Massachusetts Department of Revenue
Division of Local Services

Current Developments in Municipal Law

2006

Court and Appellate Tax Board Decisions

Book 2A

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Court and Appellate Tax Board Decisions

Table of Contents

Book 2A

GARY KENT JONES, Petitioner v. LINDA K. FLOWERS, et al.

No. 04-1477

SUPREME COURT OF THE UNITED STATES

126 S. Ct. 1708; 164 L. Ed. 2d 415; 2006 U.S. LEXIS 3451; 74 U.S.L.W. 4200

January 17, 2006, Argued
April 26, 2006, Decided

NOTICE: [*1]**
The LEXIS pagination of this document is subject to change pending release of the final published version.

PRIOR HISTORY: ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS. *Jones v. Flowers, 2004 Ark. LEXIS 722 (Ark., Nov. 18, 2004)*

DISPOSITION: Reversed and remanded.

DECISION: [415]**

Fourteenth Amendment due process held to require state to take additional reasonable steps to attempt to provide notice of tax sale to property owner after certified letter containing notice was returned unclaimed.

SUMMARY:

The owner of a house in Little Rock, Arkansas, continued to pay the mortgage on the house after separating from his wife and moving elsewhere in Little Rock. After the mortgage was paid off, the property taxes, which had been paid by the mortgage company, went unpaid, and the property was certified as delinquent. The state lands commissioner mailed to the owner a certified letter, addressed to the house, stating that unless the owner paid the taxes, the property would be subject to public sale in 2 years. Nobody was at the house to sign for the letter, and after nobody retrieved it from the post office within 15 days, the post office returned it to the commissioner, marked "unclaimed."

Two years later, the commissioner published a notice of public sale in a local newspaper. After this notice failed to yield any bids, the state negotiated a private sale. However, before selling the property, the commissioner mailed the owner a certified letter, addressed to the house, stating that the property would be sold to the buyer if the owner did not pay the taxes. This letter was also returned unclaimed. The buyer purchased the property and had delivered to the house an unlawful-detainer notice that was served on the owner's daughter, who then notified the owner of the sale.

The owner filed against the commissioner and the buyer, in the Pulaski County Circuit Court, Sixth Division, a suit alleging that the commissioner's failed attempts to notify the owner resulted in the taking of his property without due process. The county court (1) concluded that the Arkansas tax-sale statute, which set forth the notice procedure used by the commissioner, **[**416]** complied with due process; and (2) granted summary judgment for the commissioner and the owner. On appeal, the Supreme Court of Arkansas affirmed the county court's judgment (*2004 Ark. LEXIS 722*).

On certiorari, the United States Supreme Court reversed and remanded. In an opinion by Roberts, Ch. J., joined by Stevens, Souter, Ginsburg, and Breyer, JJ., it was held that when notice of a tax sale of property--mailed by a state to the property owner--was returned by the post office to the state unclaimed, the due process provisions of the *Federal Constitution's Fourteenth Amendment* required the state to take additional reasonable steps to attempt to provide notice to the owner before selling the property, if practicable, as:

(1) When a letter was returned by the post office, the sender ordinarily would attempt to resend it, if practicable, especially when the subject matter concerned such an important and irreversible prospect as the loss of a house.

(2) In the instant case:

(a) The state had good reason to suspect when the notice was returned that the owner was no better off than if the notice had never been sent.

(b) Deciding to take no further action was not what someone desirous of actually informing the owner would have done.

(c) Some contentions by the state concerning the owner's legal obligations did not relieve the state of its constitutional obligation to provide adequate notice.

(d) There were several reasonable steps that the state could have taken to attempt to provide notice.

(e) The state's use of certified mail made the state aware that the owner had not received notice.

Thomas, J., joined by Scalia and Kennedy, JJ., dissenting, expressed the view that under the Supreme Court's precedents, the state's notice methods satisfied

the requirements of the *Fourteenth Amendment's due process clause*, as the methods were reasonably calculated to inform the owner of proceedings affecting his property interest, for (1) the state was free to assume that the owner had either provided the state taxing authority with an up-to-date mailing address--as required by state law--or had left some caretaker under a duty to let the owner know that his property was being jeopardized; and (2) the state did not (a) when it sent notice, know that this method would fail, or (b) know that the owner no longer lived at the record address simply because letters were returned unclaimed.

Alito, J., did not participate.

LAWYERS' EDITION HEADNOTES:

[LEdHN1]**
CONSTITUTIONAL LAW § 807
-- due process -- tax sale by state -- adequacy of notice
Headnote: [1A] [1B] [1C] [1D] [1E] [1F] [1G] [1H]

When notice of a tax sale of property--mailed by a state to the property owner--was returned by the post office to the state unclaimed, the due process provisions of the *Federal Constitution's Fourteenth Amendment* required the state to **[**417]** take additional reasonable steps to attempt to provide notice to the owner before selling the property, if practicable. Therefore, a state failed to provide due process to a property owner, where the state--after its certified letter, containing notice of an impending tax sale of the property, mailed to the owner at the property address was returned unclaimed--sold the property without making any additional attempts to notify the owner, as:

(1) When a letter was returned by the post office, the sender ordinarily would attempt to resend it if practicable, especially when the subject matter concerned such an important and irreversible prospect as the loss of a house.

(2) In the instant case:

(a) The state had good reason to suspect when the notice was returned that the owner was no better off than if the notice had never been sent.

(b) Deciding to take no further action was not what someone desirous of actually informing the owner would have done.

(c) The state was not relieved of its constitutional obligation to provide adequate notice by the state's contentions that (i) notice was sent to an address that the owner had provided and, under a state statute, had a legal obligation to keep updated; (ii) after failing to receive a property tax bill and pay property taxes, a property holder was on inquiry-notice that the property was subject to governmental taking; and (iii) the owner was obliged to insure that those in whose hands the owner left the property would alert the owner if the property was in jeopardy.

(d) There were several reasonable steps that the state could have taken to attempt to provide notice.

(e) The state's use of certified mail made the state aware that the owner had not received notice.

(Roberts, Ch. J., joined by Stevens, Souter, Ginsburg, and Breyer, JJ.)

[LEdHN2]**
CONSTITUTIONAL LAW § 807
-- due process -- tax sale by state -- undelivered notice
Headnote: [2A] [2B]

Before forcing a citizen to satisfy the citizen's debt by forfeiting the citizen's property, due process requires the government to provide adequate notice of the impending taking. Thus, before a state may take property and sell it for unpaid taxes, the due process clause of the *Federal Constitution's Fourteenth Amendment* requires the state to provide the property owner notice and opportunity for hearing appropriate to the nature of the case. (Roberts, Ch. J., joined by Stevens, Souter, Ginsburg, and Breyer, JJ.)

[LEdHN3]**
CONSTITUTIONAL LAW § 787
-- due process -- sufficiency of notice
Headnote: [3]

Under the Federal Constitution, due process does not require that a property owner receive actual notice before the government may take the property. Rather, the United States Supreme Court has stated that due process requires the government to provide notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. (Roberts, Ch. J., joined by Stevens, Souter, Ginsburg, and Breyer, JJ.)

[LEdHN4]**
CONSTITUTIONAL LAW § 787
-- due process -- notice -- failed attempt
Headnote: [4]

Under the due process clause of the *Federal Constitution's Fourteenth Amendment*, failure of notice of a state's impending taking of property in a specific case does not establish the inadequacy of the attempted notice; in that sense, the constitutionality of a particular procedure for notice is assessed ex ante rather than post hoc. However, if a feature of the state's chosen proce-

dure is that it promptly provides additional information to the government about the effectiveness of notice, then it does not contravene the ex ante principle to consider what the government does with that information in assessing the adequacy of the chosen procedure. (Roberts, Ch. J., joined by Stevens, Souter, Ginsburg, and Breyer, JJ.)

[LEdHN5]**
CONSTITUTIONAL LAW § 807
-- due process -- tax sale by state -- sufficient notice
Headnote: [5A] [5B] [5C] [5D]

For purposes of determining whether a state failed to provide the due process required, under the *Federal Constitution's Fourteenth Amendment*, to a property owner where the state--after its certified letter, containing notice of an impending tax sale of the property, mailed to the owner at the property address was returned unclaimed--sold the property without making any additional attempts to notify the owner, some contentions by the state did not relieve the state of its constitutional obligation to provide adequate notice, for:

(1) As to the contention that notice was sent to an address that the owner was required by state statute to keep updated, although the statute provided strong support for the argument that mailing a certified letter to the property address was reasonably calculated to reach the owner, this did not affect the question of the reasonableness of the state's position that it was required to do nothing more when the notice was promptly returned unclaimed.

(2) As to the contention that the owner's failure to receive a property tax bill and pay property taxes placed the owner on inquiry-notice that the property was subject to governmental taking, (a) the common knowledge that property might become subject to governmental taking when taxes were not paid did not excuse the government from complying with its constitutional obligation of notice before taking private property; and (b) state law afforded even a delinquent taxpayer the right to settle accounts with the state and redeem the taxpayer's property.

(3) As to the contention that the owner was obliged to insure that those in whose hands he left his property would alert him if the property was in jeopardy, (a) an occupant was not charged with acting as the owner's agent in all respects, (b) an occupant could not obtain a certified letter to the owner without first obtaining the owner's signature; (c) it would not have been obvious to an occupant observing a certified mail slip from the state that the owner was in danger of losing his property; and (d) in any event, there was no record evidence that notices of attempted delivery were left at the property in question.

(Roberts, Ch. J., joined by Stevens, Souter, Ginsburg, and Breyer, JJ.)

[LEdHN6]**
WITNESSES § 88.5
-- failure to provide Miranda warnings
Headnote: [6]

Although it is widely known that, under *Miranda v. Arizona* **[**419]** *(1966) 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694*, arrestees have the right to remain silent, and that anything they say may be used against them, that knowledge does not excuse a police failure to provide Miranda warnings. (Roberts, Ch. J., joined by Stevens, Souter, Ginsburg, and Breyer, JJ.)

[LEdHN7]**
CONSTITUTIONAL LAW § 807
-- due process -- tax sale by state -- notice -- practicable steps
Headnote: [7A] [7B]

For purposes of determining whether a state failed to provide the due process required, under the *Federal Constitution's Fourteenth Amendment*, to a property owner--where the state, after its certified letter, containing notice of an impending tax sale of the property, mailed to the owner at the property address was returned unclaimed, sold the property without making any additional attempts to notify the owner--with respect to the United States Supreme Court's holding that the state ought to have taken additional reasonable steps to notify the owner (who had moved from the property) if practicable, there were several reasonable follow-up steps that the state could have taken, as the state could have:

(1) Resent the notice by regular mail, so that a signature was not required, for this might have increased the chances of actual notice to the owner, since even occupants who ignored certified mail notice slips addressed to the owner (if any had been left) might have (a) scrawled the owner's new address on the notice packet and left it for the postal carrier to retrieve; or (b) notified the owner directly.

(2) Posted notice on the property's front door or addressed otherwise undeliverable mail to "occupant," for either approach would have increased the likelihood of notice reaching the owner, since (a) occupants who might have disregarded a certified mail slip not addressed to them were less likely to ignore posted notice; (b) a letter addressed to them (even as "occupant") might have been opened and read; and (c) in either case, there was a significant chance that the occupants would have alerted the owner, if only because a change in ownership could well have affected their own occupancy.

(Roberts, Ch. J., joined by Stevens, Souter, Ginsburg, and Breyer, JJ.)

[LEdHN8]**
COURTS § 91.5
-- tax sale by state -- notice -- prescribing form of service
Headnote: [8A] [8B]

With respect to the United States Supreme Court's holding that a state, in complying with state statutory requirements, had failed to provide the due process required, under the *Federal Constitution's Fourteenth Amendment*, to a property owner, where the state--after its certified letter, containing notice of an impending tax sale of the property, mailed to the owner at the property address was returned unclaimed--sold the property without making any additional attempts to notify the owner, it was not the court's responsibility to prescribe the form of service that the state ought to adopt. (Roberts, Ch. J., joined by Stevens, Souter, Ginsburg, and Breyer, JJ.)

[LEdHN9]**
CONSTITUTIONAL LAW § 807
-- due process -- tax sale by state -- notice -- required procedure
Headnote: [9]

For purposes of determining whether a state failed to provide the due process required, under the *Federal Constitution's Fourteenth Amendment*, **[**420]** to a property owner--where the state, after its certified letter, containing notice of an impending tax sale of the property, mailed to the owner at the property address was returned unclaimed, sold the property without making any additional attempts to notify the owner--with respect to the United States Supreme Court's holding that the state ought to have taken additional reasonable steps to notify the owner (who had moved from the property) if practicable, the state was not required to search for the owner's new address in the local telephone book and other government records such as income tax rolls, as (1) return of the letter unclaimed did not necessarily mean that the address to which it had been sent was incorrect; and (2) an open-ended search for a new address--especially given that a state statute obligated taxpayers to keep their addresses updated with the tax collector--would have imposed burdens on the state significantly greater than several relatively easy follow-up options. (Roberts, Ch. J., joined by Stevens, Souter, Ginsburg, and Breyer, JJ.)

[LEdHN10]**
CONSTITUTIONAL LAW § 807
-- due process -- tax sale by state -- notice in newspaper
Headnote: [10]

For purposes of determining whether a state failed to provide the due process required, under the *Federal Constitution's Fourteenth Amendment*, to a property owner--where the state, after its certified letter, containing notice of an impending tax sale of the property, mailed to the owner at the property address was returned unclaimed, sold the property without making any additional attempts to notify the owner--with respect to the United States Supreme Court's holding that the state ought to have taken additional reasonable steps to notify the owner (who had moved from the property) if practicable, the state's publication of notice in a local newspaper a few weeks before the sale was not constitutionally adequate under the circumstances, because it was possible and practicable to give the owner more adequate warning of the impending sale. (Roberts, Ch. J., joined by Stevens, Souter, Ginsburg, and Breyer, JJ.)

SYLLABUS:

[421]** Petitioner Jones continued to pay the mortgage on his Arkansas home after separating from his wife and moving elsewhere in the same city. Once the mortgage was paid off, the property taxes--which had been paid by the mortgage company--went unpaid, and the property was certified as delinquent. Respondent Commissioner of State Lands mailed Jones a certified letter at the property's address, stating that unless he redeemed the property, it would be subject to public sale in two years. Nobody was home to sign for the letter and nobody retrieved it from the post office within 15 days, so it was returned to the Commissioner, marked **[***2]** "unclaimed." Two years later, the Commissioner published a notice of public sale in a local newspaper. No bids were submitted, so the State negotiated a private sale to respondent Flowers. Before selling the house, the Commissioner mailed another certified letter to Jones, which was also returned unclaimed. Flowers purchased the house and had an unlawful detainer notice delivered to the property. It was served on Jones' daughter, who notified him of the sale. He filed a state-court suit against respondents, alleging that the Commissioner's failure to provide adequate notice resulted in the taking of his property without due process. Granting respondents summary judgment, the trial court concluded that Arkansas' tax sale statute, which sets out the notice procedure used here, complied with due process. The State Supreme Court affirmed.

Held:

1. When mailed notice of a tax sale is returned unclaimed, a State must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is practicable to do so.

(a) This Court has deemed notice constitutionally sufficient if it was **[**422]** reasonably calculated to

reach **[***3]** the intended recipient when sent, see, *e.g., Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865*, but has never addressed whether due process requires further efforts when the government becomes aware prior to the taking that its notice attempt has failed. Most Courts of Appeals and State Supreme Courts addressing this question have decided that the government must do more in such a case, and many state statutes require more than mailed notice in the first instance.

(b) The means a State employs to provide notice "must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Mullane, 399 U.S., at 315, 70 S. Ct. 652, 94 L. Ed. 865.* The adequacy of a particular form of notice is assessed by balancing the State's interest against "the individual interest sought to be protected by the *Fourteenth Amendment.*" *Id., at 314, 70 S. Ct. 652, 94 L. Ed. 865.* Here, the evaluation concerns the adequacy of notice prior to the State's extinguishing a property owner's interest in a home. It is unlikely that a person who actually desired to inform an owner about an impending tax sale of a house would do nothing when a certified letter addressed to **[***4]** the owner is returned unclaimed. The sender would ordinarily attempt to resend the letter, if that is practical, especially given that it concerns the important and irreversible prospect of losing a house. The State may have made a reasonable calculation of how to reach Jones, but it had good reason to suspect when the notice was returned that Jones was no better off than if no notice had been sent. The government must consider unique information about an intended recipient regardless of whether a statutory scheme is reasonably calculated to provide notice in the ordinary case. See *Robinson v. Hanrahan, 409 U.S. 38, 40, 93 S. Ct. 30, 34 L. Ed. 2d 47 (per curiam)*, and *Covey v. Town of Somers, 351 U.S. 141, 146-147, 76 S. Ct. 724, 100 L. Ed. 1021.* It does not matter that the State in each of those cases was aware of the information *before* it calculated the best way to send notice. Knowledge that notice was ineffective was one of the "practicalities and peculiarities of the case" taken into account, *Mullane, supra, at 314-315, 70 S. Ct. 652, 94 L. Ed. 865*, and it should similarly be taken into account in assessing the adequacy of notice here. The Commissioner and Solicitor General correctly note the constitutionality **[***5]** of that a particular notice procedure is assessed *ex ante*, not *post hoc.* But if a feature of the State's procedure is that it promptly provides additional information to the government about the effectiveness of attempted notice, the *ex ante* principle is not contravened by considering what the government does with that information. None of the Commissioner's additional contentions--that notice was sent to an address that Jones provided and had a legal obligation to keep updated, that a property owner who fails to receive a property tax bill and pay taxes is on inquiry notice that his property is subject to governmental taking, and that Jones was obliged to ensure that those in whose hands he left his property would alert him if it was in jeopardy--relieves the State of its constitutional obligation to provide adequate notice.

[423]** 2. Because additional reasonable steps were available to the State, given the circumstances here, the Commissioner's effort to provide notice to Jones was insufficient to satisfy due process. What is reasonable in response to new information depends on what that information reveals. The certified letter's return "unclaimed" meant **[***6]** either that Jones was not home when the postman called and did not retrieve the letter or that he no longer resided there. One reasonable step addressed to the former possibility would be for the State to resend the notice by regular mail, which requires no signature. Certified mail makes actual notice more likely only if someone is there to sign for the letter or tell the mail carrier that the address is incorrect. Regular mail can be left until the person returns home, and might increase the chances of actual notice. Other reasonable follow-up measures would have been to post notice on the front door or address otherwise undeliverable mail to "occupant." Either approach would increase the likelihood that any occupants would alert the owner, if only because an ownership change could affect their own occupancy. Contrary to Jones' claim, the Commissioner was not required to search the local phone book and other government records. Such an open-ended search imposes burdens on the State significantly greater than the several relatively easy options outlined here. The Commissioner's complaint about the burden of even these additional steps is belied by Arkansas' requirement that notice **[***7]** to homestead owners be accomplished by personal service if certified mail is returned and by the fact that the State transfers the cost of notice to the taxpayer or tax sale purchaser. The Solicitor General's additional arguments--that posted notice could be removed by children or vandals, and that the follow-up requirement will encourage States to favor modes of delivery that will not generate additional information--are rejected. This Court will not prescribe the form of service that Arkansas should adopt. Arkansas can determine how best to proceed, and the States have taken a variety of approaches.

359 Ark. 443, ___ S. W. 3d ___, 2004 Ark. LEXIS 722 , reversed and remanded.

COUNSEL:

Michael T. Kirkpatrick argued the cause for petitioner.

Carter G. Phillips argued the cause for respondents.

James A. Feldman argued the cause for the United States, as amicus curiae, by special leave of court.

JUDGES: Roberts, C. J., delivered the opinion of the Court, in which Stevens, Souter, Ginsburg, and Breyer, JJ., joined. Thomas, J., filed a dissenting opinion, in which Scalia and Kennedy, JJ., joined. Alito, J., took no part in the consideration or decision of the case.

OPINION BY: ROBERTS

OPINION: **[*1712]** Chief Justice **Roberts** delivered the opinion of the Court.

[LEdHR1A]** [1A] **[**LEdHR2A]** [2A] Before a State may take property and sell it for unpaid taxes, the *Due Process Clause of the Fourteenth Amendment* requires the government to provide the owner **[***8]** "notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313, 70 S. Ct. 652, 94 L. Ed. 865 (1950).* We granted certiorari to determine whether, when notice of a tax sale is mailed to the owner and returned undelivered, the government must take additional reasonable steps to provide notice before taking the owner's property.

[424]** I

In 1967, petitioner Gary Jones purchased a house at 717 North Bryan Street in Little Rock, Arkansas. He lived in the house with his wife until they separated in 1993. Jones then moved into an apartment in Little Rock, and his wife continued to live in the North Bryan Street house. Jones paid his mortgage each month for 30 years, and the mortgage company paid Jones' property taxes. After Jones paid off his mortgage in 1997, the property taxes went unpaid, and the property was certified as delinquent.

In April 2000, respondent Mark Wilcox, the Commissioner of State Lands (Commissioner), attempted to notify Jones of his tax delinquency, and his right to redeem the property, by mailing a certified letter to Jones at the North Bryan Street address. See *Ark. Code Ann. § 26-37-301* (1997). The packet **[***9]** of information stated that unless Jones redeemed the property, it would be subject to public sale two years later on April 17, 2002. See *ibid.* Nobody was home to sign for the letter, and nobody appeared at the post office to retrieve the letter within the next 15 days. The post office returned the unopened packet to the Commissioner marked "'unclaimed.'" Pet. for Cert. 3.

Two years later, and just a few weeks before the public sale, the Commissioner published a notice of public sale in the Arkansas Democrat Gazette. No bids were submitted, which permitted the State to negotiate a private sale of the property. See *§ 26-37-202(b).* Several months later, respondent Linda Flowers submitted a purchase offer. The Commissioner mailed another certified letter to Jones at the North Bryan Street address, attempting to notify him that his house would be sold to Flowers if he did not pay his taxes. Like the first letter, the second was also returned to the Commissioner marked "unclaimed." **[*1713]** *Ibid.* Flowers purchased the house, which the parties stipulated in the trial court had a fair market value of $80,000, for $21,042.15. Record 224. Immediately after the 30-day period for postsale redemption **[***10]** passed, see *§ 26-37-202(e)*, Flowers had an unlawful detainer notice delivered to the property. The notice was served on Jones' daughter, who contacted Jones and notified him of the tax sale. *Id.*, at 11 (Exh. B).

Jones filed a lawsuit in Arkansas state court against the Commissioner and Flowers, alleging that the Commissioner's failure to provide notice of the tax sale and of Jones' right to redeem resulted in the taking of his property without due process. The Commissioner and Flowers moved for summary judgment on the ground that the two unclaimed letters sent by the Commissioner were a constitutionally adequate attempt at notice, and Jones filed a cross-motion for summary judgment. The trial court granted summary judgment in favor of the Commissioner and Flowers. App. to Pet. for Cert. 12a-13a. It concluded that the Arkansas tax sale statute, which set forth the notice procedure followed by the Commissioner, complied with constitutional due process requirements.

Jones appealed, and the Arkansas Supreme Court affirmed the trial court's judgment. *359 Ark. 443, ___ S. W. 3d ___, 2004 Ark. LEXIS 722 (2004).* The court noted our precedent stating that due process does not require actual **[***11]** notice, see *Dusenbery v. United States, 534 U.S. 161, 170,* **[**425]** *122 S. Ct. 694, 151 L. Ed. 2d 597 (2002)*, and it held that attempting to provide notice by certified mail satisfied due process in the circumstances presented, *359 Ark., at ___, ___ S. W. 3d, at ___, 2004 Ark. LEXIS 722*

We granted certiorari, *545 U.S. ___, 126 S. Ct. 35, 162 L. Ed. 2d 933 (2005)*, to resolve a conflict among the Circuits and State Supreme Courts concerning whether the *Due Process Clause* requires the government to take additional reasonable steps to notify a property owner when notice of a tax sale is returned undelivered. Compare, *e.g., Akey v. Clinton County, 375 F.3d 231, 236 (CA2 2004)* ("In light of the notice's return, the County was required to use 'reasonably diligent efforts' to ascertain Akey's correct address"), and *Kennedy v. Mossafa, 100 N. Y. 2d 1, 9, 789 N.E.2d 607, 611, 759 N.Y.S.2d 429 (2003)* ("[W]e reject the view that the enforcing officer's obligation is always satisfied by sending the notice to the address listed in the tax roll, even where the notice is

returned as undeliverable"), with *Smith v. Cliffs on the Bay Condo. Ass'n., 463 Mich. 420, 429, 617 N.W.2d 536, 541 (2000) (per curiam)* ("The fact that one **[***12]** of the mailings was returned by the post office as undeliverable does not impose on the state the obligation to undertake an investigation to see if a new address . . . could be located"). We hold that when mailed notice of a tax sale is returned unclaimed, the State must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is practicable to do so. Under the circumstances presented here, additional reasonable steps were available to the State. We therefore reverse the judgment of the Arkansas Supreme Court.

II

A

[LEdHR3]** [3] Due process does not require that a property owner receive actual notice before the government may take his property. *Dusenbery, supra, at 170, 122 S. Ct. 694, 154 L. Ed. 2d 597.* Rather, we have stated that due process requires the government to provide "notice reasonably calculated, under all the circumstances, to apprise interested **[*1714]** parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane, 339 U.S., at 314, 70 S. Ct. 652, 94 L. Ed. 865.* The Commissioner argues that once the State provided notice reasonably calculated to apprise Jones of the impending tax sale by mailing him a certified **[***13]** letter, due process was satisfied. The Arkansas statutory scheme is reasonably calculated to provide notice, the Commissioner continues, because it provides for notice by certified mail to an address that the property owner is responsible for keeping up to date. See *Ark. Code Ann. § 26-35-705* (1997). The Commissioner notes this Court's ample precedent condoning notice by mail, see, *e.g., Dusenbery, supra, at 169, 122 S. Ct. 694, 151 L. Ed. 2d 597*; *Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478, 490, 108 S. Ct. 1340, 99 L. Ed. 2d 565 (1988)*; *Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 798, 103 S. Ct. 2706, 77 L. Ed. 2d 180 (1983)*; *Mullane, supra, at 318-319, 70 S. Ct. 652, 94 L. Ed. 865*, and adds that the Arkansas scheme exceeds constitutional requirements by requiring the Commissioner to use certified mail. **[**426]** Brief for Respondent Commissioner 14-15.

It is true that this Court has deemed notice constitutionally sufficient if it was reasonably calculated to reach the intended recipient when sent. See, *e.g., Dusenbery, supra, at 168-169, 122 S. Ct. 694, 151 L. Ed. 2d 597*; *Mullane, 339 U.S., at 314, 70 S. Ct. 652, 94 L. Ed. 865.* In each of these cases, the government attempted to provide notice and heard nothing back indicating that anything **[***14]** had gone awry, and we stated that "[t]he reasonableness and hence the constitutional validity of [the] chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected." *Id., at 315, 70 S. Ct. 652, 94 L. Ed. 865*; see also *Dusenbery, supra, at 170, 122 S. Ct. 694, 151 L. Ed. 2d 597.* But we have never addressed whether due process entails further responsibility when the government becomes aware prior to the taking that its attempt at notice has failed. That is a new wrinkle, and we have explained that the "notice required will vary with circumstances and conditions." *Walker v. City of Hutchinson, 352 U.S. 112, 115, 77 S. Ct. 200, 1 L. Ed. 2d 178 (1956).* The question presented is whether such knowledge on the government's part is a "circumstance and condition" that varies the "notice required."

The Courts of Appeals and State Supreme Courts have addressed this question on frequent occasions, and most have decided that when the government learns its attempt at notice has failed, due process requires the government to do something more before real property may be sold in a tax sale. n1 See, *e.g., Plemons v. Gale, 396 F.3d 569, 576 (CA4 2005)*; *Akey, 375 F.3d, at 236*; **[***15]** *Hamilton v. Renewed Hope, Inc., 277 Ga. 465, 468, 589 S. E. 2d 81, 85 (2003)*; *Kennedy, 100 N. Y. 2d, at 9, 789 N. E. 2d, at 611*; *Malone v. Robinson, 614 A.2d 33, 38 (D. C. App. 1992)*; *St. George Antiochian* **[*1715]** *Orthodox Christian Church v. Aggarwal, 326 Md. 90, 103, 603 A.2d 484, 490 (1992)*; *Wells Fargo Credit Corp. v. Ziegler, 780 P.2d 703, 705 (Okla. 1989)*; *Rosenberg v. Smidt, 727 P.2d 778, 780-783 (Alaska 1986)*; *Giacobbi v. Hall, 109 Idaho 293, 297, 707 P.2d 404, 408 (1985)*; *Tracy v. County of Chester, Tax Claim Bureau, 507 Pa. 288, 296, 489 A.2d 1334, 1338-1339 (1985).* But see *Smith, 463 Mich., at 429, 617 N. W. 2d, at 541*; *Dahn v. Trownsell, 1998 SD 36, P23, 576 N.W.2d 535, 541-542*; *Elizondo v. Read, 588 N.E.2d 501, 504 (Ind. 1992)*; *Atlantic City v. Block C-11, Lot 11, 74 N. J. 34, 39-40, 376 A.2d 926, 928 (1977).* Many States already require in their statutes that the government do more than simply mail notice to delinquent owners, either **[***16]** at the outset or as a followup **[**427]** measure if initial mailed notice is ineffective. n2

n1 Most Courts of Appeals have also concluded that the *Due Process Clause of the Fifth Amendment* requires the Federal Government to take further reasonable steps in the property forfeiture context. See, *e.g., United States v. Ritchie, 342 F.3d 903, 911 (CA9 2003)*; *Foehl v. United States, 238 F.3d 474, 480 (CA3 2001)*; *Small v. United States, 136 F.3d 1334, 1337-1338 (CADC 1998)*; *Torres v. $ 36,256.80 U.S. Currency, 25 F.3d 1154, 1161 (CA2 1994)*; *Barrera-Montenegro v. United States, 74 F.3d 657, 660 (CA5 1996)*; *United States v. Rodgers, 108 F.3d*

1247, 1252-1253 (CA10 1997); see also *Garcia v. Meza, 235 F.3d 287, 291 (CA7 2000)* (declining to adopt a *per se* rule that only examines notice at the time it is sent, but also declining to impose an affirmative duty to seek out claimants in every case where notice is returned undelivered). But see *Madewell v. Downs, 68 F.3d 1030, 1047 (CA8 1995)*; *Sarit v. United States Drug Enforcement Admin., 987 F.2d 10, 14-15 (CA1 1993)*.

[*17]**

n2 Many States require that notice be given to the occupants of the property as a matter of course. See *Cal. Rev. & Tax. Code Ann. § 3704.7* (West Supp. 2006); *Ga. Code Ann. § 48-4-45(a)(1)(B)* (Supp. 2005); *Ill. Comp. Stat., ch. 35, § § 200/21-75(a), 200/22-10, 200/22-15* (West 2004); *Me. Rev. Stat. Ann., Tit. 36, § 1073* (1990); *Md. Tax-Prop. Code Ann. § 14-836(b)(4)(i)(2)* (Lexis 2001); *Mich. Comp. Laws Ann. § 211.78i(3)* (West 2005); *Minn. Stat. § 281.23(6)* (2004); *Mont. Code Ann. § § 15-18-212(1)(a), (2)(a)* (2005); *N. D. Cent. Code Ann. § 57-28-04(3)* (Lexis 2005); *Okla. Stat., Tit. 68, § 3118(A)* (West Supp. 2006); *S. D. Codified Laws § 10-25-5* (2004); *Utah Code Ann. § 59-2-1351(2)(a)* (Lexis 2004); *Wis. Stat. § 75.12(1)* (2003-2004); *Wyo. Stat. Ann. § 39-13-108(e)(v)(B)* (2005). Some States require that notice be posted on the property or at the property owner's last known address either at the outset, see *Del. Code Ann., Tit. 9. § § 8724, 8772* (1989 and Supp. 2004); *Ga. Code Ann. § 48-4-78(d)* (Supp. 2005); *Haw. Rev. Stat. § 246-56* (2003); *Md. Tax-Prop. Code Ann. § 14-836(b)(6)* (Lexis 2001); *Okla. Stat., Tit. 68, § 3118(A)* (West Supp. 2006), or as a followup measure when personal service cannot be accomplished or certified mail is returned, see *Fla. Stat. § 197.522(2)(a)* (2003); *Minn. Stat. § 281.23(6)* (2004); *S. C. Code Ann. § 12-51-40(c)* (Supp. 2005). And a few States require a diligent inquiry to find a property owner's correct address when mailed notice is returned. See *Miss. Code Ann. § 27-43-3* (2002); *Nev. Rev. Stat. § 361.595(3)(b)* (2003); *Pa. Stat. Ann., Tit. 72, § 5860.607a* (Purdon 1990); *R. I. Gen. Laws § 44-9-25.1* (2005). See also *26 U.S.C. § 6335(a)* (requiring the Internal Revenue Service to make a reasonable attempt to personally serve notice on a delinquent taxpayer before relying upon notice by certified mail); *28 U.S.C. § 3203(g)(1)(A)(i)(IV)* (requiring written notice to tenants of real property subject to sale under the Federal Debt Collection Practices Act); *12 U.S.C. § 3758(2)(A)(iii)* (requiring written notice to occupants before foreclosure by the Secretary of Housing and Urban Development); *§ 3758(2)(B)(ii)* (requiring that notice be posted on the property if occupants are unknown).

