

MASSACHUSETTS SUPREME JUDICIAL COURT
NO. SJC-11612
CERTIFIED QUESTIONS FROM THE FIRST CIRCUIT COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

CASE NO. 12-1917

EASTHAMPTON SAVINGS BANK, CHICOPEE SAVINGS BANK,
HAMPDEN BANK, UNITED BANK, MONSON SAVINGS BANK, COUNTRY
BANK FOR SAVINGS
PLAINTIFFS-APPELLANTS,
vs.
CITY OF SPRINGFIELD,
DEFENDANT-APPELLEE.

ON APPEAL FROM A JUDGMENT OF UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS.
[C.A No.: 11-CV-30280-MAP]

**REPLY BRIEF OF THE PLAINTIFFS-APPELLANTS,
EASTHAMPTON SAVINGS BANK, CHICOPEE SAVINGS BANK,
HAMPDEN BANK, UNITED BANK, MONSON SAVINGS BANK, COUNTRY
BANK FOR SAVINGS.**

Respectfully submitted,

The Plaintiffs/Appellants,
Easthampton Savings Bank,
et al,
By their attorney,

/s/ Tani E. Sapirstein

Tani E. Sapirstein, Esq.; Bar No. 18688
Sapirstein & Sapirstein, P.C.
1350 Main Street, 12th Floor
Springfield, MA 01103
TEL (413) 827-7500

Dated: August 12, 2013 FAX (413) 827-7797

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I. SUMMARY OF ARGUMENT

A. The Vacant or Foreclosing Residential Property Ordinance, Chapter 285 ("Foreclosure Ordinance") is preempted by state statutes and regulations which were in effect prior to its promulgation. The imposition of duties on mortgagees not in possession of premises in which they have a security interest beyond those imposed by existing statutes renders the Foreclosure Ordinance inconsistent with existing statutes.

B. The Foreclosure Ordinance and Chapter 182, the "Mediation Ordinance" (collectively, the "Ordinances") violate the Contract Clause of the U.S. Constitution because they substantially impair an existing contractual relationship between the mortgagor and the mortgagee by, *inter alia*, requiring mortgagees to consider forgiveness of the underlying debt and altering the rights of the parties in relation to the property, and the impairment is not reasonable and necessary to serve an important governmental purpose.

C. The mandatory minimum Ten Thousand and no/100 Dollar (\$10,000.00) bond is an illegal tax because the City of Springfield ("City") is imposing it to "provide funds to help the City meet the costs associated with the blight caused by

this (foreclosure) crisis" (City Br. p.5) and not to provide a particularized benefit to the mortgagees.¹

II. LEGAL ARGUMENT

A. The Ordinances Are Inconsistent With And Preempted By Existing State Law.

The City acknowledges inconsistencies between the Foreclosure Ordinance and existing state law. The City concedes that "the Ordinance anticipates some owners will be legally able to perform certain actions where others cannot" and "takes into account the possibility that it may conflict with state law regarding this section (maintenance of properties), in which case it would not apply." City Br. pp. 18, 19. Given the acknowledged potential for conflict with existing state laws, the City further concedes that "the requirements for compliance with the Ordinances largely rest on case-by-case determination from the Building and Fire Commissioners." *Id.* p. 25. The City does not, however, offer any legal rationale for failing to promulgate ordinances which are consistent with state law and can be uniformly enforced.

The Foreclosure Ordinance imposes substantive repair and maintenance obligations² on mortgagees who are not in possession

¹ The City asserts that illegal tax issue was first raised in the motion for judgment, but the issue was fully briefed and argued by the parties and fully considered by the District Court.

of the subject premises which are specifically not imposed by Mass. Gen. Laws ch. 111 (the "State Sanitary Code") and regulations promulgated thereunder. It is well established that mortgagees not in possession are outside of the scope of the State Sanitary Code and thus are not responsible for these repair and maintenance obligations. *Negron v. Gordon*, 373 Mass. 199, 366 N.E.2d 241 (1977). Because mortgagees not in possession of the subject property have no property repair duties, that responsibility falls to the mortgagees in possession. *Id.* at 206 and footnote 6.

