

Not Reported in A.2d, 2009 WL 2602727 (Conn.Super.), 48 Conn. L. Rptr. 307
 (Cite as: 2009 WL 2602727 (Conn.Super.))

UNPUBLISHED OPINION. CHECK COURT
 RULES BEFORE CITING.

Superior Court of Connecticut,
 Judicial District of Ansonia-Milford.
 CITY OF ANSONIA

v.
 Walter A. ZELANIN, Jr.
 No. CV085006828.

July 23, 2009.

West KeySummary

Municipal Corporations 268 ↻623(2)

268 Municipal Corporations

268X Police Power and Regulations

268X(A) Delegation, Extent, and Exercise of
 Power

268k623 Abatement of Nuisances

268k623(2) k. Expense of Abatement
 and Assessments Therefor. Most Cited Cases

The city's failure to send a copy of a notice of a blight violation to a lien holder required dismissal of city's claim against lien holder. If a notice of blight violation was sent to a property owner, the ordinance required that the municipality also send a copy to any lien holder. The city admitted that it did not send a copy to the lien holder. C.G.S.A. § 7-148gg.

Shepro & Blake, Stratford, for City of Ansonia.

JOHN W. MORAN, Judge Trial Referee.

*1 The plaintiff, the City of Ansonia, commenced this action on July 29, 2008, seeking to foreclose upon property owned by the other defendant, Walter Zelanin, Jr., and located at 256 North State Street, Ansonia, Connecticut ("the property"). The plaintiff alleges that, on or about February 20, 2008, it gave Zelanin notice of continuing blight ordinance violations with respect to the property, but Zelanin failed to remedy these violations. As a result, the plaintiff claims a blight lien was made against the property in the amount of \$99 per day from the date notice was sent, and that this lien was recorded on the land records of the City of Ansonia on May 9, 2008. The

plaintiff's complaint also cites Wells Fargo as a defendant on the basis that it is the holder of a 2006 mortgage that is subsequent in priority to its blight lien and bears a principal amount of \$150,007.

On June 2, 2009, Wells Fargo filed a motion to dismiss, arguing that this court lacks subject matter jurisdiction to hear the claims made against it. The motion to dismiss is accompanied by a memorandum of law in support and various relevant documents, including a copy of a "Notice of Blight Violations" the plaintiff's Anti-Blight Enforcement Officer sent to Zelanin on February 8, 2008. The plaintiff has filed a memorandum of law in opposition to Wells Fargo's motion to dismiss.

Before the court more specifically addresses the parties' arguments, it is necessary to lay out a brief recitation of the relevant statutory provisions. General Statutes

<http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000264&DocName=CTSTS7-148&FindType=L7-148> enumerates powers granted to municipalities by the General Assembly. Included among these powers is the authority to "[m]ake and enforce regulations preventing housing **blight** provided such regulations define housing **blight**, and including regulations establishing a duty to maintain property and specifying standards to determine if there is neglect " General Statutes
[http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000264&DocName=CTSTS7-148&FindType=L7-148\(c\)\(7\)\(H\)\(xv\)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000264&DocName=CTSTS7-148&FindType=L7-148(c)(7)(H)(xv)). This provision also allows municipalities acting under their **blight** prevention authority to "prescribe fines for the violation of such regulations of not less than [\$10] or more than [\$100] for each day that a violation continues " General Statutes
[http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000264&DocName=CTSTS7-148&FindType=L7-148\(c\)\(7\)\(H\)\(xv\)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000264&DocName=CTSTS7-148&FindType=L7-148(c)(7)(H)(xv)). In turn, General Statutes
[http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000264&DocName=CTSTS7-148&FindType=L7-148\(c\)\(10\)\(A\)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000264&DocName=CTSTS7-148&FindType=L7-148(c)(10)(A))

^{FNI} allows a municipality to issue citations for the

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violation of such regulations, “provided ... the designated municipal officers or employees issue a written warning providing notice of the specific violation before issuing the citation.” In the event that fines levied for blight ordinance violations are not paid, General Statutes § 7-148aa allows a municipality to place “a lien upon the real estate against which the fine was imposed from the date of such fine.” It also provides that “[e]ach such lien shall take precedence over all other liens filed after July 1, 1997, and encumbrances except taxes and may be enforced in the same manner as property tax liens.”

