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November 5, 2008

Grant F. Langley
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Re: Proposed Ordinance Regulating the Maintenance of Abandoned Residential Properties Pending Foreclosure and During Foreclosure Proceedings

Dear Mr. Langley:

We represent the Wisconsin Bankers Association, which is a statewide trade association of banks, savings and loan associations, and savings banks located in Wisconsin. The WBA regularly represents the interest of its membership in significant matters such as this. On behalf of the WBA, we submit the following comments on the proposed ordinance "regulating the maintenance of abandoned residential properties pending foreclosure and during foreclosure proceedings" ("Ordinance"). We understand that the Ordinance is scheduled to be considered by the Zoning, Neighborhoods and Development Committee. It is not clear to us whether your office has rendered an opinion that the Ordinance is legal and enforceable. For the reasons set forth below, we submit that it is not.

As you know, the City may not enact an ordinance that may "infringe the spirit of a state law or . . . general policy of the state." *Fox v. Racine*, 225 Wis. 542, 545, 275 N.W. 513 (1937). We respectfully submit that the Ordinance conflicts with state law governing foreclosure of mortgages. An understanding of Wisconsin's statutory procedure for foreclosure of mortgages is essential. Foreclosure in Wisconsin is regulated by statute, Wis. Stat. ch. 846. There is no procedure for non-judicial foreclosure, as is referenced in the draft Ordinance.

A lienholder (including but not necessarily limited to a mortgage holder) begins a foreclosure action by commencing an action in circuit court. The commencement of this action does not divest the owner of title to the property or the right of the owner to remain in possession of the property, nor give the lienholder any ownership rights in the property.

A mortgage foreclosure action generally has two steps: the judgment of foreclosure and sale, and the proceedings after the judgment. *Shuput v. Lauer*, 109 Wis.2d 164, 171, 325 N.W.2d 321 (1982). As explained by the Supreme Court in *Shuput*,

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[t]he judgment of foreclosure and sale determines the parties' legal rights in the underlying obligation and in the mortgaged property and thus determines the default, the right of the mortgagee to realize upon the security, the time and place of sale of the security and the notice required, and the right of the mortgagee to a judgment of deficiency. . . . The statutory proceedings after the judgment of foreclosure and sale, namely, the sale, judicial confirmation of the sale, the computation of the deficiency, and the entry of the judgment for deficiency, carry into effect and enforce the judgment of foreclosure and sale.

Under Wisconsin foreclosure process, "[a] judgment of foreclosure `does little more than determine that the mortgagor is in default, the amount of principal and interest due and unpaid, the amount due to the plaintiff mortgagee for taxes, etc. . . . The judgment does not destroy the lien of the mortgage but rather judicially determines the amount thereof.'" *Matter of Madison Hotel Associates*, 749 F.2d 410, 422 (7th Cir. 1984).

If the fact of default is not in dispute, the circuit court usually will grant judgment to the mortgage holder. This must be at least 20 days after the court case was commenced. In the judgment, the court will determine the amount due the mortgagor. The court will also establish a period of redemption, which may be 12, 6 or 2 months, depending on whether a deficiency judgment is sought and whether the property is abandoned. The right of redemption is a significant protection, long recognized in Wisconsin law, that gives property owners time to remain in possession of their property, attempt to sell the property and make arrangements for the future. During this period of redemption, the property owner retains title to the property, and retains all rights of possession of the property. *Zimmermann v. Walgreen Co.*, 215 Wis. 491, 496, 255 N.W. 534 (1934) ("It is the settled law of this state that the legal title and right of possession does not vest in the mortgagee, but continues in the mortgagor until terminated by a sale on foreclosure"). The foreclosure judgment does not grant the mortgage lienholder any right to enter onto the property for any purpose.

After the expiration of the redemption period, the foreclosed property may be sold at sheriff's sale. The circuit court must confirm the sheriff's sale, and it is that procedure, the order of confirmation of sale, that transfers ownership from the owner of record to whomever purchases the property at sheriff's sale, which may be but need not be the mortgage holder. See *Glover v. Marine Bank of Beaver Dam*, 117 Wis.2d 684, 697, 345 N.W.2d 449, 455 (Wis. 1984) (mortgagee acquires title to property only after judicial confirmation of the foreclosure sale).

Thus, a mortgage holder is not an "owner" of the property on which it holds a mortgage, and has none of the rights of a property owner. A mortgage is simply a means of providing collateral for

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a loan. Indeed, the mortgage holder might never become the "owner" of the property. Before and during the mortgage foreclosure process, ownership remains with the property owner. The mortgage holder has no right to enter onto property, no right to effect repairs, no right of management or control. The right of possession exists only upon confirmation of sale. The Ordinance imposes owners' duties on mortgage holders when in fact they are not owners and cannot comply with such duties.

Since mortgage holders are not owners of the property on which they hold liens, and have no right of entry or possession onto such property until confirmation of a sheriff's sale (assuming the mortgage holder is the purchaser at sheriff's sale), the Ordinance imposes burdens on mortgage holders that they cannot lawfully meet. The Ordinance requires an inspection before a foreclosure action is commenced but the mortgage holder has no lawful access to the property to conduct an inspection. The Ordinance purports to impose building maintenance obligations on mortgage holders even though they have no right to access the property and no right to make repairs.

