

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

NO. SJC-11612

EASTHAMPTON SAVINGS BANK, ET AL.,

Plaintiffs - Appellants

v.

CITY OF SPRINGFIELD,

Defendant - Appellee

AMICI CURIAE BRIEF OF THE REAL ESTATE BAR ASSOCIATION
FOR MASSACHUSETTS, INC. AND THE ABSTRACT CLUB
SUPPORTING APPELLANTS AND URGING REVERSAL

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ISSUES PRESENTED

1. "Are Springfield's municipal ordinances Chapter 285, Article II, 'Vacant or Foreclosing Residential Property' (the Foreclosure Ordinance) or Chapter 182, Article II, 'Mediation of Foreclosures of Owner-Occupied Residential Properties' (the Mediation Ordinance) preempted in part or in whole by those state laws and regulations identified by the plaintiffs?"
2. "Does the Foreclosure Ordinance impose an unlawful tax in violation of the Constitution of the Commonwealth of Massachusetts?" See docket (SJC-11612) (#1.5).

STATEMENT OF INTEREST OF AMICI CURIAE

The Amici submitting this brief are the Real Estate Bar Association for Massachusetts, Inc. ("REBA"), formerly known as the Massachusetts Conveyancers Association, and the Abstract Club.

REBA is the largest specialty bar in the Commonwealth, a non-profit corporation that has been in existence for over 100 years. It has over 2,000 members practicing throughout the Commonwealth. Through its meetings, educational programs, publications and committees, REBA assists its members in remaining current with developments in the field of real estate law and

practice and sharing in the effort to improve that practice. REBA also promulgates title standards, practice standards, ethical standards and real estate forms, providing authoritative guidance to its members and the real estate bar generally as to the application of statutes, cases and established legal principles to a wide variety of circumstances practitioners face in evaluating titles and handling real estate transactions.

The Abstract Club is a voluntary association of experienced lawyers who practice real estate law. It has been in existence for over 100 years and is limited by its by-laws to 100 members.

The Amicus Committee is a joint committee of the two organizations comprised of real estate lawyers with many years of experience. The Amicus Committee, from time to time, files amicus briefs on important questions of law. On several occasions it has been requested to do so by this Court or the Appeals Court. All Committee members serve without compensation.

The issues certified to this Court have significant implications not only for the City of Springfield, but also for other municipalities which might seek to impose additional requirements on entities holding mortgages on properties that are vacant and/or in foreclosure.

The Amici strongly support the position set forth by the Appellants in their brief and reply brief, as well as the argument advanced by the Massachusetts Bankers Association, Inc. ("MBA"), most particularly in Section A, in which the MBA properly notes the comprehensive nature of foreclosure legislation and the need to avoid a patchwork of varying foreclosure-related procedural rules at a municipal level.

Rather than restate the arguments made by the parties above, in this brief, the Amici will focus on two points less generally addressed elsewhere: (1) the Foreclosure Ordinance is inconsistent with and preempted by the State Sanitary Code, G.L.c.111, §127I, which is comprehensive legislation regarding receivership promulgated for the purpose of dealing with matters, such as the health and welfare of the public, identical to the matters that the Foreclosure Ordinance seeks to promote; (2) with respect to the Foreclosure Ordinance's cash bond requirement, the lack of particularized benefit to the mortgagees, the improper/lack of allocation to defraying the costs of providing a service to mortgagees and the disproportionate amount with the City's own estimates of anticipated expenses are all factors rendering the cash requirement bond an illegal tax. The Amici also add that

the Foreclosure Ordinance, if upheld and implemented, will likely have a significant negative impact on the public, by hindering borrowers' ability to bring their loans current (due to the \$10,000 cash bond assessed to the loan) and by delaying foreclosures, thus perpetuating the very conditions the City is seeking to eliminate.

BRIEF BACKGROUND

This case is an appeal of a judgment entered in favor of the City of Springfield ("City") involving two municipal ordinances ("Ordinances") passed in 2011 (but not yet implemented) to regulate foreclosure proceedings when there is already a comprehensive regulatory scheme by the Legislature regulating the same.

The United States Court of Appeals for the First Circuit is seeking a determination from this Court as to whether the Ordinances are preempted partly or wholly by state laws and whether the Foreclosure Ordinance's bond is unconstitutional. REBA asserts that both certified questions should be answered in the affirmative.

