COMMONWEALTH OF MASSACHUSETTS
LAND COURT
DEPARTMENT OF THE TRIAL COURT

BRISTOL, ss. 16 TL 000652 (MDV)

LHPNJ, LLC, successor in interest to the City of Taunton,

Plaintiff,

v.

JEFFERSON DEVELOPMENT PARTNERS, LLC, et al.,

Defendants.

ORDER ON MOTIONS AND CROSS-MOTIONS FOR SUMMARY JUDGMENT

Plaintiff City of Taunton filed an action in this Court in April 2016, pursuant to G.L. c. 60, § 65. In its complaint, the City sought to foreclose all rights of redemption in a 42-acre parcel on Whittenton Street in Taunton, Massachusetts (the "Property"). The City recorded a tax taking against the Property (the "Tax Title") in August 2015.

The City's case proceeded in the usual course. Along the way, the City reported it had entered a "payment agreement" for the Property. The City asked the Court to stay the case pending further notice from the City. But by August 2017, the anticipated agreement had collapsed; the Court lifted the stay and this foreclosure proceeding resumed.

The next big event in this case came in early 2018. On February 5, 2018, LHPNJ, LLC, moved to replace the City as plaintiff in this action. LHPNJ attached to its motion a recorded instrument of assignment (the "Assignment"), under which the City purported to assign to LHPNJ the City's Tax Title. This Court (Patterson, Recorder) summarily granted LHPNJ's

motion, and by February 15, 2018, the Court had issued to all parties that have an interest in the Property a new notice of this foreclosure action (a "special citation") that identified LHPNJ as the new plaintiff.

The substitution of plaintiffs didn't sit well with one of the interested parties, defendant Whittenton Holdings, LLC ("Whittenton"). Whittenton holds a mortgage on the Property. On February 22, 2018, Whittenton objected to LHPNJ's motion for substitution as plaintiff. Whittenton claimed that the Assignment was "ineffectual" because the City's process of assigning its Tax Title to LHPNJ didn't comply with c. 60, § 52.

Whittenton didn't style its objection as a motion to reconsider the Court's allowance of LHPNJ's motion for substitution, and thus the Court didn't act immediately on the objection. Perhaps thinking it was in the clear, LHPNJ filed in April 2018 what often is the last significant step in a tax-foreclosure action, a motion for entry of a finding setting the terms of redemption of the to-be-foreclosed-upon property. *See id.* at § 68. Whittenton objected to that motion and argued again that the Assignment was ineffective. Whittenton also contended that the redemption amount asserted by LHPNJ was too high.

Discovery ensued. The Court (Vhay, J.) resolved some of the parties' disputes on cross-motions for summary judgment in 2019, but in doing so, other issues arose. Chief among the new issues was whether the statute that gives rise to a sizeable portion of the suggested redemption amount, G.L. c. 148, § 5, provides due process. (Section 5 allows municipalities to abate hazardous conditions that can cause fires. Section 5 also permits municipalities to charge abatement costs to the owner of the property on which abatement has occurred, and to place a lien on the property while the municipality awaits reimbursement.) The Court's suggestion that

§ 5 might be unconstitutional prompted the Attorney General in late 2019 to intervene in this case. LHPNJ also replaced its counsel, and the parties unsuccessfully discussed settlement.

The parties have returned to the Court with a second round of motions and cross-motions for summary judgment. Those motions present chiefly four issues: (1) whether the Assignment is valid (or, to put it differently, whether LHPNJ has standing as the successor in interest to the City to prosecute this foreclosure action on the basis of the Tax Title); (2) whether the City timely perfected, as part of the liens subsumed in the Tax Title, liens pertaining to "fire watch" charges incurred by the Property's owner, defendant Jefferson Development Partners, LLC ("Jefferson"); (3) if the answer to issue #2 is yes, whether c. 148, § 5 violates Whittenton's rights to due process; and (4) whether the Court should reduce the interest charges proposed to be included in the redemption amount. After review of the parties' briefs and after hearing oral argument, the Court DENIES Whittenton's motion for summary judgment concerning the validity of the Assignment. The Court also DENIES LHPNJ and Whittenton's cross-motions for summary judgment as to whether the City perfected its fire-watch liens, as there are disputed issues of fact concerning that issue. And since it's possible that the City didn't perfect its liens, the Court will not decide at this time whether § 5 violates Whittenton's due-process rights, or whether the Court should reduce anyone's interest charges.

