

RECEIVED

07-31-2014

**CLERK OF SUPREME COURT
OF WISCONSIN**

STATE OF WISCONSIN
SUPREME COURT

Appeal No. 2013-AP-000544

Bank of New York,

Plaintiff-Respondent-Petitioner,

v.

Shirley T. Carson,

Defendant-Appellant,

Bayfield Financial LLC and Collins Financial Services,

Defendants.

BRIEF OF *AMICUS CURIAE* CITY OF MILWAUKEE

GRANT F. LANGLEY

City Attorney (SB #01013700)

DANIELLE M. BERGNER

Deputy City Attorney (SB #1049359)

KAIL J. DECKER

Assistant City Attorney (SB #1063074)

Attorney for *Amicus Curiae*

City of Milwaukee

ADDRESS:

841 North Broadway, Room 716

Milwaukee, WI 53202

Telephone: 414-286-2601

Fax: 414-286-8550

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS	<u>i</u>
TABLE OF AUTHORITIES	<u>ii</u>
ARGUMENT	
I. Introduction	<u>1</u>
II. Vacant and abandoned properties are a serious problem in the City of Milwaukee.....	<u>1</u>
III. Vacant and abandoned properties are magnets for crime and generate higher incidents of fire	<u>2</u>
IV. Vacant and abandoned properties contribute to tax foreclosures and the corresponding drain on City resources	<u>3</u>
V. 2011 Wis. Act 136 and Senate Bill 307 should be considered in interpreting Wis. Stat. § 846.102.	<u>6</u>
VI. Bank of New York’s reasoning is not consistent with the testimony provided in connection with 2011 Senate Bill 307 and would frustrate the purpose of Wis. Stat. § 846.102.....	<u>8</u>
VII. Zombie Properties and Wis. Stat. § 846.102(2) in practice.....	<u>10</u>
CONCLUSION	<u>12</u>
CERTIFICATIONS.....	<u>13</u>
CERTIFICATE OF SERVICE.....	<u>14</u>

TABLE OF AUTHORITIES

	<u>Page</u>
Wisconsin Statutes	
§ 846.102	<i>passim</i>
Other Authorities	
2011 Wis. Act 136	6, 7
2011 Senate Bill 307	6, 7, 8, 9

ARGUMENT

I. Introduction

This Brief concerns the interpretation of Wis. Stat. § 846.102, which provides that in an action for enforcement of a mortgage lien, if the court makes an affirmative finding upon proper evidence being submitted that the mortgaged premises have been abandoned by the mortgagor and assigns, judgment shall be entered as provided in Wis. Stat. § 846.10, except that the sale of such mortgaged premises shall be made upon the expiration of 5 weeks from the date when such judgment is entered. In addition to the parties to the action to enforce a mortgage lien, recently created Wis. Stat. § 846.102(2) permits a representative of the city, town, village, or county where the mortgaged premises are located to provide testimony or evidence to the court relating to whether the premises have been abandoned by the mortgagor.

II. Vacant and abandoned properties are a serious problem in the City of Milwaukee.

There are approximately 4,900 vacant buildings in the City of Milwaukee.¹ Of those 4,900 properties, many either

¹ Unless otherwise noted, all figures and statistics referenced herein are based on public records maintained by the City of Milwaukee.

meet the legal standard to be razed or will before too long if they are not rehabilitated. *See Hearing Before the Sen. Comm. on Financial Institutions and Rural Issues*, Reg. Sess. (2011) (testimony of Jennifer Gonda on behalf of the City of Milwaukee) (A-App. p. A1-A2.)² City records also indicate that approximately 400 of those 4,900 vacant properties are currently in some stage of mortgage foreclosure.

III. Vacant and abandoned properties are magnets for crime and generate higher incidents of fire.

Milwaukee Police Chief Ed Flynn describes vacant and abandoned properties as a “triple threat” to City of Milwaukee neighborhoods as they are targets of crime, serve as crime scenes, and destabilize the neighborhoods by inducing fear and contributing to further crimes. Don Walker, *Crime rate drops at Milwaukee’s vacant buildings*, Milwaukee Journal Sentinel (May 5, 2013), <http://www.jsonline.com/news/milwaukee/crime06-it9qmg-206208261.html>. Since 2011, the Milwaukee Police Department has responded to at least 2,025 burglaries, 93 aggravated assaults, 84 robberies, 44 sexual assaults, 36 sudden deaths, and 7 homicides at vacant buildings.