[*18]**

In *Mullane*, we stated that "when notice is a person's due . . . [t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it," *339 U.S., at 315, 70 S. Ct. 652, 94 L. Ed. 865*, and that assessing the adequacy of a particular form of notice requires balancing the "interest of the State" against "the individual interest sought to be protected by the *Fourteenth Amendment*," *id., at 314, 70 S. Ct. 652, 94 L. Ed. 865*. Our leading cases on notice have evaluated the adequacy of notice given to beneficiaries of a common trust fund, *Mullane, supra*; a mortgagee, *Mennonite, 462 U.S. 791, 103 S. Ct. 2706, 77 L. Ed. 2d 180*; owners of seized cash and automobiles, *Dusenbery, 534 U.S. 161, 122 S. Ct. 694, 151 L. Ed. 2d 597*; *Robinson v. Hanrahan, 409 U.S. 38, 93 S. Ct. 30, 34 L. Ed. 2d 47 (1972) (per curiam);* creditors of an estate, *Tulsa Professional, 485 U.S. 478, 108 S. Ct. 1340, 99 L. Ed. 2d 565*; and tenants living in public housing, *Greene v. Lindsey, 456 U.S. 444, 102 S. Ct. 1874, 72 L. Ed. 2d 249 (1982)*. In this case, we evaluate the adequacy of notice prior to the State extinguishing a property owner's interest in a home.

[*1716] We do not think that a person who actually desired to inform a real property owner of an impending tax **[***19]** sale of a house he owns would do nothing when a certified letter sent to the owner is returned unclaimed. If the Commissioner prepared a stack of letters to mail to delinquent taxpayers, handed them to the postman, and then watched as the departing postman accidentally dropped the letters down a storm drain, one would certainly expect the Commissioner's office to prepare a new stack of letters and send them again. No one "desirous of actually informing" the owners would simply shrug his shoulders as the letters **[**428]** disappeared and say "I tried." Failure to follow up would be unreasonable, despite the fact that the letters were reasonably calculated to reach their intended recipients when delivered to the postman.

[LEdHR1B]** [1B] By the same token, when a letter is returned by the post office, the sender will ordinarily attempt to resend it, if it is practicable to do so. See *Small v. United States, 136 F.3d 1334, 1337 (CADC 1998)*. This is especially true when, as here, the subject matter of the letter concerns such an important and irreversible prospect as the loss of a house. Although the State may have made a reasonable calculation of how to

reach Jones, it had good reason to suspect **[***20]** when the notice was returned that Jones was "no better off than if the notice had never been sent." *Malone, supra, at 37.* Deciding to take no further action is not what someone "desirous of actually informing" Jones would do; such a person would take further reasonable steps if any were available.

In prior cases, we have required the government to consider unique information about an intended recipient regardless of whether a statutory scheme is reasonably calculated to provide notice in the ordinary case. In *Robinson* v. *Hanrahan,* we held that notice of forfeiture proceedings sent to a vehicle owner's home address was inadequate when the State knew that the property owner was in prison. *409 U.S., at 40, 93 S. Ct. 30, 344 L. Ed. 2d 47.* In *Covey v. Town of Somers, 351 U.S. 141, 76 S. Ct. 724, 100 L. Ed. 1021 (1956),* we held that notice of foreclosure by mailing, posting, and publication was inadequate when town officials knew that the property owner was incompetent and without a guardian's protection. *Id., at 146-147, 76 S. Ct. 724, 100 L. Ed. 1021.*

The Commissioner points out that in these cases, the State was aware of such information *before* it calculated how best to provide notice. But it is **[***21]** difficult to explain why due process would have settled for something less if the government had learned after notice was sent, but before the taking occurred, that the property owner was in prison or was incompetent. Under *Robinson* and *Covey*, the government's knowledge that notice pursuant to the normal procedure was ineffective triggered an obligation on the government's part to take additional steps to effect notice. That knowledge was one of the "practicalities and peculiarities of the case," *Mullane, supra, at 314-315, 70 S. Ct. 652, 94 L. Ed. 865*, that the Court took into account in determining whether constitutional requirements were met. It should similarly be taken into account in assessing the adequacy of notice in this case. The dissent dismisses the State's knowledge that its notice was ineffective as "learned long after the fact," *post, at ____, n 5,164 L. Ed. 2d, at 438* (opinion of Thomas, J.), but the notice letter was promptly returned to the State two to three weeks after it was sent, and the Arkansas statutory regime precludes the State from taking the property for two *years* while the property owner may exercise his right to redeem, see *Ark. Code Ann. § 26-37-301* (Supp. 2005). **[***22]**

[LEdHR1C]** **[*1717]** [1C] **[**LEdHR4]** [4] It is certainly true, as the Commissioner and Solicitor General contend, that the failure of notice in a specific case does not establish the inadequacy of the attempted notice; in that sense, the constitutionality of a particular procedure for notice is **[**429]** assessed *ex ante*, rather than *post hoc.* But if a feature of the State's chosen procedure is that it promptly provides additional information to the government about the effectiveness of notice, it does not contravene the *ex ante* principle to consider what the government does with that information in assessing the adequacy of the chosen procedure. After all, the State knew *ex ante* that it would promptly learn whether its effort to effect notice through certified mail had succeeded. It would not be inconsistent with the approach the Court has taken in notice cases to ask, with respect to a procedure under which telephone calls were placed to owners, what the State did when no one answered. Asking what the State does when a notice letter is returned unclaimed is not substantively different.

[LEdHR1D]** [1D] **[**LEdHR5A]** [5A] The Commissioner has three further arguments for why reasonable followup measures were not required in this case. First, notice **[***23]** was sent to an address that Jones provided and had a legal obligation to keep updated. See *Ark. Code Ann. § 26-35-705* (1997). Second, "after failing to receive a property tax bill and pay property taxes, a property holder is on inquiry-notice that his property is subject to governmental taking." Brief for Respondent Commissioner 18-19. Third, Jones was obliged to ensure that those in whose hands he left his property would alert him if it was in jeopardy. None of these contentions relieves the State of its constitutional obligation to provide adequate notice.

[LEdHR5B]** [5B] The Commissioner does not argue that Jones' failure to comply with a statutory obligation to keep his address updated forfeits his right to constitutionally sufficient notice, and we agree. *Id.*, at 19; see also Brief for United States as *Amicus Curiae* 16, n 5 (quoting *Mennonite, 462 U.S., at 799, 103 S. Ct. 2706, 77 L. Ed. 2d 180* ("'[A] party's ability to take steps to safeguard its own interests does not relieve the State of its constitutional obligation'")). In *Robinson*, we noted that Illinois law required each vehicle owner to register his address with the secretary of state, and that the State's vehicle forfeiture scheme provided **[***24]** for notice by mail to the address listed in the secretary's records. See *409 U.S., at 38, n. 1, 93 S. Ct. 30, 34 L. Ed. 2d 47* (citing Ill. Rev. Stat., ch. 95 1/2, § 3-405 (1971), and ch. 38, § 36-1 (1969)). But we found that the State had not provided constitutionally sufficient notice, despite having followed its reasonably calculated scheme, because it knew that Robinson could not be reached at his address of record. *409 U.S. 38, n 1, 93 S. Ct. 30, at 31-32, 34 L. Ed. 2d 47.* Although *Ark. Code Ann. § 26-35-705* provides strong support for the Commissioner's argument that mailing a certified letter to Jones at 717 North Bryan Street was reasonably calculated to reach him, it does not alter the reasonableness of the Commissioner's position that he must do nothing more when the notice is promptly returned "unclaimed."

[LEdHR5C]** [5C] **[**LEdHR6]** [6] As for the Commissioner's inquiry notice argument, the common knowledge that property may become subject to government taking when taxes are not paid does not excuse the government from complying with its constitutional obligation of notice before taking private property. We have previously stated the opposite: An interested party's "knowledge of delinquency in the payment of taxes is not equivalent to **[**430]** notice **[***25]** that a tax sale is pending." *Mennonite, supra, at 800, 103 S. Ct. 2706, 77 L. Ed. 2d 180.* It is at least as widely known that arrestees have the right to remain silent, **[*1718]** and that anything they say may be used against them, see *Dickerson v. United States, 530 U.S. 428, 443, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000)* ("*Miranda [v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966),]* has become embedded in routine police practice to the point where the warnings have become part of our national culture"), but that knowledge does not excuse a police failure to provide *Miranda* warnings. Arkansas affords even a delinquent taxpayer the right to settle accounts with the State and redeem his property, so Jones' failure to pay his taxes in a timely manner cannot by itself excuse inadequate notice.

[LEdHR5D]** [5D] Finally, the Commissioner reminds us of a statement from *Mullane* that the State can assume an owner leaves his property in the hands of one who will inform him if his interest is in jeopardy. *339 U.S., at 316, 70 S. Ct. 652, 94 L. Ed. 865.* But in this passage, Justice Jackson writes of "libel of a ship, attachment of a chattel[,] or entry upon real estate in the name of law"--such "seiz|ures|" of property, he concluded, "may reasonably **[***26]** be expected to come promptly to the owner's attention." *Ibid.* An occupant, however, is not charged with acting as the owner's agent in all respects, and it is quite a leap from Justice Jackson's examples to conclude that it is an obligation of tenancy to follow up with certified mail of unknown content addressed to the owner. In fact, the State makes it impossible for the occupant to learn why the Commissioner is writing the owner, because an occupant cannot call for a certified letter without first obtaining the owner's signature. For all the occupant knows, the Commissioner of State Lands might write to certain residents about a variety of matters he finds important, such as state parks or highway construction; it would by no means be obvious to an occupant observing a certified mail slip from the Commissioner that the owner is in danger of losing his property. In any event, there is no record evidence that notices of attempted delivery were left at 717 North Bryan Street.

[LEdHR2B]** [2B] Mr. Jones should have been more diligent with respect to his property, no question. People must pay their taxes, and the government may hold citizens accountable for tax delinquency by taking their property. **[***27]** But before forcing a citizen to satisfy his debt by forfeiting his property, due process requires the government to provide adequate notice of the impending taking. *U.S. Const., Amdt. 14; Mennonite, supra, at 799, 103 S. Ct. 2706, 77 L. Ed. 2d 180.*

B

[LEdHR7A]** [7A] **[**LEdHR8A]** [8A] In response to the returned form suggesting that Jones had not received notice that he was about to lose his property, the State did--nothing. For the reasons stated, we conclude the State should have taken additional reasonable steps to notify Jones, if practicable to do so. The question remains whether there were any such available steps. While "[i]t is not our responsibility to prescribe the form of service that the [government] should adopt," *Greene, 456 U.S., at 455, n. 9, 102 S. Ct. 1874, 72 L. Ed. 2d 249*, if there were no reasonable additional steps the government **[**431]** could have taken upon return of the unclaimed notice letter, it cannot be faulted for doing nothing.

[LEdHR1E]** [1E] **[**LEdHR7B]** [7B] We think there were several reasonable steps the State could have taken. What steps are reasonable in response to new information depends upon what the new information reveals. The return of the certified letter marked "unclaimed" meant either that Jones still lived at 717 North Bryan Street, but **[***28]** was not home when the postman called and did not retrieve the letter at the post office, or that Jones no longer resided at that address. One reasonable step primarily addressed to the **[*1719]** former possibility would be for the State to resend the notice by regular mail, so that a signature was not required. The Commissioner says that use of certified mail makes actual notice more likely, because requiring the recipient's signature protects against misdelivery. But that is only true, of course, when someone is home to sign for the letter, or to inform the mail carrier that he has arrived at the wrong address. Otherwise, "[c]ertified mail is dispatched and handled in transit as ordinary mail," United States Postal Service, Domestic Mail Manual § 503.3.2.1 (Mar. 16, 2006), and the use of certified mail might make actual notice less likely in some cases--the letter cannot be left like regular mail to be examined at the end of the day, and it can only be retrieved from the post office for a specified period of time. Following up with regular mail might also increase the chances of actual notice to Jones if--as it turned out--he had moved. Even occupants who ignored certified mail notice **[***29]** slips addressed to the owner (if any had been left) might scrawl the owner's new address on the notice packet and leave it for the postman to retrieve, or notify Jones directly.

Other reasonable followup measures, directed at the possibility that Jones had moved as well as that he had

simply not retrieved the certified letter, would have been to post notice on the front door, or to address otherwise undeliverable mail to "occupant." Most States that explicitly outline additional procedures in their tax sale statutes require just such steps. See n 2, *supra.* Either approach would increase the likelihood that the owner would be notified that he was about to lose his property, given the failure of a letter deliverable only to the owner in person. That is clear in the case of an owner who still resided at the premises. It is also true in the case of an owner who has moved: Occupants who might disregard a certified mail slip not addressed to them are less likely to ignore posted notice, and a letter addressed to them (even as "occupant") might be opened and read. In either case, there is a significant chance the occupants will alert the owner, if only because a change in ownership **[***30]** could well affect their own occupancy. In fact, Jones first learned of the State's effort to sell his house when he was alerted by one of the occupants--his daughter--after she was served with an unlawful detainer notice.

[LEdHR9]** [9] Jones believes that the Commissioner should have searched for his new address in the Little Rock phonebook and other government records such as income tax rolls. We do not believe the government was required to go this far. As the Commissioner points out, the return of Jones' mail marked "unclaimed" did not necessarily mean that 717 North Bryan Street was an incorrect address; **[**432]** it merely informed the Commissioner that no one appeared to sign for the mail before the designated date on which it would be returned to the sender. An open-ended search for a new address--especially when the State obligates the taxpayer to keep his address updated with the tax collector, see *Ark. Code Ann. § 26-35-705* (1997)--imposes burdens on the State significantly greater than the several relatively easy options outlined above.

The Commissioner complains about the burden of even those additional steps, but his argument is belied by Arkansas' current requirement that notice to **[***31]** homestead owners be accomplished by personal service if certified mail is returned, *§ 26-37-301(e)* (Supp. 2005), and the fact that Arkansas transfers the cost of notice to the taxpayer or the tax sale purchaser, *§ 26-37-104(a).* The Commissioner has offered no estimate of how many notice letters are returned, and no facts to support the dissent's assertion that the Commissioner **[*1720]** must now physically locate "tens of thousands of properties every year." *Post, at ____, 164 L. Ed. 2d, at 439.* Citing our decision in *Greene* v. *Lindsey,* the Solicitor General adds that posted notice could be taken down by children or vandals. But in *Greene*, we noted that outside the specific facts of that case, posting notice on real property is "a singularly appropriate and effective way of ensuring that a person . . . is actually apprised of proceedings against him." *456 U.S., at 452-453, 102 S. Ct. 1874, 72 L. Ed. 2d 249.* Successfully providing notice is often the most efficient way to collect unpaid taxes, see *Mennonite, 462 U.S., at 800, n. 5, 103 S. Ct. 2706, 77 L. Ed. 2d 180* (more effective notice may ease burden on State if recipient arranges to pay delinquent taxes prior to tax sale); Tr. of Oral Arg. 24 (85 percent of tax delinquent properties in **[***32]** Arkansas are redeemed upon notice of delinquency), but rather than taking relatively easy additional steps to effect notice, the State undertook the burden and expense of purchasing a newspaper advertisement, conducting an auction, and then negotiating a private sale of the property to Flowers.

[LEdHR1F]** [1F] The Solicitor General argues that requiring further effort when the government learns that notice was not delivered will cause the government to favor modes of providing notice that do not generate additional information--for example, starting (and stopping) with regular mail instead of certified mail. We find this unlikely, as we have no doubt that the government repeatedly finds itself being asked to prove that notice was sent and received. Using certified mail provides the State with documentation of personal delivery and protection against false claims that notice was never received. That added security, however, comes at a price--the State also learns when notice has *not* been received. We conclude that, under the circumstances presented, the State cannot simply ignore that information in proceeding to take and sell the owner's property--any more than it could ignore the information **[***33]** that the owner in *Robinson* was in jail, or that the owner in *Covey* was incompetent.

[LEdHR10]** [10] Though the Commissioner argues that followup measures are not constitutionally required, he reminds us that the State did make some attempt to follow up with Jones by publishing notice in the newspaper a **[**433]** few weeks before the public sale. Several decades ago, this Court observed that "[c]hance alone" brings a person's attention to "an advertisement in small type inserted in the back pages of a newspaper," *Mullane, 339 U.S., at 315, 70 S. Ct. 652, 94 L. Ed. 865,* and that notice by publication is adequate only where "it is not reasonably possible or practicable to give more adequate warning," *id., at 317, 70 S. Ct. 652, 94 L. Ed. 865.* Following up by publication was not constitutionally adequate under the circumstances presented here because, as we have explained, it was possible and practicable to give Jones more adequate warning of the impending tax sale.

The dissent forcefully articulates some basic principles about constitutionally required notice, principles from which we have no intention to depart. In particular, we disclaim any "new rule" that is "contrary to *Dusenbery* and a significant departure from *Mullane.* **[***34]** " *Post, at ____, 164 L. Ed. 2d, at 437.* In *Dusenbery*, the

Government was aware that someone at the prison had signed for the prisoner's notice letter, and we determined that this attempt at notice was adequate, despite the fact that the State could have made notice more likely by requiring the prisoner to sign for the letter himself. *534 U.S., at 171, 122 S. Ct. 694, 151 L. Ed. 2d 597.* In this case, of course, the notice letter was returned to the Commissioner, informing him that his attempt at notice had failed.

[LEdHR1G]** **[*1721]** [1G] As for *Mullane*, it directs that "when notice is a person's due . . . [t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *339 U.S., at 315, 70 S. Ct. 652, 94 L. Ed. 865.* Mindful of the dissent's concerns, we conclude, at the end of the day, that someone who actually wanted to alert Jones that he was in danger of losing his house would do more when the attempted notice letter was returned unclaimed, and there was more that reasonably could be done.

[LEdHR8B]** [8B] As noted, "[i]t is not our responsibility to prescribe the form of service that the [government] should adopt." *Greene, supra, at 455, n. 9, 102 S. Ct. 1874, 72 L. Ed. 2d 249.* In prior cases finding notice inadequate, we have **[***35]** not attempted to redraft the State's notice statute. See, *e.g., Tulsa Professional, 485 U.S., at 490-491, 108 S. Ct. 1340, 99 L. Ed. 2d. 565*; *Robinson, 409 U.S., at 40, 93 S. Ct. 30, 34 L. Ed. 2d 47*; *Schroeder v. City of New York, 371 U.S. 208, 213-214, 83 S. Ct. 279, 9 L. Ed. 2d 255 (1962)*; *Walker, 352 U.S., at 116, 77 S. Ct. 200, 1 L. Ed. 2d 178*; *Covey, 351 U.S., at 146-147, 76 S. Ct. 724, 100 L. Ed. 1021.* The State can determine how to proceed in response to our conclusion that notice was inadequate here, and the States have taken a variety of approaches to the present question. See n 2, *supra.* It suffices for present purposes that we are confident that additional reasonable steps were available for Arkansas to employ before taking Jones' property.

* * *

There is no reason to suppose that the State will ever be less than fully zealous in its efforts to secure the tax revenue it needs. The same cannot be said for the State's efforts to ensure that its citizens receive proper notice before the State takes action against them. In this case, the State is exerting extraordinary power against a property owner--taking and selling a house he owns. It is not **[**434]** too much to insist that the State do a bit more to attempt to let him know about it when the notice **[***36]** letter addressed to him is returned unclaimed.

[LEdHR1H]** [1H] The Commissioner's effort to provide notice to Jones of an impending tax sale of his house was insufficient to satisfy due process given the circumstances of this case. The judgment of the Arkansas Supreme Court is reversed, and the case is remanded for proceedings not inconsistent with this opinion.

It is so ordered.

Justice **Alito** took no part in the consideration or decision of this case.

DISSENT BY: THOMASSCALIAKENNEDY

DISSENT: Justice **Thomas**, with whom Justice **Scalia** and Justice **Kennedy** join, dissenting.

When petitioner failed to pay his property taxes for several consecutive years, respondent Commissioner of State Lands in Arkansas, using the record address that petitioner provided to the State, sent petitioner a letter by certified mail, noting his tax delinquency and explaining that his property would be subject to public sale if the delinquent taxes and penalties were not paid. After petitioner failed to respond, the State also published notice of the delinquency and public sale in an Arkansas newspaper. Soon after respondent Linda K. Flowers submitted a purchase offer to the State, it sent petitioner a second letter by certified mail explaining that **[***37]** the sale would proceed if the delinquent taxes and penalties were not paid.

Petitioner argues that the State violated his rights under the *Due Process Clause of the Fourteenth Amendment* because, in his view, the State failed to take sufficient steps to contact him before selling his property to Flowers. Petitioner contends that once the State became aware that he **[*1722]** had not claimed the certified mail, it was constitutionally obligated to employ additional methods to locate him.

Adopting petitioner's arguments, the Court holds today that "when mailed notice of a tax sale is returned unclaimed, the State must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is practicable to do so." *Ante, at ____, 164 L. Ed. 2d, at 425.* The Court concludes that it was practicable for Arkansas to take additional steps here--namely, notice by regular mail, posting notice on petitioner's door, and addressing mail to "occupant." *Ante, at ____, 164 L. Ed. 2d, at 431.* Because, under this Court's precedents, the State's notice methods clearly satisfy the requirements of the *Due Process Clause*, I respectfully dissent.

I

The *Fourteenth Amendment* prohibits the States from "depriv[ing] **[***38]** any person of life, liberty, or property, without due process of law." This Court has held that a State must provide an individual with notice and opportunity to be heard before the State may deprive

him of his property. *Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313, 70 S. Ct. 652, 94 L. Ed. 865 (1950).* Balancing a State's interest in efficiently managing its administrative system and an individual's **[**435]** interest in adequate notice, this Court has held that a State must provide "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action." *Id., at 313-314, 70 S. Ct. 652, 94 L. Ed. 865.* As this Court has explained, "when notice is a person's due . . . [t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Id., at 315, 70 S. Ct. 652, 94 L. Ed. 865.* "[H]eroic efforts," however, are not required. *Dusenbery v. United States, 534 U.S. 161, 170, 122 S. Ct. 694, 151 L. Ed. 2d 597 (2002).* To the contrary, we have expressly rejected "[a] construction of the *Due Process Clause* which would place impossible or impractical obstacles in the way [of the State]." *Mullane, supra, at 313-314, 70 S. Ct. 652, 97 L. Ed. 865.* **[***39]** Thus, "none of our cases . . . has required actual notice"; instead, "we have allowed the Government to defend the 'reasonableness and hence the constitutional validity of any chosen method . . . on the ground that it is in itself reasonably certain to inform those affected.'" *Dusenbery, supra, at 169-170, 122 S. Ct. 694, 151 L. Ed. 2d 597* (quoting *Mullane, supra, at 315, 70 S. Ct. 652, 94 L. Ed. 865*).

The methods of notice employed by Arkansas were reasonably calculated to inform petitioner of proceedings affecting his property interest and thus satisfy the requirements of the *Due Process Clause*. The State mailed a notice by certified letter to the address provided by petitioner. The certified letter was returned to the State marked "unclaimed" after three attempts to deliver it. The State then published a notice of public sale containing redemption information in the Arkansas Democrat Gazette newspaper. After Flowers submitted a purchase offer, the State sent yet another certified letter to petitioner at his record address. That letter, too, was returned to the State marked "unclaimed" after three delivery attempts. n1

n1 Though the Court posits that "there is no record evidence that notices of attempted delivery were left at 717 North Bryan Street," *ante, at ____, 164 L. Ed. 2d, at 430*, the postal carrier was required to leave notice at the address at each delivery attempt indicating that delivery of certified mail had been attempted and that the mail could be retrieved at the local post office. See United States Postal Operations Manual § 813.25 (July 2005), http://www.nalc.org/depart/can/pdf/manuals/pom/pomc8.pdf (all Internet materials as visited Apr. 21, 2006, and available in Clerk of Court's case file) ("The carrier must leave a notice of arrival on Form 3849 if the carrier cannot deliver the certifiable article for any reason").

[*40]**

[*1723] Arkansas' attempts to contact petitioner by certified mail at his "record address," without more, satisfy due process. *Dusenbery, supra, at 169, 122 S. Ct. 694, 151 L. Ed. 2d 597.* See also *Mullane, supra, at 318, 70 S. Ct. 652, 94 L. Ed. 865*; *Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478, 490, 108 S. Ct. 1340, 99 L. Ed. 2d 565 (1988)* ("We have repeatedly recognized that mail service is an inexpensive and efficient mechanism that is reasonably calculated to provide actual notice"); *Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 792, 798, 103 S. Ct. 2706, 77 L. Ed. 2d 180 (1983)* (holding that "notice *mailed* to [the affected party's] *last known available address*" is sufficient where a State seeks to sell "real property on which payments of property taxes have been delinquent" (emphasis added)). Because the notices were sent to the address provided by petitioner himself, the State had an especially **[**436]** sound basis for determining that notice would reach him. Moreover, Arkansas exceeded the constitutional minimum by additionally publishing notice in a local newspaper. n2 See *Mullane, supra, at 318, 70 S. Ct. 652, 94 L. Ed. 865.* Due process requires nothing more--and certainly not here, where petitioner had a statutory duty **[***41]** to pay his taxes and to report any change of address to the state taxing authority. See *Ark. Code Ann. § 26-35-705* (1997).

n2 The Court found inadequate the State's attempt at notice by publication, as if that were the State's *sole* method for effectuating notice, see *ante, at ____, 164 L. Ed. 2d, at 433.* But the State plainly used it here as a *secondary* method of notice.

My conclusion that Arkansas' notice methods satisfy due process is reinforced by the well-established presumption that individuals, especially those owning property, act in their own interest. Recognizing that "'[i]t is the part of common prudence for all those who have any interest in [a thing], to guard that interest by persons who are in a situation to protect it,'" *Mullane, supra, at 316, 70 S. Ct. 652, 94 L. Ed. 865* (quoting *The Mary, 9 Cranch 126, 144, 3 L. Ed. 678 (1815)*), this Court has concluded that "[t]he ways of an owner with tangible property are such that he usually arranges means to learn of any direct attack upon his possessory or proprietary rights. **[***42]** " *Mullane, 339 U.S., at 316, 70 S. Ct. 652, 94 L. Ed. 865.* Consistent with this observation,

Arkansas was free to "indulge the assumption" that petitioner had either provided the State taxing authority with a correct and up-to-date mailing address--as required by state law--"or that he . . . left some caretaker under a duty to let him know that [his property was] being jeopardized." n3*Ibid.*

> n3 The issue is not, as the Court maintains, whether the current occupant is "charged with acting as the owner's agent." *Ante, at ____, 164 L. Ed. 2d, at 430.* Rather, the issue is whether petitioner discharged his *own* duty to guard his interests.

The Court does not conclude that certified mail is inherently insufficient as a means of notice, but rather that "the government's knowledge that notice pursuant to the normal procedure was ineffective triggered an obligation on the government's part to take additional steps to effect notice." *Ante, at ____, 164 L. Ed. 2d, at 428.* I disagree.

First, whether a method of notice is reasonably calculated to notify the interested **[***43]** party is determined *ex ante, i.e.,* from the viewpoint of the government agency at the time its notice is sent. This follows from *Mullane*, where this Court rested its analysis on the information the sender had "at hand" when its notice was sent. *339 U.S., at 318, 70 S. Ct. 652, 94 L. Ed. 865.* Relatedly, we have refused to evaluate the **[*1724]** reasonableness of a particular method of notice by comparing it to alternative methods that are identified after the fact. See *Dusenbery, 534 U.S., at 171-172, 122 S. Ct. 694, 151 L. Ed. 2d 597.* Today the Court appears to abandon both of these practices. Its rejection of Arkansas' selected method of notice--a method this Court has repeatedly concluded is constitutionally sufficient--is based upon information that was unavailable when notice was sent. Indeed, the Court's proposed notice methods--regular mail, posting and addressing mail to "occupant," *ante, at ____ - ____, 164 L. Ed. 2d, at 430-432*--are entirely the product **[**437]** of *post hoc* considerations, including the discovery that members of petitioner's family continued to live in the house. Similarly, the Court's observation that "[t]he Commissioner['s] complain[t] about the burden of . . . additional steps . . . is belied by Arkansas' current requirement **[***44]** that notice to homestead-owners be accomplished by personal service if certified mail is returned," *ante, at ____ - ____, 164 L. Ed. 2d, at 431-432*, is contrary to *Dusenbery*'s "conclusion that the Government ought not be penalized and told to 'try harder' . . . simply because [it] has since upgraded its policies," *534 U.S., at 172, 122 S. Ct. 694, 151 L. Ed. 2d 597* (citation omitted).

Second, implicit in our holding that due process does not require "actual notice," see *id., at 169-170, 122 S. Ct. 694, 151 L. Ed. 2d 597*, is that when the "government becomes aware . . . that its attempt at notice has failed," *ante, at ____, 164 L. Ed. 2d, at 426*, it is not required to take additional steps to ensure that notice has been received. Petitioner's challenge to Arkansas' notice methods, and the Court's acceptance of it, is little more than a thinly veiled attack on *Dusenbery.* Under the majority's logic, each time a doubt is raised with respect to whether notice has reached an interested party, the State will have to consider additional means better calculated to achieve notice. Because this rule turns on speculative, newly acquired information, it has no natural end point, and, in effect, requires the States to achieve something close to actual notice. The majority's **[***45]** new rule is contrary to *Dusenbery* and a significant departure from *Mullane.*

The only circumstances in which this Court has found notice by mail and publication inadequate under the *Due Process Clause* involve situations where the state or local government knew at the outset that its notice efforts were destined to fail and knew how to rectify the problem prior to sending notice. See *Robinson v. Hanrahan, 409 U.S. 38, 39, 93 S. Ct. 30, 34 L. Ed. 2d 47 (1972) (per curiam)* (intended recipient known to be in jail); *Covey v. Town of Somers, 351 U.S. 141, 145, 76 S. Ct. 724, 100 L. Ed. 1021 (1956)* (intended recipient known to be incompetent and without a guardian).