LHPNJ's Standing

Whittenton challenges the Assignment (and, by extension, LHPNJ's standing to pursue this action) on three grounds. Whittenton's arguments turn on c. 60, § 52. Section 52 states in part that

> [t]he treasurer of any city . . . holding 1 or more tax titles may assign and transfer such tax title or titles, individually or bundled, to the highest bidder after a public auction, after having given 14 days' notice of the time and place of such public

> auction by publication, which shall conform to the requirements of section 40[[1]], and having posted such notice in 2 or more convenient and public places in said city . . . . The treasurer shall send notice of the intended assignment to the owner of record of each parcel at his last known address not less than 10 days prior to the assignment . . . .

The undisputed facts pertaining to the Assignment are these: The City first scheduled an auction of the Tax Title for April 26, 2017. The City posted notice of that auction at Taunton's City Hall and the Taunton Public Library. The City published the same notice on the City Treasurer/Collector's official internet website. But for unexplained reasons, the City didn't hold an auction on April 26, 2017. Whittenton's attorney quickly became aware of that, and promptly asked the City Solicitor for notice of any rescheduled auction. The Solicitor responded that he didn't know the new auction date, but that it would be "publicly advertised in accordance with law." The Solicitor didn't promise Whittenton that the City would provide Whittenton with separate notice of the auction.

The City eventually rescheduled the auction for October 25, 2017. The City didn't give Whittenton direct or special notice of that auction. Instead, the City again posted notice of the auction at City Hall and the Public Library. Those notices stated that (1) the City would be auctioning the Tax Title, (2) the Tax Title covered the two assessors parcels on Whittenton Street that comprise the Property, (3) Jefferson owned the Property, (4) the City was setting minimum bids for the Property's two parcels, (5) the minimum bids would be "the aggregate amount of taxes, interest and fees due on the accounts for the properties that remain on the list below on the day of the Auction," and (6) the minimum bids totaled, as of the date of the notice, $1,235,165.06. The notices posted at City Hall and the Public Library announced that the

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[1] Chapter 60, § 40, provides that notices "shall contain a substantially accurate description of the several rights, lots or divisions of the land to be sold, . . . the amount of the tax assessed on each, and the names of all owners known to the collector." Whittenton doesn't argue that the City's notices violated § 40.

auction would occur on October 25, 2017. But the City also published on the City Treasurer/ Collector's official website, before October 25, 2017, a different notice of that auction. That notice still said that the auction would be April 26, 2017, the original auction date.

On October 5, 2017, the City sent Jefferson by certified mail a letter, containing notice of the October 25, 2017 auction, to a Leominster, MA address. The postal service eventually returned the letter to the City as "Unclaimed/Unable to Forward." According to records maintained by the Secretary of the Commonwealth, as of October 2017, Jefferson's principal office, the office of its registered agent, and the office address of Jefferson's two managers are in Leominster, but not at the address to which to the City sent its certified letter.

The City's auction of the Tax Title occurred on October 25, 2017, as scheduled. LHPNJ was the sole bidder at the auction. LHPNJ purchased the Tax Title via the Assignment for $1,236,631.37, slightly over the advertised minimum bid.

Whittenton's first challenge to the Assignment is that the City's notice of the October 2017 auction was defective under § 52 because the notice the City posted on the Treasurer's/ Collector's website was incorrect. The problem with Whittenton's argument is two-fold. First, Whittenton concedes that the City met each of § 52's requirements concerning *required* posted notices. Second, Whittenton admitted at oral argument that the City wasn't obligated to publish on the Treasurer's/Collector's website any notice of the auction: anything the City posted on the web was gratuitous. Whittenton hasn't directed the Court to any case that holds that a municipality's incorrect, but discretionary, notice of an event invalidates the municipality's correct, mandatory, and properly posted notice of the same event. The City's erroneous website notice thus does not invalidate the City's valid notices of the October 2017 auction.

Whittenton's second challenge to the Assignment is that the City failed to give Jefferson proper notice under § 52 of the October 2017 auction. In response to this argument, LHPNJ offers the affidavit of Noreen Harrington, one of LHPNJ's principals. She states that on October 25, 2017, she travelled to Massachusetts to attend the auction. She states she met that day with one of Jefferson's principals, David Murphy, before the auction. Both allegedly drove to Taunton City Hall, the location of the auction. Harrington claims she left Murphy in his car and entered City Hall for the auction.