ARGUMENT

I. THE FORECLOSURE ORDINANCE IS INCONSISTENT WITH AND PREEMPTED BY THE STATE SANITARY CODE, G.L.c.111, §127I.

An ordinance that is inconsistent with the General Laws is impermissible under the Home Rule Amendment. St

George Greek Orthodox Cathedral of Western Massachusetts, Inc. v. Fire Dept. of Springfield, 462 Mass. 120, 132 (2012), citing G.L.c. 43B, §13 (Home Rule Procedure Act). "In assessing the inconsistency of local enactments with the General Laws," courts consider the Legislative intent. Ibid. "[L]ocal action is precluded either where the 'Legislature has made an explicit indication of its intention in this respect,' or 'the purpose of State legislation would be frustrated [by a local enactment] so as to warrant an inference that the Legislature intended to preempt the field.'" Id., quoting Wendell v. Attorney Gen., 394 Mass. 518, 524 (1985).

As this Court recognized in Fire Dept. of Springfield, "[t]he sheer comprehensiveness of the code itself demonstrates the Legislature's intention to foreclose inconsistent local enactment." Fire Dept. of Springfield, supra at 133-134, fn.13. Here, the Foreclosure Ordinance is preempted because "the Legislature intended to occupy the field by promulgating comprehensive legislation." Id. at 133.

The primary purpose of the Sanitary Code is to "deal with matters affecting the health and well-being of the public in the commonwealth." G.L.c.111, §127A. The Foreclosure Ordinance has a similar purpose. Appellants'

Addendum at 23 (Foreclosure Ordinance, §285-8.

Purpose) ("[t]his article is enacted to promote the health, safety and welfare of the public").

To further the Sanitary Code's goal of promoting "the health and well-being of the public," the Legislature promulgated a comprehensive statutory mechanism allowing for a court-appointed receiver "whose rights, duties and powers shall be specified by the court" to "promptly repair the property and maintain it in a safe and healthful condition." §127I. While a receiver has to furnish "a bond or such other surety" and provide "such liability insurance as the court deems sufficient," Section 127I does not require that the owner or mortgagee provide any cash bond. Id. Instead, a receiver has "full power to borrow funds and to grant security interest or liens on the affected property." Id. Most importantly, all costs incurred in conjunction with the receivership, constitute a "lien with a **priority over all other liens or mortgages** except municipal liens" (emphasis added). Id. The statutory scheme allows the receiver to recover all funds incurred to repair and maintain the property, notwithstanding mortgages or other liens already recorded and encumbering the affected property. As the City concedes, "[w]hen there is equity

and economic incentive, lienholders who receive notice [of receivership] **will commonly step in** to protect their interest, obviating the need to appoint a receiver" (emphasis added).¹

While §127I gives the receiver a priority lien for the costs incurred, the receiver cannot borrow and spend funds at his own discretion. Indeed, under Section 127I, a receiver must comply with reporting requirements to disclose how the funds received were used and the exact amount spent. G.L.c.111, §127I. In particular, the receiver is required to file "on a bimonthly basis, an accounting of all funds received by and owed to the receiver, and all funds disbursed, and shall comply with such other reporting requirements mandated by the court."

Id.

The Foreclosure Ordinance, however, imposes no reporting requirements on the City whatsoever. It simply provides that "a portion" of the \$10,000 cash bond "shall be retained by the City as an administrative fee to fund an account for expenses incurred in inspecting, securing and marking said building and other such buildings that

¹ Affidavit of Steven Desilets, ¶9, Docket 11-30280, Dkt 15-4 (accompanying the City's Opposition to Plaintiff's Motion for Preliminary Injunction.)

are not in compliance with this article." Appellants' Addendum at 26 (Foreclosure Ordinance, §285-10(A)(10)).

Remarkably, there is nothing in place to ensure that the funds are in fact used for their stated purpose. Instead, while it gives the City the right to receive at least \$10,000 in cash bond for each property and the unlimited power to use those funds at its discretion, the Foreclosure Ordinance imposes no duty to account for the money. Therefore, the Foreclosure Ordinance conflicts with the State Sanitary Code implementing statute - it is nothing more than an attempt to circumvent the reporting requirements imposed by the Legislature. As a result, it is precluded. Fire Department of Springfield, supra at 126.