The fact that a lienholder has no possessory right to the property upon which the lien attaches, and no right to lawfully enter the premises, was confirmed in *Mohr v. Milwaukee*, 101 Wis.2d 670, 676, 305 N.W.2d 174 (Ct.App. 1981). In that case, the City was a party to a foreclosure proceeding because of its unpaid property tax lien. The City exercised its powers under the existing raze statute and razed the building before foreclosure had been completed. The owners contended that the City had committed waste by razing the building while the foreclosure judgment was in effect. In reversing a lower court finding against the City, the Court of Appeals noted that as a lienholder the City had no right of possession of the property during the redemption period and therefore could not be liable for waste. The Court of Appeals noted that the tort of trespass would be the appropriate remedy but that the City could not be liable for trespass because it was exercising its lawful powers under the raze statute.

Mortgage holders have no such protection. Since they have no right of possession of mortgaged property during the redemption period, they may indeed be liable for trespass if they enter onto property, regardless of the purpose for their entry. And, it bears noting, liability for trespass can include significant punitive damages. See *Jacque v. Steenberg Homes, Inc.*, 209 Wis.2d 605, 563 N.W.2d 154 (1997) (affirming an award of \$100,000 for trespass even though only nominal actual damages were awarded). The City cannot force lienholders to commit trespass, yet that is exactly what the Ordinance purports to do.

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Nor does the City have the power to eliminate owners' right to be free from trespass. That right is one of the most significant rights enjoyed by property owners. See *Jacque*, 209 Wis. 2d at ¶21. Even if the owner is not complying with City ordinances regarding upkeep of property, the City does not have the power to eliminate the owner's right to be free from trespass and thereby enable a lienholder to enter property it otherwise does not have to right to enter.

We further submit that the Ordinance conflicts with Wisconsin's raze statute, Wis. Stat. §66.0413. As you know, that statute comprehensively regulates municipalities' efforts to address buildings that are in need of repair, or are unsafe or unsanitary. The statute grants municipalities broad powers for dealing with such structures, but also establishes an orderly process under the supervision of the circuit court to protect the rights of owners.

The raze statute does not impose on lienholders the obligations to repair or raze buildings subject to the statute. The raze statute specifically makes the *owner* responsible to comply with repair or raze orders. The statute's specific allocation of responsibility constitutes a comprehensive legislative scheme with which the Ordinance cannot conflict either in letter or in spirit.

The existence of the raze statute, and related City ordinances, also demonstrates why this Ordinance is unnecessary and improper. The City *already* has the power to deal with dilapidated, unsafe or unsanitary properties. The City already has the power to deal with properties that are public nuisances. See generally, Wis. Stat. ch 823. Proper exercise of that power precludes any claim against the City for trespass. See *Mohr v. Milwaukee*, supra. If, as the preamble to the Ordinance suggests, an issue of public health, welfare and safety exists because of the presence of dilapidated buildings, the City already has the tools to deal with that problem. This Ordinance seeks to impress mortgage holders to deal with a problem the City can and should address with the laws and ordinances it has available to it.

The Ordinance also conflicts with the express provisions of Wis. Stat §292.21 as it relates to spills of hazardous substances. The Ordinance purports to extend the obligations of Ordinance 236-41, dealing with the obligation to clean up hazardous substances, to mortgage holders. However, the comprehensive state statute on the subject expressly protects mortgage lienholders from liability for such events. See Wis. Stat. §292.21.

The Ordinance is also discriminatory. The Ordinance applies only to a subset of lienholders, i.e., financial institutions holding mortgages on property. It is common for a property in foreclosure or facing foreclosure to have unpaid taxes as well. Unpaid taxes are a lien on property in favor of

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the taxing authority, and such liens have priority over mortgages. Yet the Ordinance imposes no burden on the City. Similarly, other persons may have liens on property, arising from civil judgments, unpaid work or other reasons, and the Ordinance imposes no similar burdens on such other lienholders.

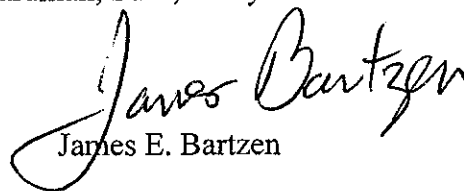
Apart from the conflicts with state law that call into question the validity of the Ordinance, the Ordinance reflects poor public policy. The Ordinance expands the concept of "owner" to include persons who are not owners, who do not have the rights or responsibilities of owners, and who may never be owners. The Ordinance seeks to force lienholders to bear the costs incident to property ownership when in fact they are simply holding collateral. It goes without saying that when title is transferred to a new owner (be it the mortgage holder or a third party who bids at sheriff's sale) after confirmation of the sheriff's sale, that new owner will be subject to all of the requirements of the City's ordinances as they pertain to owners of property. Until such time the City cannot and should not transfer those obligations to those who simply hold liens on property.

In conclusion, we would appreciate the opportunity to meet with you to discuss this matter further.

Respectfully Submitted,

Boardman, Suhr, Curry & Field LLP

By


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