The upshot of Ms. Harrington's affidavit is that Mr. Murphy (and, by extension, Jefferson) knew or should have known of the October 2017 tax-title auction, notwithstanding the City's mailing of notice to Jefferson at an incorrect address. A person who knows or should have known of an event that's subject to c. 60's notice requirements can't complain of defects in his or her receiving statutory notice of that event. *See Vincent Realty Corp. v. City of Boston*, 375 Mass. 775, 779-782 (1978) (part-owner of property claimed it didn't receive notice by registered mail of tax-foreclosure proceeding, as c. 60, § 66 requires; court rejected party's petition to vacate foreclosure decree; "It would be exalting form over substance to require notice by registered mail to [plaintiff] in light of its actual notice of the [foreclosure] proceedings."). Harrington's affidavit creates, at a minimum, a dispute of fact concerning Whittenton's contention that Jefferson didn't know of the October 2017 auction. The Court thus can't grant Whittenton summary judgment based on the alleged defect in the City's notice to Jefferson.

Whittenton's third challenge to the Assignment is that the City failed to give Whittenton notice of the October 2017 auction. Whittenton's argument fails for the simple reason that § 52 doesn't require municipalities to provide notice to a mortgagee of an auction of a tax title taken in the mortgagee's collateral. Whittenton also offers no authority for why this Court should

mandate such notices as a matter of due process. *Guaranty Mortgage Corporation v. Town of Burlington*, 385 Mass. 411 (1982), is instructive here. Guaranty Mortgage contended it deserved direct notice (and not merely notice by publication) of the Town of Burlington's sale of a parcel on which Guaranty held a mortgage. Burlington obtained title to the parcel through the "low-value land" taking procedures set forth in c. 60, § 79. The Supreme Judicial Court rejected Guaranty's insufficient-notice argument on two grounds. The court first observed that § 79 didn't require notice to mortgagees beyond publication, and that Burlington had complied fully with § 79's notice-by-publication requirements. (More on this point in a moment.) The court further held that Guaranty didn't deserve direct notice as an equitable matter, since c. 60, § 39 provides a mechanism for mortgagees to request and receive from a municipality direct notice of "all papers relative to taxes" on a mortgaged property. Guaranty hadn't made a § 39 request, and thus the court couldn't fault Burlington for not providing to Guaranty direct notice of the sale of its collateral. *See Guaranty Mortgage*, 385 Mass. at 416-418.

Guaranty Mortgage's principal holding, that mortgagees don't deserve direct notice of sales of low-value property taken by a municipality, is no longer good law. *See Christian v. Mooney*, 400 Mass. 753, 761 n.10 (1987); *Lamontagne v. Knightly*, 30 Mass. App. Ct. 647, 654 (1991). But the *Christian* and *Lamontagne* Courts note that the defect in *Guaranty Mortgage*'s principal holding is that the court didn't consider, as a matter of due process, whether a mortgagee required notice of the sale of its collateral. Supreme Court decisions rendered after *Guaranty Mortgage* hold that due process requires such notice if a municipality intends to sell a mortgagee's collateral. *See Christian*, 400 Mass. at 761 n.10; *Lamontagne*, 30 Mass. App. Ct. at 654.

A mortgagee can't make due-process arguments with respect to a mere assignment of a *municipality's* tax title: a mortgagee has no protected interest in what is, after all, the municipality's property interest. Thus, *Guaranty Mortgage*'s reasoning – that the courts may not add to c. 60's notice requirements (unless due process mandates otherwise), and that mortgagees who want tax notices must opt for them under c. 60, § 39 – still has force. *See Lamontagne*, 30 Mass. App. Ct. at 654 ("We do not . . . believe that . . . *Christian* . . . intended to overrule *Guaranty* in its entirety"; court goes on to hold that "this case is governed by the rationale of *Guaranty*"). Where c. 60's language "'is plain and unambiguous, it is conclusive as to the legislative intent.'" *Tallage Lincoln, LLC v. Williams*, 485 Mass. 449, 456 (2020), quoting *Commonwealth v. Wassilie*, 482 Mass. 562, 573 (2019). This Court thus won't add to § 52's requirements one mandating direct notice to mortgagees of a municipality's auction of a tax title taken in the mortgagee's collateral. Whittenton also makes no showing that it requested pursuant to § 39 direct notice from the City of anything having to do with the Property's taxes (assuming, without deciding, that § 39's term "all papers relative to taxes" includes notices pertaining to tax-title auctions). The Court thus DENIES Whittenton's motion for summary judgment as to the validity of the Assignment.

