

Mortgage Foreclosure Ordinances Preempted by Existing State Law

Description

The Massachusetts Supreme Judicial Court (the “SJC”) recently decided that two mortgage foreclosure ordinances adopted by the City of Springfield were preempted by existing state law. In *Easthampton Savings Bank v. City of Springfield*, 470 Mass. 284 (Dec. 19, 2014)[\[1\]](#), the SJC struck down both ordinances, which were adopted in the midst of the wave of foreclosures triggered by the economic downturn of 2008. One ordinance (the “Mediation Ordinance”) established a mandatory mediation program between borrowers of residential properties and their lenders. The other ordinance (the “Foreclosure Ordinance”) requires residential building owners with vacant property or property in foreclosure to register with the City of Springfield, and further required those properties to meet certain maintenance requirements and to post a \$10,000 bond against non-compliance. The SJC held that each ordinance conflicts with and is preempted by existing state law. In its *Easthampton Savings Bank* decision, the SJC also held that monetary charges imposed on foreclosing lenders to register the subject property with the City constituted fees and not taxes.

The suit was filed in state court by six banks holding mortgages on multiple properties in Springfield, seeking declaratory and injunctive relief regarding enforcement of both the Mediation Ordinance and the Foreclosure Ordinance. Springfield removed to federal court, and the federal district court entered summary judgment for Springfield. On appeal, the First Circuit determined that there were unresolved questions of state law, and certified two questions to the SJC: (1) whether either ordinance is preempted in whole or in part by existing Massachusetts law; and (2) whether the Foreclosure Ordinance bond requirement imposed an unlawful tax.

The Mediation Ordinance, “Facilitating Mediation of Mortgage Foreclosures of Owner Occupied Residential Properties,” is codified in Chapter 7.60 of Title 7 of the Revised City Ordinances. It establishes a program of mandatory mediation between residential borrowers and lenders prior to foreclosure. Under the procedure called for in the Mediation Ordinance, if the parties make good faith efforts in mediation but cannot avoid foreclosure, the lender may obtain a certificate stating that it has satisfied its obligations under the Mediation Ordinance and can proceed to foreclose under M.G.L. c. 244. A failure to comply with the Mediation Ordinance could result in a fine of \$300 per day.

The SJC held that the Mediation Ordinance is preempted by M.G.L. c. 244, reasoning that foreclosure has long been a matter of *state*, and not local, regulation. The Mediation Ordinance bars a lender from proceeding with foreclosure in the absence of the certificate of good faith mediation – a requirement that directly contradicts and even impedes the foreclosure process detailed in M.G.L. c. 244. The SJC therefore held that the ordinance is invalid.

The Foreclosure Ordinance, “Regulating the Maintenance of Vacant and/or Foreclosing Residential Properties and Foreclosures of Owner Occupied Residential Properties,” is codified in Chapter 7.50 of Title 7 of the Revised City Ordinances. The Foreclosure Ordinance requires owners of residential buildings that are either vacant or undergoing foreclosure to register with the City. Per the Foreclosure Ordinance, the “owner” includes “a mortgagee of any such property who has initiated the foreclosure process.” Under the Foreclosure Ordinance, if the mortgage authorizes the lender’s entry on the property to make repairs upon the borrower’s failure to do so, the lender has at that time “initiated” the foreclosure process regardless of whether the borrower has vacated the property. Further, the Foreclosure Ordinance requires the posting of a \$10,000 cash bond against the possibility of noncompliance with maintenance responsibilities. The Foreclosure Ordinance provides that upon the satisfaction of the maintenance conditions, Springfield will issue a certificate of maintenance compliance to the owner, and that failure to comply will result in a \$300 per day fine.

The SJC held that the Foreclosure Ordinance was preempted by both M.G.L. c. 21E (the Massachusetts Oil

and Hazardous Material Release Prevention Act) as well as M.G.L. c. 111, §§ 127A-127N (the State Sanitary Code), and was therefore invalid.

The Foreclosure Ordinance also raised the issue of unlawful taxation. The ordinance imposed a charge on foreclosing lenders to “register” property subject to foreclosure with the City of Springfield. The banks challenged this registration charge as an unlawful tax, rather than a lawful fee. After considering the fine distinctions between fees and taxes, the SJC concluded that the registration charge was a lawful fee, and not a tax. The SJC reasoned that the registration fee was not collected to raise revenue, like a tax, but rather to compensate for regulatory expenses incurred in entering, inspecting and securing non-compliant properties. As a general rule of distinction, unlike taxes, fees are charged for a particular governmental service benefiting the party paying the fee. Here, Springfield provided a particularized service to foreclosing lenders “in the form of maintaining property values of their loan collateral through enforcement of the foreclosure ordinance after foreclosure has commenced.” The SJC therefore upheld the registration fee itself.

In light of the SJC’s holding that the Springfield ordinances are preempted by various state laws, other similar ordinances may also be of questionable validity. The cities of Lawrence, Worcester and Lynn, Massachusetts have enacted ordinances designed to regulate the foreclosure process. The Lawrence ordinance requires “owners” to register and maintain vacant or foreclosing properties. “Owners” is defined to include mortgagees-in-possession and trustees of securitized trusts who have initiated foreclosure. The ordinances enacted in Worcester and Lynn are modeled on the Springfield ordinances providing for mandatory mediation prior to foreclosure; mandatory registration of vacant property or foreclosing property, and posting of a cash bond for each property which the city can draw down to reimburse the city for expenses incurred while the city is inspecting, maintaining and securing properties.

Like the Springfield ordinances, these foreclosure-related ordinances are viewed by housing advocates as a creative attempt to keep borrowers in their homes and avoid the neighborhood blight often brought about by vacant and abandoned properties. After the *Easthampton Savings Bank* decision, challenges should be expected to the Lawrence, Lynn and Worcester ordinances. That is not the end of it, however, as the rejection of the local ordinances will energize the advocates for state-wide mandatory foreclosure mediation and mandatory registration (including a registration fee) of foreclosing properties, especially in light of the SJC upholding the validity of the registration fee.^[2] We might even see new versions of local ordinances requiring registration fees.

^[1] Available at <http://cases.justia.com/massachusetts/supreme-court/2014-sjc-11612.pdf?ts=1419001446>

^[2] In January 2015, the Massachusetts Alliance Against Predatory Lending has filed nine foreclosure-related bills including legislation that proposes mandatory mediation and addresses vacant and foreclosed properties.

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