

Larry Rothenberg's Testimony Presented to Ohio Senate's Civil Justice Committee Hearing Regarding H.B. 138

February 5, 2008

Good morning Mr. Chairman and members of the committee. My name is Larry Rothenberg. I am a partner in the law firm of Weltman, Weinberg & Reis and am the head of its foreclosure department in its Cleveland Office. I have represented the Plaintiff in a large volume of foreclosures throughout my 29 year career. I have met with my colleagues from the other firms, which also handle foreclosures throughout Ohio on a volume basis, and have discussed H.B. 138 extensively, as it relates to mortgage foreclosures. We believe that there are some better ways to accomplish the objectives of the H.B. 138. We also have a number of recommendations for additions to H.B. 138, which would further these objectives by improving the efficiency of the foreclosure process and eliminating unnecessary costs. Costs incurred in foreclosure cases are passed on to the borrowers when the borrowers pay to resolve their delinquency, so eliminating unnecessary costs will help the borrower as well as the lender.

The cities have expressed a need to know as soon as possible after a Sheriff's Sale, who to contact with regard to problems concerning the condition of the property. The cities have also expressed concern that while foreclosures languish under the current procedures, building code violations arise and properties become vacant and vandalized, causing harm to the neighborhood and its property values. Our recommendations would better fulfill the needs of the cities and would not affect the borrowers' rights or their ability to resolve their cases. Our recommendations are as follows:

1. **Short Form Order Confirming Sale.** An order confirming the sheriff's sale is required in all cases. Depending on a particular county's requirements, it usually takes a few weeks for the order to be prepared and approved by the court. The Sheriff does not issue the sheriff's deed until after the sale is confirmed. Some Sheriff's sale purchasers delay recording their Sheriff's deeds, causing difficulty in the city's ability to determine who to contact about building code violations. H.B. 138, as drafted, attempts to address that problem by revising R.C. Section 2329.36 to have the Sheriff, rather than the purchaser, record the Sheriff's deed. However, that will cause additional problems, because the purchaser is entitled to review the deed for any errors in the deed prepared by the sheriff (and they are frequent), and have them corrected before the deed is recorded. In addition, the Department of HUD's regulations do not permit a Sheriff's deed conveying the property to HUD to be recorded until possession of the property is delivered and repairs are made. Our recommendation for a better solution to the problem is as follows: At the sale, the purchaser will be required to give the Sheriff the purchaser's name, address, and contact information for a designated person or group that is authorized by the purchaser to receive notices or inquiries from the city or any other interested party, about the condition or the purchaser's intentions with regard to the property. The Sheriff will include the purchaser's information on a short form Order Confirming the Sheriff's Sale. This is similar to Cuyahoga County's current procedure, which is more efficient than any other county. The order should be delivered to the judge and filed with the Clerk of Courts within 14 days after the sale. The statute should specifically provide that the purchaser's duties with

regard to the condition of the property, including building code violations, become effective upon the filing of the order confirming the sale. The Clerk of Courts will cause a certified copy of the Order Confirming the Sale to be delivered to the County Auditor, who without charging a fee, will note it on the Auditor's property record. The city's building department or any other interested party can then view from the Auditor's records, the purchaser's contact information well in advance of the recording of the Sheriff's deed. Therefore, the provision in H.B. 138 for the Sheriff to record the deed is unnecessary, because the purchaser's information will already be on both the records of the Court and the Auditor, based on the previously filed Order Confirming the Sale. The Sheriff, as is currently done, will issue the Sheriff's deed to the purchaser after the purchaser pays the balance due to the Sheriff, and the purchaser will be responsible for recording it. H.B. 138 as drafted, would require an out-of-state business organization to designate a natural person who resides in Ohio, to receive notices or inquiries about the property. To require out-of-state business organizations to have a resident who is a natural person as its designee in Ohio and any other state enacting a similar statute, would be unduly burdensome. If the out-of-state business organization designates a person or group, which does not reside in Ohio, the city will equally be able to serve notices on the out-of-state designee. Therefore, there is no additional purpose to be served by requiring an Ohio natural person resident to be the designee, rather than an out-of-state natural person. Moreover, imposing a requirement for an in-state designee only on business organizations, but not on other out-of-state purchasers, such as individuals or governmental agencies, would likely be unconstitutional.