Perfection of the City's Fire-Watch Liens

The Court now turns to the issue of whether the City perfected its fire-watch liens. The undisputed facts that pertain to this issue are as follows:

The Property is the site of numerous interconnected buildings that form a historic textile mill. At all times relevant to this case, the mill was in disrepair.

In 2011 and 2012, the Taunton Fire Department cited Jefferson, the mill's owner, for failing to maintain a functioning fire-protection system at the mill. The chief components of that

system are an automatic-sprinkler system and an automatic fire alarm. Neither of those things worked at the Property. The lack of an operating fire protection system created a dangerous condition both for the mill itself and residences across the street from the Property.

Jefferson didn't appeal any of the citations, but it didn't comply with them either. Thus, on January 3, 2013, the Fire Department sent Jefferson (via Mr. Murphy, the same man who allegedly accompanied Ms. Harrington to the October 2017 auction) an "Order of Notice." The Order of Notice stated that, "in accordance with the provisions of MGL Chapter 148 sec 5 and 527 CMR 1, the Taunton Fire Department will conduct a firewatch 24 hours a day 7 days a week until all repairs are made and certified by a licensed contractor." The Order mandated repairs to the mill's fire-alarm and sprinkler systems, both of which the Order described as "inoperable." Jefferson didn't appeal the Order.

The Department's first fire watch at the Property began in January 2013. The watch consisted of a single firefighter stationed on a remote section of the Property, outside of the mill, in a van. The firefighter had fire-suppression gear and a means of contacting the Department in the event of a fire.

There's no evidence in the summary-judgment record that the fire watch prompted anyone to make the repairs described in the Order of Notice. To the contrary: after the fire watch began, the Fire Department sent Jefferson four more notices of violation (in April 2013, September 2013, October 2013, and January 2014), each of which stated that the mill's sprinkler and fire-alarm systems remained "inoperable." Jefferson didn't appeal any of the 2013-2014 violation notices.

The first fire watch ended on March 27, 2014, when Jefferson agreed to hire a security firm to conduct an in-person watch until Jefferson had the sprinkler system repaired and

certified. But less than a year later, Jefferson voluntarily petitioned for bankruptcy under Chapter 11. The bankruptcy court appointed a trustee; in May 2015, the trustee moved to abandon the Property, claiming it was "burdensome to [Jefferson]'s bankruptcy estate." On June 19, 2015, without objection, the bankruptcy court granted the trustee's motion. *See In re High Voltage Engineering Corp.*, 397 B.R. 579, 603-604 (Bankr. D. Mass. 2008) (granting of trustee's motion to abandon property causes it to revert to the debtor as if the debtor hadn't petitioned for bankruptcy).

The summary-judgment record suggests that a second fire watch began on June 19, 2015, the very day the bankruptcy court allowed the trustee's abandonment motion. That watch may have lasted until September 8, 2015.[2] During that period, the City Treasurer executed the Tax Taking (on August 6, 2015) and recorded it (on August 26, 2015).

The City allegedly incurred over $450,000 in fire watch expenses, some of which a prior holder of Whittenton's mortgage may have paid.[3] The charges appear on various "Statements of

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[2] The parties' Land Court Rule 4 Statements of Material Fact don't describe the circumstances surrounding the second fire watch. Whittenton nevertheless stated at oral argument on the parties' motions for summary judgment that a second fire watch occurred in 2015. LHPNJ also filed in support of its motion for summary judgment e-mail correspondence between the Fire Department and Jefferson in March 2014, when the Fire Department ended the first fire watch. In that correspondence, the Department tied its termination of the watch to Jefferson having its own security service at the Property, and reserved the right to reinstate the watch "at any time the [Department] feels that a good faith effort is not being made . . . to repair the sprinkler system" at the Property. LHPNJ's Appendix of Exhibits, Exhibit 23(D). At oral argument, Whittenton also directed the Court to Exhibit 6 of Whittenton's Appendix of Exhibits in Support of Motion for Summary Judgment ("Whittenton's Appendix"). Whittenton's Appendix describes Exhibit 6 as "Fire Watch Records from the Taunton Fire Department." Exhibit 6 contains what appear to be invoices from the Fire Department to Jefferson, bearing dates of June 25, 2015 through September 10, 2015, that list various wage and service charges allegedly incurred between June 19, 2015 and September 8, 2015. In its response to Whittenton's Rule 4 Statement, LHPNJ objected to Exhibit 6 as not authenticated and lacking any affidavit that explains what Exhibit 6 is. For purposes of deciding the parties' summary-judgment motions, the Court will disregard Exhibit 6. LHPNJ nevertheless did not dispute Whittenton's representation at oral argument that there were two fire watches. The Court thus will treat as undisputed these facts: (1) The Department conducted a second fire watch, (2) it began in 2015, and (3) it ended in 2015.

