

## **Springfield Loses Out In Foreclosure Ordinance Case**

In Easthampton Savings Bank & others v. City of Springfield, SJC-11612, 470 Mass. 284 (December 19, 2014), the city of Springfield adopted two ordinances in 2011 to address the wave of foreclosures and resulting public safety concerns triggered by the economic downturn of 2008. Both ordinances address properties left vacant during or after the foreclosure process.

First, chapter 182, article I of Springfield's municipal ordinances entitled "Mediation of Foreclosures of Owner-Occupied Residential Properties" (the "mediation ordinance") establishes a program requiring mandatory mediation between mortgagors and mortgagees. Once notice of default and the statutory right of redemption is given, mediation must occur within forty five days. If the parties are unable to come to an agreement to avoid foreclosure, the city-provided mediation program manager must determine the mortgagee has made a good faith effort to come to an agreement and will issue a certificate stating that the mortgagee may proceed with its rights of foreclosure. Failure of a mortgagee to comply results in a \$300 per diem fine.

Second, chapter 285, article II of the Springfield's municipal ordinances entitled "Vacant or Foreclosing Residential Property" (the "foreclosure ordinance") requires owners of buildings that are vacant or undergoing foreclosure to register with the city. The term "owner" includes "a mortgagee of any such property who has initiated the foreclosure process." Included in the definition of initiating the mortgage foreclosure process is where a mortgagee whose mortgage expressly authorizes entry to make repairs upon the mortgagor's failure to do so, is an owner under the ordinance. The ordinance specifies the minimum requirements of maintenance, and only upon the satisfaction of these conditions will the city issue a certificate of compliance to the "owner." Upon failure to comply with an order to register, the building commissioner and his agents are authorized to enter the property and bring it into compliance with the ordinance. An owner must pay any expenses incurred by the commissioner in securing an unregistered property within seven days of receipt of notice or the city may file a notice of claim against the property and obtain a lien. The ordinance requires a \$10,000 bond so that the city will be able to recoup the costs of entering the property. The city will retain an unspecified portion of the bond as an administrative fee. Failure to comply results in a \$300 per diem fine.

In response to the Springfield ordinances, six banks<sup>1</sup> (collectively the "Banks") holding mortgage notes on properties in Springfield filed suit in Massachusetts state court seeking declaratory and injunctive relief from the enforcement of the ordinances. The city of Springfield (the "City") removed the case to federal district court. The Federal Court allowed

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<sup>1</sup> Easthampton Savings Bank, Chicopee Savings Bank, Hampden Bank, United Bank, Monson Savings Bank, and Country Bank for Savings.

the City's motion for summary judgment. The Banks appealed to the U.S. Court of Appeals for the First Circuit, which held the case centered on unresolved questions of Massachusetts law.

The U.S. Court of Appeals for the First Circuit certified the following questions to the Massachusetts Supreme Judicial Court (the "Court") under S.J.C. Rule 1:03: (1) Is Springfield's mediation ordinance or foreclosure ordinance preempted in part or in whole by state laws and regulations? (2) Does the foreclosure ordinance impose an unlawful tax in violation of the Massachusetts Constitution?

The Court held the mediation ordinance is preempted by M.G.L. c. 244. It held the foreclosure ordinance is preempted by M.G.L. c. 21E and M.G.L. c. 111, but not M.G.L. c. 244. It also held the foreclosure ordinance does not impose an unlawful tax.

Preemption is determined by "whether the Legislature intended to deny [a municipality] the right to legislate on the subject [in question]." This intent to deny is apparent when "the legislative intent to preclude local action is clear" or "the purpose of the statute cannot be achieved in the face of the local bylaw." The three statutes in question are the Massachusetts foreclosure statute, Massachusetts Oil and Hazardous Material Release Prevention Act, and the Massachusetts sanitary code.

The Massachusetts foreclosure statute, codified at M.G.L. c. 244, establishes three means by which the equity of redemption of a mortgage may be foreclosed. Both this statute and the mediation ordinance provide similar means by which to give mortgagees an incentive to negotiate with mortgagors before foreclosing. The mediation ordinance does not "compliment" state law, but instead imposes different penalties and prohibits mortgagees from beginning the foreclosure process until the mortgagee attempts mediation. The court further notes that mortgage foreclosure regulation is traditionally a state matter. Lastly, looking to c. 244 legislative history, the court determined that the Legislature intended to "occupy the field" in that it addresses different lenders under varying circumstances and shows a good faith effort to prevent foreclosure.

Conversely, the Court further held that the foreclosure ordinance is not preempted by c. 244 because the foreclosure ordinance does not affect the procedures for foreclosing the equity of redemption and thus has no legal effect on the statutory foreclosure process.

The Massachusetts Oil and Hazardous Material Release Prevention Act, codified at M.G.L. c. 21E, clearly preempts the field of cleaning up hazardous waste because it is so extensive; a municipality cannot regulate this field without explicit statutory authority. The court held the foreclosure ordinance is inconsistent with c. 21E because it expands the definition of "owner" of a vacant or foreclosing property to include a secured lender.

The State sanitary code, codified at 105 Code Mass. Regs. § 400 (1993), provides that the local board of health or the Department of Public Health are responsible for enforcement of the code. The foreclosure ordinance melds two separate enforcement procedures from the state sanitary code into a single mechanism: the use of the surety bond and direct entry by an enforcement authority. The foreclosure ordinance requires an owner to post bond to ensure compliance with an administrative order and fine, whereas under the same circumstances the state sanitary code would not. Because the enforcement mechanisms are essentially the same but the foreclosure ordinance places a heavier burden on an owner, the Court held this inconsistency is preempted.

The Court further held the City's requirement that foreclosing mortgagees register the subject property with the City is not a tax, but a lawful fee. Because the Court held that the requirement that a registrant post bond is preempted by state law, the Court viewed the City's retaining a portion of the bond as a separate fee. The test for a lawful fee is it must have a particularized benefit, the money collected is not used to raise government revenue, and voluntariness. There is a particularized benefit because the ordinance both attempts to regulate the foreclosure phenomenon, which is the cause of public safety concerns, and benefits the mortgagees by maintaining the value of their loan collateral. The money collected compensates the government because it is meant to reimburse officials for securing the noncompliant properties and other expenditures by the city in enforcing the ordinance. The Court did not weigh voluntariness. Therefore, the registration requirement is a lawful fee.

While this result may appear at first glance to be hindering a city's valiant effort to help struggling residents, from a regulatory standpoint, regulations regarding secured transactions and banking are best left to the states and federal government. Consumer financial rights are a relatively new concept that surfaced in the 1960's with the rapid rise of consumerism. With the upswing in lending heading into 2015, mortgagors don't want their particular cities and towns creating a quagmire of conflicting and confusing regulations impeding the lending market.

*With questions on this or related topics, please contact Gemma Ypparila, who authored this summary, or visit the Bowditch & Dewey website [www.bowditch.com](http://www.bowditch.com).*