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# Current Developments in Municipal Law

## Massachusetts Court Cases

## Book 2

2016

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**APPEALS COURT OF MASSACHUSETTS**

***89 Mass. App. Ct. 1112*; *46 N.E.3d 600***
***2016 Mass. App. Unpub. LEXIS 292***

**March 16, 2016, Entered**



**SUBSEQUENT HISTORY:** Appeal denied by *Finlayson v. Bd. of Assessors of Billerica, 2016 Mass. LEXIS 266 (Mass., Apr. 27, 2016)*

**DISPOSITION:** Decision of the Appellate Tax Board affirmed.

**JUDGES:** Vuono, Grainger & Massing, JJ. [*1]

**OPINION**

*MEMORANDUM AND ORDER PURSUANT TO RULE 1:28*

John Finlayson owns a parcel of real estate located on Seminole Road in the town of Billerica. He appeals from the decision of the Appellate Tax Board (board) affirming the defendant board of assessors' (assessors) denial of an application for abatement of real property taxes assessed on the parcel for fiscal year 2014. Finlayson contends that in affirming the denial of abatement, the board made multiple procedural errors, and that the board's decision was against the weight of the evidence. We affirm.

*General Laws c. 58A, § 7*. Finlayson contends that the board made four errors under *G. L. c. 58A, § 7*, and the board's rules prescribed thereunder, *831 Code Mass. Regs. §§ 1.00 et seq.* (2007), which govern appeals taken to the board. Finlayson argues that the board erred by (1) permitting the assessors to introduce "last minute" evidence not produced in discovery prior to the hearing; (2) not entering a default judgment in his favor after the assessors failed to file an answer to his appeal to the board; (3) allowing the assessors to challenge Finlayson's characterization of his dwelling as a "bungalow" and to contest anything else in his appeal, because [*2] of their failure to file an answer; and (4) failing to deem the dwelling a bungalow as a sanction for the assessors' failure to respond to Finlayson's request for admissions under *Mass.R.Civ.P. 36*, 365 Mass. 795 (1974). None of these contentions has merit.

Under *G. L. c. 58A, § 7*, as appearing in St. 1998, c. 485, § 2, appellees in appeals to the board are not required to file an answer "if the appellee desires to raise no issue other than the question *whether there has been an overvaluation or improper classification of the property* on which the tax appealed from was assessed" (emphasis supplied). Here, Finlayson's appeal was based entirely on a claim of overvaluation, in part because the assessors characterized the dwelling on the property as a "ranch" rather than a bungalow. As the only issue before the board was valuation, the assessors were not required to file an answer. Accordingly, the assessors did not default, and they were not precluded from contesting Finlayson's claim of overvaluation.

Finlayson's claim regarding the admission of "last minute" evidence over his objection is governed by *831 Code Mass. Regs. § 1.37* (2007), the regulation concerning practice and procedure before the board. Under *§ 1.37(1)*, the Rules of Civil Procedure do not apply, [*3][1] and the board "reserves the right to make hearings and proceedings as informal as possible, to the end that substance and not form shall govern, and that a final determination of all matters before it may be promptly reached."

> 1 Accordingly, *rule 36* does not apply, and the assessors had no obligation to respond to Finlayson's request for admissions.

Under *§ 1.37(1)*, the board did not err in admitting in evidence a sales comparison analysis that the assessors did not provide to Finlayson until the date of the hearing. When Finlayson objected to the evidence, the hearing commissioner granted a twenty-minute recess for Finlayson to review the analysis. In addition, the commissioner agreed to hold the evidence open for three weeks after the hearing to permit Finlayson to file a response, which he did, and which the board considered in reaching its decision. The hearing commissioner's actions in this regard were consonant with the regulations and did not deprive Finlayson of a fair hearing.

*Weight of* [*4] *the evidence*. On review, we determine whether the board's decision was supported by substantial evidence. See *New Boston Garden Corp. v. Assessors of Boston, 383 Mass. 456, 465, 420 N.E.2d 298 (1981)*; *First Marblehead Corp. v. Commissioner of Rev., 470 Mass. 497, 501, 23 N.E.3d 892 (2015)*. "[S]ubstantial evidence is such evidence as a reasonable mind might accept as adequate to support a conclusion." *New Boston Garden Corp. v. Assessors of Boston, supra at 466* (quotation and citation omitted). "Our review of the sufficiency of the evidence is limited to whether a contrary conclusion is not merely a possible but a necessary inference from the findings." *Olympia & York State St. Co. v. Assessors of Boston, 428 Mass. 236, 240, 700 N.E.2d 533 (1998)* (quotation and citation omitted).

Finlayson had the ultimate burden of persuasion to show that his property was overvalued. *General Elec. Co. v. Assessors of Lynn, 393 Mass. 591, 598, 472 N.E.2d 1329 (1984)*. "The taxpayer may present persuasive evidence of overvaluation either by exposing flaws or errors in the assessors' method of valuation, or by introducing affirmative evidence of value which undermines the assessors' valuation." *Donlon v. Assessors of Holliston, 389 Mass. 848, 855, 453 N.E.2d 395 (1983)*. The board gave due consideration to the evidence Finlayson submitted and the arguments he made, including his assertion that the Concord River, which abuts the assessors' comparable bungalow properties, is a more desirable setting than the Shawsheen River near his home, as well as his argument that the assessors improperly classified his dwelling as a ranch-style home. "The credibility of witnesses, the weight of the evidence, and inferences to be drawn from the evidence are matters [*5] for the board." *Cummington Sch. of the Arts, Inc. v. Assessors of Cummington, 373 Mass. 597, 605, 369 N.E.2d 457 (1977)*, citing *Fisher Sch. v. Assessors of Boston, 325 Mass. 529, 534, 91 N.E.2d 657 (1950)*. Giving "due weight to the experience, technical competence, and specialized knowledge" of

the board, *Peterson v. Assessors of Boston, 62 Mass. App. Ct. 428, 432, 817 N.E.2d 784 (2004)*, quoting from *G. L. c. 30A, § 14(7)*, and the evidence *presented by the parties, we conclude that the board did not err in its determination.

*Decision of the Appellate Tax Board affirmed*.

By the Court (Vuono, Grainger & Massing, JJ.[2]),

2 The panelists are listed in order of seniority.

Entered: March 16, 2016.