² References to the attached Appendix are denoted as “A-App. p. ____.”

In addition to crime, vacant and abandoned homes have significantly increased the incidence of fire in the City of Milwaukee. The Milwaukee Fire Department reported a 163% increase in the number of fires occurring in vacant residential buildings between 2005 and 2012. Each fire presents not only a direct monetary loss to the City, but also a very real safety risk to firefighters, neighbors, and possible occupants of the building. For a comprehensive report concerning fires associated with vacant properties, *see* James H. Ley, *Reducing Vacant Building Fires in Milwaukee*, available at <http://www.usfa.fema.gov/pdf/efop/efo43237.pdf>.

Although the City has made some progress in the last year in reducing crimes and fire associated with vacant buildings, such efforts are resource intensive and the statistics remain stubbornly high.

IV. Vacant and abandoned properties contribute to tax foreclosures and the corresponding drain on City resources.

Vacant and abandoned properties contribute to the number of properties the City acquires via tax foreclosure. Between 2008 and 2012, the City acquired 1,580 improved residential properties, 1,217 (77%) of which are estimated to have been vacant at the time of acquisition, and 495 (31%) of

which were affected by a mortgage foreclosure. Notably, of those 495 properties affected by a mortgage foreclosure, only 45 resulted in a sheriff's sale prior to the City foreclosing for taxes, and the remaining 450 ended up in City ownership.

The statistics are not surprising. Every day a property sits vacant, it is susceptible to crime, fire, and general deterioration. Once a building is vandalized, fire-damaged, exposed to the elements, or just simply not maintained for a prolonged period of time, the property loses value and marketability. That loss of property value and marketability drags down area property values, discourages tax foreclosure redemption, and encourages mortgagees to abandon foreclosure proceedings.

The following table shows the number of City tax foreclosure filings for the years 2007 – 2013, the number of properties actually acquired by the City (i.e., not redeemed by the owner), and the corresponding redemption ratio for each year. The percentage of people who redeem by paying back taxes has fallen from roughly 61% in 2007 to roughly 32% in 2013. This decline in redemption rates corresponds to an increase in the number of vacant properties recorded with the City.

YEAR	Filed	Acq'd	Redeemed
2007	386	150	61.14%
2008	508	184	63.78%
2009	892	461	48.32%
2010	1,089	532	51.15%
2011	991	597	39.76%
2012	1,152	744	35.42%
2013	1,101	748	32.06%

Tax foreclosures cost the City and its taxpayers on many levels. They reduce the tax base, cost millions to raze, and cost millions more to maintain. The City's average cost to raze a residential building is roughly \$10,000. The City projects it will raze nearly 500 vacant buildings in 2014. In addition, the City anticipates it will acquire at least 800 additional properties this year, which is projected to bring the City's tax foreclosure inventory to 1,500 properties in 2015, with a corresponding maintenance and management cost approaching \$4 million in tax levy funded expense. The Department of Neighborhood Services estimates that the 3-4% of properties in the City which are vacant or foreclosed at any time consume 25% of the department's workload.

Vacant and abandoned properties require that the City expend scarce tax levy funds on properties that no longer, and may never again, generate tax revenue. Since 2009, foreclosures and resulting declines in property values have

cost the City \$3.7 billion of its property tax base, which represents a 15% total loss in value. As foreclosed properties become vacant, assessed values for adjacent properties drop considerably. The result is a vicious cycle that undermines the local housing market, exacerbates the problem of negative equity for homeowners, and strains the City's capacity to provide public safety and infrastructure services.

V. 2011 Wis. Act 136 and Senate Bill 307 should be considered in interpreting Wis. Stat. § 846.102.

Among other things, 2011 Wis. Act 136 created Wis. Stat. § 846.102(2) to permit a representative of the subject municipality to present evidence of abandonment in a pending mortgage foreclosure proceeding. Although Wis. Stat. § 846.102(2) is not directly at issue in this case, this Court's decision will directly impact the application of § 846.102(2); therefore, 2011 Wis. Act 136 and corresponding Senate Bill 307 are appropriately considered.

