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Massachusetts Supreme Judicial Court Rejects Municipal Foreclosure Ordinances

By: Gregory N. Blase, David D. Christensen, and Matthew N. Lowe

Can a Massachusetts municipality impose ordinances on banks that are more onerous than existing statewide law? In a recent landmark decision, the Massachusetts Supreme Judicial Court (“SJC”) answered “no.” In *Easthampton Savings Bank v. City of Springfield*,¹ the SJC held that two ordinances, through which the City of Springfield (“Springfield”) sought to make foreclosures more difficult, were preempted by the Massachusetts Constitution. The *Easthampton Savings Bank* decision should serve to curtail municipalities’ attempts to impose regulations that are more stringent than those imposed by statewide law and—in welcome news to banks and investors—restore a degree of consistency in conducting foreclosures in Massachusetts.

I. Springfield’s Foreclosure-Related Ordinances

In 2011, Springfield enacted two ordinances that purported to govern residential foreclosures within the city limits.² The first ordinance (the “Mediation Ordinance”)³ required mortgagees to participate in a city-run mediation program with mortgagors before undertaking a foreclosure sale.⁴ In particular, the Mediation Ordinance directed the parties to “renegotiate the terms of the loan in an effort to avoid foreclosure,”⁵ and it precluded any residential foreclosure unless Springfield’s mediation program manager (1) determined that the parties were unable to renegotiate the terms after a good faith effort; and (2) issued a certificate of compliance authorizing the mortgagee to proceed with a foreclosure.⁶ The Mediation Ordinance also allowed for the imposition of a \$300 per day fine for “non-compliance.”⁷

The second ordinance (the “Registration Ordinance”)⁸ required “owners” to register and maintain vacant or “foreclosing” properties.⁹ The Registration Ordinance defined “owner” broadly to include mortgagees or trustees of securitized trusts that have “initiated the foreclosure process.”¹⁰ Under the Registration Ordinance (and contrary to settled Massachusetts law), the “initiation of the foreclosure process” included the filing of a complaint in Massachusetts Land Court under the Service Members Civil Relief Act (“SCRA”) or instances “where the mortgage authorizes mortgagee entry to make repairs upon mortgagor’s failure to do so.”¹¹ The Registration Ordinance required an “owner” to post a \$10,000 cash bond, remove hazardous waste, secure the property, and take other protective and maintenance measures with respect to the property within 30 days of the property becoming vacant or within 15 days of the “initiation of the foreclosure process.”¹² The Registration Ordinance further required an “owner” to obtain a certificate of compliance (separate from the Mediation Ordinance certificate) or face potential fines in the amount of \$300 per day.¹³

II. The SJC Strikes Down the Ordinances as Preempted by State Law

In December 2011, several banks filed suit in Massachusetts state court seeking to overturn the Springfield ordinances.¹⁴ Springfield removed the case to federal district court, which

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granted Springfield's motion for summary judgment. On appeal, the First Circuit certified the following two questions of unresolved state law to the SJC:

- (1) Are the ordinances preempted, in whole or in part, by Massachusetts law?
- (2) Does the Foreclosure Ordinance impose an unlawful tax in violation of the Constitution of the Commonwealth of Massachusetts?¹⁵

The SJC accepted the certified questions, and, on December 19, 2014, it ruled that Springfield had exceeded its authority by enacting the ordinances.

First, the SJC held that the Massachusetts foreclosure statute ("Chapter 244") preempts the Mediation Ordinance, because "the foreclosure process is wholly a matter of State regulation absent an expression of a clear intent to allow local regulation."¹⁶ Moreover, the SJC observed that the legislature's recent amendment of the foreclosure statute, which requires mortgagees to perform a loan modification analysis on certain loans, indicates a "legislative intent to occupy the field to the exclusion of other options—including further regulation at the local level."¹⁷

Applying these principles to the Mediation Ordinance, the SJC ruled that Springfield's mediation program conflicts with Chapter 244's provision for the possibility of pre-foreclosure negotiation.¹⁸ That is, Section 35A of Chapter 244 provides mortgagors with 150 days to cure a payment default before the mortgagee can accelerate the note and commence foreclosure proceedings.¹⁹ A mortgagee, however, can reduce the 150-day waiting period to 90 days if it "engage[s] in a good faith effort to negotiate a commercially reasonable alternative to foreclosure" that "involve[s] at least one meeting, either in person or by telephone," between the parties.²⁰ In comparing Section 35A with Springfield's Mediation Ordinance, the SJC found that "[t]he Legislature's decision to utilize the proverbial 'carrot' of a shorter right-to-cure period trumps the city's choice of the 'stick' of a daily fine. Furthermore, the ordinance by its own terms does not allow a mortgagee to proceed with foreclosure before obtaining a certificate of good faith mediation, a *direct impingement on the process of foreclosure*."²¹