**FRANK N. GOBBI, JR., TRUSTEE[1] *v.* TOWN OF NORFOLK & ANOTHER.[2]**

1 Of Park Drive Realty Trust.

2 A. DiMartino Construction, Inc.

**14-P-1862.**

**APPEALS COURT OF MASSACHUSETTS**

***88 Mass. App. Ct. 1114; 40 N.E.3d 1057***
***2015 Mass. App. Unpub. LEXIS 1080***

**November 20, 2015, Entered**



**SUBSEQUENT HISTORY:** Appeal denied by *Gobbi v. Town of Norfolk, 473 Mass. 1112, 2016 Mass. LEXIS 172 (Mass., Mar. 3, 2016)*

**DISPOSITION:** Judgment dated November 3, 2014, affirmed.

**JUDGES:** Cohen, Carhart & Blake, JJ. [*1]

**OPINION**

*MEMORANDUM AND ORDER PURSUANT TO RULE 1:28*

The plaintiff, Frank N. Gobbi, Jr., as trustee of the Park Drive Realty Trust (trust), appeals from a judgment dated November 3, 2014, allowing the town of Norfolk's (town) motion for summary judgment as to counts I and II of Gobbi's complaint for specific performance and breach of contract.[3] We affirm.

3 The judge denied the town's motion as to the other counts. The remaining counts subsequently were tried to a conclusion, and are not at issue in this appeal.

*Background*. Gobbi, individually, was the successful bidder at a foreclosure sale of property being developed as a subdivision by the defaulting developer. Gobbi assigned his interest in the property to the trust and entered into negotiations with the town and the foreclosing bank. The result was an agreement whereby the bank agreed to provide the town with $248,600, which the bank was holding to guaranty the defaulting developer's performance (security fund),[4] so that the town could complete an unfinished road and other infrastructure required by the subdivision plan. The agreement, which is dated September 30, 2009, was signed [*2] on behalf of the town by the town manager, the chairman of the town's board of selectmen, and the members of the town's planning board. However, "the Norfolk Town Meeting," the legislative and appropriating body for the town, did not authorize the agreement or make any appropriation for work on the subdivision.

4 This amount consisted of $226,000 that the bank had retained from the loan to the original developer, and an additional $22,600 that the bank contributed.

The town hired the codefendant, A. DiMartino Construction, Inc. (DiMartino), to perform the work required by the agreement, and periodically authorized the bank to make payments from the security fund directly to DiMartino and its suppliers. However, the security fund essentially was exhausted before the work was fully completed.[5]

5 All but $7,281 was spent. While the town contends that only minor items remain to be finished, Gobbi contends that significant additional work remains to be done.

As to counts I and II of his complaint, Gobbi claims that the town is contractually obliged to complete the work regardless of the exhaustion of the security fund. A judge of the Superior Court rejected that contention, agreeing with the town [*3] that compelling it to expend public funds to perform further work or to pay damages to Gobbi would violate *G. L. c. 44, § 31*, which prohibits municipalities from expending public funds without appropriation. The judge therefore allowed the town's motion for summary judgment on Gobbi's specific performance and breach of contract counts.

*Discussion*. "We review a grant of summary judgment de novo to determine 'whether, viewing the evidence in the light most favorable to the nonmoving party, all material facts have been established and the moving party is entitled to a judgment as a matter of law.'" *Juliano v. Simpson, 461 Mass. 527, 529-530, 62 N.E.2d 175 (2012)*, quoting from *Augat, Inc. v. Liberty Mut. Ins. Co., 410 Mass. 117, 120, 571 N.E.2d 357 (1991)*. As it is undisputed that no money was appropriated for work on the subdivision, and there exists no applicable exception to the operation of *G. L. c. 44, § 31*, the town is entitled to judgment as matter of law.

The agreement required only that the town use the money in the security fund to complete the work. It did not oblige the town to spend public funds if this private source of money was exhausted; nor could it lawfully do so. See *Dyer v. Boston, 272 Mass. 265, 274, 172 N.E. 235 (1930)*; *Thomas O'Connor & Co. v. Medford, 16 Mass. App. Ct. 10, 12, 448 N.E.2d 1276 (1983)*. Seeking to invoke the recognized distinction between claims under a contract (which are limited by what has been appropriated), and damages for a wrongful breach of that contract [*4] (which are not), Gobbi contends that his claim falls "outside the contract" and, hence, he may recover damages. See *id. at 13-14*. The argument fails, however, because, regardless of how the claim is styled, it is predicated upon the existence of a liability incurred under the agreement. Because the claim falls directly under the contract, the town cannot be forced to expend sums that were not appropriated or authorized. See *Murphy v.*

*Brockton, 364 Mass. 377, 380, 305 N.E.2d 103 (1973).*[6]

6 On the view we take of the case, we need not reach the town's argument that Gobbi also is barred by the doctrine of unclean hands from obtaining specific performance.

*Judgment dated November 3 2014, affirmed.*

By the Court (Cohen, Carhart & Blake, JJ.[7]),

7 The panelists are listed in order of seniority.

Entered: November 20, 2015.

**JONATHAN HAAR v. COMMISSIONER OF REVENUE.**

**14-P-1725.**

**APPEALS COURT OF MASSACHUSETTS**

***88 Mass. App. Ct. 1118*; *42 N.E.3d 211***
***2015 Mass. App. Unpub. LEXIS 1163***

**December 21, 2015, Entered**



**JUDGES:** Grainger, Hanlon & Agnes, JJ. [*1]

**OPINION**

*MEMORANDUM AND ORDER PURSUANT TO RULE 1:28*

The Commissioner of Revenue (commissioner) appeals from a decision of the Appellate Tax Board (board) in favor of Jonathan Haar (taxpayer), which granted an abatement of a $100 penalty levied on the taxpayer for the failure to file a request for an extension and to render payment electronically in compliance with the commissioner's requirements.

The undisputed facts include the following: the taxpayer annually filed requests to extend the due date of his personal income tax return, accompanied by an estimated tax payment as required. Technical information release 04-30 issued by the commissioner in 2004 requires such an estimate to be filed electronically if the amount equals or exceeds $5,000. The taxpayer did not comply for tax year 2005; he filed the extension form by mail and made an estimated payment of $5,000 by check. In a

notice dated May 2, 2006, the commissioner warned the taxpayer of the electronic filing and payment requirements and the $100 penalty if he did not comply in the future. The taxpayer was assessed the $100 penalty for failing to comply in tax year 2006, [*2] and subsequently complied for tax year 2007. For tax years 2008 and 2009, his estimated personal tax liability did not exceed $5,000, and thus did not invoke the electronic filing requirements. For tax year 2010, the taxpayer's estimated tax liability again exceeded $5,000 yet he again filed the extension request and estimated payment by mail; as a result, the commissioner assessed the $100 penalty.[1]

> 1 We note that timely payment is not an issue in this case, only the method of payment.

After his abatement request was denied by the commissioner, the taxpayer petitioned the board asking that the commissioner be overruled and the penalty abated. He testified that he had a profound distrust of online data security and as a result, conducted most of his personal and professional financial transactions offline. The board ruled that this constituted "reasonable cause" within the purview of *G. L. c. 62C, § 33(g)*, the statute that governs penalties for tax filings.[2]

> 2 *Section 33(g)*, inserted by St. 2003, c. 143, *§ 2*, provides, in pertinent part, that "if the taxpayer, without reasonable cause, fails to conform any . . . payment with the method prescribed by the commissioner in tax years beginning on or after January 1, 2005, there [*3] shall be added . . . a penalty in an amount not greater than $100 . . . for each improper payment."