In *Robinson*, the State, having arrested petitioner and detained him in county jail, immediately instituted forfeiture proceedings against his automobile and mailed notice of those proceedings to his residential address. *409 U.S., at 38, 93 S. Ct. 30, 34 L. Ed. 2d 47.* Robinson, who was incarcerated in the county jail during the entirety of the forfeiture proceedings, did not receive notice of the proceedings until after he was released and the forfeiture order had been entered. *Id., at 38-39, 93 S. Ct. 30, 34 L. Ed. 2d 47.* Because the State knew beforehand that Robinson **[***46]** was not at, and had no access to, the address to which it sent the notice, this Court held that the State's efforts were not "reasonably calculated" to notify him of the pending proceedings. *Id., at 40, 93 S. Ct. 30 34 L. Ed. 2d 47.* Similarly, in *Covey*, the Court concluded that the methods of notice used by the town--mailing, posting, and publishing--were not reasonably calculated to inform Covey of proceedings adverse to her property interests because local officials knew prior to sending notice that she **[*1725]** was "without mental capacity to handle her affairs" and unable to comprehend the meaning **[**438]** of the notices. *351 U.S., at 144, 146, 76 S. Ct. 724, 100 L. Ed. 1021.*

By contrast, Arkansas did not know at the time it sent notice to petitioner that its method would fail; and

Arkansas did not know that petitioner no longer lived at the record address simply because letters were returned "unclaimed." Pet. for Cert. 3. "[U]nclaimed" does not necessarily mean that an address is no longer correct; it may indicate that an intended recipient has simply failed or refused to claim mail. See United States Postal Service, Domestic Mail Manual (DMM), § 507, Exh. 1.4.1, http://pe.usps.gov/text/dmm300/507.htm. n4 Given that the **[***47]** State had been using the address provided by petitioner and that petitioner had a legal duty to maintain a current mailing address with the state taxing authority, return of the mail as "unclaimed" did not arm Arkansas with the type of specific knowledge that the governments had at hand in *Robinson* and *Covey*. Cf. *ante, at ____, 164 L. Ed. 2d, at 431*. The State cannot be charged to correct a problem of petitioner's own creation and of which it was not aware. n5 Even if the State had divined that petitioner was no longer at the record address, its publication of notice in a local newspaper would have sufficed because *Mullane* authorizes the use of publication when the record address is unknown. See *339 U.S., at 316, 70 S. Ct. 652, 94 L. Ed. 865* ("[P]ublication traditionally has been acceptable as notification supplemental to other action which in itself may reasonably be expected to convey a warning").

n4 The Postal Service uses "Moved, Left No Address" to indicate that the "[A]ddressee moved and filed no change-of-address order," and "Not Deliverable as Addressed--Unable to Forward" to indicate that the mail is "undeliverable at address given; no change-of-address order on file; forwarding order expired." DMM § 507, Exh. 1.4.1. **[***48]**

n5 The Court's "storm drain" hypothetical, *ante, at ____ - ____, 164 L. Ed. 2d, at 427-428*, presents the harder question of when notice is sent--at the precise moment the Commissioner places the mail in the postal carrier's hand or the split second later when he observes the departing carrier drop the mail down the storm drain. That more difficult question is not before us in this case because Arkansas learned long after the fact that its attempts had been unsuccessful.

II

The Court's proposed methods, aside from being constitutionally unnecessary, are also burdensome, impractical, and no more likely to effect notice than the methods actually employed by the State.

In Arkansas, approximately 18,000 parcels of delinquent real estate are certified annually. *Tsann Kuen Enters. Co. v. Campbell, 335 Ark. 110, 119-120, 129 S. W. 3d 822, 828 (2003)*. Under the Court's rule, the State will bear the burden of locating thousands of delinquent property owners. These administrative burdens are not compelled by the *Due Process Clause*. See *Mullane, supra, at 313-314, 70 S. Ct. 652, 94 L. Ed. 865*; *Tulsa Professional Collection Services, Inc., 485 U.S., at 489-490, 108 S. Ct. 1340, 99 L. Ed. 2d 565* **[***49]** (stating that constitutionally sufficient notice "need not be inefficient or burdensome"). Here, Arkansas has determined that its law requiring property owners to maintain a current address with the state taxing authority, in conjunction with its authorization to send property notices to the record address, is an efficient and fair way to administer its tax collection system. The Court's **[**439]** decision today forecloses such a reasonable system and burdens the State with inefficiencies caused by delinquent taxpayers.

Moreover, the Court's proposed methods are no more reasonably calculated to **[*1726]** achieve notice than the methods employed by the State here. Regular mail is hardly foolproof; indeed, it is arguably less effective than certified mail. Certified mail is tracked, delivery attempts are recorded, actual delivery is logged, and notices are posted to alert someone at the residence that certified mail is being held at a local post office. By creating a record, these features give parties grounds for defending or challenging notice. By contrast, regular mail is untraceable; there is no record of either delivery or receipt. Had the State used regular mail, petitioner would presumably argue **[***50]** that it should have sent notice by certified mail because it creates a paper trail. n6

n6 Interestingly, the Court stops short of saddling the State with the other steps that petitioner argues a State should take any time the interested party fails to claim letters mailed to his record address, see *ante, at ____, 164 L. Ed. 2d, at 431-432*, namely searching state tax records, the phone-book, the Internet, department of motor vehicle records, or voting rolls, contacting his employer, or employing debt collectors. Here, the Court reasons that because of the context--the fact that the letter was returned merely "unclaimed" and petitioner had a duty to maintain a current address--the State is not required to go as far as petitioner urges. *Ibid.* Though the methods proposed by petitioner are severely flawed (for instance, the commonality of his surname "Jones" calls into question the fruitfulness of Internet and phone-book searches), there is no principled basis

> for the Court's conclusion that petitioner's other proposed methods would "impos[e] burdens on the State significantly greater than the several relatively easy options outlined [by the Court]." *Ibid.*

[*51]**

The Court itself recognizes the deficiencies of its proposed methods. It acknowledges that "[f]ollowing up with regular mail *might* . . . increase the chances of actual notice"; "occupants who ignored certified mail notice slips . . . *might* scrawl the owner's new address on the notice packet," *ante, at ____, 164 L. Ed. 2d, at 431*; and "a letter addressed to [occupant] *might* be opened and read," *ante, at ____, 164 L. Ed. 2d, at 431* (emphasis added). Nevertheless, the Court justifies its redrafting of Arkansas' notice statute on the ground that "[its] approach[es] would increase the likelihood that the owner would be notified that he was about to lose his property . . . ." *Ibid.* That, however, is not the test; indeed, we rejected such reasoning in *Dusenbery*. See *534 U.S., at 171, 122 S. Ct. 694, 151 L. Ed. 2d 597* (rejecting the argument that "the FBI's notice was constitutionally flawed because it was 'substantially less likely to bring home notice' than a feasible substitute" (citations omitted)).

The Court's suggestion that Arkansas post notice is similarly unavailing. The State's records are organized by legal description, not address, which makes the prospect of physically locating tens of thousands of properties every year, **[***52]** and posting notice on each, impractical. See *Tsann Kuen Enters. Co., supra, at 119-120, 129 S. W. 3d, at 828*. Also, this Court has previously concluded that posting is an inherently unreliable method of notice. See *Greene v. Lindsey, 456 U.S. 444, 453-454, 102 S. Ct. 1874, 72 L. Ed. 2d 249 (1982)*.

Similarly, addressing the mail to "occupant," see *ante, at ____, 164 L. Ed. 2d, at 431*, is no more reasonably **[**440]** calculated to reach petitioner. It is sheer speculation to assume, as the Court does, that although "[o]ccupants . . . might disregard a certified mail slip . . ., a letter addressed to them (even as 'occupant') might be opened and read." *Ante, at ____, 164 L. Ed. 2d, at 431*. It is at least as likely that an occupant who receives generically addressed mail will discard it as junk mail.

III

If "title to property should not depend on [factual] vagaries," *Dusenbery, supra, at 171, 122 S. Ct. 694, 151 L. Ed. 2d 597*, then certainly it cannot turn on "wrinkle[s]," *ante, at ____,* **[*1727]** *164 L. Ed. 2d, at 426*, caused by a property owner's own failure to be a prudent ward of his interests. The meaning of the Constitution should not turn on the antics of tax evaders and scofflaws. Nor is the self-created conundrum in which petitioner finds himself a legitimate **[***53]** ground for imposing additional constitutional obligations on the State. The State's attempts to notify petitioner by certified mail at the address that he provided and, additionally, by publishing notice in a local newspaper satisfy due process. Accordingly, I would affirm the judgment of the Arkansas Supreme Court.

REFERENCES: Go To Full Text Opinion

Go To Supreme Court Brief(s)

Go To Supreme Court Transcripts

36 Am Jur 2d, Forfeitures and Penalties § 37; 58 Am Jur 2d, Notice § § 32, 36; 72 Am Jur 2d, State and Local Taxation § § 826, 827, 836-840

U.S.C.S., *Constitution, Amendment 14*

Antieau on Local Government Law § § 64.19, 64.27 (Matthew Bender 2d ed.)

L Ed Digest, **[***54]** Constitutional Law § 807

L Ed Index, Tax Sale

Annotation References

Supreme Court's views as to due process requirements, under *Federal Constitution's Fifth* and *Fourteenth Amendments*, concerning forfeitures of property to government as result of unlawful conduct. *126 L. Ed. 2d 799*.

Notice by publication as sufficient to comply with due process requirements under *Federal Constitution's Fourteenth Amendment*--Supreme Court cases. *99 L. Ed. 2d 1029*.

Supreme Court's construction of due process requirements regarding notice in proceedings to foreclose real-property tax or similar lien. *77 L. Ed. 2d 1485*.

The progeny of Miranda v Arizona in the Supreme Court. *46 L. Ed. 2d 903*.

County: **PLYMOUTH, ss.**

Case No: **MISCELLANEOUS CASE NO. 299022**

Date: **December 21, 2005**

Parties: **HINGHAM LAND, LLC, Plaintiff and Defendant-in-Counterclaim, v. TOWN OF ROCKLAND, Defendant, Plaintiff-in-Counterclaim and Third-Party Plaintiff, v. ROCKLAND GOLF COURSE, LLC and C.P. & L., LNC., Third-Party Defendants.**

Decision Type: **ORDER DENYING HINGHAM LAND LLC'S MOTION FOR SUMMARY JUDGMENT AND GRANTING PARTIAL SUMMARY JUDGMENT TO THE TOWN OF ROCKLAND**

Introduction

This case involves the eighteen-hole Rockland Golf Course, a 74 acre parcel of registered land in the Town of Rockland.[1] The entire parcel, with the exception of the clubhouse and its immediately surrounding land, has been valued, assessed and taxed under G.L. c. 61B at all relevant times.

Hingham Land LLC acquired the golf course from its prior owners, Rockland Golf

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[1] See Exhibit 1 (aerial photograph).

Course LLC and C.P.&L., Inc., on October 23, 2003 and, on December 11, 2003, gave the Town notice of its intention: (1) to divide the property into three parts,[2] (2) downsize the golf course to nine holes, reconfigured to fit on the southern and central of those parts,[3] and (3) construct age-restricted residences and access roads on the part surrounding the center, "converting" that portion of the property from c. 61B to full-value taxation,[4] all to form a "Senior Golf Community".[5] The notice purported to give the Town a 120-day option under G.L. c. 61B, s.9 to purchase the "converted" land, and that land only, at its full market value.

G.L. c. 61B, s.9 grants municipalities an option to purchase recreationally-assessed property in two circumstances. If the property is sold with the intention of converting it to residential, industrial or commercial use, the municipality has a "first refusal right" to acquire the property by meeting the terms and conditions of that sale. If the property is to be converted to residential, industrial or commercial use in a transaction not involving a sale, the municipality has the right to purchase the property at its "full and fair market value". At issue is how the s.9 option applies, in the circumstances of this case, and whether it was.timely exercised. .

Hingham Land contends that its October 23, 2003 acquisition of the Rockland Golf Course from Rockland Golf Course LLC and C.P.&L., Inc. was a "mortgage foreclosure sale" ;outside the scope of s.9 and, in any event, was made without the intent to convert the property to residential,: industrial or commercial use. It contends that its intent to "convert" did not arise. until sometime after its October 23 acquisition, and that the "conversion" is limited to that section of

the property on which the age-restricted residences and their access roads will be

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[2] See Exhibit 2 (proposed division). The three parts are labeled "Area A", "Area B", and "Converted Land".

[3] See Exhibit 2 (the parts labeled "Area A" and "Area B").

[4] See Exhibit 2 the section labeled "Converted Land").

built.[6] It contends that the applicable provision of s.9 was the option to purchase that section, and that section alone, at its full market value. It contends that its December 11, 2003 notice to the Town tendering that option was adequate. And it contends that the Town's failure to exercise its option rights within 120 days after receiving the December 11 notice has caused the option to expire.

The Town disagrees with each of these contentions. It argues that Hingham Land's October 23 acquisition of the golf course was a "sale" within the meaning of s.9 and not a "mortgage foreclosure sale". It argues that Hingham Land acquired the course with the intent to redevelop it into an integrated residential community, and that such a development is a "conversion" of the entirety of the parcel. It argues that Hingham Land's December 11 notice was inadequate and defective because it failed to disclose the terms and conditions of the October 23 transaction,and offer the Town the option to meet them. And it argues that it both possesses and timely exercised an option to purchase the entire 74 acre parcel of land on substantially the same terms and conditions as Hingham Land received on October 23.

In response, Hingham Land contends that even if its October 23 acquisition of the land came from a "sale", even if it was made with the intent to convert, and even if the conversion covers the entire property (making the.December 11 notice inadequate or defective), the Town ultimately received full "constructive notice" of the relevant facts and failed to exercise its option rights within a "reasonable time" after receipt of that information, thus losing those rights.. See Town of Sudbury v. Scott, 439 Mass. 288 (2003).

Both sides have moved for summary judgment.

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[5] See Exhibit 3 (proposed development).

For the reasons that follow, I deny Hingham Land's motion and enter partial summary judgment for the Town, ruling that the Town had an option to purchase the entire 74 acre parcel, less the clubhouse and its immediately surrounding land, and that it properly and timely exercised that option. As more fully explained below; there are material factual issues regarding the precise terms which the Town must meet to acquire the property, and those remain for determination at trial.

G.L. c. 61B, s.9

G.L. c. 61B permits an owner of five or more acres of "recreational land" to apply for, and receive, a tax assessment based solely on its recreational use.[7] G.L. c. 61B, s.s.2, 3. That value is usually significantly lower than the property's value under the "highest and best" use standard by which real property is generally assessed. See Town of Sudbury v. Scott, 439. Mass. 288, 294 (2003) (interpreting analogous statute c. 61A). A landowner must reapply annually for, assessment under c. 61B, and is required to give the municipality. immediate notice of any subsequent circumstance within its control or knowledge which may cause a change in the use of the land prior to the next following October 1. G.L. c. 61B, s.3.

Under c. 61B, s.9, so long as a parcel of land is valued, assessed and taxed as recreational, it may not be sold for, or converted to, residential, industrial or commercial use unless the municipality in which the land is located has been notified of the intent to sell or convert.[8] The

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[6] See Exhibit 2 (the section labeled "Converted Land").

[7] Golfing is a recreational use within the meaning of the statute. G.L. c. 61B, s.1.

[8] The statute has strict requirements for the form and manner of notice. The notice must be in writing and sent via certified mail to the mayor and city council of a city, or to the board of selectmen of a town, to its board of assessors, and to its planning board and conservation commission, if any. G.L. c. 61B, P. The notice must contain the name of the record owner of the land, and a description of the premises to be sold or converted "adequate for identification thereof'. Id. An affidavit that notice has been given, with a copy of the notice attached, must be recorded at the registry of deeds. Id. The 120-day option period does not begin to run until such notice has been

Municipality then has a 120-day option[9] to acquire the land on substantially the same terms and conditions that are contained in a bona fide offer to purchase the land or, in the case of conversion not involving sale, by purchasing the land at "full and fair market value" as determined by impartial appraisal. G.L. c. 61B, s.9; see Town of Franklin v. Wyllie, 443 Mass. 187, 194-196 (2005); Plante v. Town of Grafton, 56 Mass. App. Ct. 213, 214 (2002) (both interpreting c. 61A). The Town's notice of the exercise of its option must be given within the 120-day period, but the actual purchase need not occur within the 120 days.[10] It can take place afterwards, so long as it occurs within "a reasonable time". Town of Sudbury, 439 Mass. at 298, n. 13: It may also be made conditional on a Town Meeting appropriation. Meachen v. Hayden, 6 LCR 235, 238 (1998) (Misc. Case No. 240129) (Lombardi, J.).

The statute contemplates that landowners and,buyers will act in good faith to notify the municipality if a conversion or sale for non-recreational use is intended. See Town of Sudbury, 439.Mass: at 298. If the landowner fails to give notice; or if the notice given is defective,[11] the 120-day option period does not begin to run until proper notice is given, unless the city or town has "constructive notice" that its rights have been implicated. See id. at 297-299. If

the municipality has such constructive notice, it must "investigate and exercise [its] option within a

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given. Id. See Town of Sudbury, 439 Mass. at 298 (option to purchase is triggered by notice, not by an actual change of use, and notice must precede the sale or change of use).

[9] The statute permits assignment of the option to a non-profit conservation organization. G.L. c. 61B, s.9.

[10] G.L. c. 61B, s.9 places equally strict requirements on the form, manner and timing of the Town's notice of option exercise. It must be in writing, signed by the mayor or the board of selectmen, sent by certified mail, contain the name of the record owner of the land and an adequate description of that land, and be recorded with the registry of deeds, all within the option period. G.L. c. 61B, s.9. If the option has been assigned to a nonprofit conservation organization, the notice must also state the name and address of that organization and the terms and conditions of the assignment. Id.

[11] To be valid, the notice of a sale subject to a s.9 option must disclose all of the details of the terms and conditions of the proposed transaction. See Meachen v. Hayden, 6 LCR at 237. The s.9 option allows the municipality to acquire the property on substantially the same terms. Id.

reasonable period of time." Id. at 297. "A reasonable period of time" is judged by the standards applicable to options generally. Id. at 302-303 (citing Stone v. W. E. Aubuchon Co., 29 Mass. App. Ct. 523, 527 (1990)).[12] See also Meachen, 6 LCR at 237 (ruling that the period within which the option must be exercised is 120 days from the time complete information is provided). The option to purchase may be specifically enforced against the buyer if it is timely exercised. Town of Sudbury, 439 Mass. at 298.

A key question is often which s.9 right is implicated: (1) the "first refusal option" to meet a bona fide offer to purchase the land or, in the case of intended conversion not involving sale, (2) the option to purchase the land at full and fair market value. Because the statute refers to "a specific intent and a specific point in time", the critical date for assessing whether the municipality has a first refusal right to purchase the property is the date of sale, and the critical intent is the buyer's intent to discontinue the recreational use of the land on acquiring title. See Town of Sudbury, 439 Mass. at 299.

> In most cases, if not disclosed before sale, that intent will become evident soon after sale when the new owner begins a process of conversion. However, there may be instances where the new owner will continue the [recreational] use for a brief period after sale to conceal his true purpose, with the intent to defeat the town's right of first refusal. A town that can establish such intent as of the date of sale, and a

failure to give notice, is entitled to specific performance of its option to purchase.

Id. (emphasis added). On the other hand, if the buyer had no intent to convert as of the date of purchase and the intent to convert arose at a later time, the municipality's right is limited to an option to purchase the property at its full and fair market value, calculated as of the proposed effective date of conversion.

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[12] Common-law principles apply to a right of first refusal created by statute. Town of Sudbury, 439 Mass. at 297, n.12.

The provisions of G.L. c. 61B, s.9 are not applicable to mortgage foreclosure sales. Instead, at least 90 days prior to the sale, the holder of a mortgage must send prior written notice of its time and place to the municipality and other parties.

The Standard for Summary Judgment

Summary judgment is appropriately granted when there are no issues of material fact and the moving party is entitled to judgment as a matter of law. Mass. R. Civ. P. 56(c); Cassesso v. Commissioner of Correction, 390 Mass. 419, 422 (1983); Community Nat 'I Bank v. Dawes, 369 Mass. 550, 551(1976). The moving party bears the burden of demonstrating affirmatively both the absence of a triable issue and its entitlement to judgment as a matter of law. Pederson v. Time, Inc., 404 Mass. 14, 16-17 (1989).

In weighing the merits of a summary judgment motion; the court must address two questions: (1) whether the factual disputes are genuine, and (2) whether a fact genuinely in dispute is material. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). In order to determine if a dispute about a material fact is' genuine, the court must decide whether "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. at 248. "As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Id. See also Mulvihill v. The Top-Flite Golf Co., 335 F.3d 15, 19 (1st Cir. 2003); Hogan v. Riemer, 35 Mass. App. Ct. 360, 364 (1993).

When the court considers the materials accompanying a motion for summary judgment, the inferences to be drawn from the underlying facts contained in such materials must be viewed in the light most favorable to the party opposing the motion. Attorney Gen. v. Bailey, 386 Mass.

367, 371 (1982). The court does not "pass upon the credibility of witnesses or the weight of the evidence or make its own decision of facts." Id. at 370 (citations omitted). See also Town of Sudbury, 439 Mass. 288, 302, n. 19. However, "[e]ven in cases where elusive concepts such as motive and intent are at issue, summary judgment may be

appropriate if the nonmoving party rests merely upon conclusory allegations, improbable inferences, and unsupported speculation." Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 8 (1st Cir. 1990). And just as a party cannot defeat summary judgment by submitting affidavits to contradict its earlier deposition testimony, a party cannot rewrite history by submitting later affidavits or testimony to contradict its contemporaneous documents. See Ng Bros. Constr. Inc. v. Cranney, 436 Mass. 638, 647-48 (2002).

Whether an act has been done within "a reasonable time" is often a question of fact, but where the underlying facts are not in dispute, it can become a question of law capable of resolution by the court. See Williams v. Powell, 101 Mass. 467, 469 (1869); Spoor v. Spooner, 53 Mass. 281, 285 (1847). See also Costello v. Town of Medway, 63 Mass. App. Ct. 1112 (table), 2005 WL 955064, ***3 (2005) (unpublished Rule 1:28 Memorandum and Order) (recognizing that, on summary judgment, "a judge might determine without error that no conveyance could have occurred within a reasonable time").

Facts

The following facts are either not in dispute or, for purposes of this decision, to the extent permissible, are taken in the light most favorable to Hingham Land.[13]

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[13] The facts are taken either from the admissible portions of the affidavits, deposition excerpts and authenticated documents submitted by the parties, from the records on file at the Plymouth County Registry District of the Land Court, or from Hingham Land's December 11, 2003 application to this court to convert the property to a

* The property at issue is a 74 acre parcel of registered land located in Rockland, Massachusetts. The precise boundaries of the parcel are shown as Lot A on Sheet 1 of Land Court Plan #29008A, excepting and excluding Lots 67 and 74 as shown on Land Court Plans #29008B and E, respectively.
* With the exception of the clubhouse and its immediately surrounding land, the property was valued, assessed and taxed under G.L. c. 61B, from the fiscal year ending June 30, 1993 until the assessors' decision in the fall of 2004 not to approve that year's application.
* The property was mortgaged to South Coastal Bank.
* The mortgage went into default and a mortgage foreclosure sale was scheduled for August 6, 2003.
* In May 2003, South Coastal sent notice of that proposed sale to the Town.
* The August 6, 2003 mortgage foreclosure sale never took place. Instead, the sale was postponed to October 20 and, in the meantime, the mortgage was assigned to NH Funding, an affiliate of

Hingham Land. The sale was further postponed to November 3.

* No public foreclosure sale ever took place.[14] Instead, a "Comprehensive Settlement Agreement" was reached between Rockland Golf Course, LLC (the owner of the property), C.P.&L., Inc. (the entity which operated the course and clubhouse, and which also was a guarantor of the NH Funding loans), Charles P. Lanzetta (the principal officer of Rockland Golf and C.P.&L., and a guarantor of the NH Funding loans), NH Funding, Hingham Land, and Rockland Restaurant LLC (a newly established corporation, to which C.P.&L.'s liquor license for the clubhouse was to be transferred).

* In accordance with the settlement, agreed in outline on October 15, 2003[15] and finalized on October 23,[16] Rockland Golf conveyed the property to C.P.&L., and C.P.&L. conveyed the property to Hingham Land, all on October 23. Hingham Land is the present owner of the property, as reflected on Transfer Certificate of Title 104344, issued by the Land Court on October 27, 2003 and registered in the

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condominium. Judicial notice may be taken of these registry records and court files. See Correllas v. Viveiros, 410 Mass. 314, 317-318 (1991). See also G.L. c. 231, s.87 ("in any civil action pleadings shall not be evidence on the trial, but the allegations therein shall bind the party making them").

[14] The auctioneer came to the property on August 6 but, as instructed, never proceeded with the sale and instead postponed it.

[15] Deal Outline: Rockland Golf Course, LLC, dated as of October 15, 2003.

[16] Comprehensive Closing Agreement, dated October 23, 2003.

Plymouth County Registry District.

* The purchase price for the property was $2,660,000.[17] However, the overall agreement contained many additional terms, including the release of Rockland Golf, C.P.&L. and Mr. Lanzetta's liability on the NH Funding loans, an additional $300,000 payment to bring all accounts receivable and back taxes current, Hingham Land's assumption or payoff of other mortgages on the property, the transfer of the restaurant's equipment, permits and licenses to Hingham Land, the transfer of the liquor license to Rockland Restaurant LLC, a new $150,000 loan from NH Funding to C.P.&L., and the lease of the golf course (to be reduced in

size to 9 holes) to C.P.&L. for a period of 10 years at a fixed rent. As more fully described below, the transaction documents also contained a provision for the payment of additional sums to C.P.&L. based on a percentage of the proceeds from residential lot sales.

* The October 23, 2003 acquisition documents included, among others, a Comprehensive Closing Agreement, a Real Estate Sales Agreement, and a Golf Facilities Lease. Each of them included a statement of Hingham Land's "intent" for the property.

* As stated in the Comprehensive Closing Agreement:

"[Hingham Land] intends to develop this,, facility and to construct or arrange for the construction of residential housing units on the property. In the event that [Hingham Land] sells any such residential. units, [Hingham Land] agrees to pay CP&L three (3%) percent of the gross sales price of such residential units at the closing of each residential unit up to a total aggregate amount of $600,000.00 as more fully described in the Real Estate Sales Agreement executed this day."

Comprehensive Closing Agreement, dated October 23, 2003, € 13.

* As stated in the Real Estate Sales Agreement between Hingham Land and C.P.&L.:

"...[Hingham Land] intends to redevelop the Property for residential use and incorporate a 9 hole, par 3 golf course and a restaurant/function facility. [It] intends to construct and sell residential units on a portion of the Property and to convey such units with a deed(s) to be recorded at the Plymouth registry of deeds, which deed(s) shall include the gross sales price paid for such unit (the "Gross Sales Price").

Upon the recording of the deed(s) for the initial sale of such residential units,

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[17] Purchase and Sale Agreement, dated October 23, 2003, €2.1.

[Hingham Land] shall pay to [C.P.&L.] the sum of three (3%) percent of the Gross Sales Price (each sum a

"Payment" and collectively the "Payments") until such time as [C.P.&L.] has received a total aggregate amount of six hundred thousand dollars ($600,000) from such Payments."

Real Estate Sales Agreement, dated October 23, 2003, p. 1.

* As stated in the Golf Facilities Lease:

"...Landlord [Hingham Land] intends.to redevelop the Property for residential use and incorporate a 9 hole, par 3 golf course and a restaurant/function facility on the Property (the `Redevelopment')."

Golf Facilities Lease, p. 1.

* Through newspaper reports and general discussion in the community, Town officials, as individuals, were aware that a transaction had taken place regarding the golf course, but they had no knowledge of its particulars or details, and no formal notice was given to the Town at this time.

* On November 12, 2003, Hingham Land representative Donald J. MacKinnon met with Town officials, telling them that Hingham Land had acquired the property but assuring them that Mr. Lanzetta would continue to operate the golf course. No details were given of the acquisition or its terms. In a subsequent letter to the Town's Board of Selectmen, the Town Administrator mentioned the Assessor's Office's concern that the Town's s.9 option might be implicated by the transaction.

* On December 3, 2003, Hingham Land executed a Declaration of Condominium Trust and a Condominium Master-Deed, which were then submitted to this court on December 11, 2003 for approval, together with a Condominium Plan (dated November 26, 2003) and other documents. The documents sought to make the entirety of the property a condominium, subject to a single Master Deed. The submission also included a Complaint for Voluntary Withdrawal of Land from the Registration System under G.L. c. 185, s.52:

* On December 5, 2003, representatives of Hingham Land met with Town officials, stating that Hingham Land had plans to develop senior housing on the property, and intended to take nine holes of the existing golf course out of G.L. c. 61B enrollment. They further stated that Hingham

Land would be sending the Town an official notice regarding its intent.

* On December 11, 2003, Hingham Land sent the Town a Notice of Intent, stating

- 11-

that a portion of the property would now be converted to residential use.[18] The Notice took the position that the Town had an option to purchase only the "converted" portion of the property and only at its full and fair market value, and purported to limit the period for the exercise of that option to the next 120 days, i.e. on or before April 9, 2004. Aside from a citation to the deed by which Hingham Land acquired its interest in the property, the Notice made no reference to, nor provided any information regarding, the October 23, 2003 acquisition transaction.

* Beginning on December 15, 2003, the Town's Board of Selectmen held a number of open meetings and executive sessions at which Hingham Land's statements and Notice were discussed, and the possibility of the Town's purchase of the property was considered. On February 9, 2004, the Board made a written request to Mr. MacKinnon for all information available relative to the October 23rd sale of the property to Hingham Land. Specifically, the Board requested that Mr. MacKinnon provide it with "the particulars of the financial arrangements and other agreements."

* By letter dated February 25, 2004, Hingham Land, through counsel, responded to the Board's February 9th request for information by providing certain "non-confidential" documents. [19] A Those documents did not include any information regarding the terms of the October 23rd sale. Counsel did not provide any of the transaction documents (contending they were "confidential"), but indicated his willingness "to work with you to address questions or concerns that you have", and suggested that "we meet with you and town counsel to discuss this information and the pertinent documents." There was no indication, however, that the documents, or the details of the information they contained, would be forthcoming, or that they would be provided on a non-confidential (i.e. publicly disclosable) basis.

* The Board of Selectmen reviewed and discussed the matter at its March 1 meeting, noted that "we don't really know at this point what we are matching", and listened to a proposal from the Trust for Public Lands to assist the Town in investigating and exercising its option rights. At its April 5 meeting, the Board of Selectmen voted to retain special town counsel to pursue its rights, and to enter into an agreement with the TPL.

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[18] A copy of that Notice is attached as Exhibit 4.

[19] The documents provided were: (a) a copy of the deed conveying the property from C.P.&L., Inc. to Hingham Land; (b) a description of the property; (c) a copy of the mortgage assignment from South Coastal Bank to NH Funding Corporation; and (d) a copy of the "mortgage foreclosure sale" notices South Coastal had sent to the Town in May 2003.

* On April 7, 2004, through its newly retained special counsel, the Town wrote to Hingham Land, Rockland Golf Course, and C.P.&L., summarizing its view of events to date and concluding:

"Under the clear provisions of Section 9, the Town was therefore entitled to notice of each of the conveyances that occurred in October 2003, each of which notices should by law have included a description of all of the material terms of the respective transaction, and a 120-day opportunity to match such terms. The Board received no such notices. The Board thereby requests and demands that such notices be submitted to it forthwith, and in no event later than April 16, 2004. If the Board does not receive such notices, and the corresponding opportunity to acquire the property upon the same terms on which those transactions occurred, it intends to obtain a court order confirming its rights under Section 9 and compelling the submission of such notices."

* In response, Hingham Land took two actions. On May 13, 2004, after a discussion between its counsel and the Town's special counsel, it initiated this lawsuit. And, on May 14, it provided the Town with a letter marked "For Settlement Purposes Only," enclosing what were described as "all the foundation documents governing the acquisition" of the property in October 2003. It asked, however, that the Town limit disclosure of these documents "to those individuals or Town officials necessary to

evaluate the material in the context of our 'settlement meeting yesterday." Hingham Land also asked for a definitive response within 30 days as to whether the Town wished to pursue its claimed rights regarding the property, or whether it would "definitively and effectively elect not to do so".

* The Town's response, on June 18, 2004, was 'to file and serve its Answer, Counterclaim, and Third Party Complaint in this action.

* On July 23, 2004, Hingham Land filed a Special Permit Application for a "Senior Golf Community at Rockland Golf Course" with the Town's Planning Board. As described by Hingham Land in the Executive Summary of that application, the proposed Senior Golf Community "incorporates a public 9-hole golf course with clubhouse on approximately 75 acres of land located at 276 Plain Street in Rockland." The Executive Summary further stated that "[t]he primary objective of the proposed project is to master plan a 133 unit, 55 and over senior golf community on the 75 acre site while preserving nine holes of golf ...."

