

No. 92081-8

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SUPREME COURT
OF THE STATE OF WASHINGTON

CERTIFICATION FROM UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

LAURA ZAMORA JORDAN, as her separate estate, and on behalf of
others similarly situated,

Plaintiff

v.

NATIONSTAR MORTGAGE, LLC, a Delaware limited liability
company,

Defendant.

**BRIEF OF AMICUS CURIAE ON BEHALF
OF THE CITY OF SPOKANE**

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TABLE OF CONTENTS

	Page
I. IDENTITY AND INTEREST OF AMICUS CURIAE	1
II. ISSUES PRESENTED AND STATEMENT OF THE CASE	1-2
III. ARGUMENT	2
A. Spokane's Abandoned Property Registration Program.	2-3
B. Absent borrowers and unresponsive lenders require Spokane's taxpayers to incur the costs of imposing custodial receiverships for abandoned properties.	3-5
C. A prohibition on lender entry before completion of foreclosure would place an onerous burden on Spokane.	5-7
IV. CONCLUSION	7

TABLE OF AUTHORITIES

	Page
Statutes and Rules	
RCW 7.28.230(1)	1
RCW ch. 7.60	2
RCW 61.24.040	5
Spokane Municipal Code 17F.070.520.	3

I. IDENTITY AND INTEREST OF AMICUS CURIAE

The City of Spokane (“Spokane”) is a first class city and the county seat of Spokane County. It is Washington's second most populous city, with 209,525 citizens. As noted by the United States District Court for the Eastern District of Washington, the questions certified to this Court “have significant policy implications and will have far-reaching effects on those in Washington.”¹ Spokane agrees and it has an interest in the proper resolution of the questions certified to this Court. Spokane joins in the arguments raised by Defendant Nationstar Mortgage, LLC (“Nationstar”) in its answering brief.

II. ISSUES PRESENTED AND STATEMENT OF THE CASE

For the reasons set forth in §III, *infra*, Spokane urges the Court to find the following in response to the questions certified by the District Court:²

1. Under Washington’s lien theory of mortgages and RCW 7.28.230(1), a borrower and lender **may** enter into a contractual agreement prior to default that allows the lender to enter, maintain, and secure the encumbered property after default but prior to foreclosure; and

¹ See ECF No. 72, p. 3.

² Id. at 9.

2. RCW ch. 7.60, Washington’s statutory receivership scheme, **does not** provide the exclusive remedy, absent post-default consent by the borrower, for a lender to gain access to an encumbered property prior to foreclosure.

Spokane agrees with the Statements of the Case provided by Plaintiff Laura Zamora Jordan (“Ms. Jordan”) and Nationstar.

III. ARGUMENT

A finding in Ms. Jordan’s favor will shift the costs of securing and maintaining abandoned homes from the parties who contracted to purchase and finance the home to local communities and taxpayers. The problem in this case is not that homebuyers regularly contract to allow lenders to enter properties prior to foreclosure; the problem, instead, is that Ms. Jordan alleges she had not actually abandoned **her** home. This Court should not adopt her overbroad restatement of the law to address a problem that does not exist.

A. Spokane’s Abandoned Property Registration Program.

At the time of this writing, Spokane has roughly 1,400 homes in some stage of mortgage foreclosure.³ Faced with the varied and significant problems associated with abandoned homes throughout the community,

³ Based on a calculation provided in a “Communities Foreclosure Assessment report” for Spokane compiled by the independent organization Community Champions in August, 2015.

Spokane created its Abandoned Property Registration Program (“the Registry”) in 2014.⁴ The Registry requires a “lender or other responsible part[y]” to register abandoned properties with the City. *Id.* The responsible party is further required to maintain, secure, and monitor the property, or face certain penalties and fines. *Id.* The intent of the Registry is “to protect the community from becoming blighted as a result of abandoned properties that are not properly secured and maintained.” *Id.*

Although the Registry is relatively new, 197 abandoned homes have already been registered. As §II(B), *infra*, discusses, significant costs accrue to the neighbors and taxpayers as a result of these so-called “zombie properties.”

B. Absent borrowers and unresponsive lenders require Spokane’s taxpayers to incur the costs of imposing custodial receiverships for abandoned properties.

In the last six months, Spokane has twice, out of necessity, petitioned for and been granted appointment of a custodial receiver to secure and maintain abandoned homes. These receiverships are emblematic of the problems such properties pose to neighbors and the costs associated with rectifying them, borne by Spokane’s taxpayers.

⁴ See Spokane Municipal Code 17F.070.520. An accurate copy of SMC 17F.070.520 is reproduced in the Appendix to this Brief.