Upon review of the board's ruling, we defer to its findings of fact if supported by substantial evidence. See *G. L. c. 58A, § 13*; *Commissioner of Rev. v. Wells Yachts S., Inc., 406 Mass. 661, 663, 549 N.E.2d 1131 (1990)*. "We conduct an independent analysis of the board's rulings of law, according 'some deference' to the board's 'expertise in interpreting the tax laws of the Commonwealth.'" *Schussel v. Commissioner of Rev., 472 Mass. 83, 87, 32 N.E.3d 1239 (2015)* (citation omitted). The question of what constitutes "reasonable cause" is a question law.[3] *Commissioner of Rev. v. Wells Yachts S., Inc., supra at 664 (1990)* ("reasonable cause" under *G. L. c. 62C, § 33[f]*, is question of law).

> 3 No court has yet interpreted *§ 33(g)*. We look to case law analyzing *G. L. c. 62C, 33(f)*, as *§ 33(g)* states that "[a] penalty imposed by the commissioner for an improper filing or payment shall be subject to *subsection 33(f)* relative to the waiver of penalties." Furthermore, "[w]hen the meaning of any particular section or clause of a statute is questioned, it is proper, no doubt, to look into the other parts of the statute: otherwise the different sections of the same statute might be so construed as to be repugnant, and the intention of the legislature might be defeated." *Saccone v. State Ethics Commn., 395 Mass. 326, 334, 480 N.E.2d 13 (1985)*, quoting from *Holbrook v. Holbrook, 18 Mass. 248, 1 Pick. 248, 250 (1823)*.

"Reasonable cause will be established where, at a minimum, [*4] a taxpayer has demonstrated that 'he exercised the degree of care that an ordinary taxpayer in his position would have exercised.'" *Geoffrey, Inc. v. Commissioner of Rev., 453 Mass. 17, 25-26, 899 N.E.2d 87 (2009)* (citation omitted). In this case, however, we need not define the evidentiary parameters of reasonable cause as the taxpayer failed to establish a basis for his refusal to comply with the statute both before the commissioner and on appeal. Even were we to consider the taxpayer's submissions on appeal, here wholly noncompliant with the Rules of Appellate Procedure,[4] they would not avail him.

> 4 After the taxpayer filed a brief in this court, he was notified that it was nonconforming in thirteen different respects, including the lack of (1) a statement of facts, (2) a statement of the issues, (3) a statement of the case, (4) a

table of authorities, (5) references to the record, and (6) a certificate of service. He did not file a corrected document in the ensuing eight months before the scheduled hearing in this court. On the basis of his oral representation that he would file a conforming brief he nevertheless was allowed to participate in oral argument with the consent of the Commonwealth. Thereafter he filed a second document that was less conforming than [*5] the first.

It is not disputed that the taxpayer was aware of the electronic payment requirement; he received notice from the commissioner for failing to comply as long ago as tax year 2005. It is also clear that he was able to comply with the requirement, as evinced by his compliance during tax year 2007. On this record the commissioner was not required to consider this taxpayer's professed concerns of privacy (irrelevant, as paper filings are scanned electronically) or security (ignored by the taxpayer himself in 2007) to be reasonable.

*Conclusion*. The decision of the board abating the commissioner's assessment of the $100 penalty is reversed and the matter is remanded to the board with instructions to enter an order affirming the commissioner's denial of the abatement.

*So ordered*.

By the Court (Grainger, Hanlon & Agnes, JJ.[5]),

5 The panelists are listed in order of seniority.

Entered: December 21, 2015.

**PUBLIC EMPLOYEE RETIREMENT ADMINISTRATION COMMISSION v. EDWARD A. BETTENCOURT.**

**SJC-11906.**

**SUPREME JUDICIAL COURT OF MASSACHUSETTS**

***474 Mass. 60; 47 N.E.3d 667***
***2016 Mass. LEXIS 194***

**October 6, 2015, Argued**
**April 6, 2016, Decided**

**NOTICE:**

Corrected April 29, 2016.

**PRIOR HISTORY:** [***1] Suffolk. CIVIL ACTION commenced in the Superior Court Department on December 19, 2012.

[*61] The case was heard by *Garry V. Inge*, J., on motions for judgment on the pleadings.

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

*Public Emple. Ret. Admin. Comm'n v. Bettencourt, 81 Mass. App. Ct. 1113, 2012 Mass. App. Unpub. LEXIS 141, 961 N.E.2d 620 (2012)*

**HEADNOTES**

MASSACHUSETTS OFFICIAL REPORTS HEADNOTES

*Public Employee Retirement Administration Commission*. *Retirement*. *Public Employment*, Retirement benefits, Forfeiture of retirement benefits. *Constitutional Law*, Excessive fines clause.

This court concluded that the mandatory forfeiture by a public employee of retirement and health insurance benefits to which the employee would be entitled, upon conviction of a crime involving violation of laws applicable to the employee's office or position, as required by *G. L. c. 32, § 15 (4)*, constituted a fine within the meaning of the *Eighth Amendment to the United States Constitution*, where, at the point the employee became a contributing member of a municipal retirement system with deductions taken from his salary in accordance with governing statutes and rules, he acquired a protected interest in the retirement system that amounted to a property interest , and where the forfeiture of property qualified as punishment, in that it involved an extraction of payments from the employee and was punitive.

This court concluded that the mandated total forfeiture of a public employee's retirement and health insurance benefits pursuant to *G. L. c. 32, § 15 (4)*, was excessive as grossly disproportional to the gravity of the underlying offenses of which the employee was convicted, and therefore in violation of the excessive fines clause of the *Eighth Amendment to the United States Constitution*, given the nature and circumstances of his offenses, the fact that they were wholly unrelated to other illegal activities, the suggestion arising from the authorized maximum punishment that the Legislature did not view this type of crime as a grave offense, and the recognition that the harm arising from the offenses was relatively small as compared to other cases.

Having held that the mandated total forfeiture by a public employee of retirement and health insurance benefits upon conviction of a crime involving violation of laws applicable to the employee's office or position, as required by *G. L. c. 32, § 15 (4)*, constituted an excessive fine within the meaning of the *Eighth Amendment to the United States Constitution*, this court declined to attempt a determination of a level or amount of forfeiture or fine that would be constitutionally permissible, where such a determination fit squarely within the legislative domain.

**COUNSEL:** *Paul T. Hynes* (*Michael R. Keefe* with him) for the defendant.

*Peter Sacks*, State Solicitor (*Judith A. Corrigan*, Special Assistant Attorney General, with him) for the plaintiff.

*Ian O. Russell & Patrick N. Bryant* for Massachusetts Coalition of Police, amicus curiae, submitted a brief.

