



Fourth Floor
1 South Pinckney Street
P.O. Box 927
Madison, WI 53701-0927

Phone • (608) 257-9521
Fax • (608) 283-1709

James E. Bartz
Direct Dial Number • (608) 283-1791
jbartz@boardmanlawfirm.com

November 26, 2008

Atty. Vincent D. Moschella
Milwaukee City Attorneys Office
200 E Wells St Rm 800
Milwaukee, WI 53202-3515

Re: Proposed Ordinance 080871

Dear Mr. Moschella:

Thank you for your e-mail of November 13, 2008. I am writing on behalf of the Wisconsin Bankers' Association. I appreciate the opportunity to discuss the legal implications of the proposed Ordinance, and I appreciate the City Attorney's consideration of our viewpoints.

As I argued previously, since a lien is not a possessory interest in property, and since under state law, the owner/mortgagor retains both title and the right of possession until confirmation of sheriff's sale, any entry onto the property would constitute trespass, unless a contract between the owner/mortgagor and the lienholder allows such entry. I am certain you would agree that the City's police powers do not extend as far as authorizing trespass. Your analysis of the legality of the ordinance depends on language in the standard FNMA Wisconsin mortgage. Not all mortgages have such language. Moreover, if such language is deleted from mortgages in the future, is the Ordinance then illegal? One would think so.

The concept of self help repossession presents an analogous situation. A secured creditor has the right to take possession of collateral upon default, if possession can be obtained without breach of the peace. (Under the Wisconsin Consumer Act, Wis. Stat. ch. 421 et seq., consumer goods other than automobiles are not subject to self help repossession). Although "breach of the peace" is an undefined term, "the great majority of courts find unauthorized entries into the debtor's residence to be breaches of the peace, and may find entry into his garage to be such a breach." James J. White & Robert S. Summers, Uniform Commercial Code § 34-7 (4th ed. 1995). A number of the ordinances that would be applied to lienholders under the Ordinance would seem to compel the lienholder to breach the peace to comply with the ordinance. The lock ordinance, ORD 217-13-4, is one example.

Atty. Vincent D. Moschella
Milwaukee City Attorneys Office
Page 2
November 26, 2008

The general policy of the state is that property owners retain the right of possession of their property until the confirmation of sheriff's sale at the end of the foreclosure process. This general policy is set forth in the redemption provisions of ch. 846. The City may not enact an ordinance that conflicts with this state policy. I think it inconceivable that a court would allow a lienholder unfettered access to a property, even to protect the lienholder's economic interest, if the owner of the property remains in possession.

More importantly, though, the Ordinance seeks to convert a contract *right* into a legal obligation. It is at that point that I feel the Ordinance is no longer within the City's police powers. A lienholder may, by contract, have a right to enter onto property to protect its lien, but the Ordinance converts this right into an obligation to maintain the property on which it holds the lien to the satisfaction of the municipality or face the penalties set forth in the various ordinances brought under the umbrella of the Ordinance.

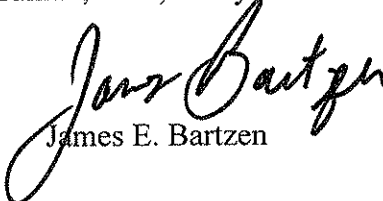
Without question, the City has the right under its general police powers to address blight, unsafe and unsanitary conditions and public nuisances. State law has already given the City the means to address such conditions, primarily through Wis. Stat. §66.0413. The Ordinance seeks to shift the City's burden, to act for the general welfare and clean up or remove offending properties, to lienholders. The City could not, for example, require neighboring property owners to clean up a problem property, even though neighboring property owners have a definite financial stake in eliminating blighted properties. Yet the City is doing just that with the Ordinance: shifting its general obligation to address problem properties to lienholders.

From a policy standpoint, the Ordinance may significantly interfere with the ability to sell mortgages in the secondary market. The consequence—restricted access to mortgage loans—cannot be desirable. Although beyond the scope of our comments here, an effort to overturn the Ordinance as an unlawful restriction on the powers of entities buying such mortgages (FNMA for example) would not come as a surprise.

Thank you for the opportunity to address our concerns with the legality of the Ordinance. I am available to confer with you in person or by phone to discuss the Ordinance if you wish.

Sincerely,

Boardman, Suhr, Curry & Field LLP
By


James E. Bartzen

Atty. Vincent D. Moschella
Milwaukee City Attorneys Office
Page 3
November 26, 2008

cc: The Hon. Thomas Barrett, Mayor
City of Milwaukee
City Hall, Room 201
200 E. Wells Street
Milwaukee, WI 53202

Alderman Michael Murphy
City of Milwaukee
City Hall, Room 205
200 E. Wells Street
Milwaukee, WI 53202

Alderman James Witkowiak
City of Milwaukee
City Hall, Room 205
200 E. Wells Street
Milwaukee, WI 53202

Continental Savings Bank, James Podewils, President
Associated Bank
Guaranty Bank
Johnson Bank
J. P. Morgan Chase Bank
Marshall & Ilsley Bank
U.S. Bank
Wells Fargo Bank

Kurt Bauer, President/CEO, Wisconsin Bankers Association
Rose Oswald Poels, Senior Vice President, Wisconsin Bankers Association
JEK