

**NO. 08-0444**

---

**IN THE SUPREME COURT OF TEXAS**

---

**MYRAD PROPERTIES, INC.**

**PETITIONER**

**v.**

**LASALLE BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR THE  
REGISTERED HOLDERS OF GMAC COMMERCIAL MORTGAGE  
SECURITIES, INC., COMMERCIAL MORTGAGE PASS-THROUGH  
CERTIFICATES, SERIES 1997-C1, ROBIN GREEN, AND MELISSA COBB,**

**RESPONDENTS**

---

**AMICUS CURIAE, TEXAS LANDOWNERS COUNCIL,  
BRIEF IN SUPPORT OF PETITIONER'S BRIEF ON THE MERITS**

---

**TED HOLLEN**  
6300 "C" Lohman Ford Road  
Lago Vista, Texas 78645  
(512) 267-2700 - direct  
(512) 267-2713 - facsimile  
State Bar Card No. 09871000  
**ATTORNEY FOR AMICUS CURIAE**  
**TEXAS LANDOWNERS COUNCIL**

## **IDENTITY OF AMICUS CURIAE**

Texas Landowners Council  
c/o James R. Gaines, President  
4425 MoPac South, Building I  
Austin, Texas 78735  
(512) 892-1802  
(512) 892-3745 – facsimile

The Texas Landowners Council was formed in 1990 by a group of landowners who recognized the need for an organization that protects property rights according to the Constitution and is committed to securing the right to own land. Texas Landowners Council is a private, nonprofit organization classified as 501(c)6. Since this organization was founded, its involvement in the legislative process has been crucial to protecting property rights for all Texans. It believes that if any property rights are violated anywhere in the state, all landowners in Texas can be subjected to the same abuse.

The fee for preparation of this brief was paid by Brazos Wyldewood, Inc.

**TABLE OF CONTENTS**

IDENTITY OF AMICUS CURIAE AND SOURCE OF FEE PAID.....ii

TABLE OF CONTENTS.....iii

INDEX OF AUTHORITIES.....iv

ISSUES PRESENTED FOR REVIEW.....v

SUMMARY OF THE ARGUMENT.....1

ARGUMENT.....1-4

PRAYER.....5

CERTIFICATE OF SERVICE.....6

**INDEX OF AUTHORITIES**

**Cases**

*A.V. Mitchell, Jr. v. Texas Commerce Bank – Irving*, 80 S.W.2d 681  
(Tex. Civ. App. – Fort Worth 1984 writ denied).....3

*Clearman v. Graham*, 4 S.W.2d 581 (Tex. Civ. App. – Austin 1928  
writ dismissed).....3

*McCullen Interex, Inc. v. Cowden*, 728 S.W.2d 813 (Houston  
[First Dist.] 1986 no writ).....3

*St. Paul Oil & Gas Corporation v. Tri John Exploration, Inc.* 872  
S.W.2d 276. (Tex. Civ. App. - Corpus Christi 1994 writ denied).....3

**Statutes**

TEXAS BUSINESS AND COMMERCE CODE, SECTION 2.38(b)(c).....2

## **ISSUES PRESENTED FOR REVIEW**

1. Whether a non-judicial foreclosure deed which unambiguously and undisputedly conveyed only one apartment complex can be held to have conveyed a separate apartment complex over one mile away by reference to extrinsic evidence such as the language of a notice of sale, the words uttered during the conduct of the foreclosure sale or the parties' alleged intent.
2. Whether a correction deed can be used to retroactively enlarge the estate granted in the original non-judicial foreclosure deed such that the correction deed retroactively conveys a second, separate, non-contiguous parcel of property over a mile away from the parcel of property conveyed in the original foreclosure deed.
3. Whether a lender, by referencing a deed of trust in a notice of sale, automatically expands the properties subject to the sale as expressly identified in the notice to include all the properties contained in the deed of trust and not just the property identified in the notice of sale.
4. Whether by referencing the deed of trust in the notice, the trustee and purchaser at the foreclosure sale are authorized to unilaterally file a correction deed after the fact to enlarge the property subject to the sale.

## SUMMARY OF THE ARGUMENT

Amicus Curiae, Texas Landowners Council, concurs with Appellant's Brief and submits its brief in support of Appellant's Brief with respect to *Argument Issues 1-4* thereof. Simply stated, once the auctioneer has struck-off the specific property that the auctioneer announced he was selling, neither the auctioneer nor the party causing the auction to take place may change or alter the events that occurred by filing a correction deed to enlarge or change the property sold.

The proper remedy would be to cancel the sale, and re-post the property (Generally requiring the acquiescence of the highest bidder. However, this is not germane to the present argument.)

## ARGUMENT

**1. Appellant has set forth an extensive set of facts. However, for purposes of this argument, all that are relevant are the facts of the actual Trustee's Sale.**

On November 7, 2006, the Substitute Trustee, Kenneth Strickland, held a Trustee's Sale and announced to the potential bidders that one specific piece of real property would be sold. Thereafter, this tract was sold to LaSalle Bank National Association, as Trustee for the Registered Holders of GMAC Commercial Mortgage

Securities, Inc., Commercial Mortgage Pass-Through Certificates, Series 1997-C1, and a Trustee's Deed to the one tract was recorded. (CR:2435-2436, Temp. Inj. Hearing Transcript p. 24-28). There were potential bidders at the sale and the sale was concluded by the acceptance of the bid from LaSalle Bank. (CR 2698-2699, Strickland Deposition Pages 22-24).