In 2011, the legislature confronted the growing problem of abandoned properties with the introduction of 2011 Senate Bill 307 and the corresponding adoption of 2011 Wis. Act 136, which amended Wis. Stat. § 846.102 to revise the redemption period for abandoned properties from two

months to five weeks, and to permit a representative of the municipality where the property is located to present evidence of abandonment in a pending mortgage foreclosure proceeding. The language in 2011 Wis. Act 136 extending the Wis. Stat. § 846.102 rights to municipalities represents an acknowledgement by the legislature that the issues presented by abandoned properties in foreclosure extend beyond the parties' respective interests and are a matter of public concern.

2011 Senate Bill 307 was introduced with bipartisan support on November 28, 2011. Two days later the Senate Committee on Financial Institutions and Rural Issues held a public hearing. Both the City of Milwaukee and the Wisconsin Bankers Association presented testimony at that hearing (A-App. A1-A5), and registered in favor of the legislation.

A central theme in the testimony provided by both the City and the Wisconsin Bankers Association is the amount of time it takes to return vacant properties to productive use, and a desire to shorten that time through the application of Wis. Stat. § 846.102. The City's representative testified that reducing the amount of time properties sit vacant is of critical

importance, and that “Senate Bill 307 would reduce the time it takes for foreclosure proceedings to run their course.” *Hearing Before the Sen. Comm. on Financial Institutions and Rural Issues*, Reg. Sess. (2011) (testimony of Jennifer Gonda on behalf of the City of Milwaukee) (A-App. p. A2.) The representative for the Wisconsin Bankers Association testified that “Senate Bill 307...gives municipalities the option to weigh in with the court system and address abandoned properties before they spiral out of control and cause great damage to both the neighborhood and the community as a whole.” *Hearing Before the Sen. Comm. on Financial Institutions and Rural Issues*, Reg. Sess. (2011) (testimony of Michael B. Semmann on behalf of the Wisconsin Bankers Association) (A-App. p. A3.) He further testified that “[t]his [legislation] should reduce costs to the municipality and will speed up the process during which a foreclosed abandoned property goes from being a blight on the community to a kept-up, owner-occupied home.” *Id.* (A-App. p. A4.)

VI. Bank of New York’s reasoning is not consistent with the testimony provided in connection with 2011 Senate Bill 307 and would frustrate the purpose of Wis. Stat. § 846.102.

Wis. Stat. § 846.102 specifically addresses abandoned properties, which as this brief discusses, present unique challenges both to the parties and the public. The purpose of Wis. Stat. § 846.102, as implicitly acknowledged by the creation of Wis. Stat. § 846.102(2), is to allow parties, and now non-party municipalities, to speed up the conclusion of foreclosure proceedings that involve abandoned properties, with the goal of returning blighted, abandoned properties to occupied, productive use in an expeditious manner.

Bank of New York argues that the two “shall” references in Wis. Stat. § 846.102 (“judgment shall be entered as provided in s. 846.10 except that the sale of such mortgaged premises shall be made upon the expiration of 5 weeks from the date when such judgment is entered) are not mandatory (Pet. Br., pp. 17-20), and even if they are mandatory, the Bank suggests it has five years to bring the property to sale. (Pet. Br., pp. 20-21.) This interpretation would allow abandoned properties to sit abandoned for five years, or longer if the two “shall” references are not mandatory. The Bank’s interpretation cannot be reconciled with the goal of “speed[ing] up the process during which a foreclosed abandoned property goes from being a blight on

the community to a kept-up, owner-occupied home.” (A-App. p. A4.) An abandoned property does not cease being a blight on the community until it makes its way into the hands of a responsible owner. In a mortgage foreclosure context, this requires a sheriff’s sale to be conducted and confirmed. And, for this reason, the Court of Appeals decision is sound.

VII. Zombie Properties and Wis. Stat. § 846.102(2) in practice.

The City estimates that roughly 360 “zombie” properties currently exist in the City of Milwaukee. Zombie properties (sometimes referred to as “zombie foreclosures” or “zombie titles”) are created when a mortgagee initiates a mortgage foreclosure lawsuit, the owner abandons the property, often on the assumption that the mortgagee took (or intends to take) title to the property, but the mortgagee never takes the property to a sheriff’s sale, and therefore, title to the property remains in an uncertain or “zombie” status. *See* Don Walker, *Hundreds of Zombie Homes Plague Milwaukee Neighborhoods*, Milwaukee Journal Sentinel (May 25, 2014), <http://www.jsonline.com/news/milwaukee/hundreds-of-zombie-homes-plague-milwaukee-neighborhoods-b99276701z1-260613161.html>. Of the estimated 360 zombie

properties currently in the City of Milwaukee, 22% are tax delinquent, which is nearly three times the overall rate of 8%.