* Between August 25 and October 13, 2004, counsel for the Town wrote to Hingham Land's counsel on four different occasions regarding the confidentiality restrictions Hingham Land had placed on the package of closing documents provided on May 14, 2004. It was the Town's position that it could only exercise

its rights after it had the ability to review those documents, and the municipal actions and financial commitments they might entail, in a session open to the public.

* In the August 25 letter, the Town's counsel stated:

"We have discussed on several occasions my request that your clients waive the confidentiality restrictions that were attached to those documents when you originally provided them to [us]. You told me that your clients had agreed to waive those confidentiality restrictions, and that you would send me a letter to that effect, but I have not yet received that letter. Accordingly, this letter is to confirm my understanding that the Town is free to use these documents with no confidentiality restrictions, just as if they

had been produced in the ordinary course of discovery."

* Hingham Land's August 25 response did not provide the requested confirmation. Instead, it reserved all claims of privilege, reserved all rights to object to the use of any of the documents at trial or otherwise during the course of litigation, did not concede, for any purpose, the authenticity of the documents, and did not purport to offer any representation as to the content, source, completeness, or subject matter of the documents..

* Town counsel wrote back on September 2 seeking clarification. Hingham Land's August 25 letter refused to waive any claim of privilege. Did that mean the documents were considered "confidential".or not? Hingham Land's May 14 letter had stated that they constituted "all of the foundation documents governing the acquisition", yet the August 25 letter seemingly contradicted this. Was this a complete set of acquisition documents or not?

* Having received no response in the interim, Town counsel wrote reminder letters on September 23 and October 13, "

* Finally, on October 19, counsel for Hingham Land wrote to state that the documents could be treated "as if produced pursuant to a discovery request". No mention was made of "privilege" or "lack of completeness", which the Town interpreted as removing the condition of confidentiality.

* On November 15, 2004, the Board met in open session. Using the October 23, 2003 closing documents and the information they contained, it publicly discussed the terms of Hingham Land's acquisition of the property. At the conclusion of that discussion, it voted:

"to exercise the Town's right of first refusal to purchase the Property for a price of

- 14-

Two Million Six Hundred Sixty Thousand Dollars ($2,660,000) and upon the other terms and conditions for the sale of the Property set forth in the documents

provided to the Town on May 14, 2004, but expressly excluding any provisions thereof relating to the sale of personal property (including a liquor license)."

* The Town's exercise was made "subject to appropriation by Town Meeting and, if necessary, approval of a Proposition 2 debt exclusion therefore at a Town Election." A Notice of Exercise of Right of First Refusal was duly executed on November 15, 2004, timely and properly served on Hingham Land, and filed at the Registry on December 2, 2004.[20]

Analysis

The Town's case rests on a single theory-its entitlement to purchase the entire 74 acre parcel, less the clubhouse and its immediately surrounding land, on the same terms and conditions as they were acquired by Hingham Land, and its timely exercise of that entitlement. The points essential to that theory are as follows:

* Hingham Land's October 23, 2003 acquisition of the property was not a "mortgage foreclosure sale".

* At the time of its October 23, 2003 acquisition, Hingham Land intended to .convert the entirety of.the parcel from recreational to residential, industrial or .:commercial use.

* The Town was entitled to full disclosure of the terms and conditions of that acquisition.

* The Town's Board of Selectmen was entitled to reveal and discuss those terms and conditions in a public session before being required to exercise the option.

* The Town properly exercised its option rights within a reasonable time after receiving permission publicly to reveal and discuss those terms and conditions.

On the undisputed facts, as a matter of law, the Town has established each of these points.

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[20] A copy of the Notice of Exercise is attached as Exhibit

I. Hingham Land's Acquisition of the Property Was Not a "Mortgage Foreclosure Sale" Within the Meaning of G.L. c. 61B, s.9.

The provisions of G.L. c. 61B, s.9 are not applicable to "mortgage foreclosure sales". G.L. c. 61B, s.9. Instead, the holder of the mortgage is required, "at least ninety days before a foreclosure sale, [to] send written notice of the time and place of such sale to the parties." Id.

Hingham Land acquired the property on October 23, 2003 by quitclaim deed from C.P.&L., Inc., which it characterizes as "a deed in lieu of foreclosure".[21] It contends that such a deed is tantamount to a "mortgage foreclosure sale" as that term is used in G.L. c. 61B, s.9, and thus not a "sale" for which a s.9 option must be tendered.

The term "mortgage foreclosure sale" is not defined within G.L. c. 61B, and there are no reported court cases either under c. 61B or its analogous statute, c. 61A, addressing it... When interpreting a statute, "the intent of the Legislature [is] ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be' accomplished, to the end that the purpose of its framers may be effectuated." Moloney v.. Boston Five Cents Savings Bank, FSB, 422 Mass. 431, 433 (1996), quoting Telesetsky v. Wight; 395 Mass. 868, 872-873 (1985) (emphasis added). "[R]emedial.statutes such as G. L. c. 61A [and, by analogy, G. L. c. 61B] are to be liberally construed to effectuate their goals ... and ... [G. L. c..

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[21] The actual transfer of the property took place in two steps, both occurring on October 23. Rockland Golf 'Course, LLC (the then record owner of the property) conveyed its interest to C.P.&L. by 'quitclaim deed, and-C.P.&L. then conveyed the property to Hingham Land. Hingham Land contends that these were deeds "in lieu of foreclosure" because the process began with a foreclosure. As previously noted, Rockland Golf was in default of its mortgage to South Coastal Bank, and South Coastal scheduled a public mortgage foreclosure sale for August .6, 2003, giving the Town notice of that sale on May 1 and 2, 2003 (more than 90 days prior to the scheduled sale). That public sale never took place. Instead, it was postponed to three later dates and, in the meantime, South Coastal assigned its mortgage to NH Funding (an affiliate of Hingham Land), which privately negotiated the terms that led to the "deed in lieu".

s.14 [and, by analogy, G. L. c. 61B, s.9], ordinarily, must be interpreted in a manner that will not frustrate or impair a town's right of first refusal." Town of Franklin v. Wyllie, 443 Mass. . 187, 196 (2005).

Hingham Land relies on Moloney in support of its argument. In Moloney, the Supreme Judicial Court held that a deed in lieu of foreclosure was a "foreclosure" within the meaning G.L.. c. 183A, s.22. Moloney, 422 Mass. at 436. Despite noting that deeds in lieu, "for a great many. purposes", are the functional equivalent of a formal foreclosure, Moloney, 422 Mass. at 433, Moloney also noted that "[t]here are of course several real differences between formal foreclosure and the deed in lieu." Moloney, 422 Mass. at 435. G.L. c. 61B, s.9 is a statute where those differences are important. Thus,

Moloney does not support Hingham's argument with respect to G.L. c. 61B, s.9. In fact, it does the opposite.

In Moloney, the Boston Five Cents Savings Bank made a construction loan to a developer. Id. at 431-32. The developer used the funds to construct an eighty-six unit residential condominium complex and sold forty-four of those units. Id. at 432. The developer then became financially distressed and reached an agreement with the bank by which the bank acquired the complex by a deed in lieu of foreclosure. Id. The bank then conveyed the complex to a wholly owned subsidiary which marketed and sold the units. Id. The trustees of the condominium association brought suit against the bank seeking "declaratory, monetary, and injunctive relief to rectify perceived faults in [the] common areas." Id. at 431. The liability of the bank rested upon the application of G.L. c. 183A, s.22, which provides:

> [i]n"the event of a foreclosure upon a condominium development, the lender taking over the project shall succeed to any obligations the developer has with the unit owners and to the tenants, except that the developers shall remain liable for any misrepresentation already made and for warranties on work done prior to the transfer.

G.L. c. 183A, s.22.

The Supreme Judicial Court first determined, as a threshold issue, whether a deed in lieu of foreclosure was the functional equivalent of a foreclosure as that term is used in s.22. The court recognized that if a deed in lieu of foreclosure was not the functional equivalent of a foreclosure for such a purpose, "a great many lenders, and perhaps every lender, exercising their - security interests would take [by a deed in lieu of foreclosure]," rather than through foreclosure, id. at 434, to avoid s.22 liability. Such a result, the court held, would render the statute ineffective and be inconsistent with the intent of the Legislature in enacting s.22, namely, "to protect retail purchasers -- unit owners -- by preserving liability [in the case of foreclosure]." Id. at 436.

Applying that reasoning to G.L. c. 61B, s.9 compels the conclusion that "deeds in lieu" are not the functional equivalent of "mortgage foreclosure sales" for purposes of that statute. The purpose of G.L. c. 61B is to conserve recreational land. G.L. c. 61B effectuates this purpose by granting a town a right of first refusal where an owner of land taxed under G.L. c. 61B intends to convert or sell the land for non-recreational uses. G.L. c. 61B, s.9. In the case of a mortgage foreclosure sale, the town does not have a right of first refusal. Id. Instead, the mortgage holder must give the town notice at least ninety (90) days prior to the date of the mortgage foreclosure sale. Id. The obvious intent is to afford the town the opportunity to participate in the mortgage foreclosure sale and potentially preserve the recreational character of the land.

If a deed in lieu of foreclosure (allowing the lender to acquire the property in a wholly private transaction) was construed to be the functional equivalent of a public mortgage foreclosure sale (open to all bidders) within the meaning of G.L. c. 61B, s.9, the foreclosure

redemption would render the statute ineffective for the purpose of conserving recreational land. As the court observed in Moloney "parties to whom liability might be owed...cannot control whether a deed in lieu is used." Moloney, 422 Mass. at 434. To paraphrase Moloney, "If taking a deed in lieu avoids [triggering the right of first refusal to a town], then a great many lenders, and perhaps every lender, exercising their security interests would take that route." Id. Such a result would not be consistent with the purpose of G.L. c. 61B. The purpose of G.L. c. 61B.(to preserve recreational land by giving a town fair opportunity to purchase it) would only be fulfilled if a deed in lieu of foreclosure is not encompassed within the meaning of "mortgage foreclosure sale" in G.L. c. 61B, s.9.[22] The October 23, 2003 transaction thus cannot-be characterized as a mortgage foreclosure sale.

The facts of this case fully support this interpretation. Although the Town did not attend the announced August 6, 2003 mortgage foreclosure sale, its attendance would have proven futile. Hingham Land hired Daniel P. McLaughlin & Company, LLC to conduct the mortgage foreclosure sale scheduled for August 6, 2003 at 10:00 a.m. Prior to August 6, 2003, however, Hingham Land instructed Mr. McLaughlin to postpone the mortgage sale. Mr. McLaughlin arrived at the property at 10:00 a.m. on August 6 and announced that the auction was postponed. until September 5, 2003 at 10:00 a.m. He would have done so even if a room full of bidders had . been in attendance. Thus, even assuming the Town had attended the August 6, 2003 mortgage.

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[22] This interpretation is consistent with the interpretation. of G.L. c. 61A, s.17 in Town of Sudbury v. Scott, 439. Mass. 288, 296 n.11 (2003). In Sudbury, the Supreme Judicial Court rejected an interpretation of s.17 which would preclude a town from exercising its right of first refusal where a landowner converted a substantial portion of a parcel taxed under G.L. c. 61A. Finding that "a landowner could reap the benefits of reduced taxes, and then avoid the municipality's right of first refusal ..., by converting all but a five-acre qualifying portion of his property to a . nonagricultural use," Sudbury, 439 Mass. at 296 n. 11, the court interpreted s.17, "consistent with the purpose of the statute and in harmony with the statute as a whole," id., as allowing a "municipality to exercise its first refusal rights as to that portion of the land that is to be separated from the remainder, when sold or converted." Id.

foreclosure sale, it would not have been able to bid on the property. If this Court were to interpret "mortgage foreclosure sale" as encompassing conveyances executed through a deed in lieu of foreclosure, a town, like the Town in this matter, might never have an opportunity to preserve the recreational character of the land in question; thereby, defeating the purpose of the statute. Clearly such an interpretation is wrong. Hingham Land did not acquire the property. through a "mortgage foreclosure sale" as that term is used in G.L. c. 61B, s.9. Any such. sale. would have to be at public auction.[23]

II. There, Is No Genuine Dispute of Material Fact Regarding Hingham Land's Intent to Purchase the Property on October 23, 2003 for Residential Use.

Town of Sudbury v. Scott, 439 Mass. 288, 302 n. 19 (2003) cautions against "fact finding" at the summary judgment stage on the issue of the purchaser's intent to convert. But this ease is not Sudbury. As Sudbury itself recognized, summary judgment may properly be entered where there is no substantial issue of fact. Id. Here, Hingham Land's intent. at the time of its acquisition, to convert the property to residential use, is clear from the acquisition documents themselves. The only "evidence" to the contrary is the subsequent affidavit of Douglas. MacKinnon, which seeks to contradict what is unmistakable in those documents. This it cannot do. Ng Eros. Constr. Inc. v. Cranney, 436 Mass. 638, 647-48 (2002).

The Comprehensive Closing Agreement, the Real Estate Sales Agreement, and the Golf : Facilities Lease could not be plainer. As of October 23, 2003, the date of Hingham Land's acquisition, each of those documents stated, "[Hingham Land] intends to develop this facility and

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[23] There is potentially a further reason why the October 23, 2003 acquisition falls outside "mortgage foreclosure sales" as contemplated by the statute. The complexity of Hingham Land's acquisition, with its additional loans, a facility leaseback, and additional payments based on future residential sales, seems far beyond the simple auction transaction the statute appears to contemplate. While debt resolution was certainly part of the October 23

construct or arrange for the construction of residential housing units on the property"; [24] "...[Hingham Land] intends to redevelop the Property for residential use and incorporate a 9 hole, par 3 golf course and a restaurant/function facility";[25] and "...Landlord [Hingham Land] intends to redevelop the Property for residential use and incorporate a 9 hole, par 3 golf course and a restaurant/function facility on the Property (the `Redevelopment')."[26] Indeed, the acquisition price included payment to C.P.&L. of a percentage of the gross proceeds of these future residential sales.[27] The identity of the acquiring entity is further evidence of this intent. The entity which held the mortgage debt was NH Funding. Yet the property was conveyed from NH Funding to its affiliate, Hingham Land LLC, a development company, whose address is "c/o Atlantic Development, 62. Derby Street, Hingham MA".

Mr. MacKinnon's affidavit attempts to avoid summary. judgment by stating:

> It was not the intention of Hingham Land to convert the entire Property after it obtained title. In fact, Hingham Land's business and NH Funding's business includes both holding mortgage interests in property and conducting

development activities. At the time that NH. Funding' became the holder of the note, it had not determined that it would undertake any activities with respect to the subject Property other than as the holder of the note.

Affidavit of Donald J. MacKinnon, dated March 22, 2005,1 9. There are three reasons why that affidavit is insufficient to create a genuine issue of material fact. First, it flatly contradicts the contemporaneous documents cited above. Just as a party cannot defeat summary judgment by submitting affidavits to contradict its earlier deposition testimony, a party cannot . rewrite history by submitting later affidavits or testimony to contradict its contemporaneous

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transaction, the overall acquisition seems far more like a negotiated sale, albeit one involving a seller under considerable financial pressure to sell.

[24] Comprehensive Closing Agreement, €13.

[25] Real Estate Sales Agreement, p. 1.

documents. See Ng Bros. Constr. Inc. v. Cranney, 36 Mass. 638, 647-48 (2002). Second, its reference to NH Funding's intent at the time NH Funding "became the holder of the note" is irrelevant. NH Funding acquired the mortgage note months before October 23, 2003-the date the property was acquired. The relevant date at which "intent" is assessed is October 23, the date of sale. Town of Sudbury, 439 Mass. at 299. Lastly, the affidavit attempts to "bifurcate" Hingham Land's intent, seeking to suggest that its intent to convert was limited to something less than the entirety of the parcel. As discussed below, the conversion Hingham Land intended-"redeveloping the Property for residential use and incorporating] a 9 hole, par 3 golf course and a restaurant/function facility"[28] -was a residential conversion of the entire parcel.

III. For Purposes of G.L. c. 61B, s.9, Hingham Land's October 23, 2003 Acquisition Triggered The Town's Option to Purchase the Property In Its Entirety.

Hingham Land contends that its "conversion" affects, and was only ever intended to affect, a portion of the 74 acre parcel, thus limiting the Town's option to that portion. This is incorrect.

As noted above, Hingham Land acquired the parcel on October 23, 2003 with the clear intent to develop an integrated Senior Golf Community-seniors-only residences, abutting and surrounding an "incorporate[d] 9 hole, par 3 golf course and a restaurant/function facility."[29] The property was registered as a single parcel, with a single Certificate of Title. It was acquired as a single parcel. The condominium documents submitted to the Land Court on December 11, 2003 continued its treatment as a single parcel, subject to a single Master Deed. Indeed, as a legal

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[26] Golf Facilities Lease, p.1.

[27] Comprehensive Closing Agreement, €13; Real Estate Sales Agreement, p.1.

[28] Real Estate Sales Agreement, p. 1.

matter, Hingham Land's December 11, 2003 tender to the Town of an option to purchase a portion of the property could not have been accomplished unless and until the Land Court gave approval to subdivide the parcel, or unless and until approval was given for withdrawal from the registration system (and the property thereafter was subdivided). Neither of these events had occurred on December 11. Indeed, it is unclear if the subdivision proposed by Hingham Land-creating a landlocked central section on the parcel, and a southern section with little or no road. frontage--would ever have been possible:

Hingham.Land's intent is reflected in its development plan, a copy of which is attached as Exhibit 3. That plan shows an integrated residential development, mirroring the description contained in the October 23 documents, thus' triggering the Town's option to purchase the entire parcel. The "residential" use permeates the entire parcel, and cannot artificially be separated as Hingham Land contends. See Town of Sudbury, 439 Mass. at 296, n.11 (suggesting that a portioning of property that defeats the statutory purpose might be invalid); see also G.L. c. 61B, s.12 (suggesting that permissible portionings must result in a separation between the portions, rather than the interrelated whole as proposed in this case).[30]

IV. The Town Exercised Its Right of First Refusal Option Within a Reasonable Time After Receiving "Constructive Notice", and is Thus Entitled to Specific Performance.

The December 11, 2003 notice was inadequate and defective for two reasons. It tendered the incorrect option (the correct option was one to purchase the entire c. 61B parcel on the same terms and conditions as Hingham Land's acquisition). And it failed to disclose all of the details

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[29] Real Estate Sales Agreement, p.1.

[30] The conclusion that the development is an integrated whole is inescapable, as even a quick glance at the development plan (Exhibit 3) reveals. The residences abut and surround the golf course. The course cannot be

of the terms and conditions of the proposed transaction. Meachen v. Hayden, 6 LCR at 237. It is fundamental to the statute that the Town know the full and complete terms it must meet when exercising its first refusal option; otherwise, that option cannot intelligently be evaluated and exercised. Id.; Roy v. Greene, Inc., 404 Mass. 67, 71

(1989). The option exercise period does not begin to run until that information is obtained. Id.

The Town may not simply "wait" for full notice without acting, however.

"Circumstances may place [a town] on constructive notice that [its] right of first refusal has been implicated, in which case the [town] must investigate and exercise [its] option within a reasonable period of time." Town of Sudbury v. Scott, 439' Mass. at 297. Here, the Town was aware that its option rights were affected by the October 23 transaction either at or soon after December 11, 2003 (when the defective notice was received, putting the Town on formal notice that the site was being developed),[31] but the information it needed to evaluate and exercise those rights-a full disclosure of the October 23 acquisition terns-did not occur until May 14, 2004 . when the deal documents were first provided. The Town had 'requested those documents from the start, and cannot be accused of "failing to investigate" within a reasonable time.

But "constructive notice" has two parts. It is not simply obtaining that information. Implicit in the statute is a requirement that the town be able to use that information in the way it ordinarily evaluates transactions of this type. Here, because of the size and type of the transaction at issue-the acquisition of 74 acres of land, for millions of dollars--the Board of Selectmen needed the ability to discuss all aspects of the transaction in public. The statute itself

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played without crossing and re-crossing the residences. There are no roads to the central of southern sections.

[31] "Under the statute, the town's option to purchase is triggered by notice, not by an actual change of use, and notice must precede the sale or change of use." Town of Sudbury v. Scott, 439 Mass. at 298.

contemplates a "public" notice containing all relevant information (its requirement that a copy of the notice document be filed at the registry of deeds before "notice" is deemed effective), and there is nothing in the statute that permits conditions to be placed on a notice, e.g. a condition that the information provided be kept confidential from public view. Indeed, it would be contrary to the public policy of "open government" to allow any such condition to be placed on. the use of information contrary to a municipality's wishes and ordinary practice. Nor is it an unfair.burden on a landowner to require its purchase or sale information to be made public. The property has received a significant tax break, and this is a small price to pay.

The "confidentiality restrictions" were not removed, for sure, until October 19, 2004. Again; the Town diligently pursued the removal of those restrictions through its many letters from counsel. As the party that raised the issue and imposed the confidentiality condition, the burden was on Hingham Land to make clear that it was removed, and this was not done until its. October ' 19 letter.

Thereafter, the Town moved quickly, and exercised its option within "a reasonable time"...: Town of Sudbury, 439 Mass. at 303. Meachen v. Hayden, 6 LCR at 237, ruled that the period of - time within which the option must be exercised is 120 days from the time complete

information, is provided. Costello v. Town of Medway, 63 Mass. App. Ct. 1112 (table), 2005 WL 955064, ***3 (2005) (unpublished Rule 1:28 Memorandum and Order) recognized that, on summary judgment, "a judge might determine without error that no conveyance could have occurred within . a reasonable time." I find, as a matter of law, that the Town's November 15, 2004 exercise, and its December 2, 2004 filing of that exercise at the registry of deeds, occurred within "a . reasonable time" after October 19, 2004 when "constructive notice" (the completion of both

aspects) occurred.

Conclusion, and the Issues Remaining for Trial

For the foregoing reasons, Hingham Land's motion for summary judgment is denied and partial summary judgment is entered for the Town. The Town has an option to purchase all portions of the 74 acre parcel that were valued, assessed and taxed under G.L. c. 61B, on the same terms and conditions as Hingham Land acquired those portions on October 23, 2003. There are issues of material fact on which of the terms and conditions of the overall transaction are applicable to the c.61B property (as opposed to those which apply to the non.-c.61B portion), and how the Town must meet those terms (for example, how the payment of 3% of the "gross sale proceeds" from residential sales should be valued, when the Town has no intent to develop those residences). These are matters for trial, and a conference in the case shall be scheduled to discuss how the case should proceed to address those issues.

SO ORDERED

By the court (Long, J.)
Judge: **/s/ Long, J.**
Justice

/s/ Deborah J. Patterson, Recorder

[FOR EXHIBIT 2, SEE TEXT]

[FOR EXHIBIT 3, SEE TEXT]

HINGHAM LAND, LLC
C/O ATLANTIC DEVELOPMENT
62 DERBY STREET, SUITE 8
HINGHAM, MA 02043

BY CERTIFIED MAIL RETURN RECEIPT REQUESTED ("RRR") # 7002 3150 0005 2171 3238 December 11, 2003

Board of Selectman
Town of Rockland
Rockland Town Offices 242 Union Street
Rockland, MA 02370

Re: Rockland Golf Course Rockland Board of Selectman,

In accordance with the provisions of Massachusetts General Law, Chapter 61B, s.9, this letter constitutes a Notice of Intent to Convert to Residential Use a portion of the land currently owned by HINGHAM LAND, LLC, located at 276 Plain Street, Rockland, MA, and used as a golf course. The deed into HINGHAM LAND, LLC from C.P. & L., INC. is recorded at the Plymouth District of the Land Court as Document No. 552123.

The land to be converted is a portion of Rockland Assessor's Map 50, Lot 005 and is more particularly described on Exhibit A attached hereto and made part hereof, (the "Converted Land") The Converted Land contains approximately (9) nine existing golf holes.

The Converted Land has been valued and assessed as recreational land pursuant to a statement from the Board of Assessors dated October 5, 1992 and filed with the Plymouth District of the Land Court on October 21, 1992 as Document Number 341101.

In accordance with the provisions of Massachusetts General Law, Chapter 61B, s.9 the Town of Rockland has an option to purchase said Converted Land at full and fair market value to be determined by impartial appraisal for a period of 120 days commencing tomorrow (December 12, 2003) and expiring April 9, 2004.

If the Board of Selectman vote L~41 to exercise the option, then roll-back taxes on the Converted Land for the current year and the (9) nine preceding tax years plus interest will be due (it is estimated the roll-back taxes plus interest are approximately $150,000). HINGHAM LAND, LLC would be willing to pay such roll-back taxes and interest within seven (7) business days of the vote and delivery and filing of the required paperwork at the Plymouth District of the Land Court.

Sincerely;
/s/ Donald J. MacKinnon

cc: Board of Assessors, BY CERTIFIED MAIL RRR # 7002 3150 0005 2171 3252 Planning Board, BY CERTIFIED MAIL RRR # 7002 3150 0005 2171 3269
Conservation Commission, BY CERTIFIED MAIL RRR # 7002 3150 0005 2171 3245 Laura Powers, Esq., By Fax

[FOR EXHIBIT 4, SEE TEXT]

NOTICE OF EXERCISE OF RIGHT OF FIRST REFUSAL

This Notice of Exercise of Right of First Refusal is made as of November 15, 2004 by the Town of Rockland, Massachusetts, acting by and through its Board of Selectmen.

Background

A. By deed dated October. 23, 2003 and filed with the Plymouth District of the Land Court on October 27, 2004 as Document No. 552122, Rockland Golf Course, LLC conveyed that certain parcel of land known and numbered as 276 Plain Street, Rockland, Massachusetts, being Lot A on sheet 1 of Land 'Court Plan '29008A with certain exceptions and exclusions, as more particularly described in said deed (the "Property") to C.P. & L., L"c.

B. By deed dated October 23, 2003 and filed with the Plymouth District of the Land Court on October 27, 2004 as Document No. 552123, C.P. & L., Inc. conveyed the Property to Hingham Land, LLC. Hingham Land, LLC is the record owner of the Property as of this date.

C. As of the date of such conveyances, the Property was assessed, valued and taxed under the provisions of General Laws Chapter 61B.

D. The provisions of General Laws Chapter 61B, Section 9 entitle the Town of Rockland (the "Town") to a notice of intent to sell the Property if the Property is to be sold for residential use.

E. Although by virtue of these deeds the Property was sold for residential use within the meaning of General Laws Chapter 61B, Section 9, the Town was not provided with a notice of intent to sell as required thereby.

F. Even after written request, the Town has not been. provided with a notice of intent to sell as required by General Laws Chapter 61, Section 9.

G. After repeated written requests, the Town was provided, on May 14, 2004, with documentation setting forth the terms of sale of the Property, but only upon a condition of confidentiality.

H. After repeated written requests, the condition of confidentiality was removed on October 19, 2004, finally allowing the terms of the sale to be discussed by the Board of Selectmen at an open meeting. .

I, The terms of the sale were. discussed by the Selectmen at an open meeting on November 15, 2004

"EXHIBIT 5"

Notice of Exercise

NOW, THEREFORE, notice is given that the Board of Selectmen of the Town of Rockland, acting pursuant to General Laws Chapter 61B, Section 9, do hereby exercise the Town's right of first refusal to purchase the

Property for a price of Two Million Six Hundred Sixty Thousand Dollars ($2,660,000) and upon the other terms .and conditions for the sale of the Property set forth in the documents provided to the Town on May 14, 2004, but expressly excluding any provisions thereof relating to the sale of personal property (including a liquor license).

The foregoing exercise is subject to appropriation by Town Meeting and, if necessary, ' approval of a Proposition 2 1/2 debt exclusion therefore at a Town Election.

Pursuant to General Laws Chapter 61B, Section 9, a copy of this Notice has been mailed by certified mail to Hingham Land, LLC, the current record owner of the Property.

THE TOWN OF ROCKLAND, acting by and through its Board of Selectmen

COMMONWEALTH OF MASSACHUSETTS

Plymouth County, ss:

On this /6day of November, 2004, before me, the undersigned notary public, personally appeared Board of Selectmen, proved to me through satisfactory evidence of identification, which was on file, to be the person whose name is signed on the preceding or attached document, and acknowledged to me that (he) (she) signed it voluntarily for its stated purpose, as member of the Board of Selectmen of the Town of Rockland.

/s/ (official signature and seal)
Name: Mary B. Stewart
My commission expires: July 2, 2010

End Of Decision

COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD

JOHN J. GIURLEO	**v.**	**BOARD OF ASSESSORS OF THE TOWN OF RAYNHAM**
Docket No. F279379		Promulgated: June 27, 2006

This is an appeal under the formal procedure pursuant to G.L. c. 58A, § 7 and G.L. c. 59, §§ 64 and 65, from the refusal of the appellee to abate a tax on real estate in the Town of Raynham assessed under G.L. c. 59, §§ 11 and 38, for fiscal year 2005.

Chairman Foley heard the appellee's Motion to Dismiss for failure to comply with an Order of the Appellate Tax Board ("Board"). She was joined in the decision for the appellee by Commissioners Scharaffa, Gorton, Egan, and Rose.

These findings of fact and report are made at the requests of the appellant and the appellee pursuant to G.L. c. 58A, § 13 and 831 CMR 1.32.

John J. Giurleo, pro se for the appellant.

Gordon D. Luciano, Assessor, for the appellee.

FINDINGS OF FACT AND REPORT

On the basis of the uncontroverted facts contained in the pleadings, the Board made the following findings of fact. The appellant, John J. Giurleo ("Mr. Giurleo") was the assessed owner of a parcel of real estate, improved with a single-family dwelling, located at 200 Wilbur Street in the Town of Raynham ("subject property"). For fiscal year 2005, the Board of Assessors of the Town of Raynham ("assessors") valued the subject property at $242,200 and assessed a real estate tax, at the rate of $10.25 per thousand, in the amount of $2,482.55. Mr. Giurleo timely paid the tax. On January 31, 2005, Mr. Giurleo timely filed an application for abatement with the assessors.

As part of the assessors' evaluation of Mr. Giurleo's application for abatement, one of the assessors, Gordon Luciano ("Mr. Luciano"), attempted to inspect the dwelling on the subject property in April, 2005. Mr. Giurleo allowed Mr. Luciano to perform only an exterior inspection of the dwelling at that time. By unanimous vote on April

12, 2005, the assessors denied Mr. Giurleo's application for abatement.

On April 26, 2005, Mr. Giurleo requested that the assessors reconsider their denial. The assessors attempted to contact Mr. Giurleo by telephone to request an interior inspection of the dwelling on the subject property, but Mr. Giurleo did not respond to the telephone calls. On April 28, 2005, Mr. Giurleo went to the assessors' office to schedule a time for the assessors to address his request for consideration. He denied the assessors' request for an interior inspection at that time.

The assessors addressed Mr. Giurleo's request for reconsideration at a meeting held on May 3, 2005. Mr. Giurleo claimed that he offered to produce a sworn statement, photographs, and a viewing of the dwelling through open doors as substitutes for the interior entry inspection. The assessors denied Mr. Giurleo's request for reconsideration. On June 10, 2005, Mr. Giurleo seasonably filed his appeal with the Board. On the basis of all these facts, the Board found it had jurisdiction over this appeal.

On July 27, 2005, the assessors filed a Motion to Dismiss the appeal based on Mr. Giurleo's refusal to allow an interior inspection of the dwelling.[1] Mr. Giurleo opposed the motion, both in writing and orally at the motion hearing, by maintaining that the assessors had no right to inspect the interior of the subject property and that the exterior inspection he had already permitted, together with a view of the interior through "open doors," photographs, and sworn statements, were sufficient. On August 9, 2005, the Board denied the Motion to Dismiss but rejected Mr. Giurleo's position by ordering an inspection of the subject property within thirty days. Mr. Giurleo refused to comply with the Board's Order and on August 18, 2005 filed a Motion for Reconsideration of the Board's Order, which restated the arguments he had made in opposition to the July 27, 2005 Motion to Dismiss. On September 8, 2005, the Board denied the Motion for Reconsideration and upheld the August 9, 2005 Order requiring an interior inspection. On September 14, 2005,

[1] The assessors' first Motion to Dismiss was filed on July 15, 2005. The Board denied the motion on July 26, 2005 because the assessors failed to appear for the motion hearing.

the assessors filed a Motion to Dismiss for Failure to Comply with the Board's Order Dated August 9, 2005.[2]

For the reasons stated in the following Opinion, the Board allowed the appellee's Motion to Dismiss for Failure to Comply with the Board's Order Dated August 9, 2005 and entered a decision for the appellee in this appeal.

