \$2,500 were presumptively reasonable.⁶⁹ In that case, the bank had purchased a tax lien certificate from the Stark County Treasurer, filed a Complaint for Foreclosure, and requested that the court award \$2,500 in attorney fees.⁷⁰ When the trial court only awarded \$450 in attorney fees, the bank appealed the case and argued, essentially, that “the court failed to accord [the bank] the benefit of the statutory presumption of reasonableness created by the Ohio Legislature, in R.C. Section 5721.371, in favor of a tax certificate holder for attorney fees incurred in tax certificate foreclosure cases where such fees do not exceed \$2,500.”⁷¹ The court found that there was “nothing within the statutes that set a presumptive amount for recoverable attorney fees, nor anything that obviates the trial court’s discretion in making the award.”⁷²

Third, Ohio courts agree that a trial court must look to DR 2-106 to determine the reasonableness of attorney fees.⁷³ DR 2-106 states that “[a] fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee.”⁷⁴ DR 2-106 seeks to guide courts in

⁶⁸ *Id.* at *2 n.1.

⁶⁹ TCF Nat’l Bank FBO Aeon Fin., LLC v. PLL Holdings, LLC, No. 2009CA00125, 2010 Ohio App. LEXIS 1184, at *7 (Ohio Ct. App. Mar. 29, 2010).

⁷⁰ *Id.* at *1.

⁷¹ *Id.* at *5.

⁷² *Id.* at *7.

⁷³ See, e.g., TCF Nat’l Bank FBO Aeon Fin., LLC v. Sweat, No. 2009CA00100, 2010 Ohio App. LEXIS 1182, at *7 (Ohio Ct. App. Mar. 29, 2010); *PLL Holdings*, 2010 Ohio App. LEXIS 1184, at *10; *GLS Capital Cuyahoga, Inc.*, 2006 Ohio App. LEXIS 248, at *7-8. *GLS Capital Cuyahoga, Inc.* was decided before the Ohio Rules of Professional Conduct were adopted by the Supreme Court of Ohio. The Ohio Rules of Professional Conduct became effective on February 1, 2007, and these rules superseded and replaced the Ohio Code of Professional Responsibility. See OHIO RULES OF PROF’L CONDUCT (2007), available at <http://www.sconet.state.oh.us/LegalResources/Rules/ProfConduct/profConductRules.pdf>. DR 2-106(B) survives almost intact as Ohio Rules of Professional Conduct Rule 1.5. Compare OHIO CODE OF PROF’L RESPONSIBILITY DR 2-106(B) (1974), available at <http://www.sconet.state.oh.us/LegalResources/Rules/professional/professional.pdf> with OHIO RULES OF PROF’L CONDUCT R. 1.5.

⁷⁴ OHIO CODE OF PROF’L RESPONSIBILITY DR 2-106(B). Effective February 1, 2007, the Ohio Rules of Professional Conduct provide eight factors to guide attorneys in determining the reasonableness of a fee:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount

assigning an individualized attorney fee for each case, but all it takes is one or two tax certificate foreclosure cases within a jurisdiction to determine that an attorney fee at or below \$2,500 is reasonable to set the new standard for attorney fees charged by private investors.⁷⁵ However, homeowners can take solace in the fact that private investors like Plymouth Park are only charging fees related to its legal costs and not for its own administrative costs.⁷⁶

In addition to attorney fees, interest rates have compounded the problem for many homeowners. Private companies can charge interest rates as high as eighteen percent on the unpaid taxes.⁷⁷ One resident of Lucas County knows first-hand the sting of the high interest rates charged by private investors.⁷⁸ Christopher Clark amassed \$6,450 in delinquent taxes, and his debt was sold to Plymouth Park—the private investor that has purchased the majority of the tax certificates sold in Lucas County.⁷⁹ Plymouth Park added \$1,853 in interest charges to the original bill, in addition to various fees, and then filed for foreclosure.⁸⁰

Interest rates of eighteen percent, the maximum rate allowable under the Ohio statutes, have become the new minimum bid at tax certificate sales.⁸¹ In 2008, property tax debts in Franklin County (Columbus) sold with an eighteen percent interest rate to a single bidder.⁸² This rate was remarkably lower in 2005, where competitive bidding in Franklin County drove the interest rate to .25 percent.⁸³ Moreover, in 2004, the buyer in Franklin County charged no interest but did include fees.⁸⁴ This begs the question that if private investors are making a profit in 2004 from fees alone, then why are county treasurers selling tax certificates with an eighteen percent interest rate to private investors in 2008?

involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; (8) whether the fee is fixed or contingent.

OHIO RULES OF PROFESSIONAL CONDUCT R. 1.5.

⁷⁵ Private investors foreclose on hundreds of delinquent tax parcels each year, and they develop a system of operating, standardized forms, and standardized fees. Attorneys representing these private investors will likely follow suit, standardizing the attorney fees charged in each case. When you couple this fact with the third factor from Rule 1.5, “the fee customarily charged in the locality for similar legal services,” it follows that a favorable ruling on attorney fees in one tax certificate foreclosure case could set a new standard for reasonableness in attorney fees sought by private investors in similar cases. OHIO RULES OF PROFESSIONAL CONDUCT R. 1.5.