The City states that, "[i]f a mortgagee is collecting rents, changing locks, seeking to evict, or carrying out other activities indicating satisfaction of the State Sanitary Code obligations, the City currently and under the Ordinances, seeks to impose obligations to maintain and repair. 105 CMR 410.020" (footnote omitted). City Br. p. 39. The imposition of maintenance and repair duties on mortgagees in possession is consistent with state statutes. The inconsistency and conflict arise when these duties are imposed on mortgagees who are not in possession, as it is well established in the Commonwealth that

² These mandatory obligations include, but are not limited to: remove hazardous material, ensure that all structures are maintained in a structurally sound condition, maintain the property in accordance with all relevant state codes and local regulations concerning the maintenance of property and maintain liability insurance. (Add. At 25-26.)

they are not required to perform these duties. This inconsistency constitutes a sharp conflict with existing state laws and supports preemption of the Foreclosure Ordinance for local by-laws or ordinances that impose conditions beyond those established by statute are invalid. *Boston Gas Co. v. City of Somerville*, 420 Mass. 702, 704, 652 N.E.2d 132 (1995). Accord *Boston Gas Co. v. City of Newton*, 425 Mass. 697, 701 (1997) (ordinances that "mandate something not required by the statute" are invalid).

Of equal concern to the existence of the inherent conflict between the Foreclosure Ordinance and state statutes, particularly the State Sanitary Code and Chapter 21E, is the City's response to these inherent inconsistencies. Instead of promulgating ordinances which do not conflict with existing state laws (for example by limiting the imposition of repair and maintenance obligations to mortgagees in possession), the City attempts to rectify the inherent inconsistencies and conflicts by endowing the Building and Fire Commissioners with the discretion to determine the applicability of the Ordinances on a case-by-case basis. This results not only in the promulgation of a patchwork of local ordinances across the Commonwealth, but also a patchwork of uneven enforcement within the City itself. The appropriate mechanism for responding to those provisions of the Ordinances which are inconsistent with state law is to

promulgate ordinances which are consistent with state law. An obvious example of drafting ordinances which are consistent with state law would be to impose repair and maintenance obligations upon mortgagees in possession and not upon mortgagees who are not in possession. The alternative, which is the existing state of affairs, is the uneven and discretionary enforcement of preempted Ordinances on a case-by-case basis.

In sum, because the Ordinances impose greater burdens on mortgagees not in possession than does the State Sanitary Code, they are preempted and invalid.

B. The Ordinances Violate the Contract Clause of the United States Constitution.

Claims for violation of the Contract Clause are analyzed under a two-pronged test. "The first question is 'whether the state law has . . . operated as a substantial impairment of a contractual relationship' . . . If the contract was substantially impaired, the court next turns to the second question and asks whether the impairment was 'reasonable and necessary to serve an important government purpose.'" *United Auto, Aerospace, Agr. Implement Workers of America Intern. Union v. Fortunato*, 633 F.3d 37, 41 (1st Cir. 2011). (Citations omitted).

The response to this initial inquiry in the case at bar is in the affirmative. Although the City concludes that there is

no substantial impairment to the contract between the mortgagor and the mortgagee, its analysis is limited to the Mediation Ordinance and fails to consider the more onerous obligations imposed by the Foreclosure Ordinance,³ obligations which were not agreed to by the parties to the mortgage and in fact were contractually assumed by the mortgagor, not the mortgagee. Neither the District Court below nor the City has considered the shift of the significant maintenance and repair obligations from the mortgagor to the mortgagee in analyzing the substantial impairment issue. Requiring mortgagees instead of mortgagors to maintain properties in accordance with all relevant state codes and local regulations conflicts with the most basic terms of the mortgage. The shift of these significant responsibilities from one party to the other clearly constitutes a substantial impairment upon the existing mortgage agreements.