**JUDGES:** Present (Sitting at New Bedford): GANTS, C.J., SPINA, CORDY, BOTSFORD, DUFFLY, LENK, & HINES, JJ.

**OPINION BY:** BOTSFORD

**OPINION**

[**670] **BOTSFORD**, J. The Commonwealth's law governing public employee retirement systems and pensions requires that a public employee forfeit the retirement and health insurance benefits (retirement allowance or pension) to which the employee would be entitled upon conviction of a crime "involving violation of the laws applicable to [the employee's] office or position." *G. L. c. 32, § 15 (4)* (*§ 15 [4]*).[1] We consider here whether this mandatory forfeiture of a public employee's retirement [***2] allowance qualifies as a "fine" under the excessive fines clause of the *Eighth Amendment to the United States Constitution*. We conclude that it does and that, in the circumstances of this case, the mandatory forfeiture of the public employee's retirement allowance is "excessive."[2]

1 The statutory forfeiture provision at issue in this case, *G. L. c. 32, § 15 (4)* (*§ 15 [4]*), by its terms applies solely to "member[s]" of a public employee retirement system. In this opinion, we generally use the term "public employee" rather than "member;" every member is or was a public employee.

2 We acknowledge the amicus brief submitted by the Massachusetts Coalition of Police.

*Background*.[3] Edward A. Bettencourt was first appointed as a police officer in the city of Peabody in October, 1980, and became a member of the Peabody retirement system on November 7, 1982.[4] Bettencourt was promoted to the rank of sergeant around 1990, and promoted again to serve as a lieutenant in 2003. In the early morning hours of December 25, 2004, Bettencourt was on duty as a watch commander, and he knowingly accessed, through the Internet and without permission, the Massachusetts human resources division (HRD) computer system, and specifically the HRD Internet site containing individual applicant record infor- [*62] mation. [***3] Gaining the unauthorized access, he viewed the civil service promotional examination scores of twenty-one other police officers, including four officers who were his direct competitors for a promotion to the position of captain in the police department. In order to view the examination scores of these other officers, Bettencourt created a distinct user account for each officer, using the Social Security numbers and birth dates of the officers.

3 The facts are taken from the record on appeal, and are generally not in dispute, except that the parties disagree about the value of the defendant Edward A. Bettencourt's retirement allowance.

4 The Peabody retirement system is a public pension system that operates pursuant to *G. L. c. 32*.

On October 26, 2006, Bettencourt was indicted for unauthorized access to a computer system, in violation of *G. L. c. 266, § 120F*; the indictment contained twenty-one separate counts. On April 4, 2008, at the conclusion of a jury-waived trial before a judge in the Superior Court (trial judge), Bettencourt was found guilty on all counts.[5] Bettencourt filed an application for voluntary superannuation retirement [**671] with the Peabody retirement board (board) on the same day he was found guilty. As of that [***4] date, he had served as a Peabody police officer for over twenty-seven years and had been a member of the Peabody retirement system for over twenty-five years. On May 23, 2008, after learning of Bettencourt's convictions, the board held an evidentiary hearing to determine whether, because of these convictions, Bettencourt remained eligible for his retirement allowance. A majority of the board concluded that none of the convictions was a "violation of the laws applicable to his office or position" under *§ 15 (4)*, and, thus, his application for superannuation retirement was to be processed, subject to the approval of the public employee retirement administration commission (PERAC). On September 10, 2008, PERAC denied Bettencourt's retirement application because it concluded that Bettencourt's criminal convictions did relate to his office or position, and therefore, under *§ 15 (4)*, he was not entitled to receive any retirement allowance.

5 On April 18, 2008, Bettencourt was sentenced to a fine of $500 on each of the twenty-one counts of the indictment, for a total of $10,500. In imposing her sentence, the trial judge rejected the Commonwealth's sentencing recommendation of a probationary sentence of eighteen [***5] months and one hundred hours of community service, in addition to a fine of $500 per count; she also rejected Bettencourt's recommendation of a period of unsupervised probation and no fine.

Bettencourt sought certiorari review of PERAC's decision in the Peabody Division of the District Court Department, arguing that his convictions did not trigger the forfeiture mandated by *§ 15 (4)* because they were not related to his office or position, [*63] and, alternatively, that the forfeiture of his pension would constitute an "excessive fine" in violation of the *Eighth Amendment*. A judge in the District Court concluded that Bettencourt's convictions were not sufficiently related to his office or position as

to trigger forfeiture under *§ 15 (4)*, and, therefore, the judge did not reach the "excessive fine" argument. PERAC sought certiorari review of the judge's decision in the Superior Court. A Superior Court judge affirmed the District Court decision, and PERAC appealed to the Appeals Court. In a memorandum and order pursuant to its *rule 1:28*, the Appeals Court, concluding that Bettencourt's convictions were linked directly to his office or position, vacated the judgment and remanded the case to the District Court for consideration of Bettencourt's [***6] alternative argument that forfeiture of his pension constituted an excessive fine. *Public Employee Retirement Admin. Comm'n v. Bettencourt, 81 Mass. App. Ct. 1113, 961 N.E.2d 620 (2012)*.

On remand, the District Court judge concluded that forfeiture of a retirement allowance pursuant to *§ 15 (4)* was a fine under the *Eighth Amendment* and that the fine in this case, forfeiture of Bettencourt's lifetime retirement allowance, as compared to the harm suffered by the other officers and the public, was excessive and violated the *Eighth Amendment*. PERAC again sought certiorari review in the Superior Court. In an amended decision dated February 6, 2014, a Superior Court judge reversed, ruling that forfeiture of an employee's pension rights under *§ 15 (4)* does not constitute a fine for purposes of the *Eighth Amendment* because "the right to a pension is conditioned on not incurring criminal convictions related to public service." Bettencourt filed a timely appeal in the Appeals Court, and we transferred the case to this court on our own motion.

*Discussion*. *General Laws c. 32, § 15 (4)*, provides:

> "*Forfeiture of pension upon misconduct*. -- In no event shall any member [of [**672] a retirement system] after final conviction of a criminal offense involving violation of the laws applicable to his office or position, be entitled to receive a retirement allowance under the provisions of [*G. L. c. 32, §§ 1 through 28*], inclusive, [***7] nor shall any beneficiary be entitled to receive any benefits under such provisions on account of such member. The said member or his beneficiary shall receive, unless otherwise prohibited by law, a return of his accumulated total deductions; provided, however, that the [*64] rate of regular interest for the purpose of calculating accumulated total deductions shall be zero."