⁷⁶ See Healy, *supra* note 58. “Plymouth Park [stated] that it charged fees related to its legal costs only, and did not charge homeowners for its own administrative costs.” *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Barbara Carmen, *Franklin County Calls Its Lien-Sale Policy Lenient*, COLUMBUS DISPATCH, Sept. 13, 2009, at 01A.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

While it is true that local governments also charge interest, counties like Franklin County (Columbus) are charging interest rates that are half of what private investors charge. In addition, local governments offer no-interest redemption payment plans to ensure that the homeowners will cooperate in repaying their tax debts.⁸⁵ Also, local governments that are responsible to their local constituents through elections are more likely to be concerned about the long-term effects of massive foreclosures in many of their local neighborhoods than private investors, like Plymouth Park, who are not subject to reelection.⁸⁶ Local officials seeking reelection should remember that once Plymouth Park forecloses on its properties, local governments will be left to clean up the mess.

2. Focus on Individual Tax Payers

When House Bill 371 was first proposed in 1997, many county treasurers saw this as a way to remedy the hard core tax delinquency plaguing many counties in Ohio.⁸⁷ Cuyahoga County (Cleveland) had more delinquent property taxes owed to it than the next five largest counties combined, with some of the delinquencies exceeding twenty years.⁸⁸ Counties argued that taxpayers on redemption payment plans were abusing the program and “slow[ing] the process of returning those delinquent dollars to the taxing districts that need the money for operations.”⁸⁹ However, the tax delinquency remedies suited for economic climate of the 1990s are exacerbating the foreclosure crisis of today.

The economic climate has changed significantly since 1997. Counties in Ohio are still trying to adapt to that reality. Cuyahoga County (Cleveland), the first county in Ohio to sell tax certificates, has canceled its tax certificate sales, and is now trying to pursue a land-bank program.⁹⁰ The land bank allows the county to purchase and take ownership of unredeemed tax foreclosed properties, make repairs, and put the properties back on the private market.⁹¹ Meanwhile, the Ohio General Assembly is debating a moratorium on mortgage foreclosures.⁹² However, even as Lucas County (Toledo) commissioners are considering backing the moratorium, Plymouth Park is increasing the number of tax certificate foreclosures filed on

⁸⁵ Healy, *supra* note 58.

⁸⁶ *Id.*

⁸⁷ See *Tax Lien Certificate Sales*, CUYAHOGA CNTY. TREASURER’S OFFICE (on file with author).

⁸⁸ *Id.*

⁸⁹ SUMMIT COUNTY FISCAL OFFICE, REAL ESTATE TAX CERTIFICATE LIENS (HOUSE BILL 371), at 3 (on file with author).

⁹⁰ Parker & Blake, *supra* note 60.

⁹¹ See Associated Press, *Cuyahoga County Wants to Create Land Bank*, DISPATCH.COM (Dec. 17, 2008, 4:51 PM), http://www.dispatch.com/live/content/local_news/stories/2008/12/17/cuyahoga_land_bank.html; see also *infra* Part IV.B, ¶ 1.

⁹² Troy, *supra* note 4.

properties in Lucas County.⁹³

Plymouth Park began purchasing tax certificates from the Lucas County Treasurer in 2006.⁹⁴ In 2008, Plymouth Park filed approximately 450 foreclosure cases.⁹⁵ The aggressive model used by Plymouth Park is well-suited to a strong economy, but is not viable in this economic climate.⁹⁶ Speaking on the subject, Ed Marks, litigation director for Legal Aid of Western Ohio, described:

“If times were good and there were only a few homeowners in this situation, it would be a benefit to the local government who would get money they otherwise wouldn’t have But a lot of people are struggling. They’re having to choose between [the] basic necessity of food and utilities or taxes.”⁹⁷

The foreclosure crisis has also been exacerbated by the practices adopted by some lenders during the mortgage bubble.⁹⁸ “[S]ome lenders kept monthly loan payments low by not tacking on an extra amount to cover taxes and insurance.”⁹⁹ Housing advocates argue that many homeowners assume that property taxes and insurance premiums are included in their monthly loan payments.¹⁰⁰ These homeowners may now be facing tax delinquency, an expensive bill from an aggressive, private investor, and notice of a pending tax certificate foreclosure.

B. Wider Implications and Unintended Consequences

1. Foreclosures at Crisis Level

Across the state, cities and counties are facing budget cuts largely due to low tax collections.¹⁰¹ For the twelve counties that meet the statutory requirement to sell tax certificates, selling tax certificates to private investors has provided a way to obtain the cash needed to continue funding public schools, police and fire departments.¹⁰² However, community

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ Parker & Blake, *supra* note 60.

⁹⁷ *Id.*

⁹⁸ Editorial, *Another Way to Lose the House*, N.Y. TIMES, Aug. 28, 2009, at A22.

⁹⁹ *Id.*

¹⁰⁰ *Stop Foreclosure Process, Tax Officials Are Urged*, STOP COLUMBUS OHIO FORECLOSURES (Sept. 3, 2009), <http://www.stopcolumbusohioforeclosure.com/articles/stop-foreclosure-process-tax-officials-are-urged/> [hereinafter STOP COLUMBUS OHIO FORECLOSURES].

¹⁰¹ *See id.*

¹⁰² *Id.*

With Tax Certificate Lien Sales, a county treasurer can initiate a sale that will include not only the desirable parcels of property, but make it necessary for buyers of the certificates to accept the undesirable parcels as well. This can be accomplished through the “bundling” of parcels, meaning selling as one unit the

advocates say that “the short-term gains from turning [tax] liens into cash are defeated by the social costs of homeless families and abandoned foreclosed properties.”¹⁰³ Local governments should be increasingly concerned about neighborhoods becoming wastelands of abandoned properties.