FN1.General Statutes § 7-148(c)(10)(A) applies generally to all powers afforded to municipalities by § 7-148(c). It provides: “Any municipality shall have the power to do any of the following, in addition to all powers granted to municipalities under the Constitution and [G]eneral [S]tatutes ... (10) Miscellaneous. (A) Make all lawful regulations and ordinances in furtherance of any general powers as enumerated in this section, and prescribe penalties for the violation of the same not to exceed [\$250,] unless otherwise specifically provided by the [G]eneral [S]tatutes. Such regulations and ordinances may be enforced by citations issued by designated municipal officers or employees, provided the regulations and ordinances have been designated specifically by the municipality for enforcement by citation in the same manner in which they were adopted and the designated municipal officers or employees issue a written warning providing notice of the specific violation before issuing the citation ...”

Particularly relevant to the motion to dismiss now before the court is General Statutes § 7-148gg, which provides: “Each municipality, in addition to any other notice required under the [G]eneral [S]tatutes or any municipal health, housing or safety codes or regulations, shall simultaneously send to each lien holder of real estate a copy of any notice or order by such municipality to the owner of such real estate to demolish, remove or otherwise dispose of the real estate or to make it safe and sanitary issued under any provision of the [G]eneral [S]tatutes or any municipal building, health or safety codes or regulations as well as a copy of any notice sent to the owner of such real

estate or recorded on the land record, with respect to any costs or expenses incurred by the municipality to demolish, remove or otherwise dispose of the real estate or to make it safe and sanitary. The municipality *shall make reasonable efforts to send such copy by first class mail to the lienholder's current or last-known address.*” (Emphasis added.)

*2 Wells Fargo argues that because it held a mortgage on the property since 2006, <http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000264&DocName=CTSTS7-148GG&FindType=L7-148gg> required the plaintiff to provide it with notice of the **blight** ordinance violations when that notice was sent to Zelanin in 2008, as well as notice of the subsequent **blight** lien and lis pendens. It further claims, then, that in order to support a cause of action against it, the plaintiff was required to allege and prove that it sent Wells Fargo notice. Because the plaintiff admittedly did not provide this notice, Wells Fargo argues that the plaintiff cannot assert a cause of action against it, and that the court therefore does not have subject matter jurisdiction to hear the plaintiff's claims as they pertain to it. See *Pecan v. Madigan*, 97 Conn.App. 617, 621, 905 A.2d 710 (2006), cert. denied, 281 Conn. 919, 918 A.2d 271 (2007) (“There is a significant difference between asserting that a plaintiff cannot state a cause of action and asserting that a plaintiff has not stated a cause of action, and therein lies the distinction between the motion to dismiss and the motion to strike.” (Internal quotation marks omitted)).

The plaintiff does not dispute that it failed to provide Wells Fargo with notice, but makes two arguments against dismissal. First, it argues that the notice contemplated by § 7-148gg is only required when the underlying blight lien is the result of expenses or costs incurred by the foreclosing municipality. The court does not agree with this contention. By its clear, unambiguous terms, § 7-148gg states that “[e]ach municipality ... shall simultaneously send to each lien holder of real estate a copy of any notice or order by such municipality to the owner of such real estate to demolish, remove or otherwise dispose of the real estate or to make it safe and sanitary issued under any provision of the [G]eneral [S]tatutes or any municipal building, health or safety codes or regulations ... The municipality shall make reasonable efforts to send such copy by first class mail to the lienholder's cur-

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rent or last-known address.” In the present case, it is clear that, in order to comply with [§http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000264&DocName=CTSTS7-148GG&FindType=L7-148gg](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000264&DocName=CTSTS7-148GG&FindType=L7-148gg), it was necessary for the plaintiff to simultaneously send Wells Fargo a copy of the “Notice of **Blight** Violations” it sent to Zelanin on February 8, 2008, since that notice directed Zelanin “to demolish, remove or otherwise dispose of [his] real estate or to make it safe and sanitary,” and because it was issued pursuant to

[§http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000264&DocName=CTSTS7-148&FindType=L7-148\(c\)\(7\)\(H\)\(xv\)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000264&DocName=CTSTS7-148&FindType=L7-148(c)(7)(H)(xv)).

[§http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000264&DocName=CTSTS7-148&FindType=L7-148\(c\)\(10\)\(A\)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000264&DocName=CTSTS7-148&FindType=L7-148(c)(10)(A)), and the City of Ansonia's **blight** ordinance.

The plaintiff's next argument is one of statutory construction. It argues that [§http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000264&DocName=CTSTS7-148GG&FindType=L7-148gg](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000264&DocName=CTSTS7-148GG&FindType=L7-148gg) is directory, not mandatory, and that its failure to send the “Notice of **Blight** Violations” to Wells Fargo is therefore of no effect. In construing [§http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000264&DocName=CTSTS7-148GG&FindType=L7-148gg](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000264&DocName=CTSTS7-148GG&FindType=L7-148gg), it contends that “[w]hile the word ‘shall’ often connotes a mandatory action, the lack of a penalty stated in the statute connotes the statute is directory.” The court disagrees with this conclusion.