[3] The note and mortgage now held by Whittenton originated with United Commercial Bank. By May 2012, the note and mortgage had been assigned to Eric Goldfine, trustee of the Self Employed Retirement Plan and Trust and the owner of a membership interest in Whittenton. In 2013, Trustee Goldfine paid the City $112,094.41, the amount shown as due on the Property's May 2013 tax bill. The summary-judgment record isn't clear whether the

Claim and Municipal Charges Liens" (the "Statements") recorded by the City against the Property. Each Statement asserts that it has been issued "[p]ursuant to G.L. c. 148 § 5, G.L. c. 148 § 28, G.L. c. 40 § 58, Taunton Ordinance section 7-28, section 7-48 and every other pertinent authority . . . ." Recall, however, that the Order of Notice – the Department's predicate for imposing its fire watches on the Property – lists only c. 148, § 5 and 527 CMR 1 as legal authority for the watches. The other authorities asserted in the Statements don't apply to the fire watches in this case:

- By order dated March 6, 2019, this Court held that a municipality can't impose a lien under c. 148, § 28 unless the municipality also complies with G.L. c. 40, § 58 (another statute cited in the Statements). This Court further held on summary judgment that the City hadn't complied with § 58 in connection with amassing the charges listed in the Statements.

- Section 7-28 of the Taunton Revised Ordinances, "Duties of chief at fire; authority to order buildings demolished; protection of property damage," does not grant the Chief the right to impose the fire watches at issue in this case. Section 7-28 governs the conduct of Department personnel only during a fire. While fires occurred at the Property prior to 2013, it's undisputed that the Department didn't institute either the 2013-2014 watch or the 2015 watch during a fire.

- Section 7-48 of the Revised Ordinances doesn't give the Department authority to impose a fire watch either. Section 7-48(1), "Penalty on Overdue Fire Detail Invoices," provides (italics added; underline in original):

> Any individual, business, corporation, agency or unincorporated association *who hires a fire detail* shall be responsible for payment of the invoice for detail services within thirty (30) calendar days from the date the service was provided or thirty (30) days after an invoice for services is postmarked, whichever is later. Interest shall begin to accrue and be charged on any balance remaining unpaid after the expiration of the thirtieth (30th) day (as described above). Interest shall be charged beginning the thirty-first (31st) day and continuing each day thereafter. At a rate of 14%, per annum compounded daily. [sic]

May 2013 tax bill included fire-watch charges. In September 2015, Trustee Goldfine assigned to Whittenton Jefferson's note and the mortgage.

The parties agreed at oral argument that Jefferson never "hired a fire detail" at the Property.

So how must a municipality perfect a lien under c. 148, § 5? Section 5 provides in pertinent part (emphasis added):

> The . . . head of the fire department or any person to whom . . . the head of the fire department may delegate his authority in writing may . . . enter into buildings and upon premises . . . within their jurisdiction and make an investigation as to the existence of conditions likely to cause fire. They shall, in writing, order such conditions to be remedied . . . . Notice of such order shall be served upon the owner, occupant or his authorized agent by a member of the fire or police department. If said order is not complied with within twenty-four hours, the person making such order, or any person designated by him, may enter into such building or upon such premises and . . . abate such conditions at the expense of such owner or occupant. *Any expense so incurred by or on behalf of . . . any city . . . shall be a debt due . . . the city . . . upon completion of such . . . abatement and the rendering of an account therefor to the owner.* The provisions of the second paragraph of section three A of chapter one hundred and thirty-nine, relative to liens for such debt and the collection of the claims for such debt, shall apply to any debt referred to in this section, except that . . . the head of the fire department shall act hereunder in place of the mayor . . . .