According to a recent study, the number of foreclosures in Ohio “has been and remains at crisis levels.”¹⁰⁴ Nearly every county has experienced at least a two-hundred percent growth in foreclosure filings since 1995,¹⁰⁵ and the study indicates that “[t]he costs of the foreclosure crisis, both to the families and communities affected, are only beginning to be totaled.”¹⁰⁶ For the fourth year in a row, Cuyahoga County (Cleveland) topped the list of foreclosures per person, followed by Lucas (Toledo) and Montgomery (Dayton) counties.¹⁰⁷ The ten biggest urban counties, all with populations over 240,000, accounted for 62.7% of the foreclosure filings in Ohio in 2008, but represented only 52.8% of the 2007 population.¹⁰⁸

Lucas County is leading the state in foreclosure filings.¹⁰⁹ Filing rates in Lucas County for 2008 have topped 9.86 filings/1,000 pop.,¹¹⁰ while the state average in 2008 was 7.48 filings/1,000 pop.¹¹¹ The proposed moratorium resolution stated that 4,059 property foreclosures were filed in Lucas County in 2008, out of about 86,000 property foreclosures filed statewide.¹¹² This is up from 3,486 in 2007 and 3,285 in 2006.¹¹³

Lucas County’s marked increase in foreclosure filings has been caused in large part by Plymouth Park. In 2006, Lucas County began selling tax certificates to Plymouth Park.¹¹⁴ Since 2006, Plymouth Park has filed over one thousand foreclosure actions in Lucas County—“more than any single mortgage lender in the county.”¹¹⁵ In 2008, Plymouth Park filed

entire delinquent parcel list or offering smaller bundles in sizes such as 20 parcels per bundle or 40 parcels per bundle.

SUMMIT COUNTY FISCAL OFFICE, *supra* note 89, at 3.

¹⁰³ STOP COLUMBUS OHIO FORECLOSURES, *supra* note 100.

¹⁰⁴ DAVID ROTHSTEIN & SAPNA MEHTA, POLICY MATTERS OHIO, FORECLOSURE GROWTH IN OHIO 2009, at 1 (2009). “As in 2007, there was one foreclosure filing for every 60 housing units in the state.” *Id.*

¹⁰⁵ *Id.* at 9-11. Rates since 1995 in Ohio’s twelve largest counties are as follows: Cuyahoga (314.3%), Franklin (537.9%), Hamilton (347.9%), Montgomery (447.3%), Summit (452.1%), Lucas (274.2%), Stark (693.9%), Butler (568.5%), Lorain (491.3%), Mahoning (472.0%), Trumbull (483.1%), and Lake (404.0%). *Id.*

¹⁰⁶ *Id.* at 4.

¹⁰⁷ *Id.* at 1. “In Cleveland, an estimated 8,009 homes are in need of demolition at a cost of roughly \$8,000 a home.” *Id.* at 4-5.

¹⁰⁸ *Id.* at 3.

¹⁰⁹ *Id.* at 1.

¹¹⁰ *Id.* at 13.

¹¹¹ *Id.* at 14.

¹¹² Troy, *supra* note 4.

¹¹³ Parker & Blake, *supra* note 60.

¹¹⁴ Healy, *supra* note 58.

¹¹⁵ *Id.*

about 450 tax certificate foreclosures, which accounted for more than ten percent of all foreclosures filed in the county that year.¹¹⁶ In December 2008, Plymouth Park filed approximately 120 new tax certificate foreclosure cases in two days, “threatening residents during the Christmas season with the possible loss of their homes.”¹¹⁷

2. Quick Profits

Lucas County implemented the tax certificate sales in 2006 as a “way to shore up revenue for local schools and other agencies.”¹¹⁸ The proceeds from the first tax certificate sale conducted in Lucas County totaled \$472,000.¹¹⁹ The tax certificate sales were the perfect method for removing delinquency, and provided the county with an “immediate windfall of cash.”¹²⁰ From 2006-2008, Lucas County earned \$11.3 million through tax certificate sales to Plymouth Park,¹²¹ and by 2009, the County had sold over three thousand tax certificates to Plymouth Park for a total of \$14.7 million.¹²²

Lucas County was not the only county enticed by the immediate profits provided by the tax certificate sales. Cuyahoga County (Cleveland), the first county to implement the tax certificate sales, has sold 22,912 tax certificates since 1998, which has brought in over \$61 million.¹²³ Summit County (Akron), which began implementing the tax certificate sales in 1998, collected over \$25.3 million in four years.¹²⁴ Franklin County (Columbus) has also relied upon the tax certificate sales to generate revenue for the county. Franklin County sold 1,022 tax certificates in 2008,¹²⁵ and in 2009, the County sold 4,520 tax certificates.¹²⁶ Unfortunately, as counties would quickly learn, the immediate windfall of cash was not without its consequences.

3. Unintended Consequences

The tax certificate sales are having several unintended consequences. The counties are realizing that the tax certificate sales have a

¹¹⁶ Parker & Blake, *supra* note 60.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *County's First Tax Lien Sale*, LUCAS CNTY., <http://www.co.lucas.oh.us/index.aspx?NID=522> (last visited Feb. 25, 2011).

¹²⁰ Healy, *supra* note 58.

¹²¹ Parker & Blake, *supra* note 60.

¹²² STOP COLUMBUS OHIO FORECLOSURES, *supra* note 100.

¹²³ *Tax Lien Certificate Sales*, *supra* note 87 (The numbers represent the total tax certificates sold and revenue collected between 1998 and 2006).

¹²⁴ SUMMIT COUNTY FISCAL OFFICE, *supra* note 89, at 3.

¹²⁵ Carmen, *supra* note 81.