Currently, Wis. Stat. § 846.102 is the only tool the City has to try to return abandoned “zombie” properties to responsible ownership and use. Citing the authority granted under Wis. Stat. § 846.102(2), the City Attorney has already filed 16 motions under Wis. Stat. § 846.102 this year. Of those 16 cases, 9 have foreclosure judgments entered more than a year ago, and 4 of those are more than three years old. These cases do not involve post-judgment loan modifications or redemption by the mortgagors (which would not involve abandoned properties because the mortgagors have not relinquished possession and control in such circumstances). Rather, most of these cases involve abandoned properties that have been sitting in that state for many months, and in some cases years, beyond the entry of judgment and ordered redemption period.

The City of Milwaukee’s experience working with Wis. Stat. § 846.102 is further reason to affirm the Court of Appeals decision in this case. If a prompt sale of an abandoned property is not required under Wis. Stat. § 846.102, the City could have no expectation that a meaningful

outcome would result from such proceedings, and as such, little reason to expend City resources on such efforts. In other words, the recently created § 846.102(2) would be virtually useless to the City if this Court were to adopt the interpretation of Wis. Stat. 846.102 advanced by Bank of New York.

CONCLUSION

While this case is certainly important to the parties' respective interests, it is also important to the City of Milwaukee and its residents. For the reasons stated herein, the City of Milwaukee respectfully requests that this Court affirm the decision of the Court of Appeals.

Dated and signed this 28th day of July, 2014, at Milwaukee, Wisconsin.

GRANT F. LANGLEY
City Attorney

s/Danielle M. Bergner
DANIELLE M. BERGNER
Deputy City Attorney
State Bar No. 1049359
KAIL J. DECKER
Assistant City Attorney
State Bar No. 1063074
Attorney for *Amicus Curiae*
City of Milwaukee

FORM AND LENGTH CERTIFICATION
Brief, Appendix, Electronic Filing

I hereby certify that the foregoing brief and appendix conform to the rules contained in Wis. Stat. § 809.19 (7), (8)(b), (8)(c)2, and (8)(d), for a non-party brief produced with a proportional serif font. The length of this brief is 2,199 words (maximum is 3,000).

Per Wis. Stat. § 809.19 (12) and (13), the text of any electronic filing of this brief and the content of any electronic filing of this appendix, are identical to the paper copy filed with the Court.

A copy of this certificate has been served with the paper copies of this brief filed with the Court and served on all opposing parties.

Dated this 28th day of July, 2014.

GRANT F. LANGLEY
City Attorney

s/Danielle M. Bergner
DANIELLE M. BERGNER
Deputy City Attorney
State Bar No. 1049359
KAIL J. DECKER
Assistant City Attorney
State Bar No. 1063074
Attorney for *Amicus Curiae*
City of Milwaukee

CERTIFICATE OF SERVICE

Lynn Claflin herein certifies that she is employed by the City of Milwaukee, assigned to duty in the office of the City Attorney, which is located at 841 North Broadway, Suite 716, Milwaukee, Wisconsin 53202; that on the 28th day of July, 2014, she caused 22 copies of the Brief of *Amicus Curiae* City of Milwaukee, in the above-entitled case, to be sent by courier for delivery to the Clerk of the Wisconsin Supreme Court, P.O. Box 1688, 110 East Main Street, Suite 205, Madison, WI 53701-1688; and deposited in the U.S. mail, three copies of the above-referenced brief, securely enclosed, the postage prepaid and addressed to:

April A.G. Hartman & Jeffery R. Myer
Legal Action of Wisconsin, Inc.
230 West Wells Street, Room 800
Milwaukee, WI 53203

Valerie L. Bailey-Rihn
Quarles & Brady LLP
33 E. Main Street, Ste. 900
Madison, WI 53703

Jillian N. Walker
Messerli & Kramer P.A.
3033 Campus Drive, Suite 250
Minneapolis, MN 55441

Catherine M. Doyle & Amanda Adrian
Legal Aid Society of Milwaukee Inc.
521 N. 8th Street
Milwaukee, WI 53233

s/Lynn M. Claflin
Lynn M. Claflin