Prior to November 7, 2016, the second paragraph of c. 139, § 3A provided (emphasis added):

> *Any such debt, together with interest thereon at the rate of six per cent per annum from the date such debt becomes due, shall constitute a lien on the land upon which the structure is . . . located if a statement of claim, signed by the mayor . . . , setting forth the amount claimed without interest is filed, within ninety days after the debt becomes due, with the register of deeds for record . . . in the county . . . where the land lies.* Such lien shall take effect upon the filing of the statement aforesaid and shall continue for two years from the first day of October next following the date of such filing.[4] If the debt for which such a lien is in effect remains unpaid when the assessors are preparing a real estate tax list and warrant to be committed under section fifty-three of chapter fifty-nine, the mayor . . . shall certify such debt to the assessors, who shall forthwith add such debt to the tax on the property to which it relates and commit it with their warrant to the collector as part of such tax. . . . Upon commitment as a tax or part of a tax, such debt shall be subject to the provisions of law relative to interest on the taxes of

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[4] Chapter 218, St. 2016, § 221, which became effective November 7, 2016, replaced the phrase "shall continue for two years from the first day of October next following the date of such filing" with "shall continue, unless dissolved by payment or abatement, until such debt has been added to or committed as a tax pursuant to this section, and thereafter, unless so dissolved, shall continue as provided in section 37 of chapter 60; provided, however, that if any such debt is not added to or committed as a tax pursuant to this section for the next fiscal year commencing after the filing of the statement, then the lien shall terminate on October 1 of the third year following the date of such filing."

> which they become, or, if the property were not tax exempt would become, a part; and the collector of taxes shall have the same powers and be subject to the same duties with respect to such debts as in the case of annual taxes upon real estate, and the provisions of law relative to the collection of such annual taxes, the sale or taking of land for the non-payment thereof, and the redemption of land so sold or taken shall, except as otherwise provided, apply to such claims. . . .

Taking these statutes together, (a) charges incurred by a fire department to abate hazards become a "debt due" to the municipality "upon [i] the completion of such . . . abatement and [ii] the rendering of an account therefor to the owner";[5] and (b) "such debt, together with interest thereon . . ., shall constitute a lien on the land upon which the structure is . . . located if [i] a statement of claim, [A] signed by the [head of the fire department], [B] setting forth the amount claimed without interest [ii] is filed, within ninety days after the debt becomes due, with the register of deeds for record . . . in the county . . . where the land lies." A municipality that fails to comply with all of the steps necessary for perfecting a § 5 lien loses the lien, and may not add to a property's § 68 tax-foreclosure redemption amount the value of that lien.[6]

It's undisputed that the Taunton Fire Department chose to abate the hazards identified in its January 2013 Order of Notice by instituting two fire watches, one from January 2013 to March 27, 2014, and the other beginning and ending in 2015. The Department completed the first "such . . . abatement" on March 27, 2014. (LHPNJ argues, and the Court agrees, that since § 5 phrases the first of its milestones as "the completion of such . . . abatement," abatement

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[5] In its sole challenge to the alleged perfection of the City's liens, Whittenton argues that § 7-48(1) of the Taunton Revised Ordinances makes charges for fire watches due 30 days after "the service was provided" or an invoice issues. As discussed above, § 7-48(1) doesn't apply to the fire watches in this case. The Court thus DENIES Whittenton's motion for summary judgment on the lien-perfection issue.

[6] *See City of Worcester v. Hoffman*, 345 Mass. 647 (1963) (construing G.L. c. 40, §§ 42A-42C, and striking from § 68 redemption amount liens for unpaid water bills, where city had not recorded certificate of its acceptance of former c. 40, § 42A); *City of Lynn v. Razzaboni*, 1990 WL 10092008, *3 (Mass. Land Ct. Mar. 23, 1990) (Sullivan, C.J., construing c. 139, § 3A); *see also Town of Freetown v. New Bedford Wholesale Tire, Inc.*, 384 Mass. 60, 62 (1981) (statutes such as c. 148, § 5 "have generally been strictly construed").

charges incurred over a period of days don't become due daily. Instead, the earliest such charges can be due is the day that marks the "completion" of the abatement effort.)