¹²⁶ *Id.*

negative impact on long-term revenue.¹²⁷ In addition, the increasing number of tax certificate foreclosures has created entire neighborhoods of abandoned homes.¹²⁸ Not only are vacant properties targets for vandalism and thefts of reusable materials,¹²⁹ but the property value of houses in proximity to these foreclosed properties decline.¹³⁰ In Toledo, a home that only five years ago had a listed price of \$60,000, sold for \$15,000 in 2009.¹³¹ Moreover, this property was described as “abandoned, vandalized, and unlivable.”¹³²

In Lucas County, foreclosure sales are driving down property values.¹³³ Lucas County Auditor Anita Lopez stated that the tax certificate foreclosures “are doing more than having a chilling effect; they are impacting the market”¹³⁴ Private appraiser Marlin Pritchard, owner of Fort Miami Appraisal Services, noted that home values are down as much as forty percent.¹³⁵

Lucas County is also likely to see an unprecedented decline in taxable values, caused in no small part by Lucas County’s sustained reliance on the tax certificate sales.¹³⁶ Lucas County began its triennial revaluation in 2009, conducted by Auditor Lopez.¹³⁷ The triennial revaluation is based on housing sale prices for the county.¹³⁸ With foreclosures driving down property values, Auditor Lopez stated that the new taxable “values will reflect the changed real estate environment in Lucas County, and could result in reductions of [ten] percent.”¹³⁹ A ten percent reduction in taxable values would mean that revenues from property taxes into the city of Toledo’s general fund, which generated \$19.4 million in 2007, would drop \$1.9 million in 2010.¹⁴⁰ In addition, the Toledo Public School District stands to lose over one million dollars in 2010.¹⁴¹ The same tax certificate sales that provided an immediate windfall of cash to “shore up revenue for local schools and other agencies,”¹⁴² are potentially costing the city of

¹²⁷ As opposed to the 1997 conclusion that the tax lien sales would have an “indeterminate” effect on revenue. OHIO LEGIS. BUDGET OFFICE, FISCAL NOTE & LOCAL IMPACT STATEMENT, 122-HB371, Reg. Sess., at 2 (as reported by Senate Finance & Financial Insts. Comm. Nov. 13, 1997).

¹²⁸ Associated Press, *supra* note 91.

¹²⁹ *Id.*

¹³⁰ ROTHSTEIN & MEHTA, *supra* note 104, at 5.

¹³¹ Tom Troy, *Lucas Co. Faces Funding Dip with Drop in Property Values*, THE BLADE, Mar. 15, 2009, at A1.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² Parker & Blake, *supra* note 60.

Toledo around two million dollars in revenue.¹⁴³ Moreover, this could mean budget cuts to those agencies supported by the tax certificate sales, such as public schools, police and fire departments.¹⁴⁴ The unintended consequences of the tax certificate sales are certainly taking their toll on Lucas County.

IV. ANALYSIS

In light of the severe, unintended consequences of the tax certificate sales, counties must reevaluate their dependence upon the tax certificate statutes for collecting delinquent real property taxes. Local officials must take a long-term approach to this problem, as opposed to the current short-term approach embodied by the exchange of an immediate windfall of cash for rapidly decreasing property values and a lowered tax base. There are two alternative solutions to these problems. First, counties should reevaluate the costs and benefits of these tax certificate sales and reduce their reliance on the tax certificate sales. Alternatively, if the counties do not act, then the General Assembly should amend the statutes to include a series of limitations on both the tax certificate sales and the total amount of tax certificates that can be sold in any year.

A. Reevaluating Tax Certificate Sales

Each of the twelve counties in Ohio should reevaluate the costs and benefits of the tax certificate sales, and each county must actively reduce their reliance on the tax certificate sales as a major source of revenue for the county. The reality of the situation is that the “the economy [is] faltering and property values [are] plunging[;] homeowners and landlords are falling behind on their bills or abandoning their property, just as governments are facing huge budget shortfalls.”¹⁴⁵ While reliance on these previous tax certificate sales cannot be undone, counties should reevaluate a system that in the long-term creates a “no-win situation.”¹⁴⁶

A complete reevaluation will not only require counties to face the reality of the current economic downturn, but will also require county treasurers to undergo a change of attitude. Mere acceptance of the current situation is not an option.¹⁴⁷ County treasurers should approach the situation with the attitude embodied by Columbus City Attorney Richard C. Pfeiffer Jr., who stated that “[a]nything attempting to address foreclosed properties

¹⁴³ Troy, *supra* note 131.

¹⁴⁴ STOP COLUMBUS OHIO FORECLOSURES, *supra* note 100.

¹⁴⁵ Healy, *supra* note 58.

¹⁴⁶ *Id.*

¹⁴⁷ *See id.* Responding to the charge that tax-lien sales were exacerbating the foreclosure crisis, Lucas County Treasurer Wade Kapszukiewicz stated, “What is the alternative? . . . The alternative is to let people not pay taxes and do nothing about it.” *Id.*

is worth looking at”¹⁴⁸ County treasurers should also remember that they are not merely foreclosing on delinquent properties but on someone’s home.¹⁴⁹

In undertaking a reevaluation of the tax certificate sales, with a focus on both the long-term effects and the wider implications of using of the tax certificate sales in the current economic climate, counties should look at both the long-term benefits and the long-term costs of the tax certificate sales. It must be noted that the tax certificate sales are not devoid of benefits. Counties must obtain cash to continue funding public schools, police and fire departments,¹⁵⁰ and the payment of real estate taxes “is a responsibility of any citizen of the country.”¹⁵¹ These tax certificate sales provide cash and prevent those who pay their taxes from paying out higher taxes “to pick up the slack from scofflaw landlords or tax evaders.”¹⁵² Moreover, there are private investors, like Plymouth Park, that are more than willing to take on this “risky but potentially high-yielding investment.”¹⁵³