At this juncture, Bettencourt does not challenge the Appeals Court's conclusion that his convictions under *G. L. c. 266, § 120F*, involved violations of a law "applicable to his office or position" within the meaning of *§ 15 (4)*, and, thus, triggered imposition of the section's forfeiture provisions.[6] Rather, he focuses solely on his *Eighth Amendment* claim.[7] That claim has two parts: (1) the forfeiture of his pension under *§ 15 (4)* by its terms qualifies as a fine; and (2) the fine is excessive. This court has considered the claim's second part, excessiveness, in two previous cases, *MacLean v. State Bd. of Retirement, 432 Mass. 339, 347-350, 733 N.E.2d 1053 (2000)*, and *Maher v. Retirement Bd. of Quincy, 452 Mass. 517, 523-525, 895 N.E.2d 1284 (2008)*, cert. denied, *556 U.S. 1166, 129 S. Ct. 1909, 173 L. Ed. 2d 1058 (2009)*.[8] We have never addressed the threshold question whether the forfeiture of a public employee's pension under *§ 15 (4)* is a "fine" under the *Eighth Amendment*. We consider that question first.

6 Bettencourt appealed his underlying convictions, and the Appeals Court affirmed the judgments in an unpublished memorandum and order pursuant to its *rule 1:28*. *Commonwealth v. Bettencourt, 87 Mass. App. Ct. 1112, 26 N.E.3d 1142 (2015)*.

7 The *Eighth Amendment to the United States Constitution* [***8] provides:

"Excessive bail shall not be required, *nor excessive fines imposed*, nor cruel and unusual punishments inflicted" (emphasis added). The *due process clause of the Fourteenth Amendment to the United States Constitution* "makes the *Eighth Amendment's* prohibition against excessive fines and cruel and unusual punishments applicable to the States," *Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 433-434, 121 S. Ct. 1678, 149 L. Ed. 2d 674 (2001)*, and imposes "substantive limits" on the broad discretion that States exercise in the criminal penalty arena, *id. at 433*.

*Article 26 of the Massachusetts Declaration of Rights* contains an excessive fines clause: "No magistrate or court of law, shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments." However, the parties have not raised a claim under *art. 26* and therefore we consider solely the *Eighth Amendment* in this case.

8 In both *MacLean v. State Bd. of Retirement, 432 Mass. 339, 733 N.E.2d 1053 (2000)*, and *Maher v. Retirement Bd. of Quincy, 452 Mass. 517, 895 N.E.2d 1284 (2008)*, cert. denied, *556 U.S. 1166, 129 S. Ct. 1909, 173 L. Ed. 2d 1058 (2009)*, this court assumed, without deciding, that forfeiture of pension benefits pursuant to *§ 15 (4)* constitutes a fine for purposes of the *Eighth Amendment*, and then concluded in each case that the fine was not excessive and therefore no violation of the excessive fines clause had occurred. See *MacLean, supra at 346, 347-350*; *Maher, supra at 523-525*. See also *Flaherty v. Justices of the Haverhill Div. of the Dist. Court Dep't of the Trial Court, 83 Mass. App. Ct. 120, 123-125, 981 N.E.2d 745*, cert. denied, *134 S. Ct. 325, 187 L. Ed. 2d 158 (2013)* (adopting same assumption and concluding forfeiture not excessive).

1. *Is the forfeiture required by § 15 (4) a fine*? a. *Property requirement*. As it noted in *United States v. Bajakajian, 524 U.S.* [*65] *321, 327, 118 S. Ct. 2028, 141 L. Ed. 2d 314 (1998)*, the United States Supreme Court has had "little occasion" to interpret the *Eighth Amendment's* excessive fines clause. In that case, following the lead of [**673] two earlier decisions, the Court explained that "at the time the Constitution was adopted, 'the word "fine" was understood to mean a payment to a sovereign as punishment for some offense.'" *Id. at 327*, quoting *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 265, 109 S. Ct. 2909, 106 L. Ed. 2d 219 (1989)*.[9] A [***9] fine may involve the payment of money to the government, but as *Bajakajian* makes clear, the forfeiture of property also may qualify as a fine.[10] Moreover, the Supreme Court has held that the excessive fines clause does not apply solely to criminal cases, such as *Bajakajian*; a civil forfeiture proceeding in which the government seeks the forfeiture of particular property on account of its owner's conviction of a crime also implicates the clause. See *Austin v. United States, 509 U.S. 602, 608-610, 618, 621-622, 113 S. Ct. 2801, 125 L. Ed. 2d 488 (1993)* (civil proceeding initiated by government seeking to forfeit auto body shop and mobile home as instrumentalities of drug offense to which property owner pleaded guilty; forfeiture sought by government qualified as fine under *Eighth Amendment*). "*The Excessive Fines Clause* thus 'limits the government's power to extract payments, whether in cash or in kind, "as punishment for some offense."' ... Forfeitures -- payments in kind -- are thus 'fines' if they constitute punishment for an offense." *Bajakajian, supra at 328*, quoting *Austin, supra at 609-610*.

9 In *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 265, 275-276, 109 S. Ct. 2909, 106 L. Ed. 2d 219 (1989)*, the United States Supreme Court concluded that an award of punitive damages in a civil case between two private parties does not implicate the excessive fines clause, because the clause applies only when the required payment is to the government, i.e., [***10] the sovereign.

10 *United States v. Bajakajian, 524 U.S. 321, 118 S. Ct. 2028, 141 L. Ed. 2d 314 (1998)*, involved a defendant who had pleaded guilty to failing to report exported currency in excess of $10,000 in violation

> of *31 U.S.C. § 5316(a)(1)(A)*. A separate Federal statute required that "a person convicted of willfully violating this reporting requirement shall forfeit to the Government 'any property ... involved in such offense.'" *Bajakajian, supra at 324*. Under this forfeiture statute, *18 U.S.C. § 982(a)(1)*, the United States sought forfeiture of the entire $357,144 that Bajakajian had failed to report. The Supreme Court concluded that forfeiture of the entire amount constituted an excessive fine in violation of the *Eighth Amendment*. *Bajakajian, supra at 339-340*.

To decide whether the forfeiture of Bettencourt's pension qualifies as a fine under the Supreme Court's definition, the first question to be answered is whether the forfeiture operates to "extract payments" from him -- that is, requires the transfer of [*66] money or some other form of property of Bettencourt's to the government. See *Hopkins v. Oklahoma Pub. Employees Retirement Sys., 150 F.3d 1155, 1162 (10th Cir. 1998)* (considering forfeiture of retired State employee's pension as result of criminal bribery conviction: "Implicit in [the Supreme Court's] interpretation of the *Excessive Fines Clause* is the notion that it applies only when the payment to the government involves turning over 'property' [***11] of some kind that once belonged to [the employee]").[11]

> 11 If the forfeiture does require transfer of a property interest, the second question is whether the forfeiture operates as a form of punishment related to Bettencourt's convictions. We address the punishment issue in part 1.b, *infra*.

In response to this first question, Bettencourt contends that the mandatory forfeiture under *§ 15 (4)* has required him to transfer or turn over property -- his right to receive his retirement allowance -- to the Commonwealth. PERAC, on the other [**674] hand, argues that Bettencourt had no property interest in the retirement allowance being forfeited. Rather, in PERAC's view, Bettencourt, as a member of the Peabody retirement system, had only a future interest in receiving retirement allowance payments, one that was wholly contingent on his not being convicted of a crime involving misconduct in office, and "contingent, future interests are not property."