*3 Insomuch as [§http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000264&DocName=CTSTS7-148GG&FindType=L7-148gg](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000264&DocName=CTSTS7-148GG&FindType=L7-148gg) contains the mandatory “shall” but does not expressly prescribe a penalty for failure to comply with its terms, the court finds that the statute is ambiguous. The parties have not provided the court with, nor has the court discovered, any previous case law interpreting § 7-148gg. Thus, the court must apply well-established rules of statutory construction in order to

determine whether the statute is mandatory or directory. The question to be resolved is whether the language “shall simultaneously send” found in § 7-148gg was intended to be mandatory or merely directory. Mandatory statutory provisions typically must be strictly complied with, absent some explicit or implicit waiver by the party protected by the requirement. *Schreck v. Stamford*, 72 Conn.App. 497, 500, 805 A.2d 776 (2002). On the other hand, a directory statutory provision merely directs what is to be done, but will not invalidate actions taken for failure to comply. *Kindl v. Dept. of Social Services*, 69 Conn.App. 563, 568, 795 A.2d 622 (2002).

“Any ambiguity over whether a particular provision is mandatory or directory may be resolved by examining the statute's language, its legislative history and the statutory context.” *Grasso v. Zoning Board of Appeals*, 69 Conn.App. 230, 238-39, 794 A.2d 1016 (2002); see also General Statutes § 1-2z. While “the legislature's use of the word ‘shall’ is not sufficient to make compliance with [an] aspect of [a] statute mandatory”; *Kindl v. Dept. of Social Services, supra*, 69 Conn.App. at 568, 795 A.2d 622; it is also true that “the word ‘shall’ ... often ... is construed as indicating a mandatory duty under a statute.” *C.R. Klewin Northeast, LLC v. Fleming*, 284 Conn. 250, 263, 932 A.2d 1053 (2007). “The test to be applied in determining whether a statute is mandatory or directory is whether the prescribed mode of action is the essence of the thing to be accomplished, or in other words, whether it relates to a matter of substance or a matter of convenience ... If it is a matter of substance, the statutory provision is mandatory ... If, however, the ... provision is designed to secure order, system and dispatch in the proceedings, it is generally held to be directory ... Linguistically, a statutory provision generally is considered directory if the requirement is stated in affirmative terms unaccompanied by negative words ... [T]he lack of a penalty provision or invalidation of an action as a consequence for failure to comply with the statutory directive is a significant indication that the statute is directory.” (Citations omitted; internal quotation marks omitted.) *Weems v. Citigroup, Inc.*, 289 Conn. 769, 790-91, 961 A.2d 349 (2008).

Some of these rules of statutory construction initially seem to suggest that § 7-148gg is directory. The statute contains the affirmative “shall,” which is unaccompanied by any negative words. Also, and as pre-

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viously mentioned, the statute contains no penalty provision to be applied when a municipality fails to simultaneously send or make reasonable efforts to send notice to lienholders.

*4 However, upon examination of § 7-148gg's role in the larger statutory context and review of the relevant legislative history, the court comes to the conclusion that the notice requirement found in the statute is not merely “designed to secure order, system and dispatch in the proceedings,” but is instead intended to protect the substantive rights of preexisting lienholders. It is therefore mandatory.

Section 7-148gg was introduced to the General Statutes by Public Acts 2006, No. 06-185, § 4. On the whole, P.A. 06-185 made various changes and additions to the General Statutes that were designed to strengthen municipalities' ability to prevent housing blight and to recover public monies spent enforcing blight ordinances, public nuisance provisions, and the health code. See 49 H.R. Proc., Pt. 18, 2006 Sess., pp. 5634-37, remarks of Representative Paul R. Doyle (discussing changes made by P.A. 06-185 and their intended consequences). During debate before the Senate, House of Representatives, and Planning and Development Committee, a great deal of discussion took place regarding aspects of the bill that were designed to give municipalities the ability to file **blight** liens in order to recoup enforcement costs and repair expenses. More specifically, much of this debate centered on a proposal that these **blight** liens be given priority over other liens and encumbrances, including mortgages and mechanic's liens, just as priority is now given to **blight** liens made pursuant to <http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000264&DocName=CTSTS7-148AA&FindType=L7-148aa>. Several Senators, Representatives, and testifying third parties expressed concern that these “super-lien” provisions would actually be counter-productive, in that they would discourage mortgage lending and the extension of credit by skilled tradesmen in **blighted** neighborhoods.^{FN2} One such instance of this line of debate occurred between Representative Drew and Representative Doyle, a proponent and sponsor of the bill:

^{FN2}. For instance, during debate before the House of Representatives, Representative Stripp remarked as follows:

“[L]et me say that I'm concerned about the unintended consequences, and what I mean by that, if we put too much risk in there, this may steer lending institutions away from the cities that we want to help.