However, the benefits are quickly outweighed by the long-term costs when counties develop a heavy dependence on the tax certificate statutes for collecting delinquent taxes. As community advocates have stated, “the short-term gains from turning liens into cash are defeated by the social costs of homeless families and abandoned foreclosed properties.”¹⁵⁴ Counties should take note of the arguments that private investors, like Plymouth Park, are exacerbating the foreclosure crisis, and counties should be concerned about the long-term effects that these aggressive, private investors are having on local neighborhoods.¹⁵⁵ Credence should be given to arguments that private investors are overwhelming homeowners with fees and interest and providing homeowners with unattainable redemption payment plans, as entire neighborhoods become wastelands of abandoned properties.¹⁵⁶ It is also important to remember that the purpose of the tax certificate sale at its inception was “to eat away at this hard core tax delinquency,” meaning those properties with unpaid taxes in excess of the property value.¹⁵⁷ Even at its inception, the tax certificate sale was not meant to be utilized as a remedy for all of the tax delinquencies within a

¹⁴⁸ Mark Ferenchik, *Land Banks Might Help Counties Fight Blight*, COLUMBUS DISPATCH, Jan. 2, 2010, at 01B.

¹⁴⁹ Healy, *supra* note 58.

¹⁵⁰ *Id.*

¹⁵¹ STOP COLUMBUS OHIO FORECLOSURES, *supra* note 100.

¹⁵² Healy, *supra* note 58.

¹⁵³ *Id.*

¹⁵⁴ STOP COLUMBUS OHIO FORECLOSURES, *supra* note 100.

¹⁵⁵ Healy, *supra* note 58.

¹⁵⁶ *Id.*

¹⁵⁷ *House Activity*, *supra* note 7, at 6.

county.¹⁵⁸

Putting a halt to the tax certificate sales in order to undertake a proper reevaluation will not be without its costs. Lucas County Deputy Treasurer Mark Austin has stated that without “the prospect of potential tax foreclosure, or a tax-lien sale, . . . schools and parks and all of the different county agencies which collect property taxes would have no way of anticipating revenues and their budget.”¹⁵⁹ There will be an immediate loss of cash coming into the county, which could be high based on the potential to earn as much as \$472,000 in a single tax certificate sale.¹⁶⁰ However, by putting a temporary halt to the tax certificate sales, counties will gain two benefits: (1) a healthier community that is more capable of bearing the stresses of economic shifts, and (2) an ability to pursue remedies to the foreclosure crisis—a crisis that has been exacerbated by the tax certificate sales.

B. Land Bank Remedy

One remedy to the harmful effects caused by the tax certificate sales is the land bank, which comes from Cuyahoga County—one of the counties in Ohio worst hit by the foreclosure crisis.¹⁶¹ Cuyahoga’s land bank is funded through interest and penalties paid on delinquent property taxes.¹⁶² The land bank allows the county to purchase and take ownership of unredeemed tax foreclosed properties, which will help counteract the “growing, destructive practice of speculators buying up foreclosed properties -- often sight unseen -- and flipping them to a new buyer, without making improvements.”¹⁶³ As of April 8, 2010, the Cuyahoga County Land Reutilization Corporation had acquired more than 170 vacant properties.¹⁶⁴ The Federal National Mortgage Association, Fannie Mae,¹⁶⁵ is also participating in the program, selling its foreclosed homes to the land bank for one dollar each, and paying up to \$3,500 to demolish homes “too far gone to be fixed.”¹⁶⁶

Cuyahoga’s land bank is gaining acceptance in many counties, and in 2009, the Ohio General Assembly began debating a bill that would create

¹⁵⁸ *Id.*

¹⁵⁹ Parker & Blake, *supra* note 60.

¹⁶⁰ *County’s First Tax Lien Sale*, *supra* note 119.

¹⁶¹ ROTHSTEIN & MEHTA, *supra* note 104, at 1.

¹⁶² *About the Land Bank*, CUYAHOGA LAND BANK, <http://www.cuyahogalandbank.org/about.php> (last visited Feb. 25, 2011).

¹⁶³ Associated Press, *supra* note 91.

¹⁶⁴ Jim Siegel, *Counties Get Tool to Fight Blight*, COLUMBUS DISPATCH, Apr. 8, 2010, at 01B.

¹⁶⁵ 12 C.F.R. § 900.3 (2010). “Fannie Mae is a government-sponsored enterprise (GSE) chartered by Congress with a mission to provide liquidity, stability and affordability to the U.S. housing and mortgage markets.” *About Us*, FANNIE MAE, <http://www.fanniemae.com/kb/index?page=home&c=aboutus> (last visited Feb. 25, 2011).