The summary-judgment record is murky as to what happened after March 27, 2014. LHPNJ has submitted the affidavit of Taunton's City Treasurer. The Treasurer states that "[a]n account of expenses incurred by the City due to the fire watch was rendered" to Jefferson. There are three problems with that statement. First, the Treasurer doesn't say *when* the account was "rendered," nor did she attach to her affidavit a document containing the alleged rendering. (And as explained in note 2 above, LHPNJ has convinced the Court, at least for now, that the documents in Whittenton's Appendix that might be fire-watch invoices aren't admissible.) Under c. 148, § 5 and c. 139, § 3A, the date on which a municipality renders an account to the owner is critical: it starts the clock on the 90-day period in which the municipality must prepare and record a statement of claim. While it's undisputed that the City recorded four such Statements, the first two predated March 27, 2014 (that is, the City filed them before the completion of the first fire watch), and the City recorded the other two in September 2015, well more than 90 days after the end of the first fire watch (but possibly within 90 days of the end of the second).

The second problem with the Treasurer's affidavit is that it consistently mentions "a" fire watch—just one. It's now undisputed that there were two watches. In deciding LHPNJ's motion for summary judgment as to whether it perfected its § 5 liens, the Court must draw all reasonable inferences from the record in Whittenton's favor. *See Attorney Gen. v. Bailey*, 386 Mass. 367, 371 (1982). And one such inference is that the City rendered an account to Jefferson for one of the fire watches, but not the other.

The third problem with the Treasurer's affidavit is that it avers that "[a]n account," of "expenses incurred by the City due to the fire watch," was rendered to Jefferson. It's not clear from that assertion, however, whether what the City sent to Jefferson in the way of an "account" included all of the expenses now allegedly contained in the City's § 5 liens. Chapter 148, § 5 requires a municipality that seeks to impose a § 5 lien to "render[] an account *therefor* to the owner"; the word "therefor" refers to the completed "abatement."

Because LHPNJ hasn't established, on the summary-judgment record, (a) that the City rendered to Jefferson "accounts" for the full amount of the fire-watches charges the City included in its § 5 liens, and (b) when the City rendered those accounts (if it did so), the Court cannot rule on summary judgment whether the City complied with § 5 and § 3A's lien-perfection requirements. The Court thus DENIES LHPNJ's motion for summary judgment as to whether the City perfected its fire-watch liens. And because the Court cannot rule at this time whether the City perfected any of its fire-watch liens, the Court DENIES without prejudice the parties' respective motions concerning what interest, if any, those liens should include. The Court will have to hold a trial on whether the City perfected its § 5 liens.

Chapter 148, § 5 and Due Process

In March 2019, in deciding a prior round of summary-judgment motions, the Court questioned whether (as Whittenton argued) c. 148, § 5 comports with due process, as it contains no express mechanism for a property owner or a mortgagee to challenge, at any time, the "debt due" to a municipality for abatement charges or the municipality's later imposition of a lien for those charges. The parties have briefed the due-process issue and have moved and cross-moved for summary judgment on it.

The Court declines to reach the § 5 due-process issues at this time. The courts have a duty to avoid, if reasonably possible, unnecessary decision of constitutional questions. *See Beeler v. Downey*, 387 Mass. 609, 613 & n.4 (1982); *SCVNGR, Inc. v. Punchh, Inc.*, 478 Mass. 324, 325 (2017); *Commonwealth v. Fontanez*, 482 Mass. 22, 32 (2019). Should the Court determine that the City did not perfect some (or all) of its § 5 liens, it's possible that the Court may not have to reach the issue of § 5's constitutionality. The Court nevertheless will allow the parties to present at trial evidence that may bear on Whittenton's constitutional claims, including whether (a) Jefferson waived any objections to the fire-watch charges, (b) Whittenton knew (or may be charged with knowledge) of those charges at the time it took an assignment of its mortgage in the Property, and (c) additional due-process measures would have reduced or obviated the need for a fire watch and any resulting abatement charges.

The Court ORDERS the parties to appear for a telephonic pre-trial conference on April 13, 2021 at 10:00 AM. A separate notice of pre-trial conference will issue.

SO ORDERED.

By the Court (Vhay, J.)

/s/ Michael D. Vhay

Attest:

/s/ Deborah J. Patterson
Deborah J. Patterson, Recorder

Dated: March 17, 2021