In the first instance, the “Joseph Property,” the home lay abandoned after the homeowner died intestate in 2013. The deed of trust holder obtained a default judgment of foreclosure, but the foreclosure sale was never consummated. The vacant and unsecured property became a destination for trespassers and criminal activity over the next two years. Despite being apprised of the property’s condition and the myriad problems associated with it, the lender remained unresponsive. In the three months preceding Spokane’s action to appoint a custodial receiver, the Spokane Police Department received fifteen calls for service to the property ranging from neighbors’ requests to remove trespassers to shots fired at the property.

In the second instance, the “Belt Property,” the owners disappeared following a divorce in 2010. Again, foreclosure proceedings were initiated but never concluded by the lender. Though the property was without water, sewer, power, or other utilities for several years, Code Enforcement noted the presence of long-term squatters residing at the property.

In both cases, a Do Not Occupy Order (“DNO”) was issued after investigations by Code Enforcement. However, absent owners and unresponsive lenders made it impossible for Code Enforcement to carry out the DNO. Without permission of the owner, Spokane could not legally secure the property and remediate the unsanitary and hazardous conditions.

Spokane was compelled to petition for a custodial receiver to obtain the authority and permission to carry out the DNO and secure the homes.

Spokane's citizens demanded action, the owners and lenders refused to act, and Spokane's taxpayers were forced to hire counsel, hire a receiver, and fund the costs of ameliorating the nuisance.

C. A prohibition on lender entry before completion of foreclosure would place an onerous burden on Spokane.

As the Joseph and Belt Properties illustrate, abandoned properties are significant problems for neighboring homes. Criminal activity, waste, and hazardous living conditions are a common result, with Spokane's taxpayers bearing the burden of remediating the blight. These examples are harbingers of difficult times if Ms. Jordan is successful in prohibiting lenders access to **any** abandoned property prior to the completion of foreclosure proceedings.⁵

Even in instances where the foreclosure sale proceeds seamlessly, without delay, title is not transferred instantaneously. The process takes, at a minimum, 120 days from service of the notice of default to foreclosure sale. RCW 61.24.040. While, in reality, almost no residential foreclosure sale is completed within 120 days, the *best case scenario* of four months is a long

⁵ Spokane's interest in this matter is focused on situations where a borrower has vacated the home. Spokane retains recourse options against borrowers who allow a property to fall into disrepair or become a nuisance while remaining in the home.

time for a neighborhood when an adjacent or nearby property is abandoned, unsecured, and unmaintained.

Ms. Jordan argues that a borrower's exclusive right of possession is violated not only where the lender enters the home and changes the locks, but also when a lender enters a vacant home and replaces or boards up broken doors and windows and shuts off utilities for the winter.⁶ No distinction is made for homes that have been abandoned by the owner but remain occupied by a squatter or other unauthorized party. Such a conclusion is concerning to Spokane. Spokane does not benefit from the mortgage contract as both the lender and borrower do. Yet its taxpayers will incur the costs of appointing custodial receivers when lenders cannot secure and maintain vacant or illegally occupied homes.

Requiring appointment of a custodial receiver to perform basic caretaking responsibilities for vacant or otherwise problematic homes prior to foreclosure will necessarily result in all lenders taking a hands-off approach. There are a limited number of qualified receivers in Spokane. And the costs associated with their appointment are significant.⁷ Further, there

⁶ Pl.'s Opening Br. at p. 13.

⁷ In addition to internal costs incurred in the form of time and personnel by Code Enforcement, Police, and other city departments in attempting to address and limit the problems common to nuisance properties, Spokane paid \$10,874.92 in legal fees, costs, and receivership expenses with respect to the Joseph and Belt Properties.

are evidentiary problems in appointing a receiver. To succeed on a petition for appointment of a receiver, Spokane must prove that the property is abandoned, that the current occupant, if any, has no right to be there, and that the nuisance is of such importance that a receiver should be appointed for the benefit of the community.

Ms. Jordan's interpretation puts Spokane in the position of a benefactor for lenders to whom it owes no duty. Spokane becomes every lender's de facto property manager, at no cost to either of the parties to the contract. That position is simply untenable and would be exceedingly burdensome on municipalities state-wide.

IV. CONCLUSION

Spokane requests the Court answer the Certified Questions consistent with this brief and the arguments of Nationstar.

[Signatures to follow.]

Respectfully submitted this 4th day of December, 2015.

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DECLARATION OF SERVICE

I declare, under penalty of perjury, that on the 4th day of December, 2015, I caused a true and correct copy of the foregoing "Brief of Amicus Curiae on Behalf of the City of Spokane" to be delivered to the parties below in the manner noted:

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Subject: Supremem Court No. 92081-8, Jordan v. Nationstar Mortgage, LLC

Case Name: Laura Zamora Jordan, as her separate estate, and on behalf of others similarly situated vs. NATIONSTAR MORTGAGE, LLC, a Delaware limited liability company

Case Number: 92081-8

Dear Supreme Court Clerk – attached for filing **Brief of Amicus Curiae on Behalf of the City of Spokane** in the above matter, filed by:

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