¹⁶⁶ Ferenchik, *supra* note 148.

land banks across Ohio.¹⁶⁷ The original proposal for House Bill 313 enabled “any county with more than 100,000 people or with between 78,000 and 81,000 people to establish a land bank.”¹⁶⁸ This new mechanism would allow counties “to take control of vacant and abandoned properties plaguing neighborhoods by issuing bonds to acquire homes.”¹⁶⁹ Dawn Larzelere, the policy director of Greater Ohio, stated that “[t]he bonds would be paid off with money from penalties and interest collected on delinquent property taxes”¹⁷⁰

Once the foreclosed properties have been acquired, non-profit groups could repair the homes.¹⁷¹ Then, counties can put these properties back on the private market.¹⁷² State Representative Peter Ujvagi (Toledo), one of the House bill’s two main sponsors, offered the land bank as a way to deal with “vacant homes dragging down the value of [neighboring] houses”¹⁷³ Montgomery County Treasurer Carolyn Rice, a proponent of the bill, has stated that “[w]ithout [the land bank] we don’t have many options to deal with the problem of abandoned and vacant properties.”¹⁷⁴ However, the bill is not perfect, and Rice gave the caveat that “[w]e have a whole lot more homework to do”¹⁷⁵

There are several problems with House Bill 313. First, as stated by State Representative Matt Dolan, from Novelty, “It’s not a solution to the economic crisis or the foreclosure crisis,” but “[i]t’s a tool that will help.”¹⁷⁶ While the land bank proposal is not a solution, large counties like Lucas, Hamilton, and Montgomery have been closely watching the Cuyahoga land bank, and are hoping “to gain another tool in the fight against foreclosures.”¹⁷⁷ Second, there was some initial skepticism that the land bank proposal would increase government power, “essentially turning counties into landlords with control over private property.”¹⁷⁸ However, following an aggressive and successful lobbying campaign by Cuyahoga County Treasurer Jim Rokakis, this skepticism subsided.¹⁷⁹

Third, the land bank proposal is not a viable option for all counties because the funds for the land banks must be raised locally.¹⁸⁰ Preliminary estimates show that Lucas County could raise about \$1.5 million through

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ Associated Press, *supra* note 91.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

local sources, and Cuyahoga County expects to raise around \$9 million.¹⁸¹ Smaller counties cannot fund their land banks in the same manner as Cuyahoga's land bank—which is funded by interest and penalties paid on delinquent property taxes—because they obtain less revenue from delinquent property taxes.¹⁸² These counties must explore other ways to fund the land banks.¹⁸³ However, even larger counties may have trouble funding the land banks.¹⁸⁴ Franklin County and Columbus already have land banks, but as Franklin County Treasurer Ed Leonard has stated, “the county isn't actively going after properties because it doesn't have the money”¹⁸⁵

On December 17, 2009, the Ohio House voted 88-6 to approve the bill, sending it to the Senate,¹⁸⁶ and on April 7, 2010, Governor Ted Strickland signed the bill into law.¹⁸⁷ Effective July 7, 2010, House Bill 313 will allow “any county with a population of more than 60,000 to create a land bank.”¹⁸⁸ Currently, more than forty counties will qualify under the law to utilize this “new tool to help deal with the pileup of foreclosed, vacant properties that are driving down property values in a number of Ohio cities.”¹⁸⁹ While the results may take years to develop, former State Representative and bill sponsor Peter Ujvagi (Toledo) said that the “success of the program will be judged by how quickly properties are turned around and property values are stabilized.”¹⁹⁰

C. Limits Placed on Tax Certificate Foreclosure Sales by the General Assembly

Alternatively, if the counties do not act, the General Assembly should amend the new tax certificate statutes to include a series of limitations on the tax certificate sales. First, the General Assembly should examine the parameters in the fee structure of private investors like Plymouth Park.¹⁹¹ Interest charges and fees are overwhelming and are creating tax certificate redemptions that are “out of reach” for many homeowners.¹⁹² Second, the General Assembly should increase the filing fees for tax certificate foreclosures, and the General Assembly should require that these fees be paid by the private investors and not included in

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ Ferenchik, *supra* note 148.

¹⁸⁵ *Id.*

¹⁸⁶ Associated Press, *supra* note 91.

¹⁸⁷ OHIO LEGIS. SERV. COMM'N, STATUS REPORT OF LEGISLATION, H. 128-313, Reg. Sess., at 1 (2010); Siegel, *supra* note 164.

¹⁸⁸ Siegel, *supra* note 164.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ Parker & Blake, *supra* note 60.

¹⁹² *Id.*

the fees charged to delinquent taxpayers. Through the increase in filing fees, the General Assembly can increase a private investor's incentive to negotiate more reasonable terms with homeowners, and the filing fee increase will compensate local courts that have been inundated with these tax certificate foreclosures.¹⁹³ Third, the General Assembly should amend the tax certificate statutes to require mediation as a prerequisite to filing a tax certificate foreclosure.¹⁹⁴ This method would provide homeowners with an opportunity to speak to a neutral third party, and it would encourage private investors to enter into a more reasonable redemption payment plan with homeowners. Fourth, the General Assembly should amend the tax certificate statutes to include a limitation on the amount of tax certificates that can be sold in any given year. This limitation would ensure that the original purpose of the bill, to remedy hard core tax delinquency, would be carried out, even amidst the current economic downturn.¹⁹⁵

First, interest rates and fees are overwhelming homeowners.¹⁹⁶ Attorney fees alone can range as high as \$2,500 without court approval.¹⁹⁷ Two possible amendments to the statute would alleviate the burden imposed by the attorney fees charged by these private investors. One way to remedy the high costs of attorney fees is to bring the tax certificate statutes in conformance with Ohio mortgage law. Under Ohio law, a mortgage-holder seeking to foreclose must pay its own legal costs.¹⁹⁸ Bringing the tax certificate statutes in conformance with Ohio mortgage law would require the General Assembly to amend the statutes and delete the provision awarding attorney fees to bidders at the tax certificate sales. The immediate effect would be two-fold: (1) it would reduce the costs imposed on homeowners, and (2) it would offer homeowners a better opportunity to enter into the redemption payment plans that are provided by private investors. In the long-run, this amendment to the tax certificate statutes will give private investors an incentive to negotiate rather than litigate. A private investor faced with paying its own attorney fees will be more willing to negotiate a redemption payment plan with homeowners than to file a tax certificate foreclosure and incur the increased costs.