OPINION

Assessors have a statutory right to inspect property that is the subject of an abatement application (G.L. c. 59, § 61A) or an appeal to the Board (G.L. c. 58A, § 8A). General Laws c. 59, § 61A provides in pertinent part as follows:

> A person applying for an abatement of a tax on real estate or personal property shall, upon request, exhibit to the assessors the property to which the application for abatement relates and if required by said assessors, shall exhibit and identify such property, and further, shall, upon request, furnish under oath such written information as may be reasonably required by the board of assessors to determine the actual fair cash valuation of the property to which the application for abatement relates . . . .

Pursuant to § 61A, the assessors attempted to inspect the subject property during the pendency of Mr. Giurleo's application for abatement. Mr. Giurleo refused to allow an interior inspection of his dwelling, contending that the definition of "exhibit" in § 61A is "not restricted" to interior inspections requiring entry into the property. Therefore, Mr. Giurleo claimed that he satisfied the provisions of this statute by offering to produce a sworn statement, photographs, and a viewing of the dwelling through open doors as substitutes for the interior entry inspection, because these would have been means to "exhibit" his property. The assessors subsequently denied his application for abatement, and Mr. Giurleo filed an appeal with the Board.

The assessors moved to dismiss the appeal based on Mr. Giurleo's failure to allow an interior inspection. After hearing Mr. Giurleo's position that no interior

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[2] On that same date, Mr. Giurleo filed a Motion that the Court Order the Appellee to Allow the Appellant an Interior Inspection of [the assessors'] Office Procedures and Records, which the Board denied.

inspection was required, the Board, pursuant to G.L. c. 58A, § 8A, rejected his argument and ordered that Mr. Giurleo permit an inspection of his residence within thirty days. Section 8A, which governs discovery procedure before the Board, provides in pertinent part that:

> Before the hearing of a petition for the abatement of a tax upon real estate, machinery or other tangible property, the appellant shall permit the appellee personally or by attorneys, experts or other agents, to enter upon such real estate or upon any premises where such personal property is situated and examine and inspect such real estate or personal property, including any property which the appellant claims is exempt from taxation. . . . ***In the event the appellant refuses to permit the appellee to inspect said property, the board may dismiss the appeal***.

(emphasis added).

Rather than comply with the Board's Order, Mr. Giurleo chose once again to refuse the assessors access to the interior of his dwelling in order for them to evaluate his abatement claim. Instead, he filed a Motion to Reconsider the Board's Order, which added nothing to the argument the Board previously rejected. Accordingly, the Board denied the Motion to Reconsider. The Board had the discretion to dismiss Mr. Giurleo's appeal due to his blatant disregard of the Board's Order. G.L. c. 58A, § 8A. *See also* ***Board of Assessors of Provincetown v. Vara Sorrentino Realty Trust***, 369 Mass. 692, 694 (1976) ("In the matter of 'discovery' much must be left to the judgment and discretion of the Appellate Tax Board."); ***U.A. Columbia Cablevision of Massachusetts, Inc. v. Board of Assessors of the City of Taunton***, ATB Findings of Fact and Reports 1987-468, 474-75, ***aff'd*** 26 Mass. App. Ct. 1104 (1998) (dismissal of an appeal is "well within the Board's discretion" when a party does not comply with a statutory provision, and the explicit direction of the presiding commissioner, requiring service of a copy of an appeal on the opposing party). The Board determined, after hearing the parties, that the assessors were entitled to an inspection of the property in order to prepare for the hearing of this appeal. Such a determination was within the discretion of the Board, as was its decision to dismiss the appeal for failure to comply with its Order.

Conclusion

It was clear that Mr. Giurleo had no intention of allowing an interior inspection of his property, despite the Board's Order and the explicit provisions of G.L. c. 58A § 8A. Mr. Giurleo was afforded more than ample opportunity to avoid dismissal by complying with the assessors' numerous requests, and the Board's Order to allow an inspection of his property. Dismissal of this appeal was consistent with the provisions of § 8A and within the discretion of the Board. Accordingly, for all of the foregoing reasons the decision was for the appellee.

THE APPELLATE TAX BOARD

By: _____

Anne T. Foley, Chairman

_____

Frank J. Scharaffa, Commissioner

_____

Donald E. Gorton, III, Commissioner

_____

Nancy T. Egan, Commissioner

_____

James D. Rose, Commissioner

A true copy,

Attest:_____

Assistant Clerk of the Board

COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD

STAGG CHEVROLET, INC.	**v.**	**BOARD OF ASSESSORS OF THE TOWN OF HARWICH**[1]
Docket No. F266854		Promulgated: February 1, 2006

This is an appeal under the formal procedure pursuant to G.L. c. 40, §§ 42A through 42F, as amended, and G.L. c. 59, §§ 64 and 65, as amended, from the refusal of the appellee to abate water-usage charges imposed on the appellant for the period reflected in the June 26, 2002 water bill.

Commissioner Gorton heard this appeal. Commissioners Egan and Rose joined him in the decision for the appellant.

These findings of fact and report are made pursuant to requests by both parties under G.L. c. 58A, § 13, as amended, and 831 CMR 1.32.

Pamela B. Marsh, Esq. for the appellant.
Brian W. Riley, Esq. for the appellee.

FINDINGS OF FACT AND REPORT

This appeal arose from the refusal of the Harwich Water Board to abate a water bill dated June 26, 2002 in

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[1] The appellant mistakenly named the "Board of Assessors of the Town of Harwich" as the appellee in the caption of its petition initiating this appeal, instead of the intended appellee, the Board of Water Commissioners of the Town of Harwich ("Harwich Water Board" or "appellee"). The appellant used one of the recommended fill-in-the-blank form petitions provided by the Appellate Tax Board ("Board") to initiate this appeal. The form petition contained the following printed words and blank space for designating the appellee: "Board of Assessors of the City (Town) of _____." The Board found that the appellant intended to bring this appeal against the Harwich Water Board when inserting "Harwich" in the form petition's blank space. The Harwich Water Board timely appeared as the appellee in this appeal and never raised this misidentification issue in defending its water charge. The Board further found that the Harwich Water Board was not in any way prejudiced by the appellant's initial misidentification. Accordingly, the Board treated this appeal as if it had been brought by the appellant against the Harwich Water Board. *See* 831 CMR 1.37 ("[T]he Board reserves the right to make hearings and proceedings as informal as possible, to the end that substance and not form shall govern.").

the amount of $9,083.35 for the preceding four-month period of water usage ("Period at Issue") at the property located at 182 Route 137 in Harwich ("Subject Property" or "Property"), which, at all relevant times, was owned by Stagg Chevrolet, Inc. ("Stagg Chevrolet" or "appellant").[2] The appellant timely filed an application for abatement of water-usage charges with the appellee on July 15, 2002. The appellee first acted on the application on August 20, 2002 and sent a written notification of its refusal to grant an abatement to the appellant the next day. The written notification did not in any way indicate, as required by G.L. c. 59, § 63, that an appeal from the Harwich Water Board's decision could be taken as provided in G.L. c. 59, §§ 64 to 65B, inclusive.[3]

On September 24, 2002, at the appellant's behest, the Harwich Water Board again reviewed the appellant's application. After hearing a presentation from a representative of the appellant, the appellee once again refused to grant an abatement, and once again sent a written notice lacking the requisite information about appeal rights to the appellant. There is no dispute that, at all relevant times, the subject water bill remained unpaid. On December 19, 2002, the appellant appealed the Harwich Water Board's failure to grant the appellant's request for abatement of its water-usage charge by filing an informal petition and filing fee with the Board. The appellant neglected, however, to file a written waiver of its right of appeal. By leave of the Board and not wishing to waive its right of appeal, the appellant subsequently filed a formal petition.[4]

Prior to the hearing of this appeal, the appellee brought a motion to dismiss for lack of jurisdiction ("Motion"). The appellee sought to dismiss this appeal on the ground that the appellant had filed its petition with

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[2] The evidence relating to the period of time covered by the subject water bill is inconsistent. According to different sources in evidence, the bill covered water usage at the Subject Property for the 181-day period ending on May 15, 2002, or an approximate four-month period ending on or about May 15, 2002. The Board adopted this latter four-month period because it is consistent with the testimony of the Town of Harwich's Water Superintendent and the starting date of the succeeding billing cycle.

[3] As discussed more fully in the Opinion below, G.L. c. 40, §§ 42A through 42F, which control the appeal of unpaid water bills for municipalities that have accepted them, like Harwich, direct owners of real estate aggrieved by water-usage charges to appeal them as prescribed by chapter 59.

[4] A written waiver of the right of appeal was not filed because it is only necessary in informal appeals.

the Board late, *i.e.*, beyond the three-month statutory period for filing an appeal following the appellee's initial refusal, on August 20, 2002, to grant the appellant's application for abatement. After hearing the parties' arguments, reviewing their memoranda, finding relevant facts, and resolving applicable legal issues, the Board denied the appellee's Motion. Denied also was the subsequent motion for reconsideration. The Board found that the purported denial upon which the appellee predicated its Motion to trigger the three-month statutory period for appeal, was defective and a nullity (as was the appellee's second purported denial on September 24, 2002). The Board, therefore, found that the appellant timely filed its petition with the Board on December 19, 2002, within three months of the deemed denial of its application for abatement on October 15, 2002.

In denying the appellee's Motion, the Board found that Harwich Water Board's two written notifications of action on the appellant's application for abatement were defective and nullities because both of these letters failed to include the written notice-of-appeal-rights requirement mandated by G.L. c. 59, § 63. The allegation by the appellee that the appellant may, at some time, have been orally notified of its appeal rights is, even if accepted as true, insufficient for purposes of § 63. *Written notification* of these appeal rights must be sent within ten days after action on the related application for abatement. The Board found that, under these circumstances, a proper written notification under § 63 is a necessary and statutorily mandated condition subsequent to a valid denial of an application for abatement. Therefore, the Board found that the appellee's purported denials, on August 20, 2002 and September 24, 2002, of the appellant's application for abatement, were inoperative because they failed to comply with the provisions of § 63.

Accordingly, absent valid denials, the Board found that the appellant's application for abatement was deemed denied on October 15, 2002, three months after it had been filed with the Harwich Water Board. The Board further found that the appellant's appeal of the Harwich Water Board's deemed denial of its application for abatement was seasonably commenced on December 19, 2002, the date the petition under the informal procedure and filing fee were filed with the Board. Moreover, the Board found that the subsequent filing of the formal petition related back to the date of the earlier filing. On the basis of these facts and as discussed more fully in the Opinion below, the

Board denied the appellee's Motion and found that it had jurisdiction to hear and decide this appeal.

The appellant presented the testimony of two witnesses to prove that the June 26, 2002 water bill was excessive and should be abated. The appellant's first witness was Peter Stagg, the president, treasurer, and general manager of Stagg Chevrolet, an automobile dealership. At all relevant times, Mr. Stagg was responsible for the day-to-day operations at Stagg Chevrolet. He testified that the Subject Property first utilized town water in October 1985, having previously relied on well water. The water usage at the Property remained generally uniform until 1992 when the appellant received a bill for 4,828,000 gallons of water usage over a six-month period. After the water meter that recorded the water usage for that bill was replaced and the Harwich Water Board had granted an abatement, the water usage at the Property returned to normal until June 2002. Then, once again, Stagg Chevrolet received a bill in the amount of $9,083.45 for over 4,000,000 gallons of water usage at the Property. After that water meter was replaced, water-usage readings again returned to a more typical range of approximately 79,000 to 110,000 gallons per six-month period.

After filing for abatement, Mr. Stagg testified that he received a letter dated August 21, 2002 from the Harwich Water Board which enclosed a photocopy of a letter dated July 23, 2002 from Regan Supply & Testing Service ("Regan Testing Service"). The Regan Testing Service letter indicated that the water meter that had been recently removed from the Subject Property had been tested and was slightly under-estimating the amount of water being used. Following a subsequent hearing with the Harwich Water Board in September 2002, which resulted in another letter from the Harwich Water Board refusing the appellant's request for abatement, Mr. Stagg retained the services of S. David Graber, an engineer, to evaluate the situation. At Mr. Graber's request, Mr. Stagg measured the diameter of the appellant's water pipes, drew schematics of the Property's water-pipe system, and recorded the readings from the Property's sprinkler-system gauges. Mr. Stagg then provided all of this information to Mr. Graber.

Mr. Stagg described the building on the Subject Property as containing a total of one three-quarter and four one-half bathrooms. According to Mr. Stagg, the shower in the three-quarter bathroom had not been used for twenty-five years. He also testified that there were never any irrigation systems on the Property and, for the past

several years, no functioning automatic car-washing facility, either. However, up to ten cars were hand-washed on a daily basis. In the early 1980s, a sprinkler system was installed in the building on the Property in the event of fire. According to Mr. Stagg, the sprinkler system was inspected twice yearly by the Harwich Fire Department. Because of his involvement in the design of a recent addition to the building on the Property, Mr. Stagg testified that he was familiar with the location of the water pipes throughout the Subject Property.

The appellant's second and final witness was Mr. Graber, who is a registered engineer in Massachusetts and New York. Mr. Graber testified that he was trained at and holds advanced degrees in mechanical and civil engineering from the Massachusetts Institute of Technology and also has significant experience in the field of hydraulic engineering.[5] Among other accomplishments, he has completed water distribution projects for the Massachusetts Water Resources Authority and is a member of the American Waterworks Association. The appellant retained Mr. Graber to evaluate the water usage at the Subject Property and, in particular, the water usage leading up to the June 26, 2002 water bill. In performing his evaluation, Mr. Graber reviewed the Property's historical water-usage record; the measurements, schematics, and readings, including pressure data, supplied by Mr. Stagg; and the Neptune water meter test report from Regan Testing Service. Mr. Graber also reviewed information provided by the manufacturer of the water meter in question relating to pressure drops and information regarding the particular back-flow preventor on the appellant's water system, which is located just downstream of the water meter to prevent the back-flow of contaminated water into the public water system.

Based on all of this information, Mr. Graber prepared a spreadsheet, which contained an analysis of water usage at the Subject Property since 1985. The spreadsheet included a chronology of the flow rate of water at the Property for the various billing periods from October 1985 to May 15, 2003 in gallons per day and gallons per minute. The spreadsheet also contained an analysis of the average flow rates at the Property excluding the two outliers,[6] and an average flow rate as a multiple of long-term average excluding the two outliers. On the basis of this

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[5] Mr. Graber described the field of hydraulics as the study of the flow of water through various conduits.

[6] The two outliers that he excluded from his averaging were the two billing periods where water usage exceeded four million gallons.

spreadsheet analysis, Mr. Graber concluded that the bill in question represented water usage over forty-seven times that of the long-term average rate of flow.

In addition, for the Period at Issue, Mr. Graber questioned the physical ability of the pipes at the Subject Property to support an average flow rate per minute and per day suggested by the water bill at issue. His water pressure calculations further substantiated his view that the amount of water supposedly used during the Period at Issue could not possibly have flowed through the Property's water system. He also debunked the so-called "leaky-toilet" theory because even 2,500 gallons per day of additional water consumption caused by five perpetually leaking toilets would explain only a small fraction of the water bill.

Mr. Graber theorized that the water meter in question incorrectly read the water usage at the Subject Property during the Period at Issue because the meter "jumped and dragged" an adjacent dial or dials along with it. This jump caused at least the seventh- or millionth-place digit of the meter's mechanical-counting system to over-rotate and erroneously display a higher number in that place. Mr. Graber confirmed the possibly of just such a mechanical-counting-system failure with the manufacturer of this particular Neptune meter and model, which has not been manufactured since 1981. Mr. Graber further testified that the test of the subject water meter conducted by Regan Testing Service did not use a sufficient quantity of water to test for the mechanical-counting-system anomaly, which, in his view, caused the excessive water-usage reading.

In defense of the water-usage charge, the Harwich Water Board called two witnesses. Its first witness was Craig Wiegand, Water Superintendent for Harwich. Mr. Wiegand testified that personnel from the Harwich Water Department investigated the appellant's water pipes and system on four different occasions following the appellant's receipt of the bill in question and failed to discover any leaks or problems. He further testified that, in his view, Regan Testing Service verified the accuracy of the water meter, which, if anything was under-estimating the water usage at the Subject Property for the Period at Issue. Accordingly, the Harwich Water Board refused the appellant's request for abatement and stood by its June 26, 2002 water bill. Mr. Wiegand also testified that, in his opinion, up to 73,000 gallons of water per day could flow through the meter as well as the appellant's pipes and water system. He speculated that someone at the Subject

Property could have left a hose on. Mr. Wiegand further testified that the water bill at issue was for water usage over an approximate four-month period because the billing cycle and system had been changed at that time.

The second and final witness to testify for the Harwich Water Board was Donald Ladd, vice-president and sales manager for Ti-Sales of Sudbury, Massachusetts. At all relevant times, Ti-Sales sold Neptune water meters to virtually all of the municipalities in Massachusetts, including Harwich. In the sixteen years that he had worked for Ti-Sales, Mr. Ladd testified that he had never heard of the type of mechanical-counting problem that Mr. Graber theorized had caused the excessive water-usage reading in question.

On the basis of all of the evidence, the Board found that Mr. Graber, a licensed engineer with advanced degrees and significant experience in hydraulics, presented well-reasoned and documented analyses and theories explaining why the subject water bill was excessive. The Board's own analysis of the water bills and usage documentation in evidence also supported abatement. Neither of the appellee's witnesses was an engineer, and Mr. Wiegand's speculation that an unattended hose had caused over four million gallons of excess water usage over four months fell far short of Mr. Graber's credible explanation. For these reasons, the Board decided this appeal for the appellant and reduced the water-usage charge on the subject water bill to $174.15, which represented a four-month *pro-rata* charge more in keeping with Mr. Graber's long-term average rate of flow and other recent water bills. Abatement was granted in the amount of $8,909.30 in water-usage charges.

OPINION

The appeal of an unpaid water charge is governed by G.L. c. 40, §§ 42A through 42F. Section 42E provides that "[a]n owner of real estate aggrieved by a charge imposed . . . under [§§ 42A-42F] . . . may apply for an abatement . . . with the board . . . having control of . . . [the water] department . . . and . . . the provisions of chapter fifty-nine relative to abatement of taxes by assessors shall apply." Section 42E goes on to state that, if the request for abatement is refused, "the petitioner may appeal to the [A]ppellate [T]ax [B]oard upon the same terms and conditions as a person aggrieved by the refusal of the assessors . . . to abate a tax."

General Laws c. 59, § 65 provides in pertinent part:

> A person aggrieved . . . with respect to a tax on property in any municipality may, subject to the same conditions provided for an appeal under section sixty-four, appeal to the [A]ppellate [T]ax [B]oard by filing a petition with such [B]oard within three months after the date of the assessors' decision on an application for abatement as provided in section sixty-three, or within three months after the time when the application is deemed to be denied as provided in section sixty-four.

Accordingly, within three months after denial or deemed denial of an application for abatement of an unpaid water-usage charge, the owner may appeal to this Board. *See* ***Epstein v. Executive Secretary of the Board of Selectmen of Sharon***, 22 Mass. App. Ct. 135, 137 (1986) ("***Epstein***").

In the instant appeal, there was no dispute that the subject water bill remained unpaid, a prerequisite to the Board's jurisdiction. *Id.* at 137. The Board also found that the application for abatement of the water-usage charge was timely filed with the Harwich Water Board and seasonably appealed to this Board within three months of the deemed denial. *See* G.L. c. 59, §§ 59, 64 and 65. The Board found that the application for abatement was deemed denied because, even though the Harwich Water Board had acted on the application for abatement on two separate occasions, the respective written notices of its decision, required by G.L. c. 59, § 63, were defective, and thus failed to trigger the start of the appeal period. The Board found that a valid denial requires a proper notice under § 63 as a condition subsequent to a timely action on an application for abatement. The provisions of § 65 specifically require assessors to provide written notice of their decisions, which fully complies with § 63, to applicants. The Harwich Water Board failed to do that here.

Section 63 provides in pertinent part that:

> Assessors shall, within ten days after their decision on an application for abatement, send written notice thereof to the applicant. . . . Said notice shall indicate the date of the decision or the date the application is deemed denied . . . , *and shall further state that appeal from such decision or inaction may be*

> *taken as provided in sections sixty-four to sixty-five B, inclusive."* (Emphasis added.)

The Board found that because neither of the subject notices of decision included the required notice-of-appeal-rights language, which is emphasized in the quotation above, both such notices were defective and thus nullified both of the Harwich Water Board's prior actions relating to the appellant's application for abatement. Because the Harwich Water Board's purported denials were ineffective, the Board found that the appellant's application for abatement was deemed denied on October 15, 2002. The subsequent filing of its petition with this Board on December 19, 2002 was timely as it was within the three-month statutory period for appealing the deemed denial of its application for abatement. *See* G.L. c. 59, §§ 64 and 65.

In ***Valley Realty Company v. Assessors of Springfield***, ATB Findings of Fact and Reports 1945-45 ("***Valley Realty Co.***"), the assessors failed to include the notice-of-appeal-rights language required by § 63 in their notice of decision sent to the appellant, which advised the appellant only of their purported denial of its appeal of a real estate assessment. The Board, in that appeal, ruled that this omission rendered not only the notice invalid, but also the prior action purportedly denying the appellant's request for abatement, and, therefore, resulted in a deemed denial of the application for abatement. *Id.* at 48. The Board in ***Valley Realty Co.*** stated:

> In our opinion such an omission rendered the notice invalid because it failed to comply with the statutory requirement. The applicant was entitled to be informed that the assessors had made a decision which under the law would lay the foundation of the right of an appeal under governing statutes. In the absence of a valid notice from the assessors of its decision, the application for abatement was deemed denied upon expiration of four months[7] from the date it was filed.

Id. at 48.

More recent decisions of the Board and the Supreme Judicial Court in similar circumstances support the Board's

[7] An application for abatement is now deemed denied three months after its filing if the assessors fail to act on it. G.L. c. 59, §§ 64 and 65, as amended.

decision here. In ***Spring Hill Garden Associates v. Assessors of Plymouth***, ATB Findings of Fact and Reports 1991-38, the Board ruled that when a notice under § 63 does not include the date of the assessors' action on an application, it remains valid only if the notice itself is at least dated so that the date of the notice can then be construed as the date of the assessors' action. *Id.* at 44-45.

Similarly, in ***Lehane v. Assessors of Saugus***, ATB Findings of Fact and Reports 2000-415 ("***Lehane***"), the assessors sent a timely notice of partial abatement to the appellant seeking abatement of real estate tax. While the notice itself was dated, it did not indicate the date when the assessors had acted on the appellant's application for abatement. The Board ruled that, under the circumstances, the appellant could properly construe the date of the notice itself as the date of the assessors' action on its application for abatement. Accordingly, the appellant's petition, which was filed with the Board in ***Lehane*** almost exactly three months after the date of the notice, was timely, even if the assessors' action on the application for abatement had occurred earlier. *Id.* at 416-17, n.1.

In ***Cardaropoli v. Assessors of Springfield***, ATB Findings of Fact and Reports 2001-913 ("***Cardaropoli***"), the Board invalidated an untimely notice of inaction under § 63, which was sent after the ten-day statutory deadline. The Board, for this reason as well as others, then permitted the taxpayer to file his petition appealing the deemed denial of his application for abatement within the additional two-month period allowed for filing a petition for late entry under G.L. c. 59, § 65C. *Id.* at 922-23. The Board in ***Cardaropoli*** further recognized that a proper notice under § 63 requires, *inter alia*, that the "notice . . . advise the applicant of its right to appeal the decision or deemed denial under G.L. c. 59, §§ 64 through 65B." *Id.* at 920-21.

In an analogous Department of Revenue appeal, ***SCA Disposal Services of New England, Inc. v. State Tax Commission***, 375 Mass. 338 (1978), the Supreme Judicial Court held that where the taxpayer did not receive the written notice of the denial of its application for abatement, which the Commissioner of Revenue was mandated to send under G.L. c. 62C, § 37, until after the expiration of the sixty-day appeal period for filing a petition with this Board, the taxpayer was entitled to a "reasonable time" to file the appeal measured from the date of receipt. *Id.* at 340-42.

All of the above appeals and cases support the Board's conclusion that notices of decision under § 63 are required to effect a valid denial process. Furthermore, familiar rules of statutory construction provide that questions of interpretation "'in tax statutes are to be resolved in favor of the taxpayer' . . . '[and that a] tax statute must be strictly construed' and 'all doubts are to be resolved in favor of the taxpayer.'" ***Mann v. Assessors of Wareham***, 387 Mass. 35, 39 (1982) (quoting ***Xtra, Inc. v. Commissioner of Revenue***, 380 Mass. 277, 281 (1980)). These rules support the Board's holding here that the Harwich Water Board's failure to include in its notices the notice-of-appeal-rights language mandated under G.L. c. 59, § 63, vitiated the appellee's prior actions purportedly denying the application for abatement. In the Board's opinion, to rule otherwise would frustrate the statutory scheme established by the Legislature for abatement and appeal. *See* ***Becton, Dickinson & Co. v. State Tax Comm'n.***, 374 Mass. 230, 233 (1978) ("Recent decisions of this court have emphasized that statutes embodying procedural requirements should be construed, when possible, to further the statutory scheme intended by the Legislature without creating snares for the unwary."); and ***Assessors of Brookline v. Prudential Insurance Company***, 310 Mass. 300, 313 (1941) ("Tax laws 'should be construed and interpreted as far as possible so as to be susceptible of easy comprehension and not likely to become pitfalls for the unwary.'" (quoting ***Hemenway v. Milton***, 217 Mass. 230, 233 (1914))).

The burden of proof is upon the appellant to make out its right as a matter of law to an abatement of an assessment or water charge. *Cf.* ***Schlaiker v. Assessors of Great Barrington***, 365 Mass. 243, 245 (1974) ("***Schlaiker***"). The appellant must first show that it has complied with the statutory prerequisites to its appeal, *see* ***Epstein,*** 22 Mass. App. Ct. at 137; ***Brown v. Board of Sewer Commissioners & Board of Water Commissioners of Chicopee***, ATB Findings of Fact and Reports 1995-14, 19-20, *aff'd*, 38 Mass. App. Ct. 1101, 1116 (1995); *cf.* ***Cohen v. Assessors of Boston***, 344 Mass. 268, 271 (1962), and then demonstrate that the usage charge on the water bill is improper. *See* ***Foxboro Associates v. Assessors of Foxborough***, 385 Mass. 679, 691 (1982); ***Epstein***, 22 Mass. App. Ct. at 136. The charge is presumed valid until the appellant sustains its burden of proving otherwise. *Cf.* ***Schlaiker***, 365 Mass. at 245. In the instant appeal, the Board found and ruled that the appellant established the Board's

jurisdiction and sustained its burden of proving that the subject water-usage charge was excessive.

In ruling that the subject water-usage charge was excessive and should be abated, the Board relied on the well-reasoned and documented explanations offered by Mr. Graber, a licensed engineer with advance degrees and significant experience in hydraulics. The Board's own analysis of the water bills and usage documentation in evidence also supported abatement. Neither of the appellee's witnesses was an engineer, and Mr. Wiegand's conjecture that an unattended hose had siphoned off over four million gallons of excess water over four months fell far short of Mr. Graber's convincing theory. "[The Board can] accept such portions of the evidence as appear to have the more convincing weight." ***Assessors of Quincy v. Boston Consol. Gas Co.***, 309 Mass. 60, 72 (1941). "The [B]oard is not required to believe the testimony of any particular witness." *Id.* "The credibility of witnesses, the weight of evidence, and inferences to be drawn from the evidence are matters for the [B]oard." ***Cummington School of the Arts, Inc. v. Assessors of Cummington***, 373 Mass. 597, 605 (1977).

On this basis, the Board decided this appeal for the appellant and reduced the water-usage charge on the subject water bill to $174.15, which represented a four-month *pro-rata* charge more in keeping with Mr. Graber's long-term average rate of flow and other recent water bills. Accordingly, the Board abated $8,909.30 in water-usage charges.

APPELLATE TAX BOARD

By: _____
Anne T. Foley, Chair

_____
Frank J. Scharaffa, Commissioner

_____
Donald E. Gorton, III, Commissioner

_____
Nancy T. Egan, Commissioner

_____
James D. Rose, Commissioner

A true copy,

Attest: _____
Assistant Clerk of the Board

COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD

WB&T MORTGAGE COMPANY, INC. v. BOARD OF ASSESSORS OF THE CITY OF BOSTON

Docket No. F264697

Promulgated:
June 7, 2006

This is an appeal under the formal procedure pursuant to G.L. c. 59, §§ 64 and 65 from the refusal of the appellee to abate a "pro forma" tax computed under G.L. c. 59, § 2C for that part of fiscal year 2000 beginning on December 17, 1999, the date of appellant's purchase of certain real estate in the City of Boston, and ending on June 30, 2000.

Commissioner Rose allowed the parties' request to submit this appeal to the Board for decision on an Agreed Statement of Facts and Briefs. Chair Foley and Commissioner Egan joined Commissioner Rose in a decision for the appellee. Commissioners Scharaffa and Gorton dissented.

These findings of fact and report are made pursuant to a request by the appellant under G.L. c. 58A, § 13 and 831 CMR 1.32.

M. Robert Dushman, Esq. for the appellant.
Laura A. Caltenco, Esq. for the appellee.

FINDINGS OF FACT AND REPORT

The parties submitted this appeal to the Appellate Tax Board ("Board") for decision on an Agreed Statement of Facts with attached exhibits ("Agreed Statement") and Briefs.[1] On the basis of the Agreed Statement, the Board finds the following facts.

On December 17, 1999, appellant WB&T Mortgage Company, Inc. ("WB&T") purchased two parcels of real estate at 49-57 Franklin Street, Boston ("subject parcels"). The subject parcels are adjacent to WB&T's place of business at 63 Franklin Street. The seller was the Roman Catholic Archdiocese of Boston, which was not subject to real estate

[1] Rule 31 of the Rules of Practice and Procedure of the Appellate Tax Board, 831 CMR 1.31, provides that "[a]n appeal in which no issue of fact is raised, or in which the parties file an agreed statement of facts . . . may be submitted to the Board for decision by either or both parties, on briefs without oral argument".

tax on the parcels. The total sale price for the parcels was $4,500,000.

Nearly two years later, on November 21, 2001, the appellee Board of Assessors of the City of Boston ("assessors") issued to WB&T a tax bill pursuant to G.L. c. 59, § 2C in the amount of $82,861.11 (the "§ 2C tax"). The § 2C tax was based on the sale price of $4,500,000, a tax rate of $34.21 per thousand and, according to the "*pro forma*" tax bill attached to the Agreed Statement, a total of 197 days in the fiscal year during which WB&T owned the property. The tax was computed by applying the rate to the sale price and multiplying the result by the ratio of total days that WB&T owned the real estate in fiscal year 2000 (197) to total days in the fiscal year (366).[2]

WB&T paid the tax on December 20, 2001 with no interest. On December 21, 2001, WB&T applied for an abatement, which was deemed denied on March 21, 2002. The present appeal was filed with the Board on June 21, 2002. Accordingly, the Board has jurisdiction to hear and decide this appeal.

WB&T's sole argument in support of its claim for an abatement is that the § 2C tax imposes a disproportionate, discriminatory, and therefore, unconstitutional tax on purchasers of property from tax-exempt entities. WB&T maintains that the § 2C tax imposed on purchasers of real estate from tax-exempt entities differs from the general property tax assessed on all other property owners in two respects. First, the § 2C tax is based on purchase price, unlike the general property tax, which is based on the property's fair cash value. Second, real estate is valued for general property tax purposes as of January 1 of the year preceding the relevant fiscal year, while the date of purchase is the relevant date for purposes of the § 2C tax. WB&T argues that the disparate treatment of purchasers of property from tax-exempt entities results in unconstitutional disproportionate taxation, necessitating a full abatement of the § 2C tax it paid.