Second, the Court held that the Registration Ordinance is preempted by the Massachusetts Oil and Hazardous Material Release Prevention Act ("OHMRPA"), a statute designed "to compel the prompt and efficient cleanup of hazardous material and to ensure that costs and damages are borne by the appropriate responsible parties."²² The SJC agreed with the plaintiff banks that the Registration Ordinance's definition of "owner" was impermissibly broader than the OHMRPA's definition of that term, and thus, the Ordinance was "squarely in conflict with a clearly stated legislative policy" regarding the liability of secured lenders.²³ The Court noted that OHMRPA offers a safe harbor where a secured lender will "not be deemed an owner or operator with respect to the site securing the loan" under certain conditions, including for "releases and threats of release [of hazardous materials] that first begin to occur before such secured lender acquires ownership or possession of the site."²⁴ Thus, the plaintiff banks argued, the Registration Ordinance undermined OHMRPA's safe harbor by exposing secured lenders to liability for a release or threat of release of hazardous materials that began *prior* to the lender's possession.²⁵ The SJC agreed and held that the Registration Ordinance was inconsistent with the statutory scheme because it required "mortgagees not yet in possession to enter the property and assume possession," and therefore, it was preempted by OHMRPA.²⁶

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The SJC further held that Massachusetts' State Sanitary Code (the "Sanitary Code"),²⁷ which regulates "minimum health and safety standards for residential premises," also preempted the Registration Ordinance. The Sanitary Code authorizes local boards of health and the State Department of Public Health to enforce the Sanitary Code by requesting that a court, among other remedies, appoint a receiver to remediate ongoing code violations.²⁸ While Sanitary Code regulations permit enforcement authorities to enter properties to clean and repair them (under certain conditions) and charge the responsible person for incurred expenses, only receivers are required to post a bond and, even then, only after court appointment.²⁹ Springfield's Registration Ordinance, however, required an owner to post a bond up front that Springfield could draw on to cover incurred expenses.³⁰ Because the Registration Ordinance required the posting of a bond where the Sanitary Code does not, the SJC found that the ordinance was preempted as it "place[d] a heavier burden on any owner than does the code to ensure enforcement of essentially the same mandates."³¹

Finally, even though it had already found that Massachusetts law preempted the Registration Ordinance, the SJC also addressed the plaintiff banks' argument that the \$10,000 bond requirement was an unlawful tax. The Court held that the bond requirement was not a tax, but rather a lawful fee.³²

III. Restoring Consistency to Lenders' Foreclosure Obligations

The decision in *Easthampton Savings Bank* should curtail municipalities' attempts to impose local foreclosure ordinances that are plainly inconsistent with statewide law. Moreover, Massachusetts cities that have already enacted local foreclosure ordinances may face similar challenges to that faced by Springfield. For instance:

- The City of Lawrence passed an ordinance requiring "owners"—which is broadly defined to include mortgagees in possession and trustees of securitized trusts who have initiated the foreclosure process—to register and maintain vacant or foreclosing properties.³³
- The cities of Worcester and Lynn passed ordinances that largely track the two Springfield ordinances that the SJC has now struck down, including ordinances (1) establishing a mandatory mediation program that is a prerequisite for proceeding with foreclosure;³⁴ and (2) mandating registration and maintenance of vacant or foreclosing properties, as well as the posting of a cash bond for each property, upon which the cities can draw down to satisfy unreimbursed expenses incurred while inspecting, maintaining, and securing properties.³⁵

Time will tell if those ordinances stand up to scrutiny in light of the *Easthampton Savings Bank* decision. In the meantime, Massachusetts has taken a step forward in removing inconsistent barriers to foreclosure within the Commonwealth.

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¹ *Easthampton Savings Bank v. City of Springfield*, No. SJC-11612, slip op. (Mass. Dec. 19, 2014).

² *Id.* at 3. In the *Easthampton Savings Bank* decision, the SJC cites to the ordinances under the prior version of Springfield's municipal code of 1986, but Springfield amended its municipal code in 2011. For ease of reference, citations in this alert are made to Springfield's revised 2011 code, which is available at <http://ecode360.com/SP2105>.