Another way to keep attorney fees down is to require bidders at the tax certificate sales to use the county prosecutor's office when filing foreclosures.¹⁹⁹ Currently, the statute allows bidders either to utilize the

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *House Activity, supra* note 7, at 6.

¹⁹⁶ Parker & Blake, *supra* note 60.

¹⁹⁷ OHIO REV. CODE ANN. § 5721.371 (West 2007 & Supp. 2010).

¹⁹⁸ 69 OHIO JUR. 3D, *supra* note 62 ("In Ohio, attorney's fees, as a general rule and in the absence of statute, are not properly a part of the costs, and therefore the judgment in a mortgage foreclosure action should not allow attorney's fees to be deducted as costs out of the proceeds of the sale.").

¹⁹⁹ Parker & Blake, *supra* note 60.

prosecutor's office or to utilize private attorneys.²⁰⁰ Lower attorney fees charged by county prosecutors, compared to those charged by private attorneys, will help to reduce the total dollar amount of the bill that is presented to homeowners, and it may give homeowners a better opportunity to make the upfront payments required to enter into a redemption payment plan with the private investors.²⁰¹ The increased reliance on the prosecutor's office will also bring in more business to the prosecutor's office, and the increased revenues generated from the attorney fees may allow the prosecutor's office to hire more attorneys and staff.²⁰²

Second, the General Assembly should increase the filing fees for tax certificate foreclosures. Lucas County (Toledo) has explored this option "to help residents who face being forced from their homes"²⁰³ These filing fees have also gone to pay for more court staff in courts that have been inundated with these tax certificate foreclosures, amidst budget and staff cuts.²⁰⁴ By increasing filing fees, the General Assembly can help to ease the immense burden placed upon homeowners. However, the General Assembly should require the increased fees to be an externality for private investors, thereby preventing private investors from passing these increased filing fees on to delinquent taxpayers in the form of a higher total bill.²⁰⁵ The increased filing fees will cut into the profit margin of private investors holding these tax certificates, which will make negotiations with homeowners more attractive than the aggressive foreclosure filings that have dominated in the past.²⁰⁶

Third, the General Assembly should amend the tax certificate statutes to require mediation as a prerequisite to filing a tax certificate foreclosure.²⁰⁷ Lucas County (Toledo) has also explored this option, hiring a foreclosure magistrate to help mediate cases.²⁰⁸ One positive attribute of this method is that it provides a homeowner with an opportunity to state his or her case to a neutral third party. This is especially important with the current economy leaving homeowners feeling that they are in a "no-win situation."²⁰⁹ Also, this method encourages private investors to enter into a

²⁰⁰ OHIO REV. CODE ANN. § 5721.37(C)(1)-(2).

²⁰¹ Healy, *supra* note 58.

²⁰² *Lucas County Prosecutor Organizational Chart*, LUCAS CNTY., <http://www.co.lucas.oh.us/index.aspx?NID=312> (last visited Feb. 25, 2010).

²⁰³ Parker & Blake, *supra* note 60.

²⁰⁴ *Id.* In addition, Lucas County has provided free legal assistance to homeowners facing tax certificate foreclosures from members of the Toledo Bar Association. *Id.*

²⁰⁵ There is already movement in the General Assembly to make fees payable by the party filing the foreclosure. House Bill 3 requires a filing fee to be charged of "any mortgage servicer that files a complaint to initiate a foreclosure action that involves a residential mortgage loan." OHIO LEGIS. SERV. COMM'N, BILL ANALYSIS, H. 128-3, Reg. Sess., at 7 (2009).

²⁰⁶ Healy, *supra* note 58.

²⁰⁷ Parker & Blake, *supra* note 60.

²⁰⁸ *Id.*

²⁰⁹ Healy, *supra* note 58.

more reasonable redemption payment plan with homeowners. Private investors may be amenable to this new process, as Ed Marks, litigation director for Legal Aid of Western Ohio, has indicated that “Plymouth [Park] has shown in the past a willingness to negotiate with homeowners.”²¹⁰

Fourth, the General Assembly should amend the tax certificate statutes to include a limitation on the amount of tax certificates that can be sold in any given year. When House Bill 371 was first introduced in 1997, its proponents stated that the purpose of the tax certificate sales would be to “eat away at this hard core tax delinquency.”²¹¹ Hard core tax delinquency was defined as “properties with unpaid taxes in excess of the property value”²¹² To place an adequate limitation on tax certificate sales, the General Assembly should restrict the sale of tax certificates to only those properties with unpaid taxes in excess of the property value. This limitation will bring the tax certificate statutes more in line with the intended purpose of House Bill 371,²¹³ and this limitation will promote long-term health and growth within Ohio’s largest counties.

D. Six-Month Moratorium

As pressure grows for a state response, the General Assembly seems relatively receptive to the changes described above. As State Senator Teresa Fedor, a Democrat from Toledo, has described, “There is some movement in Ohio to address this issue and get the attention of elected leaders to do something to protect people from losing their homes. The system isn’t working”²¹⁴ Acknowledging that the system is not working, the Ohio House of Representatives has passed a bill that “calls for major changes including the establishment of a comprehensive licensing regime of mortgage servicers, a six-month moratorium on foreclosures, and increased filing fees for foreclosure filings.”²¹⁵ In 2009, Policy Matters Ohio issued a report identifying the issues that House Bill 3 was created to address:

These actions are in response to several problematic issues noted by community groups and the media. First, servicers may not need to comply with federal workout regulations because many are not federally regulated banks. Second, keeping families in their homes until workouts are possible is a community benefit and allows the homeowner a chance

²¹⁰ Parker & Blake, *supra* note 60.