II. THE CASH BOND REQUIREMENT IN THE FORECLOSURE ORDINANCE IS AN ILLEGAL TAX.

"A municipality does not have the power to levy, assess or collect a tax unless the power to do so in a particular instance is granted by the Legislature." Commonwealth v. Caldwell, 25 Mass.App.Ct. 91, 92 (1987). However, a municipality may charge a user fee, based on its rights as proprietor of the instrumentalities used; or a regulatory fee, founded on its police power to regulate businesses or activities. Denver Street LLC v.

Saugus, 462 Mass. 651, 652 (2012). The test for whether a charge is a fee or a tax "focuses ... on 'whether the charge (1) applies to the direct beneficiary of a particular service, (2) is allocated directly to defraying the costs of providing the service, and (3) is reasonably proportionate to the benefit received.'" Silva v. Attleboro, 454 Mass. 165, 172(2009).

The Foreclosure Ordinance acts not as a fee but as a tax. Its stated purpose is to "promote the health, safety and welfare of the public, to protect and preserve the quiet enjoyment of occupants, abutters and neighborhoods, and to minimize hazards to public safety personnel inspecting or entering such properties." In practice, however, the Foreclosure Ordinance provides mortgagees with no particularized benefits and deprives them of a significant amount of money – well in excess of the amount the City might reasonably consider compensation for a particular governmental service - for an indefinite amount of time.

A. The cash bond provides no particularized benefit to mortgagees.

One of the traits that distinguishes a fee from a tax is that fees "are charged in exchange for a particular government service which benefits the party paying the fee in a manner 'not shared by other members of society.'" Denver Street, 462 Mass. at 652 (quoting

Emerson College v. Boston, 391 Mass. 415, 424-425 (1984)).

The true nature of the charge must be determined by its operational effect rather than its name. Thomson Elec. Welding Co. v. Commonwealth, 275 Mass. 426, 429 (1931).

The Foreclosure Ordinance requires that, for each property in foreclosure, a foreclosing mortgagee register the property and deposit a \$10,000 cash bond with the City. An unspecified portion of the bond is dedicated to "an account for expenses incurred in inspecting, securing, and marking said building and other such buildings that are not in compliance with" the City's ordinances. Looking no further than the affidavits submitted by the City with its brief, it is clear that the funds will be used for generalized prosecution of blight cases, and not to benefit the property or foreclosing mortgagee at issue.

The Affidavit of Geraldine McCafferty² ("McCafferty Affidavit") seeks to characterize all blight in the City as a consequence of foreclosures, noting that "[t]he Foreclosure Ordinances, once implemented, will...provide funds to help the City meet the costs associated with the

² Affidavit of Geraldine McCafferty, Docket 11-30280, Dkt 15-2 (accompanying the City's Opposition to Plaintiff's Motion for Preliminary Injunction).

blight caused by [the foreclosure] crisis." McCafferty Affidavit, at 2. However, not all blight in Springfield is the result of foreclosures. The Affidavit of Steven Desilets³ ("Desilets Affidavit") notes that over the course of approximately 18 months between the beginning of 2011 and May 2012, the City issued almost 500 citations for violations of the anti-blight ordinance and referred approximately 1200 properties for Housing Court prosecution. Desilets Affidavit, at 2. The Desilets Affidavit also indicates that "[m]any of these [sanitary code cases, blight cases and receiverships] involve vacant or abandoned properties in foreclosure." Id. From this latter statement, one can reasonably infer that some of the properties being handled by the City's Code Enforcement staff are not foreclosure properties.

Recognizing that the City is dealing with widespread problems of genuine blight, it is nonetheless inappropriate for the City to use foreclosing mortgagees as a source of funding the many resources dedicated by the City to combatting all blighted properties, including properties with no connection to a foreclosure. The foreclosing mortgagees being called upon to deposit

³ See fn.1.

\$10,000 per property are receiving no particularized benefit from the portion of the bond to be permanently withheld. Instead they, like all other property owners, will continue to be subject to a panoply of legal and administrative tools used by the City to ensure compliance with municipal and state housing codes. Unique among impacted property owners, however, foreclosing mortgagees – simply by virtue of having initiated a foreclosure - are being assessed to fund the City's code enforcement operations.