In response, the assessors maintain that using the purchase price as a basis for the § 2C tax is a reasonable method to tax property which was, prior to its sale, exempt from real estate tax. Because exempt property is not part of the triennial revaluation process or the subject of pre-assessment information requests pursuant to G.L. c. 59,

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[2] The fiscal year at issue, 2000, ran from July 1, 1999 through June 30, 2000. Because calendar year 2000 was a leap year, February had 29 days in 2000, and fiscal year 2000 had 366 days.

§ 38D, the assessors argue that they lack current and reliable information on which to base valuation determinations for property transferred from tax-exempt entities. Accordingly, the assessors argue that using the purchase price as the basis for the § 2C tax is a rational and reasonable, and therefore constitutional, method for the Legislature to use for taxing property owned for part of a fiscal year by non-exempt entities that would otherwise escape taxation entirely because the property was owned by a tax-exempt entity on the January 1 assessment date.

In its resolution of the contested issue raised in this appeal, the Board is limited to the evidence before it. WB&T notes that for the fiscal year following the year at issue, the assessors valued the subject parcels as of January 1, 2000 at a total of $3,281,600.[3] Accordingly, the fiscal year 2001 real estate tax was based on a value for the parcels of $3,281,600, compared to the $4,500,000 purchase price on which the assessors based the § 2C tax for fiscal year 2000. WB&T therefore maintains that the disparity between the purchase price and the fiscal year 2001 assessed value means that the purchase price is "presumably likewise substantially higher than the fair cash value on the preceding January 1, 1999." (appellant's Trial Memorandum, p. 6).

However, WB&T offered no evidence and made no attempt to establish the fair cash value of the subject parcels as of January 1, 1999. The only facts bearing on the fair cash value of the parcels as of January 1, 1999 that have been proven in this appeal are: 1) the parcels were purchased within a year of the relevant valuation date; 2) by an abutter; 3) for $4,500,000; and 4) the purchase price exceeded the assessed value for the following year. For the following reasons, this evidence does not constitute substantial evidence upon which the Board could make a determination of the subject parcels' fair cash value as of January 1, 1999.

WB&T offered no meaningful evidence concerning the subject parcels' description[4] or whether any buildings or

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[3] The assessors valued the individual parcels at $1,694,000 and $1,587,600, for a total assessed value of $3,281,600 for the subject parcels.

[4] The deed for the subject parcels identifies the first parcel as the "land with the buildings thereon … now numbered 49-51 Franklin Street" and the second parcel as the "land with the buildings and improvements thereon, now known and numbered 53 and 55 on Franklin Street." No description of the buildings or, in the case of the second parcel, the improvements, is given in the deed. The § 2C tax bill contains no

improvements on the parcels remained unchanged between January 1, 1999 and January 1, 2000. It also offered no evidence of market conditions at any time during the relevant period for purposes of adjusting either the purchase price or the fiscal year 2001 assessed value to determine the fair cash value of the parcels as of January 1, 1999.

Further, WB&T offered no evidence concerning the circumstances of its purchase of the subject parcels. There was no evidence of whether the parcels were marketed to other potential purchasers or whether WB&T paid in excess of fair market value because the parcels had a unique value to it as the owner of abutting property. Accordingly, the Board can make no finding of fact either that the purchase price was a meaningful indicator of the parcels' fair cash value for the fiscal year at issue or that it was not.

Given the minimal and contradictory evidence of record, the Board found and ruled that there was no substantial evidence of the subject parcels' fair cash value as of January 1, 1999. Accordingly, the Board ruled that WB&T failed to prove a necessary factual predicate to its constitutional argument: because WB&T failed to prove that the purchase price upon which the § 2C tax was based exceeded the parcels' fair cash value as of January 1, 1999, it did not establish that the § 2C tax imposed on it was disproportionate.

On the basis of the foregoing, and for the reasons detailed in the following Opinion, the Board found and ruled that § 2C is not unconstitutional on its face but that it would be unconstitutional as applied if the purchase price on which the § 2C tax is based exceeded the fair cash value of the property as of the relevant assessment date. However, the Board ruled that WB&T failed to meet its burden of proving that § 2C is unconstitutional as applied to it because it failed to produce substantial evidence of fair cash value for the property as of January 1, 1999. Accordingly, the Board issued a decision for the appellee in this appeal.

OPINION

I. STATUTORY LANGUAGE

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information concerning the parcels other than their parcel number and "51 49 Franklin Street" for the location. The tax bills for fiscal year 2001 reference "LAND" and "BLDG" but no separate values for each. The tax bills also appear to reflect a land area for each parcel of "3050."

Under G.L. c. 59, § 2C, when an entity whose real estate is exempt from property tax sells such real estate after January 1 in any year, the purchaser must pay:

> a pro rata amount or amounts . . . in lieu of taxes that would have been due for the applicable fiscal year under this chapter if the real estate had been so owned on January first of the year of sale and, with respect to a sale between January first and June thirtieth, if the real estate had been so owned on January first of the year of sale and the preceding year.

In the present appeal, the sale took place on December 17, 1999. Accordingly, the § 2C tax was imposed on WB&T in lieu of the tax that would have been due if it were the owner of the property on January 1 of the year of sale, 1999. The January 1 ownership date is significant because: "Taxes on real estate shall be assessed, in the town where it lies, to the person who is the owner on January first." G.L. c. 59, § 11. By virtue of § 2C, WB&T is treated as the assessed owner of the property for the fiscal year following January 1, 1999, fiscal year 2000, which begins July 1, 1999 and ends June 30, 2000. *See* G.L. c. 44, § 56 ("[t]he fiscal year of all towns of the commonwealth shall begin with July first and end with the following June thirtieth.").

Because the sale did not take place between January 1 and June 30,[5] WB&T's § 2C tax was calculated under § 2C(a) which provides:

> The pro rata amounts payable to the city or town shall be determined as follows:
>
> (a) A portion of a pro forma tax for the fiscal year in which such sale occurred allocable on a pro rata basis

[5] When a sale takes place between January 1 and June 30, the § 2C tax is imposed on the purchaser in lieu of the tax that would have been due if the purchaser were the owner of the property on January 1 of the year of sale and the January 1 of the year preceding the sale. For example, if the sale at issue in this appeal occurred on January 2, 2000, the tax imposed on WB&T would be in lieu of the tax that would be due if WB&T owned the parcels as of January 1, 1999 and January 1, 2000, the relevant assessment dates for fiscal years 2000 and 2001. It would then owe the § 2C tax for the period January 2, 2000 through June 30, 2000 for fiscal year 2000 and for all of fiscal year 2001.

> to the days remaining in such fiscal year from the date of sale to the end of the fiscal year.

WB&T does not challenge the assessors' use of 197 days as the number of days remaining in the fiscal year after the date of sale, or the overall computation of the § 2C tax, which was "computed by applying the tax rate . . . to the sale price." G.L. c. 59, § 2C. Rather, WB&T argues that the § 2C tax violates the Massachusetts Constitution because it bases the tax on sale price, and not fair cash value, and because the "relevant assessment" date is the date of sale rather than the January 1 preceding the relevant fiscal year.

II. STANDARD APPLICABLE TO BOARD'S CONSIDERATION OF CONSTITUTIONAL CLAIMS

In numerous cases, the Supreme Judicial Court has affirmed the Board's authority to rule on constitutional claims in determining the legality of tax assessments. *See, e.g.* ***Mullins v. Commissioner of Revenue,*** ATB Findings of Fact and Reports 1997-973, *aff'd,* 428 Mass. 406 (1998); ***Gillette Co. v. Commissioner of Revenue,*** ATB Findings of Fact and Reports 1996-362, *aff'd,* 425 Mass. 670 (1997); ***Lonstein v. Commissioner of Revenue,*** ATB Findings of Fact and Reports 1988-355, *aff'd,* 406 Mass. 92 (1989); ***Tregor v. Assessors of Boston,*** ATB Findings of Fact and Reports 1978-203, *aff'd,* 377 Mass. 602 (1979) ("***Tregor***").

In fact, a taxpayer must raise a constitutional claim with the Board to preserve the right to appellate consideration of the issue. ***New Bedford Gas & Electric Light Co. v. Assessors of Dartmouth,*** 368 Mass. 745, 752 (1975) ("To raise a constitutional question on appeal to this court from the board, the taxpayer must present the question to the board and, in so doing, make a proper record on appeal. Otherwise, the taxpayer waives the right to press the constitutional argument."). Further, a denial of the right of a taxpayer to challenge a disproportionate assessment at the Board "would present a serious constitutional question because the Massachusetts Constitution requires that property be taxed proportionately." ***Assessors of Danvers v. Tenneco, Inc.*** 388 Mass. 739, 741 (1983). Accordingly, the Board has jurisdiction to determine whether the § 2C tax assessed to WB&T is unconstitutional and, if so, to provide a remedy by granting an appropriate abatement. *See, e.g.,* ***Shoppers' World, Inc. v. Assessors of Framingham,*** 348 Mass. 366 (1965) ("***Shoppers' World***").

In determining whether the § 2C tax is unconstitutional, the Board's analysis must be guided by the principle that: "A tax measure is presumed valid and is entitled to the benefit of any constitutional doubt, and the burden of proving its invalidity falls on those who challenge the measure." ***Opinion of the Justices***, 425 Mass. 1201, 1203-1204 (1997) (*quoting* ***Daley v. State Tax Commission***, 376 Mass. 861, 865-66 (1978)); *see also* ***Andover Savings Bank v. Commissioner of Revenue***, 387 Mass. 229, 235 (1982). Accordingly, the following analysis proceeds from the presumption that § 2C is valid and that any doubts concerning its interpretation must be resolved in favor of an interpretation that renders it constitutional.

III. SECTION 2C IMPOSES A TAX

The parties agree that § 2C imposes a property tax, as opposed to an excise or other governmental exaction, and their constitutional analyses proceed from that premise. However, the Board is not bound by that agreement and must determine whether the payment under § 2C is a tax, which, as will be detailed in Section IV(A) below, must be "proportional" under Massachusetts Constitution, Part II, c. 1, § 1, art. 4.

A "tax" is a "revenue-raising exaction imposed through generally app1icable rates to defray public expense." ***Opinion of the Justices,*** 393 Mass. 1209, 1216 (1984), *citing* P. NICHOLS, TAXATION IN MASSACHUSETTS 3-4, 15 (3rd ed. 1938). The cited sections of NICHOLS analyze late nineteenth and early twentieth century case law, which provides that in order to be a "tax," an exaction must consist of:

1. an enforced contribution of money or other property;
2. assessed in accordance with some reasonable rule of apportionment;
3. by authority of a sovereign state;
4. on persons or property within its jurisdiction;
5. for the purpose of defraying the public expense.

Section 2C uses the phrases "a pro rata amount . . . in lieu of taxes" and also a "pro forma tax" to describe the required payment by a purchaser of previously tax-exempt property. To determine whether the § 2C exaction is a tax, "we look to the proposed operation of the exaction." ***German v. Commonwealth,*** 410 Mass. 445, 448 (1991). When the characterization of a monetary exaction by the government is in doubt, "the intention of the Legislature, as it may

be expressed in part through its characterization . . . deserves judicial respect, and especially so where the constitutionality of the exaction depends on its proper characterization." ***Associated Industries of Massachusetts, Inc. v. Commissioner of Revenue,*** 378 Mass. 657, 667-68 (1979). "Ultimately, however, the nature of a monetary exaction 'must be determined by its operation rather than its specially descriptive phrase.'" ***Emerson College v. Boston,*** 391 Mass. 415, 424 (1984) ("***Emerson College***") (*quoting* ***Thomson Elec. Welding Co. v. Commonwealth,*** 275 Mass. 426, 429 (1931)).

For example, although the exaction at issue in ***Emerson College*** was described in the statute as a "fee," the court held that the charge was a tax and, because the tax was not proportional, it violated Part II, c. 1, § 1, art. 4 of the Massachusetts Constitution. *Id.* at 418, 428. The court noted in particular that, unlike a fee which is generally used to meet expenses incurred for a particular service, amounts collected under the statute were added to the general fund, and unlike an excise, which is based on a voluntary act of the person taxed in enjoying a privilege, the exaction constituted an "absolute and unavoidable demand" on certain property owners. *Id.* 427-28.

Accordingly, in analyzing whether § 2C imposes a tax, which must be proportional to be constitutional, or some other charge which need not be proportional, the Board must give respect to the legislative characterization of the exaction as "in lieu of tax" and a "pro forma tax," but ultimately must look to the operation of § 2C to determine the nature of the charge.

First, under § 2C, "sums received under this section . . . shall be credited to the general fund of the city or town." The fact that revenue obtained from a government charge is not used for a particular purpose but is destined for the general fund "while not decisive, is of weight in indicating that the charge is a tax." *Id.* at 427. Also, under § 2C, there appears to be no "voluntary act" or "privilege" for which an excise could be charged. *See* ***Emerson College,*** 391 Mass. at 428 ("The mere right to hold and own . . . property cannot be made the subject of an excise.").

Rather, the amount charged under § 2C is in substantially all respects identical to the general property tax: § 2C refers to the amount charged to the purchaser as "in lieu of taxes that would have been due" if the real estate had been owned by the taxable purchaser on January 1; the tax rate is the same as the rate charged for similarly classified real estate in the municipality; any

exemptions from the general property tax to which the grantee would otherwise be entitled are allowed in computing the § 2C tax; the due date of the § 2C tax is the later of thirty days from the bill or the due date of the general real estate tax bills in the municipality; interest is due on late payments of the § 2C tax pursuant to G.L. c. 59, § 57, the same provision under which interest is incurred for late payment of real estate tax bills; and the collector of taxes of the municipality in which the real estate is located has the same collection mechanisms under G.L. c. 60 that are available for collecting unpaid real estate tax. Accordingly, the Board rules that the amounts charged under § 2C are meant to replicate the general property tax for non-exempt purchasers who owned property for part of a fiscal year but who would otherwise escape tax for that year because exempt entities owned the property as of the January 1 assessment date.

Further, although § 2C uses the phrase "in lieu of taxes," the § 2C exaction is not the typical contractual "in lieu of tax" payment which an entity voluntarily agrees to pay in exchange for some benefit from the municipality. For example, in ***Anderson Street Associates v. City of Boston,*** 442 Mass. 812 (2004), plaintiff argued that its payments in lieu of taxes under a contract with the city under G.L. c. 121A exceeded the amount of real estate tax which it would have to pay under G.L. c. 59 and that, therefore, its payments in lieu of tax were disproportional and unconstitutional. The court rejected this claim because:

> the money owed under G.L. c. 121A, § 6A is not a tax; rather it is a contractually agreed upon amount in lieu of taxes. Moreover . . . because plaintiffs voluntarily contracted to make additional payments under § 6A, they have no basis for arguing that the clear contractual terms of the § 6A contracts cannot be enforced.

Id. at 820. *See also* ***Town of Saugus v. Refuse Energy Systems Company,*** 388 Mass. 822, 829 n. 9 ("If the town wished to ensure a minimum payment from the company, it could have made an arrangement with the company for a contribution in lieu of taxes to defray some of the expense its facility might impose on the town").

There is nothing voluntary or contractual about the exaction due under § 2C. It is imposed on all purchasers of tax-exempt property and is in operation and effect a

property tax on non-exempt owners for that part of a fiscal year during which they owned the property. Accordingly, for all of the foregoing reasons, the Board ruled that § 2C imposes a tax.

IV. CONSTITUTIONAL ANALYSIS

A. PROPERTY TAX MUST BE PROPORTIONAL

The significance of the distinction between a property "tax" and other governmental exactions is that the Massachusetts Constitution requires that property taxes must be "proportional." *See* Massachusetts Constitution, Part II, c. 1, § 1, art. 4, which provides, in pertinent part:

> full power and authority are hereby given and granted to said general court . . . to impose and levy ***proportional*** and reasonable assessments, rates, and taxes, upon all the inhabitants of, and persons resident, and estates lying, within said commonwealth. [emphasis added].

See also ***Opinion of the Justices,*** 220 Mass. 613 (1915) ("A general property tax, in order to be proportional, must be divided so that the amount to be raised shall be shared by the taxpayers according to the taxable real and personal estate of each . . . On the other hand an excise . . . is of a different character. It need not be based on any rule of proportion. It must only be 'reasonable.'")

Further, Article 10 of the Massachusetts Declaration of Rights provides that:

> Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty, and property according to standing laws. He is obliged, consequently, to contribute ***his share*** to the expense of this protection. [emphasis added].

"It is well settled that the words 'his share' in art. 10 of the Declaration of Rights 'forbid the imposition upon one taxpayer of a burden relatively greater or relatively less than that imposed upon other taxpayers." ***Bettigole v. Assessors of Springfield,*** 343 Mass. 223, 230 (1961) ("***Bettigole***") (*quoting* ***Opinion of Justices***, 332 Mass. 769, 777 (1955)). The "rule of proportionality" embodied in the above-cited constitutional provisions "was designed so that 'each tax-payer should be obliged to bear only such part of the general burden as the property owned by him bore to the

whole sum to be raised.'" ***Keniston v. Assessors of Boston,*** 380 Mass 888, 895 (1980) ("***Keniston***") (*quoting* ***Brookline v. County Comm'rs of the County of Norfolk***, 367 Mass. 345, 350 (1975)). In mathematical terms,

> The precise fractions which must be equivalent to satisfy the constitutional proportionality requirement were set forth in ***Opinion of the Justices***, 220 Mass. 613, 621 (1915): "[A] tax is proportional, within the meaning of the Constitution, only when it bears the same ratio to the whole sum raised by taxation as the taxpayer's taxable estate bears to the whole taxable estate of the Commonwealth.

Keniston, 380 Mass. at 896-97.

It has long been recognized, however, that "practically it is impossible to secure exact equality or proportion in the imposition of taxes." ***Cheshire v. County Commissioners of Berkshire,*** 118 Mass. 386, 389 (1875) ("***Cheshire***"). Rather, the Constitution requires "equality by approximation." ***Keniston,*** 380 Mass. at 896-97. Equality of approximation in assessing property tax is achieved by assessing all taxable property at its "fair cash valuation" pursuant to G.L. c. 59, § 38. *See* ***Bettigole,*** 343 Mass. at 231. Where, however,

> "one or a few of a class of taxpayers are assessed at 100 per cent of the value of their property, in accord with a constitutional or statutory requirement, and the rest of the class are intentionally assessed at a much lower percentage . . . the right of the taxpayer whose property alone is taxed at 100 per cent of its true value is to have his assessment reduced to the percentage of that value at which others are taxed even though this is a departure from the requirement of statute. The conclusion is based on the principle that where it is impossible to secure both the standard of true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law."

Shoppers' World, 348 Mass. at 372-73 (*quoting* ***Sioux City Bridge Co. v. Dakota County, Nebraska***, 260 U.S. 441, 446 (1922)).

Shoppers' World established the right of a taxpayer to an abatement remedy for a disproportionate tax assessment if the taxpayer could prove "an intentional policy or scheme . . . of valuing properties or classes of property at a lower percentage of fair cash value than that percentage in fact applied to the taxpayer's own property." *Id.* at 377. Accordingly, most of the cases "applying the rule of the ***Shoppers' World*** case have focused on the issue whether there was a sufficient showing of disproportionate assessment." ***Tregor,*** 377 Mass. at 608. Taxpayers seeking to establish disproportionate assessment bear the burden of proving that the assessors employed a "deliberate scheme" of disproportionate and discriminatory assessment whereby they "systematically" assessed properties or a class of properties at a lower percentage of fair cash value than the percentage applied to the taxpayer's property. ***Stilson v. Assessors of Gloucester***, 385 Mass. 724, 727-28 (1982).

Shoppers' World and the cases which followed it "represented the Supreme Judicial Court's attempt to fashion an appropriate remedy for a problem with which it and numerous courts in other jurisdictions had confronted for many years: the deliberate practice by assessors of a city or town of assessing different classes of real estate at widely differing percentages of fair cash value." ***Brown v. Assessors of Brookline,*** Mass. A.T.B. Findings of Fact and Reports 1996-1, 15, *aff'd,* 43 Mass.App.Ct. 327 (1997). The problem has largely disappeared with the ratification of Article 112 of the Amendments to the Massachusetts Constitution allowing municipalities to classify real property according to use and to assess different classes of property at different rates, together with ensuing statutes which attempted to establish an "orderly transition to revaluation at full and fair cash value" throughout the Commonwealth. *Id.* at 15-18; ***Keniston,*** 380 Mass. at 899.

The issue of disproportion raised in the present appeal is not dependant on any "deliberate" or "intentional scheme" by the assessors to illegally assess property in a disproportionate manner. There is no allegation that the assessors improperly or illegally applied the statutory formula set out in § 2C or that they valued the property for fiscal year 2001, the year following the fiscal year for which the § 2C tax was imposed, at anything other than full and fair cash value. Rather, the issue raised in this

appeal is whether the § 2C tax assessed to WB&T for fiscal year 2000 is a disproportionate tax because it, unlike the property tax assessed to all owners other than purchasers from tax-exempt entities, is measured by the purchase price of the property and not by its fair cash value. Accordingly, it is not necessary to determine whether the assessors engaged in an intentional or deliberate scheme of illegal assessment if the assessors' imposition of the § 2C tax according to its terms results in a disproportionate tax.

Statutes which imposed a property tax on owners of certain property based on a measure other than fair cash value, while all other property owners are assessed a tax based on their property's fair cash value, have been declared unconstitutional as violating the "proportional" requirement of c. 1, § 1, art. 4 of the Massachusetts Constitution. In ***Cheshire v. County Commissioners of Berkshire,*** 118 Mass. 386 (1875) ("***Cheshire***"), the statute at issue required that reservoirs, dams, and underlying land used to maintain a water supply for mill power be assessed "at a valuation not exceeding a fair valuation of land of like quality in the immediate vicinity," rather than at its fair cash value. *Id.* at 388. Noting that the statute required a valuation of land used for a mill's water power "which excludes all increase of value by reason of the improvements or additions made thereon for the construction and maintenance of the reservoir, however valuable or costly," the court held that "the practical operation of this statute . . . is directly and necessarily to produce disproportion." *Id.* at 389. *See also* ***Opinion of the Justices***, 220 Mass. 613 (1915) (statute which imposed a tax on certain property based on a multiple of its net income, rather than on its fair cash value, violated the constitutional proportional requirement); ***Opinion of the Justices,*** 208 Mass. 616 (1911) (statute requiring uniform rate of tax for all personal property in the Commonwealth, while real estate remained taxable at rates varying by municipalities, unconstitutional as disproportionate tax); ***Opinion of the Justices,*** 195 Mass. 607 (1908) (statute imposing uniform rate of tax for money, debts, bonds and stocks unconstitutional as disproportionate tax).

Under § 2C, a certain class of property, real estate purchased from a tax-exempt entity, is subjected to a tax based on purchase price, not on fair cash value. Although the purchase price of property sold at a time proximate to the relevant valuation date is generally the best evidence of fair cash value, it is not always determinative of fair

cash value. *See, e.g.*, ***Pepsi-Cola Bottling Co. v. Assessors of Boston,*** 397 Mass. 447, 449-50 (1986) (Board entitled to disregard sale price negatively affected by below-market lease); ***Donlon v. Assessors of Holliston***, 389 Mass. 848, 857 (1983) (foreclosure sale of little relevance because not voluntary or at arm's length); ***Foxboro Associates v. Assessors of Foxborough***, 385 Mass. 679, 682 (1982) (Board need not consider price stated on deed where it was decided solely by seller and no agreement between buyer and seller as to portion of sale price allocated to subject property). In particular, a sale to an abutter may not represent fair cash value because the property may not have been exposed to the market for a sufficient period or the price may have been influenced by considerations unique to the purchaser. *See* ***Bainbridge Realty Trust v. Assessors of Chilmark***, ATB Findings of Fact and Report 2003-93, 101.

The facts that WB&T owned adjacent property at the time that it purchased the subject parcels, and that the assessors' valuation of the property, as of just two weeks after the sale, at over $1.2 million less than the purchase price, suggest that the purchase price may not represent fair cash value as of the preceding January 1. The City does not argue otherwise; rather, it maintains that the Legislature used purchase price, rather than fair cash value, as the measure of the § 2C tax because it recognized that assessors would not have current information, from the triennial valuation process or G.L. c. 59, § 38D information requests, with which to determine fair cash value. Therefore, the City maintains, it was "rational and reasonable" for the Legislature to use sale price as the measure of the § 2C tax.

The Supreme Judicial Court has recognized that "administrative convenience" and "practicality" may limit an abatement remedy for disproportionate assessment. In rejecting a taxpayer's constitutional challenge to the "interim" abatement remedy for disproportionate assessments provided by G.L. c. 58A, § 14, which required the Board to calculate an "equalized tax rate" for each fiscal year based on Department of Revenue biennial calculations of each municipality's total fair cash value, the court stated:

> We recognize that in order to ensure precise proportionality the Legislature would have to have provided for a determination of the fair cash value of the town on the assessment date for the fiscal year in question, in this case January 1, 1979. But the Legislature

> has provided for such determinations only in even-numbered years. . . . In light of the difficulty of making a determination of the fair cash value of a town, *see* ***Keniston v. Assessors of Boston***, ***supra*** at 901, the Legislature could rationally determine that administrative convenience requires that the Department of Revenue make such determinations only in alternate years, and that practicality does not permit burdening the Appellate Tax Board with making fair cash value determinations for years in which the Department of Revenue does not.

Axelrod v. Assessors of Boxborough, 392 Mass. 460, 463-64 (1984).

However, the assessors' "administrative convenience" argument in the present appeal is undercut by the absence of any time limit within which the assessors must assess the § 2C tax and the fact that there has been no showing of undue burden on the assessors to determine the fair cash value of property. For example, if the § 2C tax had to be assessed within a certain time of the sale or by a date which would make it impractical or burdensome for the assessors to gather information on which to base a fair cash value determination, the assessors' argument might have force. As it is, however, there is no time limit for assessment of the § 2C tax and the City's Tax Collector waited nearly two years, from the December 17, 1999 sale to the November 21, 2001 § 2C tax bill, to issue a bill for the § 2C tax.[6] In fact, the § 2C tax bill was sent after

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[6] Reaching an issue not raised by the parties, the dissent concludes that the "untimeliness" of the § 2C tax bill renders the § 2C tax void. Such a conclusion is contrary to the established principle that a failure to send a tax bill does not affect the validity of the underlying tax. *See* G.L. c. 60, § 3 ("An omission to send a notice under this section shall not affect the validity either of a tax or of the proceedings for its collection"); *see also* ***City of Boston v. DuWors***, 340 Mass. 402, 404 (1960) (holding that language in G.L. c. 59, § 57 concerning sending of tax bills constituted a direction to tax collector that did not affect validity of tax); ***Canron v. Assessors of Everett***, 366 Mass. 634, 639 (recognizing the principle that an "irregularity does not invalidate a tax notice if the taxpayer's rights were not prejudiced by the irregularity."); *cf.* ***McManus v. City of Boston***, 320 Mass. 585, 587 (1963) ("The assessment of taxes is not *strictissimi juris*. It has always been held that a non-compliance by the assessors with the strict requirements of the statutes, if it does

the assessors determined the fair cash value of the subject property, and WB&T was assessed and billed, for the subsequent fiscal year's general real estate tax. Given the lack of urgency in billing the § 2C tax, the disproportion which would result from the imposition of a tax based on a purchase price which exceeds fair cash value, and the assessors' familiarity with their role of determining the fair cash values of property on a yearly basis, substituting purchase price for fair cash value is not justified by "administrative convenience."

When purchase price exceeds fair cash value as of the relevant assessment date, applying the formula for determining whether a tax is proportional compels the conclusion that the § 2C tax is disproportionate. *See* ***Keniston,*** 380 Mass. at 896-97 (a tax is proportional, within the meaning of the Constitution, only when it bears the same ratio to the whole sum raised by taxation as the taxpayer's taxable estate bears to the whole taxable estate of the Commonwealth). Where the purchase price of the property exceeds its fair cash value and the total taxes raised in any municipality is based on fair cash value, the ratio of the purchaser's tax to the "whole sum raised by taxation" will exceed the ratio of its taxable estate to the whole taxable estate. Accordingly, where the purchase

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not affect the rights of the tax-paying citizen, does not render the tax invalid.") There was no allegation or evidence that WB&T was hindered in its ability to contest the § 2C tax or was otherwise prejudiced by the delay in billing the tax, and no interest appears to have been charged to WB&T. Further, even if the timeliness of the § 2C tax bill were relevant to the validity of the § 2C tax, the Board could make no finding of fact concerning whether the § 2C bill was mailed "seasonably upon commitment" under § 57 because no evidence was offered concerning the date that the assessors committed the § 2C tax to the tax collector, the amount of time between the commitment and the sending of the bill, and the reasons for any delay between the commitment and the sending of the bill. *Cf.* ***Tambrands, Inc. v. Commissioner of Revenue,*** ATB Findings of Fact and Report 1996-482, 498 (Board rejected appellant's claim that notices of assessment issued fifteen and eighteen months after assessment violated G.L. c. 62C, § 31 as a matter of law where statutory standard of "as soon as may be," in contrast to general rule of strict statutory tax deadlines, required determination "based on facts and circumstances of a particular case."). Finally, contrary to the dissent's assertion, G.L. c. 59, § 75 cannot be read to provide an "outside timetable for billing taxes," because § 75 sets a deadline for "assessing" property unintentionally omitted from the annual assessment, not for the mailing of tax bills. *See* Commissioner of Revenue's Informational Guideline Release 90-215(I)(B) (§ 75 deadline is the date by which assessors "must commit the omitted or revised assessment" to the tax collector) (emphasis in original).

price of property purchased from a tax-exempt entity during a fiscal year exceeds its fair cash value as of the January 1 preceding the fiscal year for which the § 2C tax is assessed, the § 2C tax is disproportionate and unconstitutional. The issue remains, however, whether WB&T has met its burden of proving that the § 2C tax is unconstitutional. *See, e.g.*, ***Opinion of the Justices***, 425 Mass. at 1203-04.

B. FACIAL OR AS-APPLIED CONSTITUTIONAL CHALLENGE

WB&T does not characterize its constitutional challenge to § 2C as either a "facial" or an "as-applied" challenge. However, given its choice to proceed in this appeal without introducing evidence of the subject parcels' fair cash value and its generalized assertions concerning the effect of a § 2C tax in circumstances not present in this appeal,[7] WB&T's argument most closely resembles a facial constitutional challenge to § 2C. However, as the following sections detail, WB&T's constitutional challenge fails, regardless of how it is characterized.

1. FACIAL CHALLENGE

A facial challenge to the constitutional validity of a statute is the "weakest form of challenge, and the one that is the least likely to succeed." ***Blixt v. Blixt,*** 437 Mass. 649, 652 (2002), *citing* ***United States v. Salerno,*** 481 U.S. 739 (1987) ("***Salerno***"). In ***Salerno,*** the Court ruled that:

> A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that ***no set of circumstances exists under which the Act would be valid***. The fact that the . . . Act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid.

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[7] Both in its initial and reply briefs, WB&T makes extended arguments concerning the imposition of a § 2C tax on purchasers who acquire property between January 1 and June 30. WB&T acquired the subject parcels on December 17, 1999. Accordingly, whether the constitutional rights of a purchaser who acquires property between January 1 and June 30 are somehow infringed by the imposition of a § 2C tax is not before the Board and it makes no ruling on that hypothetical proposition. *See generally,* ***Amory v. Assessors of Boston,*** 310 Mass. 199, 203 (1941) (recognizing "general rule of law that one cannot attack the validity of a tax that affects only others").

Id. at 745 (emphasis added).

In deciding a claim that a statute is facially unconstitutional, courts "'grant all rational presumptions in favor of the constitutionality of a legislative enactment'" and the "positing of theoretically possible unreasonable scenarios are insufficient to make the Act" unconstitutional. ***Route One Liquors, Inc. v. Secretary of Administration and Finance,*** 439 Mass. 111, 118 (2003) ("***Route One Liquors***"), *quoting* ***Kienzler v. Dalkon Shield Claimants Trust,*** 426 Mass. 87, 89 (1997). If the statute in question "may reasonably be applied in ways that do not violate constitutional safeguards, then we must indulge that presumption and find that the . . . provisions escape a facial constitutional challenge." ***Route One Liquors,*** 439 Mass. at 117-18.