²¹¹ *House Activity*, *supra* note 7, at 6.

²¹² *Id.*; see also *Senate Activity*, *supra* note 7, at 2. One of the bill’s sponsors, Senator Grace Drake, echoed the use of the bill to remedy hard core tax delinquency, stating that “it is often the case in urban areas that the amount of delinquent taxes exceeds the value of the property itself.” *Senate Activity*, *supra* note 7, at 2.

²¹³ *House Activity*, *supra* note 7, at 6.

²¹⁴ Troy, *supra* note 4.

²¹⁵ ROTHSTEIN & MEHTA, *supra* note 104, at 6.

at a workout. Finally, there are financial incentives in the current foreclosure process for servicers to foreclose on a home.²¹⁶

The six-month moratorium would affect all foreclosures on occupied homes.²¹⁷

Lucas County (Toledo) has expressed its support for House Bill 3. As Lucas County Commissioner Tina Wozniak has stated, “Our community can’t afford to do nothing. We’ve got some of the highest foreclosures here in Lucas County compared to the entire nation. All we’re asking is for people to have time to do workouts with their lenders”²¹⁸ Even Lucas County Treasurer Wade Kapszukiewicz, a major supporter of the tax certificate sales, said that if the state legislature enacts a moratorium, “we would have to stop our foreclosures also and I would support that.”²¹⁹

The measure passed in the House in May 2009, and was assigned to the Senate Finance and Financial Institutions Committee on May 21, 2009.²²⁰ Although House Bill 3 is constitutional,²²¹ the bill still has some hurdles to cross. Many people are concerned that the resolution will not do enough to remedy the foreclosure crisis. Lucas County Commissioner Ben Konop expressed his feeling on the matter, stating “[i]t’s not going to immediately bring any relief. It’s more of a symbolic gesture”²²² Mr. Konop is not alone in his concerns. While the first hearing of House Bill 3 was held in the Senate on January 12, 2010, it is skeptical whether the measure will pass.²²³ While House Bill 3 is certainly a positive step taken by the General Assembly to revisit the issue of tax certificate sales amidst the foreclosure crisis, it is not the long-term strategy that should be advocated. Once again, it is a temporary bandage being placed on a gaping wound. Serious reevaluation and reform should take place to remedy the wastelands of abandoned properties growing across Ohio.

V. CONCLUSION

Immediate action should be taken to remedy the unintended consequences of the tax certificate sales. Treasurers should begin by

²¹⁶ *Id.*

²¹⁷ Troy, *supra* note 4.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ OHIO LEGIS. SERV. COMM’N, STATUS REPORT OF LEGISLATION, H. 128-3, Reg. Sess., at 1 (2009).

²²¹ *See* Home Bldg. & Loan Assoc. v. Blaisdell, 290 U.S. 398, 444-48 (1934) (holding that the Minnesota Mortgage Moratorium Act was constitutional because the Act had been enacted pursuant to the state’s police power with regard to an emergency economic crisis, the legislation was addressed to a legitimate end, the conditions upon which the period of redemption was extended were not unreasonable, and the legislation was temporary in operation).

²²² Troy, *supra* note 4.

²²³ Bill Cohen, *Ohio Senate Finally Takes up Six Month Moratorium on Home Foreclosures*, 89.7 WKSU, Jan. 12, 2010, <http://www.wksu.org/news/story/24734>.

reevaluating their heavy reliance on these tax certificate statutes during this economic downturn. Remembering that the original purpose of House Bill 371 was to eat away at hard core tax delinquency, treasurers should utilize the tax certificate sales only for those properties with unpaid taxes in excess of the property value.²²⁴ Moreover, the aggressive model used by Plymouth Park is well-suited to a strong economy, but is not viable in this economic climate.²²⁵ The current system is broken, and treasurers should only offer to sell tax certificates with reasonable interest rates, minimal costs, and minimal fees.

If treasurers continue to depend on the tax certificate sales with excessive costs and interest despite the obvious impact on their communities, then the General Assembly should take action. The General Assembly has five options to counter the harmful effects of the tax certificate sales: (1) bring the tax certificate statutes in conformance with Ohio mortgage law, amending the tax certificate statutes and deleting the provision awarding attorney fees to bidders at the tax certificate sales; (2) increase the filing fees for foreclosures, but require that these fees be paid by the private investors and not included in the fees charged to delinquent taxpayers; (3) amend the statute to require bidders at the tax certificate sales to use the county prosecutor's office when filing tax certificate foreclosures;²²⁶ (4) amend the tax certificate statutes to require mediation as a prerequisite to filing a tax certificate foreclosure;²²⁷ and (5) amend the tax certificate statutes to restrict the sale of tax certificates to only those properties with unpaid taxes in excess of the property value.

The true costs of not paying your property taxes in Ohio are rapidly rising, and serious reevaluation and reform must take place to remedy the wastelands of abandoned properties growing across Ohio.

²²⁴ *House Activity*, *supra* note 7, at 6.

²²⁵ Healy, *supra* note 58.

²²⁶ Parker & Blake, *supra* note 60.

²²⁷ *Id.*