A sale by auction is complete when the auctioneer so announces by the fall of the hammer or in another customary manner, TEXAS BUSINESS AND COMMERCE CODE, SECTION 2.38(b). Such a sale is with reserve unless the goods are in explicit terms put up without reserve. In an auction with reserve, the auctioneer may withdraw the goods at any time until he announces the completion of the sale. In an auction without reserve, after the auctioneer calls for bids on an article or lot, that particular article or lot can not be withdrawn unless no bid is made within a reasonable time, TEXAS BUSINESS AND COMMERCE CODE, SECTION 2.38(c).

The Trustee's representation in the Notice of Sale states that he would sell the Property to the highest bidder is comparable to an auction without reserve in which the auctioneer, once he has called for bids, may not withdraw the article to be sold, unless no proper bid is made within a reasonable time. *St. Paul Oil & Gas Corporation v. Tri John Exploration, Inc.*, 872 S.W.2d 276. (Tex. Civ. App. - Corpus Christi 1994 writ denied). Therefore, in the present matter, the Substitute Trustee, once he announced the Property

that was being sold, specifically the one tract of land, he could not withdraw the same from the sale. On accepting the highest bid, the sale was complete.

When the sale was complete and the Trustee's Deed was recorded, the potential bidders left the premises. When a sale is complete, the Trustee can not thereafter change the terms of the sale without again, giving notice and conducting a new sale. *Clearman v. Grahm*, 4 S.W.2d 581 (Tex. Civ. App. – Austin 1928 writ dismissed); *A.V. Mitchell, Jr. v. Texas Commerce Bank – Irving*, 80 S.W.2d 681 (Tex. Civ. App. – Fort Worth 1984 writ denied); *McCullen Interex, Inc. v. Cowden*, 728 S.W.2d 813 (Houston [First Dist.] 1986 no writ). These cases involved a sale which was apparently completed with the acceptance of a high bid. However, the high bidder either later rejected the bid or failed to return in a reasonable time with the bid amount. In each case, three (3) different courts of appeal held that the second sale or request to award the property to the second highest bidder was neither valid nor correct because most of the bidders had dispersed, and the property should have been noticed for a subsequent sale. It is the lack of notice to potential bidders, after a sale was concluded in one manner, which prevents the Trustee from subsequently changing the manner or terms of the sale.

Unlike the *Clearman*, *A.V. Mitchell*, and *McCullen* cases, the present case does not involve a second sale or a request to award the property to the previous bidder, instead the lender and the Trustee have attempted to change the events occurring during the actual sale by filing a correction deed which specifically included another tract of land

and indicating that the sale was actually two tracts of land. The correction deed does not memorialize the sale as it occurred. The auctioneer only orally offered for sale the one tract described in the original Trustee's Deed. Surely, a correction deed cannot be used to record a sale that did not, in fact, occur, and in which the bidders present did not have an opportunity to bid.

The reasoning used by the above-quoted cases can be applicable in the present matter. Each of the courts held, once the sale was complete, and the bidders had dispersed, a subsequent sale without notice did not offer those bidders an opportunity to bid. In the present matter, only one tract of land was actually offered for sale by the Trustee, and the bidders present were not offered the opportunity to bid on the second tract. It is because these bidders were not offered the opportunity to bid on the second tract that a correction deed is not proper. Admittedly, the deed does not correct the actual events that transpired the day of the sale. Had the Trustee announced that he was selling one tract and then the other, or that he was selling both tracts at the same time, then the bidders would have been given an opportunity to bid on both or each tract. If the oral announcement had included both tracts, a correction deed, truly setting forth the events as they occurred would be proper. It appears from the record that there is no dispute regarding what the Trustee actually and orally stated at the sale, that being that he was selling only the one tract of land. Therefore, both the trial court and the court of appeals erred in failing to hold that a correction deed was not applicable to the situation presented, and should have set aside the correction deed.

**PRAYER**

Wherefore, Premises considered, the Texas Landowners Council, prays that this Honorable Court grant its request for Oral Argument, grant the relief requested by Appellant, and such other and further relief to which Appellant may show itself justly entitled.

Respectfully Submitted,

---

***TED HOLLEN***  
***Attorney for Texas Landowners Council***  
6300 "C" Lohman Ford Road  
Lago Vista, Texas 78645  
(512) 267-2700 - direct  
(512) 267-2713 - facsimile  
State Bar Card No. 09871000

**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing document was served on the attorney of record for each Party by delivering a true and correct copy *via certified mail, return receipt requested* on this the \_\_\_\_\_ *day of December, 2008*, to the following:

Donald R. Taylor  
Miguel S. Rodriguez  
TAYLOR, DUNHAM AND BURGESS, L.L.P.  
301 Congress Avenue, Suite 1050  
Austin, Texas 78701  
(512) 473-2257  
(512) 478-4409 - facsimile

Keith M. Aurzada  
Powell Goldstein L.L.P.  
2200 Ross Avenue, Suite 3200  
Dallas, Texas 75201

Bryan College Station Regional Association of Realtors  
c/o Cully Lipsey  
Hoelscher, Lipsey & Elmore, P.C.  
1021 University Drive East, suite 102  
College Station, Texas 77840

Hill Country Home Builders Association  
c/o Justin MacDonald, President  
1444 Sidney Baker Street  
Kerrville, Texas 78028

Home Builders Association of Greater Austin  
c/o Gary Henky, President  
8140 Exchange Drive  
Austin, Texas 78754

Multifamily Council of Texas Association of Builders  
c/o W. Barry Kahn, Chair  
Hettig/Kahn Holdings, Inc.  
5325 Katy Freeway, Suite One  
Houston, Texas 77007

---

**TED HOLLEN**  
*Attorney for Texas Landowners Council*