We do not share PERAC's view. Under the Commonwealth's contributory retirement system, the relationship between a member and the system is contractual. See *G. L. c. 32, § 25 (5)*.[12] However, we previously have noted that in this context, the term

> "'[c]ontract' (and related terms such as rights, benefits, protection) [***12] should be understood ... in a special, somewhat relaxed sense. ... It is not really feasible -- nor would it be desirable -- to fit so complex and dynamic a set of arrangements as a statutory retirement scheme into ordinary contract [*67] law which posits as its model a joining of the wills of mutually assenting individuals to form a specific bargain. ... When, therefore, the characterization 'contract' is used, it is best understood as meaning that the retirement scheme has generated material expectations on the part of employees and those expectations should in substance be respected. Such is the content of 'contract.'
>
> " ...
>
> "The contract so 'envisaged [by *G. L. c. 32, § 25 (5),*] is under the shelter of the impairment-of-contract clause, or, *what amounts to much the same thing, the due process clause of the Federal Constitution and State constitutional provisions cognate to the latter. ... [A] retirement plan establishing a contractual relationship[,] ... whether viewed strictly as contract or as*

> *property[,] may be constitutionally guarded against impairment*" (emphasis supplied; footnote omitted).

*Opinion of the Justices, 364 Mass. 847, 861, 863, 303 N.E.2d 320 (1973).*[13] See *Madden v. Contributory Retirement Appeal Bd., 431 Mass. 697, 701, 729 N.E.2d 1095 (2000)* (under contractual relationship between State retirement system members and State, "[t]here can be no change to the system that deprives members of benefits [***13] [**675] as long as they have paid the required contributions").

12 *General Laws c. 32, § 25 (5)*, provides:

> "The provisions of [*G. L. c. 32, §§ 1 through 28*,] inclusive, and of corresponding provisions of earlier laws shall be deemed to establish and to have established membership in the retirement system as a contractual relationship under which members who are or may be retired for superannuation are entitled to contractual rights and benefits, and no amendments or alterations shall be made that will deprive any such member or any group of such members of their pension rights or benefits provided for thereunder, if such member or members have paid the stipulated contributions specified in said sections or corresponding provisions of earlier laws."

13 In *Opinion of the Justices, 364 Mass. 847, 862, 303 N.E.2d 320 (1973)*, we quoted with approval the following passage from a decision of a California appellate court, *Wisley v. San Diego, 188 Cal. App. 2d 482, 485-486, 10 Cal. Rptr. 765 (1961)*, and characterized the passage as describing a contractual relationship similar to that envisaged by *G. L. c. 32, § 25 (5)*:

> "Where a city charter provides for pensions, it is well settled that the pension rights of the employees are an integral part of the contract of employment and that these rights are vested at the time the employment is accepted. An amendment to the charter which attempts to take away or diminish these vested [***14] rights is an unconstitutional impairment of contract. However, this does not preclude reasonable modifications of the pension plan prior to the employees' retirement [to maintain the financial viability of the plan]. ... "

As *Opinion of the Justices* and *Madden* reflect, this court has long held the view that a public employee who is a member of a retirement system holds an interest in retirement benefits that originates in a "contract" and in substance amounts to a property right. See *Garney v. Massachusetts Teachers' Retirement Sys.,* [*68] *469 Mass. 384, 389, 14 N.E.3d 922 (2014)* (*G. L. c. 32, § 15*, "involves the forfeiture of property"). See also *Collatos v. Boston Retirement Bd., 396 Mass. 684, 686, 488 N.E.2d 401 (1986).*[14,15] Cf. *G. L. c. 208, § 34* (property constituting marital estate subject to division in divorce includes vested and unvested retirement benefits); *Krapf v. Krapf, 439 Mass. 97, 104, 786 N.E.2d 318 (2003)* (pension rights "often constitute valuable marital assets").

14 The public employee retirement administration commission (PERAC) argues that to the extent *Collatos v. Boston Retirement Bd., 396 Mass. 684, 686, 488 N.E.2d 401 (1986)*, implies that forfeiture of a pension involves property, the case was concerned with *G. L. c. 32, § 15 (3A)*, which requires forfeiture not only of pension benefits, but also of the employee's accumulated salary deductions (i.e., the employee's contributions to the retirement system), whereas *§ 15 (4)* directs that the employee's accumulated deductions be

returned to him. We read *Collatos* as more broadly suggesting [***15] that the employee's right to pension benefits themselves represented a property interest, but in any event, *§ 15 (4)* itself requires an employee to forfeit the interest that would otherwise be due to him on his accumulated salary deductions, see *G. L. c. 32, § 15 (4)*, and such interest clearly represents property belonging to the employee.

15 While the view that retirement benefits provided by a public employee retirement system constitute a contractually created property right is not universally shared by all, a number of courts have so held. See, e.g., *Betts v. Board of Admin. of the Pub. Employees Retirement Sys., 21 Cal. 3d 859, 863, 148 Cal. Rptr. 158, 582 P.2d 614 (1978)*; *Birnbaum v. New York State Teachers Retirement Sys., 5 N.Y.2d 1, 8-9, 152 N.E.2d 241, 176 N.Y.S.2d 984 (1958)*; *Mazzo v. Board of Pensions & Retirement of the City of Philadelphia, 531 Pa. 78, 84, 611 A.2d 193 (1992)*; *Leonard v. Seattle, 81 Wash. 2d 479, 487-488, 503 P.2d 741 (1972)* (pension rights constitute property as deferred compensation); *Booth v. Sims, 193 W. Va. 323, 337-341, 456 S.E.2d 167 (1994)*. See also *Pineman v. Oechslin, 195 Conn. 405, 416-417, 488 A.2d 803 (1985)* (even in absence of express contractual rights to pension benefits, State employees have property interest in them). Contrast, e.g., *Hopkins v. Oklahoma Pub. Employees Retirement Sys., 150 F.3d 1155, 1162 (10th Cir. 1998)* (Oklahoma law); *Hames v. Miami, 479 F. Supp. 2d 1276, 1288 (S.D. Fla. 2007)* (Florida law); *Spiller v. State, 627 A.2d 513, 516 (Me. 1993)*; *Scarantino v. Public Sch. Employees' Retirement Bd., 68 A.3d 375, 385 (Pa. Commw. Ct. 2013)*.