³ Springfield, MA, Rev. Ordinances of 2011, Art. I, Ch. 182, *et seq.*

⁴ *Id.* at 4; Mediation Ordinance, § 182-3

⁵ *Id.*, § 182-8(F).

⁶ *Id.*

⁷ *Id.*, § 182-10.

⁸ Springfield, MA, Rev. Ordinances of 2011, Art. II, Ch. 285, *et seq.*

⁹ *Easthampton Savs. Bank*, slip op. at 5; Registration Ordinance, § 285-10.

¹⁰ Registration Ordinance, § 285-9.

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¹¹ *Id.* Contrary to the definition of “initiation of the foreclosure process” in the Mediation Ordinance, the SJC has long held that the “foreclosure process” is initiated with publication of the notice of sale, and that the SCRA proceeding and the sending of the notice of right to cure under Section 35A are “pre-foreclosure” undertakings, which are unrelated to foreclosure. *See, e.g., U.S. Bank N.A. v. Schumacher*, 467 Mass. 421, 431, 5 N.E.3d 882, 890 (2014) (holding Section 35A notice is merely a “preforeclosure undertaking”); *HSBC Bank USA, N.A. v. Matt*, 464 Mass. 193, 197, 981 N.E.2d 710, 715 (2013) (holding a SCRA “proceeding is neither a part of nor necessary to the foreclosure process”); *Beaton v. Land Court*, 367 Mass. 385, 390, 326 N.E.2d 302, 305 (1975) (holding SCRA proceedings “occur independently of the actual foreclosure itself and of any judicial proceedings determinative of the general validity of the foreclosure”).

¹² Registration Ordinance, § 285-10(A).

¹³ *Id.*, § 285-17.

¹⁴ *Easthampton Savs. Bank*, slip op. at 3.

¹⁵ *Id.* at 2.

¹⁶ *Id.* at 12.

¹⁷ *Id.* at 13 (citing MASS. GEN. LAWS ch. 244, § 35B(b)).

¹⁸ *Id.* at 11.

¹⁹ *Id.* at 10; MASS. GEN. LAWS ch. 244, § 35A(b).

²⁰ MASS. GEN. LAWS ch. 244, § 35A(b).

²¹ *Easthampton Savs. Bank*, slip op. at 12 (emphasis added).

²² *Id.* at 15 (quoting *Taygeta Corp. v. Varian Assocs.*, 436 Mass. 217, 223 (2002)). The SJC held that Chapter 244 did not preempt the Registration Ordinance because that ordinance did not impact the statutory “procedures by which the equity of redemption in a mortgage may be foreclosed.” *Id.* at 13.

²³ *Id.*

²⁴ MASS. GEN. LAWS ch. 21E, § 2(c); *Easthampton Savs. Bank*, slip op. at 15.

²⁵ *Easthampton Savs. Bank*, slip op. at 16.

²⁶ *Id.* at 17. The SJC also rejected Springfield’s argument that the Registration Ordinance was not preempted because it expressly excluded owners “exempt from such action by Massachusetts General Laws,” because Massachusetts’ “comprehensive” statutory scheme “wholly occupied” the field, and, thus, because Springfield “has no regulatory power,” irrespective of any exemptions.

²⁷ 105 CMR § 410, *et seq.*

²⁸ *Id.* at 19; MASS. GEN. LAWS ch. 111, § 127I; 105 CMR § 410.960(A).

²⁹ *Easthampton Savs. Bank*, slip op. at 20; MASS. GEN. LAWS ch. 111, § 127I.

³⁰ Registration Ordinance, § 285-10(A)(11).

³¹ *Easthampton Savs. Bank*, slip op. at 20.

³² *Id.* at 21-27.

³³ *See* Lawrence, Mass., Code ch. 8.28 §§ 8.28.010 *et seq.* (2008).

³⁴ Worcester, MA., Rev. Ordinances, ch. 9, § 14A (2013); Lynn, MA, Ordinance Amending the Ordinance to Establish a Bill of Rights for Homeowners in the City of Lynn, §§ 3.00-11.00. (Mar. 4, 2014) (“Lynn Ordinance”).

³⁵ Worcester, MA., Rev. Ordinances, ch. 9, § 14 (2013); Lynn Ordinance, § 13.00.

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