- B. The cash bond is not allocated directly to defraying the costs of providing a service to mortgagees.

As explained above, mortgagees are not the direct beneficiary of a particular service provided to them by the bond money; to the extent they derive any benefit, it is incidental and not sufficiently directed towards foreclosure properties as distinct from other blighted properties. With no service being provided through the bond money, the bond money cannot possibly be allocated to directly defraying the cost of providing the service.

C. The cash bond is completely disproportionate to the City's own estimates of its anticipated expenses.

The final trait that distinguishes fees from taxes is that fees, unlike taxes, only cover the agency's reasonably anticipated costs of providing the services for which the fees are charged. Southview Co-Op. Hous'g Corp. v. Rent Control Bd. of Cambridge, 396 Mass. 395 (1985).

The City intends to retain a portion of the \$10,000 bond permanently, regardless of whether the property requires any expenditure by the City. In arguing this case, the City has provided variable estimates of the amount it expects to retain (between \$200 and \$1,000 per file). See Order from the First Circuit Court of Appeals, with certified questions of law, dated November 22, 2013 at fn.3. The City has also given no indication of how it plans to hold the funds, track and account for expenses, or return any money it ultimately deems appropriate to give back to the mortgagee.

The City has essentially given itself unregulated and indefinite access to \$10,000 per foreclosure property, an amount ten times larger than the City's highest estimate of its administrative charge, and seeks to apply a tautology to validate the funding scheme in

its ordinance (i.e. "Our charge meets the test of only covering the agency's reasonably anticipated costs of service, because ultimately we will refund everything except the agency's reasonably anticipated costs of service.") Instead, the City is arbitrarily taxing the foreclosure process, which it cannot do.

III. THE FORECLOSURE ORDINANCE MAY VERY WELL HURT BORROWERS AND PERPETUATE BLIGHT.

An unintended consequence of the ordinance is that it could ultimately hinder borrowers from curing their delinquency. The \$10,000 cash bond will likely be added to the borrower's delinquency balance, since the mortgagee will have advanced the funds to the City and will seek recoupment pursuant to the terms of the mortgage contract if the borrower attempts to bring the account current. Thus, a marginally manageable arrearage may become completely impossible for borrowers to cure. Far from furthering the City's efforts to combat blight, this arrangement reduces the likelihood that borrowers will be able to save their homes.

The Foreclosure Ordinance is also counterproductive to its goal of increasing property values and reducing vacancies. Because the \$10,000 cash bond is so onerous, some mortgagees may choose to defer or eschew

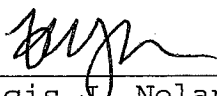
foreclosure, particularly where the property is of low value or is in significant need of repair. Thus, the tax may delay or prevent a foreclosure that could otherwise accelerate the sale of a property to a new owner determined to occupy and maintain it.

CONCLUSION

For all of the reasons set forth herein, this Honorable Court should answer the questions of whether the Foreclosure Ordinance is preempted by state laws and whether it imposes an unlawful tax in violation of the Constitution of the Commonwealth of Massachusetts in the affirmative.

Respectfully submitted,

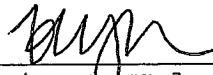
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RULE 16 CERTIFICATION

Pursuant to Mass. R.A.P. 16(k), I hereby certify that this brief complies with the Rules of Court that pertain to the filing of briefs, including, but not limited to, Mass. R.A.P. 16(b); Mass. R.A.P. 16(d); Mass. R.A.P. 16(e); Mass. R.A.P. 16(f); Mass. R.A.P. 16(g); Mass. R.A.P. 16(h); Mass. R.A.P. 18; and Mass. R.A.P. 20.



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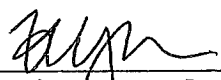
CERTIFICATE OF SERVICE

Pursuant to Mass. R. App. P. 13(d), I, Francis J. Nolan, Esq., certify under the pains and penalties of perjury that two (2) copies of the foregoing Amici Curiae Brief were served by first class mail, postage prepaid, on August 20, 2014 to the Appellants, Appellee and Amicus:

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