Similarly, courts apply this same standard to determine whether a regulation is facially invalid. *See* ***Purity Supreme, Inc. v. Attorney General,*** 380 Mass. 762, 776 (1980)(court "bound to test" regulations by same standard applicable to statutes and "must apply all rational presumptions in favor" of validity). Under this standard, "plaintiffs must show not that the regulation is [unlawful in some circumstances], but rather that the regulation could never be applied" in a lawful manner. ***Dowell v. Commissioner of Transitional Assistance,*** 424 Mass. 610, 615 (1997).

In contrast to a facially unconstitutional act, where "no set of circumstances exist under which the Act would be valid," (***Salerno,*** 481 U.S. at 745), courts have long recognized that a "statute may be constitutional as applied to some states of facts and violative of rights secured by fundamental law as applied to other states of facts." ***Magee v. Commissioner of Corporations & Taxation,*** 256 Mass. 512, 518 (1926); *see also,* ***Bowe v. Secretary of the Commonwealth,*** 320 Mass. 230, 246 (1946). Where a statute is unconstitutional "as applied" to certain facts, the statute itself is not invalid; rather, it is "left for full force as to all subjects which it may constitutionally govern." ***Thurman v. Chicago, M. & St. P. Ry. Co.,*** 254 Mass. 569, 575 (1926).

In ***Macioci v. Commissioner of Revenue,*** 386 Mass. 752 (1982) ("***Macioci***"), taxpayers challenged guidelines used by the Commissioner to determine whether the City of Fitchburg should be certified as valuing property at full and fair cash value. The lower court found that "the guidelines, 'on their face, permit an unconstitutional degree of

undervaluation of specific classes of property.'" *Id.* at 762. The lower court ruled, however, that:

> since the guidelines do not prescribe improper assessment, [the court] would have to turn to what the Commissioner actually did pursuant to her guidelines . . . if she required full and fair cash valuation pursuant to a rational scheme before certifying Fitchburg, the "plaintiffs cannot be heard to complain that the guidelines, as written, could conceivably allow improper assessment practices."

Id. at 763 (quoting lower court's decision). The Supreme Judicial Court upheld the lower court's ruling that the guidelines, although permitting an unconstitutional undervaluation of specific classes of property, were not void on their face:

> The Commissioner, through her guidelines, informed the city of assessment limits which were acceptable to her. These limits were illegal as to the land classification. This declaration is not, however, dispositive of this case. Since the disputed guidelines were merely an aid to cities and to the Commissioner to facilitate assessment at full and fair cash value, that they may have allowed for illegal results does not end the matter. Rather, we must turn to the validity of the Commissioner's certification procedures, as applied, to determine whether the plaintiffs in this case were injured.

Id. at 763.

In the present case, the § 2C tax is based on a measure other than fair cash value. Although § 2C "on its face" permits a disproportionate tax when purchase price exceeds fair cash value, there are also circumstances where the § 2C tax will be constitutional, *i.e.* when purchase price represents the fair cash value of the property on the assessment date preceding the date of purchase. In fact, the purchase price of the property at issue is generally

the most persuasive evidence of value: "Actual sales are, of course, very strong evidence of fair market value, for they represent what a buyer has been willing to pay to a seller for a particular property." ***New Boston Garden Corp. v. Assessors of Boston,*** 383 Mass. 456, 469 (1981) ("***New Boston Garden***") (*quoting* ***First National Store, Inc. v. Assessors of Somerville,*** 358 Mass. 554, 560 (1971)).

Further, WB&T's argument that the § 2C tax is unconstitutional because it is based on the date of sale, not the January 1 assessment date applicable to the general property tax, is of no moment because the sale price is evidence of the value as of the January 1 assessment date, not merely as of the date of sale. Even in cases where the sale is significantly more remote from the valuation date than the ten months present in this appeal, the Board, as the trier of fact, is given wide latitude in determining whether purchase price is the best evidence of value as of the relevant valuation date. *See* ***Ramacorti v. Boston Redevelopment Authority***, 341 Mass. 377, 380 (within trial court's discretion to rely on sale of subject two years and seven months prior to valuation date); ***Brush Hill Development, Inc. v. Commonwealth***, 338 Mass. 359, 367 (1959)(no abuse of discretion to rely on sale of subject five years prior to the valuation date).

Given that purchase price is generally the best evidence of fair cash value as of the relevant valuation date, and that § 2C is constitutional where purchase price represents fair cash value, the "practical operation" of § 2C does not "directly and necessarily [] produce disproportion." *Compare* ***Cheshire***, 118 Mass. at 389. Accordingly, because § 2C "may reasonably be applied in ways that do not violate constitutional safeguards," the Board ruled that it "must indulge [the presumption of constitutionality] and find that the . . . provisions escape a facial constitutional challenge." ***Route One Liquors,*** 439 Mass. at 117-18.

2. AS-APPLIED CHALLENGE

Regarding an as-applied challenge, WB&T is entitled to relief if it proved that the § 2C tax imposed on it was in fact disproportionate. *See, e.g.*, ***Macioci,*** 368 Mass. at 763. The § 2C tax imposed on WB&T is disproportionate, and therefore unconstitutional, if the ratio of WB&T's § 2C tax to the whole sum raised by taxation in Boston exceeds the ratio of the value of the subject parcels to the value of all taxable property in Boston. *See* ***Keniston,*** 380 Mass. at 896-97. Those ratios are equal if the subject parcels, like parcels subject to the general property tax, are valued at fair cash value. *See* ***Bettigole,*** 343 Mass. at

231. Accordingly, WB&T would have met its burden of proving that its § 2C tax was disproportional if it established that the purchase price on which its § 2C tax was based exceeded the fair cash value of the parcels as of the January 1, 1999.

However, the only facts of record in this appeal that bear on the fair cash value of the subject parcels as of January 1, 1999 are: 1) the parcels were purchased within a year of the relevant valuation date; 2) by an abutter; 3) for $4,500,000; and 4) the purchase price exceeded the parcels' assessed value for the following year. Neither party attempted to derive a fair cash value for the subject parcels nor offered any further evidence of the parcels' value.

It is beyond question that the taxpayer bears the burden of proof "to make out its right as [a] matter of law to [an] abatement of the tax." ***Schlaiker v. Assessors of Great Barrington***, 365 Mass. 243, 245 (1974). That burden encompasses a requirement that the taxpayer prove "every material fact necessary to prove" its entitlement to an abatement. ***General Electric Co. v. Assessors of Lynn,*** 393 Mass. 591, 599 (1984)

The valuation evidence of record cuts in two contradictory directions. The $4,500,000 purchase price paid less than a year after the relevant valuation date suggests that the purchase price represented the subject parcels' fair cash value as of the assessment date. However, the assessors' valuation of the parcels at $3,281,600, as of a date just weeks after the sale to the owner of abutting property, suggests a fair cash value as of January 1, 1999 significantly less than the purchase price. In the absence of further evidence either reconciling the contrary evidence or supporting one or the other of these proposition, a Board finding of fair cash value would not be supported by substantial evidence. *See, e.g.,* ***New Boston Garden,*** 383 Mass. at 465-67 (Decisions of the Board must be based on substantial evidence; substantiality of evidence must "take into account whatever in the record fairly detracts from its weight," particularly evidence that is "robbed of persuasive substance" by other evidence).

On the present state of the evidence, the Board simply cannot reach a fair cash value determination that is supported by substantial evidence. The record is devoid of even a description of the subject property, a fundamentally necessary consideration in reaching a fair cash value determination. *See* ***Valkyrie Company v. Assessors of Worcester,*** ATB Findings of Fact and Report 2005-407, 412

("The dearth of descriptive information left the Board without the evidence needed to make findings relevant to the value of the subject property.").

Further, the bare fact that the property was sold to an abutter establishes neither that the price represented fair market value nor that it did not. In order to be a reliable indicator of value, a sale price paid by an abutter requires evidence concerning the circumstances surrounding the sale to ensure that the purchase price was neither artificially inflated by "considerations unique to the purchaser" nor reduced below fair market value because the property was not sufficiently "exposed to the market." *See* ***Bainbridge v. Assessors of Chilmark,*** ATB Findings of Fact and Report 2003-93, 101; ***Cove v. Assessors of Uxbridge,*** ATB Findings of Fact and Report 1998-1001, 1008. However, the absence of such evidence does not provide substantial evidence that the purchase price in fact exceeded fair cash value. *See* ***New Boston Garden***, 383 Mass. at 456 ("disbelief of any particular evidence does not constitute substantial evidence of the contrary").

Moreover, the assessed value of the subject parcels for the subsequent year provides inconclusive evidence of their fair cash value as of January 1, 1999. There is no evidence concerning the method or underlying factual considerations by which the assessors valued the subject parcel as of January 1, 2000 or that they considered, or were even necessarily aware of, the sale price of the parcels at the time it valued the parcels for fiscal year 2001. Although the issuance of the fiscal year 2001 real estate tax bills to WB&T for the subject parcels indicates that the assessors clearly knew that WB&T was the record owner of the parcels as of the January 1, 2000 assessment date, there is no indication on the record that the assessors, even assuming that they were aware of the sale price, used it to value the subject parcels rather than a capitalization of income or a depreciated cost methodology. *See, e.g.,* ***Correia v. New Bedford Redevelopment Authority,*** 375 Mass. 360, 362 (1978) (sales, income-capitalization, and depreciated reproduction cost are the three generally approved methods of real estate valuation).

Moreover, no evidence was offered concerning market conditions between January 1, 1999 and January 1, 2000 or whether the type or condition of any buildings on the properties remained unchanged between those dates, including whether any such buildings were razed, rehabilitated, converted to a new use, or constructed during that period. Accordingly, the assessed value of the subject parcels for purposes of fiscal year 2001 is not

reliable evidence of what the fair cash value of the parcels were on January 1, 1999.

For all of the foregoing reasons, there is no substantial evidence of record upon which the Board could find the fair cash value of the subject parcels as of January 1, 1999. In the absence of such a finding, the Board cannot determine whether the purchase price upon which the §2C tax was based exceeded the property's fair cash value as of January 1, 1999. Because § 2C is "presumed valid and is entitled to the benefit of any constitutional doubt" (***Opinion of the Justices,*** 425 Mass. at 1203-4) and WB&T had the burden of proving that § 2C is unconstitutional (*id.*), including all facts necessary to support its abatement claim (***General Electric Co,*** 393 Mass. at 599), the Board ruled that WB&T failed to meet its burden of proving that the § 2C tax imposed on it was an unconstitutional disproportionate tax.

Accordingly, for all of the foregoing reasons, the Board ruled that WB&T's failure to prove the fair cash value of the parcels as of January 1, 1999 is fatal to its claim that § 2C is unconstitutional. The Board, therefore, ruled that WB&T failed to meet its burden of proving its entitlement to an abatement and issued a decision for the appellee in this appeal.

APPELLATE TAX BOARD

By: _____
Anne T. Foley, Chair

_____
Nancy T. Egan, Commissioner

_____
James D. Rose, Commissioner

Commissioner Gorton and Commissioner Scharaffa join in the following Dissent:

We concur with the majority insofar as they conclude that the monetary exaction provided for by G.L. c. 59, § 2C constitutes a tax. The appellant has neither availed itself of the privilege of pursuing some voluntary activity, so as to fall subject to an excise, nor received any special benefit for which a service fee may be charged. *See* ***Emerson College v. City of Boston***, 391 Mass. 415, 424-425 (1984).

The incidence of the tax is on the ownership of property, after purchase from an exempt owner during the course of a Fiscal Year. *Cf.* ***Riesman v. Commissioner of Corporations and Taxation***, 326 Mass. 574 (1950). The imposition must accordingly conform to the standards of proportionality the Massachusetts constitution requires of property taxes. *See* **Mass. Const., Part II, c. 1, § 1, art. 4; Mass. Declaration of Rights, art. 10.**

At the threshold, however, we believe the majority gives short shrift to an issue that might have averted any necessity of reaching the constitutional question. The tax bill which apprised appellant of the subject liability was issued nearly two years after the December 17, 1999 purchase of the parcels at 49-57 Franklin Street, Boston from an exempt seller, which gave rise to the tax. The tax bill was not forthcoming until November 21, 2001. Thus a liability arising in Fiscal Year 2000 was not billed until Fiscal Year 2002. The clear untimeliness of the bill should be sufficient to void the liability and warrant a decision for the appellant, without regard to constitutional proportionality analysis.

Given our conclusion that the G.L. c. 59, § 2C exaction constitutes a property tax; the statutory provision governing the timing of sending out tax bills applies by its plain terms. G.L. c. 59, § 57 states that "*[e]xcept as otherwise provided*, bills for real estate and personal property taxes shall be sent out *seasonably* upon commitment in every city, town, and district in which the same are assessed." (Emphasis added.) The legislature's choice of the criterion of "seasonabl[eness]" allows more latitude in the time frame for the billing of municipal taxes than would have pertained had a date certain been prescribed as a deadline. We assume that in qualifying circumstances a tax bill which went out somewhat late could nevertheless be termed "seasonable" and thus valid under the flexible timeliness standard § 57 adopts.

However, the stipulated record before us is devoid of any factual circumstances suggesting the two-year delayed tax bill could be found to have been mailed "seasonably." *Cf.* ***Tambrands, Inc. v. Commissioner of Revenue,*** 46 Mass. App. Ct. 522, 523-24 (1999) (Notice of Assessment timely where G.L. c. 62C, § 31 prescribes notice "as soon as may be" and delay was occasioned by transition to a problem-ridden computer system). If the requirement of seasonable billing means anything, it must entail the sending out of the relevant tax bill within the applicable Fiscal Year. The City of Boston has offered no explanation of the two-year time lapse in the sending out of the tax bill for the

subject parcels. Accordingly, given the absence of any basis for finding the timing to be "seasonable" as required, the tax bill was late under G.L. c. 59, § 57.

Our conclusion that the tax bill was fatally late is strengthened by the provision governing omitted assessments at G.L. c. 59, § 75. This statute gives municipalities express authority to assess properties "unintentionally omitted from the annual assessment of taxes due to clerical or data processing error or other good faith reason...." *Id.* The statute addressing omitted assessments permits action to be taken as late as June 20th of the given fiscal year, or ninety days "after the date on which the tax bills are mailed, whichever is later…." *Id.* Yet no special provision for omitted assessments would be needed if the "seasonableness" standard of § 57 were so elastic as to stretch out beyond the relevant fiscal year regardless of circumstances. General Laws c. 59, § 75 sets up what is in effect an outside timetable for billing taxes, even then applicable only in specified instances. To allow the "seasonableness" timetable of G.L. c. 59, § 57 to sweep past the explicit time limitations applicable to omitted assessments would render §75 null; an omitted bill might just as easily be sent out "seasonably" without regard to the time parameters and restricted circumstances laid down in G.L. c. 59, § 75. *See, e.g.,* ***Wolfe v. Gormally,*** 440 Mass. 699, 704 (2004) ("A basic tenet of statutory construction requires that a statute 'be construed 'so that effect is given to all its provisions, so that no part will be inoperative or superfluous.'")(Citations omitted.)[8]

The majority elides the question of whether the liability was billed seasonably. We believe the majority errs in so doing, because a more careful reading of G.L. c. 59, § 57 could have mooted the constitutional issue.

We accordingly turn to the validity of G.L. c. 59, § 2C. It is a given that, while this statute imposes a tax on property, the imposition is measured on a basis other than the full and fair cash value, determined using a

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[8] The majority argues that delay in the mailing of the instant tax bill, no matter how long, "does not affect the validity of the underlying tax". *See* n. 6, *supra.* This sweeping conclusion would all but eviscerate the requirement of "seasonab[leness]" in the billing of property taxes. *See* G.L. c. 59, § 57. The word would be consigned to a merely precatory effect. If the requirement is to mean anything, billing must occur during the relevant yearly taxing cycle. The majority's approach also renders the provision for omitted assessments at G.L. c. 59, § 75 meaningless.

uniform methodology and valuation date applicable to all properties alike. Because the statute, on its face, departs from the constitutional command that exactions on account of the ownership of property be proportional, our "'duty is to apply the higher law of the Constitution, and disregard the statute.'" ***Mullins v. Commissioner of Revenue,*** ATB Findings of Fact and Reports 1997-973, *aff'd*, 428 Mass. 406 (1998), *quoting* ***Bowe v. Secretary of the Commonwealth***, 320 Mass. 230, 245 (1946).

We perceive no disagreement that "full and fair cash value" is the constitutional lodestar which must guide all assessments of real property in the Commonwealth. *See* ***Coomey v. Board of Assessors of Sandwich***, 367 Mass. 836, 837 (1975) ("***Coomey***"). *Accord* ***Boston Gas Co. v. Assessors of Boston,*** 334 Mass. 549, 566 (1956) ("***Boston Gas")***. Indeed, two bedrock principles inform the proportionality jurisprudence of the Supreme Judicial Court: First, property must be assessed based on its "market value." *See* ***Opinion of the Justices***, 220 Mass. 613, 620 (1915). Second, all properties must be "assessed on the same basis." *Id. See also* ***Shoppers' World, Inc. v. Board of Assessors of Framingham,*** 348 Mass. 366, 373 (1965) (articulating "the standard of the true value, and [the requirement of] uniformity and equality …." If there is conflict between these two principles, the "latter requirement is to be preferred as the just and ultimate purpose of the law.'") ("***Shoppers' World")***

The uniform assessment of all properties based on their market value is the foundation of a system of taxation designed to ensure that each property owner pays his proportional share of the costs of maintaining the government, no more and no less. *See* ***Opinion of the Justices,*** 324 Mass. 724, 727-729 (1949). Through "periodic valuations" on a standardized timetable taxing authorities adhere to the requirement that "assessments …' be made with equality.'" *See Id.* at 728 (Citation omitted).

Of course, it is well-understood that "[d]etermining the value of real estate is not a science …." ***National Railroad Passenger Corp. v. Certain Temporary Easements***, 357 F.3d 36, 39 (1st Cir. 2004). Accordingly, the Supreme Judicial Court has allowed that "'[p]ractically it is impossible to secure exact equality or proportion in the imposition of taxes'." ***Bettigole v. Assessors of Springfield***, 343 Mass. 223, 231 (1961), ***quoting Cheshire v. County Commrs. of Berkshire***, 118 Mass. 386, 389 (1875)("***Cheshire"***). "[F]ull and fair cash values can only be approximated." ***Macioci v. Commissioner of Revenue***, 386 Mass. 752, 761 (1982) (***"Macioci***").

While the Court has necessarily accorded latitude to municipal assessors, it has insisted that practices and procedures be calculated toward achieving the end of "assessment at full and fair cash value…." *See id.* at 763. In the early leading case of ***Cheshire,*** 118 Mass. at 389, the Court stressed that "[t]he test, in all legislative enactments affecting taxation, is that their aim be towards [equality or proportion], by approximation at least." The constitution will not tolerate encroachment on the principle of proportionality "'whether that discrimination is effected directly in the assessment or indirectly through arbitrary and unequal methods of valuation.'" ***Tregor v. Board of Assessors of Boston***, 377 Mass. 602, 604 (1979), ***quoting Cheshire***, 118 Mass. at 389. Accordingly, the Court held in ***Cheshire***, 118 Mass. at 389, that "[n]o enactment respecting taxation under [the proportionality] clause conforms to its provisions if it directly and necessarily tends to disproportion in the assessment."

The rule of ***Cheshire*** was reaffirmed in ***Brookline v. County Commissioners of Norfolk***, 367 Mass. 345, 350 (1975). *Accord* ***Opinion of the Justices,*** 324 Mass. 724, 733-34 (1949) (rejecting law which "would have 'a direct tendency to produce unreasonable or disproportional taxation' contrary to c. 1, § 1, art. 4, of the Constitution.")(Cite omitted.) The result in ***Macioci*** is consistent with ***Cheshire:*** the Court upheld the administrative guidelines being challenged only after concluding that they "were merely an aid to cities and to the Commissioner to facilitate assessment at full and fair cash value…." 386 Mass. at 763.

Applying these principles, the Court upheld the local option afforded municipalities under G.L. c. 59, § 2A(*a*) to tax improvements to real property completed by July 1, as though they had existed on the January 1 valuation date for the applicable fiscal year. *See* ***C&S Wholesale Grocers, Inc. v. City of Westfield***, 436 Mass. 459 (2002) (***"C&S Wholesale Grocers")***. The Court emphasized that this statutory provision comported with the requirement of proportionate taxation because "all properties [within a municipality] are treated uniformly with respect to the inclusion of improvements added or destroyed after the January 1 tax date and by June 30." *Id.* at 463. The Court went on to say that "all properties are treated equally and identically with respect to changes in value resulting from other market forces. Such changes are not accounted for after the tax date of January 1." *Id.*

In ***Opinion of the Justices***, 324 Mass. 724 (1949), the Court rejected a proposed measure which would have exempted

new construction from property taxation for a five year period. The Court noted that property owners within a municipality would face disparate tax treatment, with some owners paying no tax at all, while others were subjected to tax at the prescribed rate on their full and fair cash value. *Id. at 729.* The Court found "a direct tendency to produce unreasonable or disproportional taxation contrary to c. 1, § 1, art. 4, of the Constitution. Such exemptions would, we think, constitute in themselves a serious inroad upon the proportional principle and could readily serve as stepping stones toward still further encroachments." *Id.* at 733-34.

The majority fails to analyze G.L. c. 59, § 2C under the test thus laid down for squaring enactments with the constitution's requirement of proportionality. Instead, the majority reads the ***Maciocl*** case broadly to say that, if on any conceivable set of facts, the enactment would operate to assess tax on the basis of full and fair cash value, the presumption of constitutionality attendant to any statute would save it. Only on proof of a divergence between the "sales price" criterion of G.L. c. 59, § 2C and the constitutional norm of full and fair cash value with respect to a subject property, the reasoning continues, would the statute fail, only as applied.

General Laws c. 59, § 2C is indeed entitled to a presumption of constitutionality, but the majority takes this precept to such an extreme as would vitiate the rule of proportionality. In the context of reviewing statutes under the rational basis prong of the equal protection clause, the test is indeed as the majority suggests. "Where taxation is concerned and no specific federal right, apart from equal protection, is imperiled, the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation." ***Lehnhausen v. Lake Shore Auto Parts Co.,*** 410 U.S. 356, 359 (1973).

Proportionality analysis under ***Cheshire***, by contrast, follows principles less deferential than rational basis review. The proportionality clause offers relatively bright-line criteria with its twin requirements of assessment according to "true value" and with "uniformity and equality" in method. *See* ***Shoppers' World***, 348 Mass. at 373. *See also* ***Opinion of the Justices***, 220 Mass. 613, 620 (1915) (Enactments must provide that "all property is … assessed on the same basis … [and] assessed on market value.") No statute which "directly and necessarily tends to disproportion in the assessment" passes muster. ***Cheshire,*** 118 Mass. at 389.

Once the correct constitutional analysis is applied, it becomes clear that G.L. c. 59, § 2C impermissibly tends to disproportionate assessment outcomes. First, the statute entails that the subject property is not assessed on the same basis as other properties of the same class within the City of Boston. Properties generally are assessed on the basis of their fair cash value as of the January 1 immediately *preceding* the beginning of the relevant fiscal year. G.L. c. 59, § 11. Properties purchased from exempt owners, by contrast, are assessed as of whatever point *during* the fiscal year a sale happens to be consummated. In the instant case, the subject property sold on December 17, 1999, almost twelve months after the date as of which other properties were valued for purposes of Fiscal Year 2000, or January 1, 1999. The date of sale is nearly six months after the 2000 Fiscal Year commenced. The disparity is manifest; assessing the same property as of two divergent points in time, nearly a year apart, will typically yield different values even under a uniform assessment methodology. *See generally* ***Sudbury v. Commissioner of Corporations and Taxation,*** 366 Mass. 558, 560 (1974) (***"Sudbury"***)(Assessed values are "soon out-of-date" given fluctuations in the property market.) Such inconsistency in the timing of valuation upsets the proportionality which can only be achieved by gauging values as of a single fixed date, as is done with virtually all other properties within the subject's class and municipality. *See generally* ***Boston Gas,*** 334 Mass. at 549.

Second, the statute conclusively adopts sale price as the measure of the tax, without providing any filter to screen out prices resulting from suspect transactions with dubious reliability as barometers of value. Nor are there mechanisms to adjust sale price to bring it into correspondence with the statutory valuation date, or fair market value as determined according to a fuller consideration of facts and circumstances. While sale price is certainly "competent evidence bearing upon fair cash value of the property on the taxing date," it is not "as a matter of law a decisive index of fair cash value…" ***Tremont & Suffolk Mills v. Lowell***, 271 Mass. 1, 15 (1930). The Supreme Judicial Court and this Board have recognized that, in many circumstances, sale price has but a "limited relevance to establishing the fair market value of … property …." ***Donlon v. Board of Assessors of Holliston***, 389 Mass. 848, 857 (1983). *See also* ***American House, LLC v. Board of Assessors of Greenfield,*** ATB Findings of Fact and Reports 2005-39 (related party sales not conclusive of fair market value); ***Northshore Mall Limited Partnership v. Board***

of Assessors of Peabody, ATB Findings of Fact and Reports 2004-195, 249 ("little weight" accorded to allocated price set by the buyer following "the August 1999 portfolio sale of the Mall"). *See also* ***Amory v. Commonwealth***, 321 Mass. 240, 257 (1947) ("Our decisions uniformly hold that a sale not freely and voluntarily made must be rejected as evidence of market value….") To tax a property inflexibly on the purchase price notwithstanding abundant cautions that price is sometimes unreliable in predicting value is to engage in discriminatory "spot" assessing of the subject parcels. *See* ***C&S Wholesale Grocers,*** 436 Mass. at 463, n.2.

In the instant case, there is strong inferential evidence that sale price as of December 19, 1999 is not a valid measure of the fair market value of the subject parcels as of any relevant point in time. It is undisputed that the Assessors valued the subject parcels as of January 1, 2000, or two weeks after the sale, at $3,281,600, for purposes of the Fiscal Year 2001 real estate tax assessment. A marker of fair market value as gauged by the City relatively cotemporaneous with the date of sale thus reveals a substantial divergence between sale price and fair market value. *See generally* G.L. c. 58A, § 12B (assessed valuations admissible as evidence of fair cash value). Given the Fiscal Year 2001 assessed value, it is inconceivable that fair market value as of January 1, 1999 could somehow have equaled the December 19, 1999 $4,500,000 purchase price. At the very least, the window on value represented by the Fiscal Year 2001 assessment precludes an assumption that the property market was static in calendar year 1999.

The majority declines, however, to grasp the obvious import of the undisputed facts and postulates the theoretical possibility that the $4,500,000 sale price might correspond to the fair market value of the subject parcels as of January 1, 1999. The hope that a law might avoid disproportionality in one imagined circumstance will not cure the constitutional defect where there is a direct or necessary tendency to disproportion. *Cf.* ***Solem v. Helm***, 463 U.S. 277, 303 (1983) (proportionality analysis of criminal sentence under the Eighth Amendment; possibility that commutation of sentence might avert disproportionality, insufficient to save statute.) A stopped clock will be right twice a day, but nevertheless cannot be relied upon to tell time.

Here, inequality between sale price and fair market value for purposes of the 2000 Fiscal Year is an inescapable inference, one the Board can scarcely avoid making on the given facts. *See* ***General Mills, Inc. v.***

Commissioner of Revenue, 440 Mass. 154, 161 (2004) (Findings of Board not binding where "'contrary conclusion is not merely a possible but a necessary inference from the'" facts as found.) (Citation omitted.) Thus, the G.L. c. 59, § 2C tax on properties acquired from an exempt seller during a Fiscal Year fails the requirement of proportionality that limits the imposition of property taxes. We would grant the appellant a full abatement, and must therefore respectfully dissent from the decision of the Board.

Frank J. Scharaffa, Commissioner

Donald E. Gorton, III, Commissioner

A true copy,

Attest: _____
Assistant Clerk of the Board

COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD

WILLIAM B. RICE EVENTIDE HOME, INC.	**v.**	**BOARD OF ASSESSORS OF THE CITY OF QUINCY**
Docket Nos. F277089, F277169-70		Promulgated: June 30, 2006

These are appeals filed under the formal procedure pursuant to G.L. c. 58A, § 7 and G.L. c. 59, §§ 64 and 65 from the refusal of the appellee to abate taxes on certain real estate in the City of Quincy owned by and assessed to the appellant under G.L. c. 59, §§ 11 and 38 for fiscal years 2004 and 2005.

Commissioner Rose heard these appeals. He was joined by Chairman Foley and Commissioners Scharaffa, Gorton, and Egan in dismissing Docket No. F277089 for lack of jurisdiction, in the decision for the appellee in Docket No. F277169, and in the decision for the appellant in Docket No. F277170.

These findings of fact and report are made pursuant to a request by the appellant under G.L. c. 58A, § 13 and 831 CMR 1.32.

Paul N. Barbadoro, Esq. and *Susan M. Molinari, Esq.* for the appellant.

Robert Quinn, Esq. for the appellee.

FINDINGS OF FACT AND REPORT

On the basis of testimony and exhibits entered into evidence at the hearing of these appeals, the Appellate Tax Board ("Board") made the following findings of fact. At all times relevant to these appeals, the appellant, the William B. Rice Eventide Home, Inc. ("Eventide" or the "appellant") was a charitable corporation organized pursuant to G.L. c. 180. Eventide operated a skilled nursing facility on its property located at 215 Adams Street in the City of Quincy, Massachusetts ("215 Adams Street"). In May 2004, two nominee realty trusts purchased two parcels of land, one located at 191 Adams Street, which contained a single-family residential home, and one at 205 Adams Street, which was vacant land. These two parcels, which were contiguous with 215 Adams Street, were taxed as

one parcel, and are thus referred to herein collectively as "191 Adams Street."

For the fiscal years at issue, the appellant claimed that it occupied 191 Adams Street and 215 Adams Street (the "subject properties") in furtherance of its charitable purposes and that, therefore, the subject properties were exempt from real estate taxes. The appellee, the Board of Assessors of the City of Quincy (the "assessors"), reversed their long-standing treatment of 215 Adams Street as tax exempt. The assessors also taxed the newly-acquired 191 Adams Street parcels, contending that these parcels were not owned by Eventide, and Eventide had failed to demonstrate to the assessors that it was the beneficiary of the two nominee trusts that purchased the parcels. The assessors also contended that the parcels were not being used in furtherance of Eventide's charitable purposes.

1. Jurisdiction.

a. Fiscal year 2004 appeal.

Eventide timely filed Form 3ABC and Form PC for fiscal year 2004 with the assessors.[1] On or about June 14, 2004, Eventide received a fiscal year 2004 tax bill for 215 Adams Street. This was the first property tax bill from the City of Quincy ("City") that Eventide had received in its nearly eighty years of operation. The City mailed its fiscal year 2004 property tax bills on or about December 30, 2003. The City did not issue a tax bill to Eventide in December. However, the City issued an omitted assessment to Eventide in June, 2004, labeled "OMITTED BILL 6/14/04."

Eventide did not appeal its charitable exemption status directly to the Board. Instead, Eventide filed an application for abatement with the assessors on or about July 15, 2004. The assessors took no action on Eventide's application for abatement, and therefore, the application for abatement was deemed denied on or about October 15, 2004.[2] On November 26, 2004, Eventide filed its appeal for fiscal year 2004 with the Board. The fiscal year 2004 tax as reflected on the "OMITTED BILL 6/14/04" was $105,992.81.

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[1] See *infra*, pages 19-20, for an explanation of Forms 3ABC and Forms PC.

[2] The assessors sent to the appellant a Property Tax Abatement Denial Notice, dated October 14, 2004, stating that the application for abatement was deemed denied on October 14, 2005. However, pursuant to G.L. c. 59, § 64, an application for abatement filed with the assessors is deemed denied three months from its filing. Three months following July 15, 2004 is October 15, 2004.

As of September 13, 2005, the date of the hearing of this appeal, the appellant had made no tax payments for fiscal year 2004.

For the reasons more fully described in the following Opinion, the Board has no jurisdiction over the appeal for fiscal year 2004 because the appellant failed to timely pay the tax assessed without incurring interest. Accordingly, the Board dismissed the appeal and issued a decision for the appellee in Docket No. F277089.

b. Fiscal year 2005 appeals.