2. **Lis Pendens.** Ohio has an unusual Lis Pendens statute, which results in a prolonging of many foreclosures. The Lis Pendens date provided by R.C. 2703.26 takes effect as of the date service of the summons is complete. It should be changed to take effect as of the date the Complaint is filed. This would make Ohio's Lis Pendens provision consistent with most other states. Under the current Lis Pendens statute, when new liens are filed between the date the of the initial title exam and the date service of the summons is complete, it is necessary to amend the Complaint and join the additional lienholder as a New Party Defendant. The case must then be delayed until the new party is also served with a summons and the 28 day time period for it to file an answer expires. Adding additional creditors as parties to the foreclosure causes both a delay and additional costs, which benefit neither the debtor nor the creditor who commenced the foreclosure case.
3. **Attorney to prepare Sheriff's Deed.** Due to the volume of cases, many sheriff's have backlogs in preparing the deed. Our recommendation is that by the 14th day after the Order Confirming the Sale is filed, the attorney for the party who caused the Order of Sale to be issued should be required to prepare and deliver to the Sheriff, the Sheriff's deed for execution. This will relieve the Sheriff of the burden of preparing the Sheriff's deeds, and will help eliminate errors by Sheriffs in preparing the deeds.
4. **Taxes to be paid through sale date.** The proceeds of the Sheriff's sale should be used to pay the real estate taxes, assessments, penalties and interest, which are due and payable as of the date of the Sheriff's Sale. Currently, different counties have different interpretations as to the date through which the real estate taxes are to be paid from the proceeds of the Sheriff's sale. This should be made uniform by statute.

5. **Purchaser to pay within 30 days of sale.** R.C. 2329.30 should require a purchaser, including a lienholder, to pay the balance due to the Sheriff specifically within 30 days after the sale date, or be subject to contempt of court. This will eliminate ambiguity and make the requirement consistent statewide. It will help expedite the completion of the transfer of title to the purchaser.
6. **Shorten time for service by publication, and legal description of property not required in legal notices.** The provision for service of the summons by publication in mortgage foreclosures should be the same as the provision of R.C. 5721.18 for tax foreclosures. Currently, service by publication in mortgage foreclosures is made once a week for six weeks, with service being deemed complete as of the date of the last publication. Service by publication is primarily necessary when the property has been abandoned and the owner cannot be located. Therefore, the delay during the service by publication process is not productive. The time frame should be shortened as in R.C. 5721.18, to publication for three weeks, with service being deemed complete as of the date of the first publication. In addition, like the second paragraph of R.C. 5721.18 (A), it should not be necessary to include the legal description in the legal notice of service by publication, or in the notice of the Sheriff's sale, if the county has a permanent parcel number system and if the complete legal description is not necessary to provide reasonable notice to the interested parties. Including the entire legal description when not necessary serves only to increase the cost to the creditor, and ultimately to the borrower.
7. **Preliminary and Final Judicial Reports.** The filing of title evidence in the form of a Preliminary Judicial Report and a Final Judicial Report with an effective date after the Lis Pendens date, should be required by statute. Currently, different counties have different requirements as to whether any title evidence is required to be filed in the case, or the type of title evidence to be filed. The Preliminary Judicial Report is the product created by the title insurance industry specifically for foreclosure cases. The requirement to file Preliminary and Final Judicial Reports should be made uniform statewide. Any interested party, including prospective bidders, can then review the Judicial Reports, to ascertain the lien priorities, and whether a Sheriff's deed can be expected to convey clear title. Currently, some judges arbitrarily require that Supplemental Final Judicial Reports be obtained, which causes additional costs without any valid reason. If the Final Judicial Report has an effective date after the Lis Pendens date, no further Judicial Reports should be required, as long as any pertinent assignment of the mortgage to the plaintiff appears on the Preliminary or Final Judicial Report.
8. **Master Commissioners.** The party who is entitled to foreclosure should have the option to have the sale conducted by a Master Commissioner, rather than by the Sheriff. In some counties, the Sheriff is extremely backlogged, resulting in delays of many months prior to sale. Master Commissioners are effectively used in all federal court foreclosures, and should be an option in state court foreclosures as well.