In arguing that Bettencourt had no property interest in his retirement allowance, as stated previously, PERAC posits that an employee's interest is always contingent on not being convicted of an offense "applicable to his office" under *§ 15 (4)*; in contractual terms, this contingency, in PERAC's view, is a condition precedent that must be satisfied before the employee's right to retirement benefits "matures" into a contractual [***16] right, see *Haverhill v. George Brox, Inc., 47 Mass. App. Ct. 717, 719, 716 N.E.2d 138 (1999)*, and without so maturing, no property right is or could be created. In support of this argument, PERAC relies on three decisions of courts applying the laws of other States: *Hopkins, 150 F.3d at* [*69] *1162* (holding that, under Oklahoma law, public employee convicted of accepting bribe while in office had no property right in pension benefits because pension was always contingent on maintaining "honorable service" while in office; employee's acceptance of bribe constituted breach of duty of honorable service, and as result, employee had no "vested right" in pension); *Hames v. Miami, 479 F. Supp. 2d 1276, 1288 (S.D. Fla. 2007)* [**676] (11th Cir. 2008) (under Florida law, public employee has no property interest in pension because pension vests "subject to the conditions in the forfeiture statute"); and *Scarantino v. Public Sch. Employees Retirement Bd., 68 A.3d 375, 385 (Pa. Commw. Ct. 2013)* (under Pennsylvania law, public employee's right to pension depends upon certain conditions precedent, including that "an employee cannot have been convicted of ... [certain] crimes").

We are not persuaded by the reasoning in these cases. If an employee has a protected contract right and, derivatively, a property interest in retirement benefits, the fact that the benefits may be subject to forfeiture on account of misconduct does not change the fundamental character of [***17] the contract right or property interest. Rather, it simply means that the employee will lose his or her right and interest as a result of the misconduct.[16]

16 Furthermore, in contrast to at least the *Scarantino* case -- and directly contrary to PERAC's argument here -- when we have described a public employee's conviction of an offense described in *§ 15 (4)* in contract terms, we have not characterized the conviction as a "condition precedent" but rather a "condition subsequent" that operates to discharge the duty of the retirement system to pay benefits. See *State*

*Bd. of Retirement v. Woodward, 446 Mass. 698, 705 n.7, 847 N.E.2d 298 (2006)*. This characterization supports our conclusion that, under the statutory scheme, a public employee participating in the retirement system possesses a contractual entitlement or right to the benefits *before* his or her commission of an offense results in the forfeiture of that right.

PERAC also argues that no forfeiture occurred here because, through the operation of *§ 15 (4)*, Bettencourt simply was foreclosed from receiving retirement benefits in the future, and nothing was actually "extracted" from him and paid to the government as required to trigger review under the *Eighth Amendment*. We disagree with PERAC that the phrase "extract payments .... in cash or in kind," [***18] as used by the Supreme Court in *Austin, 509 U.S. at 609-610*, and *Bajakajian, 524 U.S. at 328*, means that there literally must be a physical transfer of tangible property from the individual to the State; "property" exists in tangible and intangible form. Under the Commonwealth's public employee retirement system, the employee makes contributions to the sys- [*70] tem during the period of his or her active employment through salary deductions. When the employee retires for superannuation (assuming no beneficiaries), he or she retires with an allowance that is comprised of an "annuity share" actuarially determined on the basis of his or her accumulated deductions, and a "pension share" that the governmental unit is required to pay and that represents "the usually considerable difference needed to make good the normal yearly allowance paid to the [employee] until his death." *Opinion of the Justices, 364 Mass. at 854*. The pension share that the employee is entitled to receive from the government during retirement is money, i.e., property. If the employee is obligated to forfeit his or her retirement allowance pursuant to *§ 15 (4)*, the pension share reverts to the government; put another way, by operation of *§ 15 (4)*, the pension share is effectively transferred from the employee to the government. We consider [***19] this effective transfer of property to qualify as an extraction of payment from the employee to the sovereign within the meaning of *Austin* and *Bajakajian*.

To summarize, at the point that Bettencourt, as a Peabody police officer, became a contributing member of the Peabody retirement system with deductions taken from his salary in accordance with governing statutes and rules, he acquired a [**677] protected interest in the retirement allowance provided by the retirement system that amounted to a property interest. See *Opinion of the Justices, 364 Mass. at 863*.[17] This is not to say that Bettencourt, or any public employee, may not lose his right to receive his retirement allowance as a result of committing a crime connected to his employment. *Section 15 (4)* expressly requires this result, and Bettencourt raises no challenge to the authority of the Legislature to enact such a statute. But the fact that *§ 15 (4)* mandates forfeiture of an employee's retirement allowance when the employee is convicted of misconduct in office does not mean that the employee lacked a property interest in that allowance prior to the employee's conviction. Rather, it is precisely this property interest that the employee is required to forfeit, and the forfeiture effects what is in [***20] substance an extraction of payments from the employee to the Commonwealth.

17 For cases in other jurisdictions to the same effect, see, e.g., *Betts, 21 Cal. 3d at 863*; *Birnbaum, 5 N.Y.2d at 8-9*; *Leonard, 81 Wash. 2d at 487*.

b. *Punishment requirement*. A forfeiture of property only qualifies as a fine under the *Eighth Amendment* if it constitutes punish- [*71] ment. See *Bajakajian, 524 U.S. at 328*. Bettencourt argues that the required statutory forfeiture here did operate to punish him for his criminal offense; PERAC, pointing to *MacLean, 432 Mass. at 351*, characterizes the mandatory forfeiture as serving remedial, nonpunitive purposes.

In *MacLean, 432 Mass. at 351*, in the context of considering a retired public employee's argument that the forfeiture of his retirement allowance violated double jeopardy principles, we stated that "[a]lthough *§ 15 (4)* certainly contains an element of deterrence, it also serves other, nonpunitive purposes, such as protection of the public fisc and preserving respect for government service." But there is no double jeopardy issue raised in this case, and for purposes of the excessive fines clause, the Supreme Court has made clear that unless the sanction at issue -- here, forfeiture -- can be said to serve "*solely*" a remedial purpose, it qualifies as punishment. *Austin, 509 U.S. at 610*, quoting *United States v. Halper, 490 U.S. 435, 448, 109 S. Ct. 1892, 104 L. Ed. 2d 487 (1989)*. Accord *Bajakajian, 524 U.S. at 329 n.4, 331 n.6*.

In *Bajakajian*, the Court described the characteristics of the currency forfeiture [***21] at issue there that indicated it qualified as punishment: "The forfeiture is ... imposed at the culmination of a criminal proceeding and requires conviction of an underlying felony, and it cannot be imposed upon an innocent owner." *Id. at 328*. Forfeiture pursuant to *§ 15 (4)* meets all of these criteria. It operates as "an automatic legal consequence of conviction of certain offenses," *MacLean, supra at 343*; it only comes into play after the employee's final conviction of one of those offenses; and it cannot be imposed on an employee who is not convicted of committing such an offense. We conclude, therefore, that the forfeiture required by *§ 15 (4)* qualifies as "punishment." Accordingly, because the forfeiture does involve an "extraction of payments" and is punitive, it is a fine within the meaning of the excessive fines clause of the *Eighth Amendment*. We turn to the question whether the forfeiture is excessive.