“And in fact, it may have a very negative effect on them as opposed to a positive effect. I think the idea of trying to get rid of blight is a good one, and I do want to support it.”

49 H.R. Proc., *supra*, pp. 5646-47.

Representative Drew: “I'm particularly concerned about mortgage lenders and refinancing ...” [T]he practical reality is that the value of the property has gone down, and at the same time, the kind of pervasive deterioration would cause major renovation to the property.

“What I'm thinking, and I think I've been in a couple buildings like this, what I'm thinking is that the town could then come in and complete this major renovation that may cost many tens of thousands of dollars. And that they jump in front of that mortgage lender and [at] a time when the building is actually worth a lot less, that this scenario may be very troubling to the financial community, and that might have a very negative impact on the financing and creation of housing in these neighborhoods ...

Representative Doyle: “That hypothetical is possible, but the provisions of this Bill when notice is sent to the bank, the bank then as a lienholder could step in and address and remedy these problems, and that would be [the] ultimate goal of the municipality, ultimately.

*5 “So it is hypothetical. The reality is the first lienholder, or all lienholders, will get notice. So if the bank wants to address it, they step in and deal with the problem and remedy it with the landowner. So this hypothetical log could happen. I would submit to you, you know, the bank probably will step in, get actively involved in the fact situation ...”

Representative Drew: “Just to clarify, if I may, Mr. Speaker. At precisely what time would the mortgage

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holder receive notice? ...

Representative Doyle: “Before any work is done, early on. When the lien is completed, notice is sent out.” 49 H.R. Proc., *supra*, pp. 5701-04.

This exchange demonstrates that the notice requirements of § 7-148gg were designed to give a mortgage holder an opportunity to exercise its rights, pursuant to the mortgage terms, to prevent waste on the property. Of course, if a mortgagee did not receive timely notice, and the owner of the property stood by and did nothing to fix the violations-as allegedly occurred in the present case-then the mortgagee would risk losing a substantial amount of its already dwindling security by being rendered subsequent in priority if the municipality were to lien the property and ultimately proceed with a foreclosure action.

During another exchange, Representative Miner questioned Representative Drew regarding the “reasonable effort” standard now codified in § 7-148gg:

Representative Miner: “On page six of the amendment, line 144, reasonable efforts. I gather this is not certified mail. Are reasonable efforts to notify the lien holders just regular standard mail?”

Representative Doyle: “The notice requirement is reasonable effort. That's a common standard. *It could be argued in court*, but the reality is this reflects first-class mail, not certified mail, and the reality is there's no guarantee you're going to get it to the person ...” (Emphasis added.) 49 H.R. Proc., *supra*, p. 5696.

Representative Doyle's statement that the reasonable efforts standard “could be argued in court” further suggests that § 7-148gg's notice requirement was intended to be mandatory, because if the provision were intended to be merely directory there would be no cause for litigating the issue. Furthermore, if the notice provision was determined to be directory, and there was no penalty for failing to adhere to it, mortgage lenders and skilled tradesmen would be exposed to greater risk when offering their services in heavily **blighted** neighborhoods, and would therefore be less likely to do so. The legislative history demonstrates that

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[=CTSTS7-148GG&FindType=L7-148gg](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000264&DocName=CTSTS7-148GG&FindType=L7-148gg) was specifically intended to alleviate this type of risk.

The court finds that the notice requirements found in <http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000264&DocName=CTSTS7-148GG&FindType=L7-148gg> are an essential component of a statutory scheme designed to, on the one hand, afford municipalities the tools necessary to deter housing **blight** and recoup monies spent in furtherance of this objective, but to, on the other hand, provide some degree of protection for the substantive rights of preexisting lien holders, whose services are often central to the prevention and elimination of housing blight. By interpreting § 7-148gg's “shall simultaneously send” language as mandatory, the provision's purpose will best be accomplished and the legislature's intent will be respected. In the present case, the plaintiff admits that it failed to send a copy of the “Notice of Blight Violation” to Wells Fargo.

*6 The motion to dismiss is granted.

Conn.Super.,2009.

City of Ansonia v. Zelanin

Not Reported in A.2d, 2009 WL 2602727 (Conn.Super.), 48 Conn. L. Rptr. 307

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