Once the threshold determination has been made that the Ordinances substantially impair existing contractual relationships, the inquiry must be made as to whether the challenged Ordinances are reasonable and necessary to effectuate an important governmental purpose. *Id.* at 45. "[T]he reasonableness inquiry asks whether the law is reasonable in

³ Even the analysis under the Mediation Ordinance fails to consider and address the requirement that the mortgagee consider forgiveness of the debt. The existence of the underlying debt is the *sine qua non* of the mortgage agreement.

light of the surrounding circumstances and the necessity inquiry focuses on whether . . . [Puerto Rico] imposed a drastic impairment when an evident and more moderate course would serve its purposes equally well." *United Auto, Aerospace, Agr. Implement Workers of American Intern. Union v. Fortunato*, 633 F.3d 37, 45-6. (Citations and internal quotation marks omitted).

The City's flawed response to this inquiry is that:

the Ordinances do not shift any responsibilities in terms of repairing or rehabilitating properties that do not exist currently, but rather call for maintenance that is in furtherance of the preservation of properties already established by state law and the terms of the mortgage agreement. Such maintenance obligations already exist for mortgagees in Massachusetts. For example, the State Sanitary Code imposes a duty upon entities exercising control over properties which could be a property manager, owner, or mortgagee, depending on the facts. If a mortgagee is collecting rents, changing locks, seeking to evict, or carrying out other activities indicating satisfaction of the State Sanitary Code obligations, the City currently and under the Ordinances seeks to impose obligations to maintain and repair.

(City Br., p. 39)

This statement is inaccurate. The definition of "Owner" in the Ordinances expressly includes "a mortgagee of any such property who has initiated the foreclosure process as defined in this section." *Add.* at 24.⁴ Not only

⁴ All citations to the Addendum are to the Addendum to Appellants' principal brief.

does this definition of "Owner" depart from and conflict with the definition of owners in state laws regulating the maintenance of property as discussed hereinabove but this definition of "Owner" is unreasonable and unnecessary as a matter of law and therefore fails the second prong of the constitutional analysis.

This Court considers the following factors in determining whether a law is reasonable in light of the surrounding circumstances and whether a more moderate course would serve its purposes equally well: "whether the act (1) was an emergency measure; (2) was one to protect a basic societal interest, rather than particular individuals; (3) was tailored appropriately to its purpose; (4) imposed reasonable conditions; and (5) was limited to the duration of the emergency." *Id.* at 46 (Citations omitted). It is clear that the Ordinances are not appropriately tailored to their purpose and a more moderate course is available. In fact, the existing State Sanitary Code provides a reasonable and more moderate course to deal with the issues of blight and the City already has a more moderate and reasonable course to impose some responsibility on mortgagees in place which requires foreclosing mortgagees to complete a registration form and,

inter alia, provide some basic information for a database.
(Add. 77)

In sum, the Ordinances violate the Contract Clause because they substantially impair existing contracts,⁵ are not appropriately tailored to their purpose and impose unreasonable conditions upon mortgagees not in possession.

C. The Foreclosure Ordinance Bond Requirement Is An Unlawful Tax

Municipalities in Massachusetts do not have the authority to levy, assess or collect a tax "unless the power to do so in a particular instance is granted by the legislature." *Silva v. City of Attleboro*, 454 Mass. 165, 168, 908 N.E.2d 722 (2009) (*citations and internal quotation marks omitted*) and Constitution of the Commonwealth of Mass. Arts. Of Amendment Art. LXXXIX Art. 11 §7. Add. at 84. *Citations and internal quotation marks omitted.*

Although the City asserts that the mandatory bond is a fee, the purposes of the bond as articulated by the City in fact define a tax: "provide funds to help the City meet the costs associated with the blight caused by this crisis" (City Br. p. 5), "by providing for mediation where litigation can be avoided and financial resources where

⁵ The Ordinances as drafted apply retroactively to mortgages in existence on the effective date of the Ordinances.