Eventide timely filed Form 3ABC and Form PC with the assessors for fiscal year 2005. On or about January 3, 2005, Eventide received a 2005 tax bill for 215 Adams Street. At this time, the assessors also issued the 2005 tax bill for 191 Adams Street to Joyce Haglund ("Ms. Haglund"), the administrator for Eventide. The 2005 tax bill listed Ms. Haglund as "trustee" and was mailed to her attention at 215 Adams Street. Eventide appealed these assessments directly to the Board pursuant to G.L. c. 59, § 5B, seeking an abatement based on its eligibility for a charitable exemption for each of the subject properties. Eventide filed its appeals for fiscal year 2005 on January 27, 2005. On the basis of these facts, the Board found it had jurisdiction over the appeals for fiscal year 2005.

2. Eventide's entitlement to charitable exemptions for the subject properties for fiscal year 2005.

a. 215 Adams Street's qualification for a charitable exemption.

Eventide was incorporated on or about March 21, 1924, and was at all material times the record owner of real estate located at 215 Adams Street. The appellant's articles of incorporation, dated March 21, 1924, state that Eventide was formed for the purposes of "establishing and maintaining a Home in Quincy, Massachusetts, for the permanent care of such elderly deserving men and women as may be admitted under the existing rules and regulations, and to create a fund therefor." The mission of Eventide, as adopted by its Board of Directors, was "to provide a unique life-care retirement community for residents of Quincy and surrounding towns" and to "provide[] supportive services in a home-like atmosphere which allows the residents to maintain independent lives with dignity" and

"further provide[] individualized and caring, medical and custodial services for the residents as the need arises." Eventide qualified as a charitable organization under the federal Internal Revenue Code ("Code") § 501(c)(3) and as a charitable organization under Massachusetts G.L. c. 180.

Eventide operated a sixty-bed skilled nursing facility at 215 Adams Street. Ms. Haglund testified that most of Eventide's residents were from Quincy, but Eventide has accepted residents from many other surrounding communities and from communities as far away as Maine. She further testified that Eventide was open to most, if not all, individuals that applied: "We don't typically deny applications. More often, we are unable to provide a room for someone because of our size and the fact that we're full." Ms. Haglund testified that, in addition to maintaining its wait list according to the dates of applications, Eventide's selection process also took into account a potential resident's condition and the features of the available room:

> It's not exactly a cross-off-the-top list because our rooms are all unique, and we kind of need to assess as every room comes up. It may, for example, share a bathroom with a male, and so your mother may not want to do that. Or, for example, if it's an applicant that has dementia, I may not feel comfortable putting them in a room that's right next to a stairwell if they have a tendency to get up confused in the middle of the night or something like that. If it's somebody with a very fragile heart condition, I wouldn't want to put them at some length from the nurse's station. They'd need to be in a room somewhat close to staff.

She further testified that there were no selection requirements, financial or otherwise, that limited a potential resident's admission, so long as Eventide could meet their personal and medical needs.

Paula O'Connor ("Ms. O'Connor"), the director of nurses at Eventide, further testified that Eventide could not provide some services, including routine ventilator treatments and dialysis treatments, and an applicant's need for a treatment that Eventide could not provide would affect their eligibility. However, she also testified that Eventide's residents were not capable of living independently. The average age of the Eventide residents was 93, and several residents were over the age of 100.

She testified that Eventide's staff provided assistance with activities of daily living ("ADLs") including bathing, dressing, grooming, and toileting, as well as "instrumental ADLs" like housekeeping, shopping, and laundry.

As part of its intake procedure, Eventide requested financial information, but Ms. Haglund testified that this information was used only for purposes of setting Eventide's budget, not to screen and eliminate potential residents. She explained that Eventide subsidized the therapies and services offered to its residents, including those residents receiving Medicaid, when the services were not fully covered by insurance. Ms. Haglund and Ms. O'Connor both testified that Eventide provided enhanced services at its own cost, consisting of activities like discussion groups, musical programs and games to stimulate the residents, and an enhanced "home-cooked" food program for the residents. Ms. Haglund also testified that Eventide recognized the importance to the residents' quality of life for their families and friends to remain involved in their lives, and therefore, Eventide hosted numerous events that families and friends were encouraged to attend, including family picnics, at no cost to the residents or their families.

Robert Dwyer ("Mr. Dwyer"), a member of the Eventide board of directors, testified that for fiscal years 2004 and 2005, Eventide operated at a loss of $701,520 and $255,516, respectively. These deficits resulting from therapies and activities for the residents were paid from Eventide's endowment. Ms. Haglund testified that Eventide spent in excess of $100,000 per year on activities for its residents. When asked why Eventide made so many extra expenditures for enhanced therapies and services for its residents, Ms. Haglund testified, "[b]ecause we're a charitable home and we're charged with taking care of our residents," and that the residents ultimately benefited from the enhanced programs: "They live longer, and they thrive, more than residents of other homes at the same age." Ms. Haglund asserted that these activities substantially enhanced the quality of life of Eventide's residents, and therefore resulted in fewer hospitalizations for the residents. Eventide submitted into evidence the Commonwealth of Massachusetts Office of Medicaid statistics which demonstrated that during the period from October 1, 2003 through June 30, 2004, Eventide had zero hospitalizations for "preventable" conditions which Medicaid monitors, including congestive heart failure, kidney or urinary tract infections, dehydration, and

chronic obstructive pulmonary disease. The industry average during that same period was 4.63 hospitalizations per facility for all four conditions.

Ms. Haglund testified that between 61-66% of Eventide's residents were receiving Medicaid at the time of the hearing of these appeals. She further testified that for fiscal years 2004 and 2005, Eventide subsidized its Medicaid residents in the amount of $73.36 per day and $58.72 per day, respectively. Ms. Haglund stated that no residents at Eventide were denied admission or transferred to another facility for an inability to pay.

Ms. Haglund also testified that Eventide provided and hosted many community outreach programs at no cost to the community. Community programs included blood pressure screenings and seminars on elder issues, including a fall prevention workshop, which were advertised to the community. Eventide also created and distributed a resource guide to all Quincy residents over the age of 65. The guides cost Eventide approximately $63,000 to produce and distribute when Eventide originally produced them about five years prior to the hearing, and Eventide was still distributing the guides to Quincy residents during the tax years at issue. Eventide also encouraged the community to visit the facility by hosting speakers, including Quincy Mayor Phelan, hosting local organizations, including local Girl Scout troops, and allowing individuals to hike or bicycle along its walking trails. Eventide did not post "no trespassing" signs or employ any security guards to discourage the use of its outdoor property.

The Board found that Eventide's intake procedure and admissions criteria, which were intended to match potential residents to certain rooms based on their locations within the facility, had the effect of better serving potential residents and were not designed to deny them entry. Moreover, Eventide's endowment bore deficits to pay for expenditures which greatly enhanced the quality of life of the elderly residents. The fact that Eventide's population was comprised of about two-thirds Medicaid patients and that Eventide generously supplemented therapies and services available to all of its residents, including its Medicaid residents, indicated that Eventide's services were available to a broad segment of the population and not just those who could afford its services. Eventide's outreach programs, including its free seminars on elder issues, free blood pressure screenings, the publication and distribution of its free resource guide, and the availability of its facilities and grounds to the community, further indicated

that Eventide made its resources available to the community. On the basis of these findings, the Board thus found that Eventide's services benefited a significantly broad segment of the population.

Furthermore, the average age of Eventide's residents was 93, with several residents over the age of 100, and all the residents required assistance with various ADLs and "instrumental ADLs." The Board found that, in the absence of the care provided by Eventide, the residents would require publicly-assisted hospitalization or transfer to another skilled nursing facility. The Board thus found that Eventide's elderly residents were unable to live independently. The Board also found that Eventide's rate of zero hospitalizations for "preventable" conditions, well below the industry average, was proof of the care which Eventide provided to its elderly residents. The Board thus found that Eventide's provision of enhanced therapies and services to its residents, including the many family-friendly activities, had the ultimate effect of preventing expensive, publicly-assisted hospitalizations for the residents. On the basis of these findings, the Board thus found that Eventide relieved a burden of government by caring for the community's elderly citizens.

Having found that Eventide met its burden of proving that its skilled nursing services were available to a sufficiently large segment of the elderly population and that it provided relief of a burden to government to care for the elderly, the Board found that the appellant was entitled to an exemption for 215 Adams Street for fiscal year 2005. The Board accordingly issued a decision for the appellant in Docket No. F277170.

b. 191 Adams Street's qualification for a charitable exemption.

Ms. Haglund testified that 191 Adams Street was purchased on May 7, 2004 with funds from Eventide's endowment by two nominee realty trusts, (1) the Barnside Realty Trust, with John Caravan, Eventide's treasurer, as trustee; and (2) the 205 Adams Street Trust, with Ms. Haglund as trustee. She testified that Eventide was the sole beneficiary of these trusts. Ms. Haglund further testified that the purpose of purchasing 191 Adams Street was "to support the operations" of Eventide.

According to Ms. Haglund, Eventide organized a Building and Development Committee to research the best possible use of the property "to expand and further the

mission" of Eventide. She testified that 191 Adams Street was currently being used for "storage, some parking, and we have meetings over there occasionally." Ms. Haglund posited that a possible use for 191 Adams Street would be to house Eventide's headquarters. However, she admitted that zoning was an issue that required resolution before any such plans could be implemented because 191 Adams Street was located in a single-family residence zone. As of the hearing of these appeals, Eventide had made no applications to the City for a zoning variance, nor had any conversations with City officials been scheduled to attempt to resolve this issue. When asked by the Presiding Commissioner about the progress of zoning variance applications, Ms. Haglund explained that Eventide had not wanted to approach City officials until the committee had made solid plans for using 191 Adams Street, and as of the hearing, this issue was still undetermined: "We are sort of in the process of determining what we're going to use that property for."

The Board found that Ms. Haglund's testimony, as well as the lack of applications to the City for zoning variances, revealed that Eventide's board of directors had made no specific plans for the use of 191 Adams Street. The Board also found that Eventide failed to take action in preparation for removing any of its charitable functions to 191 Adams Street. For the reasons explained in the Opinion, the Board found that Eventide's lack of specific plans for the use of 191 Adams Street and its failure to make plans for removal of any of its charitable functions to 191 Adams Street was fatal to its eligibility for a charitable exemption. The Board accordingly issued a decision for the appellee in Docket No. F277169.

OPINION

General Laws c. 59, § 5, Third, ("Clause Third") provides an exemption for:

> real estate owned by or held in trust for a charitable organization and occupied by it or its officers for the purposes for which it is organized or by another charitable organization or organizations or its or their officers for the purpose of such other charitable organization or organizations.

The issue presented by these appeals was whether Eventide was entitled to a charitable exemption for each of the subject properties. The Board found and ruled that for fiscal year 2005, Eventide was entitled to an exemption for 215 Adams Street, but not for 191 Adams Street. The Board did not reach the merits in the appeal for fiscal year 2004 because it lacked jurisdiction over that appeal. The Board's analysis follows.

1. Jurisdiction.

a. The Board lacked jurisdiction over the fiscal year 2004 appeal.

When a city issues a tax bill which treats as taxable real estate which the appellant claims is exempt under Clause Third, the appellant has two options: (1) apply to the assessors for an abatement under G.L. c. 59, § 59 ("§ 59"); or (2) appeal directly to the Board under G.L. c. 59, § 5B ("§ 5B") for a ruling on the property's eligibility for a charitable exemption. ***Trustees of Reservations v. Assessors of Windsor***, ATB Findings of Fact and Reports 1991-225 ("***Trustees of Reservations***").

Eventide sought abatement of its fiscal year 2004 tax by filing an application for abatement with the assessors on or about July 15, 2004. The appellant maintained that no direct appeal to the Board under § 5B was available to it because Eventide received its fiscal year 2004 bill on or about June 14, 2004, more than three months after the date of mailing of the City's 2004 bills. The appellant then argued, based on its reading of the Board's decision in ***Trustees of Reservations***, that it did not need to comply with the filing and payment provisions of G.L. c. 59, §§ 59-65D: "Having reviewed the pertinent statutes and cases, the board concludes that in enacting Section 5B, the Legislature authorized appeals from denials of charitable exemptions without compliance with the jurisdictional requirements imposed on appeals brought under G.L. c. 59, ss. 64 and 65 . . . ." ***Trustees of Reservations***, ATB Findings of Fact and Reports 1991 at 232. By way of analogy with ***Trustees of Reservations***, Eventide concluded that it should also be permitted to appeal to the Board under § 59 without compliance with any of the jurisdictional requirements of G.L. c. 59, §§ 59-65D, including those requirements pertaining to payment of the tax.

The appellant's argument is flawed for several reasons. First, there is nothing in § 5B or the cases construing it indicating that the § 5B remedy is not available to a taxpayer receiving an omitted assessment. Section 5B requires an appellant to file an appeal to the Board within three months of "a determination of the board of assessors as to the eligibility or noneligibility of a corporation or trust for the exemption granted pursuant to the clause third of section five." Without addressing the efficacy of the fiscal year 2004 tax bill under G.L. c. 59, § 75, the Board found that June 14, 2004, the date of "OMITTED BILL 6/14/04" was the date of the assessors' determination as to the eligibility of 215 Adams Street for a Clause Third exemption. *See* ***Samson Foundation Charitable Trust v. Board of Assessors of the City of Springfield***, ATB Findings of Fact and Reports 2004-150, 158 ("***Samson Foundation***") ("The 'determination' of the assessors which the charitable entity appeals under § 5B is the issuance of a tax bill which includes the property which the entity claims is exempt under Clause Third.") (citing ***Trustees of Reservation***, ATB Findings of Fact and Reports 1991 at 235-237). Accordingly, Eventide could have filed a § 5B appeal directly to the Board within three months of the City's issuance of "OMITTED BILL 6/14/04."

However, Eventide instead chose to file an application for abatement with the assessors on or about July 15, 2004. Therefore, Eventide did not appeal directly to the Board pursuant to § 5B but instead filed its appeal pursuant to the procedures in § 59 from the "refusal of the assessors to abate a tax." "[B]ecause the appellant appealed to the Board from the 'refusal of the assessors to abate a tax,' it necessarily invoked G.L. c. 59, §§ 64 and 65," which sections require an appellant to pay the tax due for the fiscal year without incurring interest if the tax at issue exceeds $3,000. ***Samson Foundation***, ATB Findings of Fact and Reports 2004 at 156. In the instant appeal, the tax for fiscal year 2004 exceeded $3,000 and no payments were made as of the date of the hearing of these appeals.[3] The jurisdictional principles discussed in ***Trustees of***

[3] G.L. c. 59, § 64 alternatively authorizes the taxpayer to pay a minimum of the average of the three preceding tax years' assessments. However, "a year in which no tax was due shall not be used on computing such sum and if no tax was due in any of the three next three preceding years, the sum shall be the full amount of said tax due . . . ." Therefore, Eventide was required to pay the full amount of the tax due for fiscal year 2004, since the fiscal year 2004 was the first tax bill it had received.

Reservations cannot be extended to appeals filed under § 59 to excuse noncompliance with the provisions of G.L. c. 59, §§ 59-65D. *See* ***Samson Foundation***, ATB Findings of Fact and Reports 2004 at 157-58. The Board thus ruled that the appellant's failure to pay the tax assessed, as required under G.L. c. 59, § 64, deprived the Board of jurisdiction to hear and decide this appeal from the assessors' refusal to abate the tax.

Moreover, even if Eventide's appeal to the Board could somehow be construed as a direct appeal under § 5B, the appeal was filed after the expiration of the statutory deadline under § 5B. Eventide filed its fiscal year 2004 appeal on November 26, 2004. The assessors' "determination" under § 5B was June 14, 2004, the date reflected in Eventide's "OMITTED BILL 6/14/04." *See* ***Samson Foundation,*** ATB Findings of Fact and Reports 2004 at 158. Eventide's § 5B appeal to the Board was therefore due on September 14, 2004. Accordingly, its November 26, 2004 appeal was filed beyond the due date under § 5B.

The Board found that the appellant failed to prosecute its appeal properly under either of the alternative remedies provided under § 59 or § 5B. Accordingly, the Board had no jurisdiction over Docket No. F277089.

b. The Board had jurisdiction over the appeals for fiscal year 2005.

Clause Third provides that a charitable organization shall not be exempt unless it first provides to the assessors "the list, statements and affidavit required by section twenty-nine" (Form 3ABC) and "a true copy of the report for such year required by section eight F of chapter twelve to be filed with the division of public charities in the department of the attorney general" (Form PC). *Id.* *See also* ***Children's Hospital Medical Center v. Assessors of Boston***, 388 Mass. 832, 837 (1983)(finding that timely filing of Form 3ABC and Form PC are jurisdictional prerequisites to action by assessors and review by the Board). In the instant appeals, the assessors conceded, and the Board found, that the appellant timely filed its Forms 3ABC and its Forms PC for the fiscal years at issue.[4]

[4] The appellant purchased 191 Adams Street on May 7, 2004, subsequent to the timely filing of its Form 3ABC and Form PC for fiscal year 2004. Therefore, 191 Adams Street was not listed on the Form 3ABC and Form PC for fiscal year 2004. The assessors did not challenge the Form 3ABC or Form PC as insufficient. The Board has previously ruled that "the corporation's failure to include property acquired after the relevant

The Board thus found and ruled that it had jurisdiction over Dockets No. F277169 and F277170.

2. Eventide's entitlement to charitable exemptions for the subject properties for fiscal year 2005.

a. 215 Adams Street qualified for a charitable exemption.

Clause Third provides an exemption for "[r]eal estate owned by or held in trust for a charitable organization and occupied by it or its officers for the purposes for which it is organized." "A corporation claiming that its property is exempt under § 5, Third, has the burden of proving that it comes within the exemption, and that it is in fact operated as a public charity." ***Town of Norwood v. Norwood Civic Association***, 340 Mass. 518, 525 (1960) (citing ***American Inst. For Economic Research v. Assessors of Great Barrington***, 324 Mass. 509, 512-14 (1949)). "The mere fact that the organization claiming exemption has been organized as a charitable corporation does not automatically mean that it is entitled to an exemption for its property. . . . Rather, the organization 'must prove that it is in fact so conducted that in actual operation it is a public charity.'" ***Western Massachusetts Lifecare Corp. v. Board of Assessors of Springfield***, 434 Mass. 96, 102 (2001) ("***Western Massachusetts Lifecare***") (quoting ***Jacob's Pillow Dance Festival, Inc. v. Assessors of Becket***, 320 Mass. 311, 313 (1946)).

The organization bears the burden of proving that its occupation of the property is in furtherance of the charitable purposes for which it was organized. *See* ***Board of Assessors of Hamilton v. Iron Rail Fund of Girls Club of America, Inc.,*** 367 Mass. 301, 306 (1975). The Supreme Judicial Court has ruled that the term "occupied" in the Clause Third exemption:

> means something more than that which results from simple ownership and possession. It signifies an active appropriation to the immediate uses of the charitable cause for which the owner was organized. The extent of the use, although entitled to consideration, is not decisive. But

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date for filing the Form 3ABC will not deprive the Board of jurisdiction." ***Healthtrax Int'l et al. v. Board of Assessors of the Town of Hanover and South Shore YMCA***, ATB Findings of Fact and Reports 2001-366, 386, *aff'd*, 56 Mass. App. Ct. 1116 (2002).

> the nature of the occupation must be such as to contribute immediately to the promotion of the charity and physically to participate in the forwarding of its beneficient objects.

Babcock v. Leopold Morse Home for Infirm Hebrews & Orphanage, 225 Mass. 418, 421 (1917)(other citations omitted).[5]

Eventide's articles of organization and its mission statement clearly indicate that it was organized to provide a skilled nursing facility to care for elderly residents of the community. The Appeals Court has found that "the operation of a nursing home for the elderly and the infirm is the work of a charitable corporation." ***H-C Health Services, Inc. v. Board of Assessors of South Hadley***, 42 Mass. App. Ct. 596 (1997) ("***H-C Health Services***"). However, in determining whether an organization is in fact occupying property in furtherance of its charitable purpose, a court must also consider whether the organization's benefits are readily available to a sufficiently inclusive segment of the population. Charging a fee for services will not necessarily preclude charitable exemption, but "the organization's services must still be accessible to a sufficiently large and indefinite class of beneficiaries in order to be treated as a charitable organization." ***Western Massachusetts Lifecare***, 434 Mass. at 105. It is necessary that "the persons who are to benefit are of a sufficiently large or indefinite class so that the community is benefited by its operations." ***Harvard Community Health Plan, Inc. v. Assessors of Cambridge***, 384 Mass. 536, 543 (1981) (citing ***Children's Hospital Medical Center v. Board of Assessors of Boston***, 353 Mass. 35, 44 (1967), ***Assessors of Boston v. Garland School of Home Making***, 296 Mass. 378, 388-89 (1937), and 4 A. Scott, ***Trusts*** at 2897-2898 (3d ed. 1967)).

Several cases have ruled that a facility serving the elderly must be affordable to limited-income elders to be recognized as charitable. For example, in affirming the Board's ruling that a nursing home was charitable, the

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[5] "[T]he residents of a nursing home are not lawful tenants and, accordingly, they are not considered the occupants of the property for purposes of G.L. c. 59, § 5, Third." ***Jewish Geriatric Services, Inc. et al. v. Board of Assessors of the Town of Longmeadow***, ATB Findings of Fact and Reports 2002-337, 355, *aff'd*, 61 Mass. App. Ct. 73 (2004) (citing ***H-C Health Services, Inc. v. Board of Assessors of South Hadley***, 42 Mass. App. Ct. 596 (1997)). The Board thus found and ruled that Eventide, and not the individual resident, was the lawful occupant of 215 Adams Street.

Appeals Court in ***H-C Health Services*** specifically noted that "[t]he population at the nursing home [was] predominantly Medicaid patients." ***H-C Health Services***, 42 Mass. App. Ct. at 597. In finding another nursing home to be charitable, the Board in ***Fairview Extended Care Services v. Board of Assessors of Danvers***, ATB Findings of Fact and Reports 1997-800, 805 ("***Fairview***"), emphasized that the residents "were predominantly Medicaid patients, representing 65%-70% of the population." Conversely, in affirming the Board's denial of a charitable exemption to an elderly retirement community corporation, the Supreme Judicial Court in ***Western Massachusetts Lifecare*** focused on the stringent selection requirements which limited the availability of the organization's services to a select portion of the community's elderly population:

> The benefits of Reeds Landing are limited to those who pass its stringent health and financial requirements, requirements that make most of the elderly population ineligible for admission. The class of elderly persons who can pay an entrance fee of $100,000 to $300,000 and have, from their remaining assets, monthly income of $2,000 to $7,000 is a limited one, not a class that has been "drawn from a large segment of society or all walks of life."

434 Mass. at 104 (quoting ***New England Legal Foundation v. City of Boston***, 423 Mass. 602, 612 (1996) ("***New England Legal Foundation***")). *See also*, ***Jewish Geriatric Services, Inc. et al. v. Board of Assessors of the Town of Longmeadow***, ATB Findings of Fact and Reports 2002-337, 366, *aff'd*, 61 Mass. App. Ct. 73 (2004) ("***Jewish Geriatric Services***") ("The slim showing of actual subsidies being awarded demonstrated that the screening processes successfully narrowed the pool of applicants to an impermissibly small portion of the elderly community."); ***Kings Daughters & Sons Home, et al. v. Board of Assessors of the Town of Wrentham***, ATB Findings of Fact and Reports 2002-427, 457 (ruling that Pond Home Community did not lessen any burden of government, because the residents enjoyed good health and had significant assets and income).

In this appeal, Eventide's acceptance of Medicaid supplements indicated that Eventide provided a service for recipients who could not otherwise afford the service. Eventide's population of between 61-66% Medicaid patients, about two-thirds of its residents, placed Eventide squarely

within the same category as nursing homes previously found to be charitable. *See* ***H-C Health Services***, 42 Mass. App. Ct. at 597. Moreover, Eventide operated at a deficit of $701,520 for fiscal year 2004 and $255,516 for fiscal year 2005 in order to provide its residents the many services and activities that greatly enhanced their quality of life. As Ms. Haglund testified, Eventide's endowment bore these deficits "[b]ecause we're a charitable home and we're charged with taking care of our residents." The Board thus found and ruled that Eventide benefited a significantly large segment of the population by providing nursing care to a class of elderly citizens drawn from "all walks of life." ***New England Legal Foundation***, 423 Mass. at 612. The Board's ruling was further supported by Eventide's provision of services to the community at large, including its publication at no cost of the extensive directory for elderly Quincy residents, its free seminars on elder issues and free blood pressure screenings, and the availability of its facilities and property to the community.

Additionally, a charitable organization must "'lessen[] any burden government would be under any obligation to assume.'" ***Western Massachusetts Lifecare***, 434 Mass. at 105 (quoting ***Boston Chamber of Commerce v. Assessors of Boston***, 315 Mass. 712, 717 (1944)). Private organizations can operate in the furtherance of a charitable purpose when they "perform activities which advance the public good, thereby relieving the burdens of government to do so." ***Sturdy Memorial Foundation v. Board of Assessors of the Town of North Attleborough***, ATB Findings of Fact and Reports 2002-203, 218, *aff'd*, 60 Mass. App. Ct. 573 (2004) ("***Sturdy Memorial Foundation***")(citing ***Molly Varnum Chapter DAR v. City of Lowell***, 204 Mass. 487 (1909)). "However, to the extent that a[n] [] organization is conducting a business for profit, it is not relieving government of a burden and, accordingly, its business is not charitable." ***Sturdy Memorial Foundation***, ATB Findings of Fact and Reports at 218 (citing ***Hairenik Association, Inc. v. City of Boston***, 313 Mass. 274, 279 (1943)).

In these appeals, the Board found that Eventide, a skilled nursing facility whose population's average age was 93, serviced a segment of the population that otherwise would have required a government-provided alternative means of care, including care provided by another skilled nursing facility or even by a hospital. In fact, as indicated by its rate of zero hospitalizations for "preventable" conditions, the care provided by Eventide relieved government of the burden to provide costly hospital care.

See ***Fairview***, ATB Findings of Fact and Reports at 810 (finding that the use of property as a nursing home alleviated a burden of government). *Contra* ***Western Massachusetts Lifecare***, 434 Mass. at 106 (denying exemption to a continuing care retirement community whose residents "enjoy[ed] sufficient good health to live independently"). The Board thus found and ruled that Eventide relieved government of the burden of providing alternative nursing care or more expensive publicly-assisted hospital care to the Eventide residents.

Moreover, Eventide supplemented the therapies required by its elderly residents, of whom between 61-66% received Medicaid supplements, indicating that non-government alternative means of care, like expensive at-home services or assisted living facilities, were not options for Eventide's residents. This appeal is thus distinguishable from ***Western Massachusetts Lifecare*** and ***Jewish Geriatric Services***, involving high-priced continuing care and assisted living communities housing physically and financially independent elderly residents who would not have depended upon government assistance for their care.

On the basis of all these facts, the Board found and ruled that Eventide was entitled to an exemption for the 215 Adams Street property for fiscal year 2005. The Board accordingly issued a decision for the appellant in Docket No. F277170.

b. 191 Adams Street did not qualify for a charitable exemption.

To qualify for a charitable exemption under Clause Third, the appellant must demonstrate that the property "is used directly for the fulfillment of its charitable purposes." ***Boston Symphony Orchestra v. Board of Assessors of the City of Boston***, 294 Mass. 248, 255 (1936) (citing ***Burr v. Boston***, 208 Mass. 537, 543 (1911)). Clause Third contains a "relocation" provision as follows: "real estate purchased by a charitable organization with the purpose of removal thereto, until such removal, but not for more than two years after such purchase . . . ." However, under Clause Third, the relevant date for determining whether property is entitled to a charitable exemption for any given fiscal year is July first of the taxable year. "It is the use of the property at [that] time . . . which determines whether it is exempt." ***Trustees of Amherst College v. Assessors of Amherst***, 193 Mass. 168, 178 (1906). Therefore, the "relocation" provision does not create an

automatic grace period for a charitable corporation that purchases property without material plans for its usage; instead, the corporation must establish that as of July first of the relevant tax year, it had the requisite intent for removal to the property within two years of its purchase. *See* ***Mt. Auburn Hospital v. Board of Assessors of the Town of Watertown***, ATB Findings of Fact and Reports 2000-441, 462 ("***Mt. Auburn Hospital***").

In ***Mt. Auburn Hospital***, the property at issue was a parcel which a charitable organization, a hospital, had purchased to effectuate its plan to relocate "part of its outpatient services, which was in furtherance of its charitable purpose for which it was organized." *Id.* at 453. In 1990, approximately one year prior to its purchase of the parcel, the appellant there formed a task force "to evaluate the appellant's needs with respect to its physical plant and facilities." *Id.* at 450. By the spring of 1991, the task force recommended that the appellant acquire additional facilities, preferably at nearby locations, "to alleviate pressing space constraints at its existing facility." *Id.* In furtherance of this plan, the appellant purchased the property in September, 1991, and took specific, concrete steps to implement usage of the property:

> Almost immediately after purchasing the subject property, the appellant formed a Project Coordinating Committee ("Committee") to formulate site-specific plans for removing some of the appellant's outpatient services to the subject. The Committee was composed of senior hospital administrators and staff, health care consultants, and development professionals, including architects, engineers, developers, urban planners, and traffic consultants. The appellant spent over $550,000 over three years for related studies performed by the development professionals. At all relevant times, the Committee conducted its weekly meetings at the subject property.

Id. at 451.

The Board there found that as of July first of the relevant tax year, the appellant had a plan "to use a portion of the building for the relocation of part of its outpatient services, which was in furtherance of its charitable purpose for which it was organized." *Id.* at

453. Accordingly, "the Board ruled that the appellant's plan to remove part of its charitable services to the subject property brought the property within [the Clause Third exemption]." *Id.* at 462.

In contrast with the appellant in ***Mt. Auburn Hospital***, Eventide failed to establish that, as of July 1, 2004, or even by the date of the hearing of these appeals, it had a specific intent to utilize the 191 Adams Street property in furtherance of its charitable purpose. As of the date of the hearing, Eventide had organized a Building and Development Committee. However, Ms. Haglund's testimony that the appellant was "sort of in the process of determining what we're going to use that property for" revealed that Eventide's intentions with respect to the parcel were nebulous at best. Furthermore, the appellant had taken no actions toward creating plans for removal of any services to 191 Adams Street, such as filing applications for zoning variances with the City. Therefore the property was restricted to its current zoning as a single family residence.

Moreover, unlike the appellants in ***Mt. Auburn Hospital***, the appellant in the instant appeal failed to demonstrate a regular and consistent use of 191 Adams Street. Ms. Haglund's testimony that the property was being used for some medical record storage gave no indication to the regularity and extent of the property's usage for that function, or whether the property actually was used for storage on July 1, 2004. The appellant also failed to establish that the meetings at the subject property were more than sporadic.

The Board found and ruled that the lack of sufficient action toward creating specific plans and the lack of evidence establishing an actual use of 191 Adams Street was fatal to its eligibility under the Clause Third exemption. Accordingly, the Board ruled that 191 Adams Street did not qualify for a charitable exemption for fiscal year 2005.

Conclusion

The Board lacked jurisdiction over the appeal for fiscal year 2004. Accordingly, the Board dismissed the appeal and issued a decision for the appellee in Docket No. F277089.

The Board ruled that the appellant occupied 215 Adams Street in furtherance of its charitable purpose and, therefore, qualified for the charitable exemption for 215 Adams Street for fiscal year 2005. Accordingly, the

Board issued a decision for the appellant in Docket No. F277170.

The Board ruled that the appellant did not meet its burden of proving a specific intent to remove part of its charitable services to the 191 Adams Street parcels within the statutorily mandated period of time. The Board thus issued a decision for the appellee in Docket No. F277169.

APPELLATE TAX BOARD

By: _____
Anne T. Foley, Chairman

_____
Frank J. Scharaffa, Commissioner

_____
Donald E. Gorton, III, Commissioner

_____
Nancy T. Egan, Commissioner

_____
James D. Rose, Commissioner

A true copy,
Attest: _____
Assistant Clerk of the Board