litigation is required" (*id.* p. 11); "provide funds to help the City meet the costs associated with the blight caused by this crisis" (*id.* p. 13); "what the Ordinance provides is a regulatory database, funding for operations, and an alternative dispute resolution process" (*id.* p. 39, emphasis added); "allows the Code Enforcement Department greatly increased efficiency in dealing with vacant and foreclosed properties" (*id.* p. 43).⁶

In determining whether the mandatory bond is a permissible fee or an unlawful tax, the Supreme Judicial Court has established a three-prong test: "'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. City of Attleboro*, 454 Mass. at 172 (2009). (*Citations omitted*). The mandatory bond fails each prong of the test. The Appellants receive no particularized benefit from the mandatory bond. The City identifies three purported benefits which it asserts are particularized to the Appellants: preservation of the value of the property underlying the mortgages, stability in the real estate

⁶ All of the preceding citations are to the Brief of the City filed in this matter.

market, and the maintenance of a database (City Br., pp. 42-43); none of these benefits is particular to the Appellants. Preservation of property values and stability in the real estate market equally benefit homeowners and the City. Lenders generally have the option under a mortgage to foreclose by entry, and, once in possession of the property, the concomitant obligation to repair and maintain it. Thus the payment of the mandatory bond does not benefit the lender to any greater degree than the homeowner or the neighbors of the homeowner or the City.

The maintenance of a database does not benefit the Appellants at all. The City already maintains such a database and charges registrants a registration fee of \$100.00. The City itself concedes that the maintenance of the database is a greater benefit to the City than it is to the Appellants (it "allows the Code Enforcement Department greatly increased efficiency in dealing with vacant and foreclosed properties." City Br., p. 43.)

The City's brief shows that the mandatory bond is in fact an unlawful tax. The actual purpose of the bond, as represented by the City, is to provide funds to the City to deal with blight, provide the City with financial resources in litigation, and provide the Code Enforcement Department with increased efficiency in dealing with vacant and

foreclosed properties. Thus the stated purpose of the mandatory bond is to raise revenue. Raising revenue is the essence of an unlawful tax, which is beyond the authority of the City to impose absent the grant of such power by the legislature. There has been no such grant of power in this case.

Accordingly, the mandatory bond is an unlawful tax and should be held invalid.

III. CONCLUSION

For the foregoing reasons and the reasons articulated in the principal brief and the amicus brief, the Plaintiffs/Appellants request that this Court reverse judgment in favor of the Defendant City, enter judgment in their favor, allow Plaintiffs'/Appellants' Motion for Judgment as a matter of law, and deny the City's Motion to Dismiss or in the Alternative for Summary Judgment.

The Plaintiffs/Appellants,
Easthampton Savings Bank,
et al,
By their attorney,
/s/ Tani E. Sapirstein, Esq.
Tani E. Sapirstein, Esq.
Bar No. 18688
BBO No. 236850
Sapirstein & Sapirstein, P.C.
1350 Main Street, 12th Floor
Springfield, MA 01103
TEL (413) 827-7500
FAX (413) 827-7797

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/s/ Tani E. Sapirstein, Esq.
Tani E. Sapirstein, Esq.
Attorney for Appellants

Dated: August 12, 2013

CERTIFICATE OF SERVICE

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Edward M. Pikula, Esq.
Lisa C. DeSousa, Esq.
Thomas D. Moore, Esq.
Anthony I. Wilson, Esq.
City of Springfield Law Department
36 Court Street
Springfield, MA 01103

Thomas M. Hefferon, Esq.
William F. Sheehan, Esq.
Goodwin Proctor LLP
901 New York Ave., N.W.
Washington, DC 20001

Brenda R. Sharton, Esq.
Goodwin Proctor LLP
Exchange Place
Boston, MA 02109

Dated: August 12, 2013

/s/ Tani E. Sapirstein, Esq.
Tani E. Sapirstein, Esq.