[**678] 2. *Was the fine excessive*? Bettencourt argues that the mandated forfeiture of his retirement benefits is excessive because the amount of the forfeiture is grossly disproportional to the gravity of his offenses. The District Court judge agreed.[18]

> 18 The Superior Court judge, having concluded that forfeiture pursuant to *§ 15 (4)* did not [***22] constitute a fine, did not analyze excessiveness.

We review the District Court judge's determination of exces- [*72] siveness de novo. *Maher, 452 Mass. at 523*.[19] "The touchstone of the constitutional inquiry under the *Excessive Fines Clause* is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish." *Bajakajian, 524 U.S. at 334*. In conducting the review, we are to compare the forfeiture amount to that offense, and "[i]f the amount of the forfeiture is grossly disproportional to the gravity of the defendant's offense, it is unconstitutional." *Id. at 337*. See *Maher, supra at 522*. As the party challenging the constitutionality of the forfeiture, Bettencourt bears the burden of demonstrating that the forfeiture is excessive. *Id. at 523*.

> 19 Factual findings, when made by a judge, are to be accepted unless clearly erroneous. See *Bajakajian, 524 U.S. at 336 n.10*. The District Court judge made no findings here. As this court has noted, "[i]n any forfeiture case it would be helpful for the judge to make a finding of the total value of the forfeiture involved." *MacLean, 432 Mass. at 348 n.11*.

The amount of the forfeiture is the first issue to consider. Bettencourt estimated the value of his pension benefits to be approximately $1,487,940 and the value of his health care benefits [***23] to be approximately $482,500, or approximately $1.9 million in total. In contrast, PERAC introduced an actuarial estimate stating that the value of Bettencourt's pension benefits, independent of the health benefits, was $659,000. Although PERAC disputes Bettencourt's calculation of health benefits, PERAC agrees that they confer some value. Accepting for purposes of discussion that

PERAC's estimate is correct, Bettencourt would face forfeiture of $659,000 at a minimum, plus the value of health insurance benefits.[20] Bettencourt accrued his interest in the forfeited benefits over more than twenty-five years of public service.

> 20 The differing values and estimates provided by the parties underscore the need for factual findings to be made by the District Court judge reviewing a forfeiture case such as this.

Turning to the gravity of the underlying offenses that triggered the forfeiture, we are called upon to gauge the degree of Bettencourt's culpability and, in that regard, to consider the nature and circumstances of his offenses, whether they were related to any other illegal activities, the aggregate maximum sentence that could have been imposed, and the harm resulting from them. See *Maher, 452 Mass. at 523*, citing [***24] *Bajakajian, 524 U.S. at 337-339*; *MacLean, 432 Mass. at 346*. We consider these factors in order.

First, with respect to the nature and circumstances of the [*73] offenses, Bettencourt was convicted of twenty-one counts of unauthorized access to a computer system in violation of *G. L. c. 266, § 120F*,[21] during a [**679] single shift of duty; in the period of access, he viewed private information, including civil service examination scores relating to several police officers within his department. In sentencing Bettencourt, the trial judge observed that there was no evidence that Bettencourt made any use at all of this private information -- i.e., no evidence of any gain to Bettencourt other than the satisfaction of his curiosity; the essence of his crime, in substance, was one of "snooping."

> 21 *General Laws c. 266, § 120F*, provides in relevant part:
>
> > "Whoever, without authorization, knowingly accesses a computer system by any means, or after gaining access to a computer system by any means knows that such access is not authorized and fails to terminate such access, shall be punished by imprisonment in the house of correction for not more than thirty days or by a fine of not more than one thousand dollars, or both."

Second, Bettencourt's offenses were wholly unrelated to other illegal activities. Bettencourt had [***25] no prior criminal record, and there is nothing before us suggesting that he had engaged in any criminal or illegal misconduct besides this one episode of accessing the computer files without authority.

The third factor focuses on the maximum potential penalties for Bettencourt's offenses. See *Bajakajian, 524 U.S. at 338-339*. In this regard, "the maximum punishment authorized by the Legislature is the determinative factor." *Maher, 452 Mass. at 524 n.12*. See *MacLean, 432 Mass. at 348*.[22] The maximum punishment authorized by the Legislature for a single offense under *G. L. c. 266, § 120F*, a misdemeanor, is imprisonment in a house of correction for thirty days and a fine of not more than $1,000, which suggests to us that the Legislature did not view this crime as a grave, serious offense. See *Bajakajian, 524 U.S. at 338-339* (maximum possible punishment of six months' imprisonment and $5,000 fine confirms "minimal level of culpability"). Compare *Maher, supra at 524* (discussing maximum penalties of felonies of which retired public employee had been convicted). The ag- [*74] gregate maximum penalty that could have been imposed on Bettencourt -- imprisonment in the house of correction for 630 days and a fine of $21,000[23] -- does not indicate a substantial level of culpability for purposes of this analysis, particularly where the potential period [***26] of imprisonment is relatively low as compared to that of other crimes.[24]

22 Bettencourt argues that our analysis of the maximum penalty should be controlled by the maximum punishment authorized by the Massachusetts sentencing guidelines, citing *Bajakajian, 524 U.S. at 338-339*. The argument fails. The Massachusetts sentencing guidelines are simply guidelines, not a set of rules that judges *must* follow -- in contrast to the Federal sentencing guidelines that were in effect at the time that *Bajakajian* was decided and until the Supreme Court's decision in *United States v. Booker, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005)*.

23 Bettencourt received a sentence of $10,500, or $500 for each offense, but was not sentenced to a term of imprisonment or probation. We decline to consider the relative leniency of the sentence received by Bettencourt as opposed to other potential violators. See *Maher, 452 Mass. at 524 n.12*.

24 In *MacLean, 432 Mass. at 348*, this court opined that the maximum term of imprisonment that could be imposed for a single violation of the conflict of interest law, *G. L. c. 268A, § 7* -- two years (at the time of that case) -- in combination with the possible aggregate fine for the two offenses to which MacLean had pleaded guilty -- $6,000 -- indicated that the Legislature "considered violations of this [statute] a serious offense." The opinion does not explain [***27] why the court combined the maximum statutory period of incarceration for a single violation of *G. L. c. 268A, § 7*, with the maximum fine for MacLean's two offenses. The maximum term of imprisonment for two violations of this statute would have been four years. This is significantly longer than the maximum possible term of imprisonment in this case, 630 days.

[**680] Harm caused by the offense is the fourth factor. PERAC contends that Bettencourt's offenses were a breach of the public trust that was "especially serious because it involve[d] a police officer, in command of a police department, breaking the law in the police station, by willfully impersonating fellow police officers while using their personal information to do so." We recognize that Bettencourt's offenses certainly violated the privacy rights of his fellow officers, and -- as will always be the case when a public employee commits a crime by violating a law connected to his or her office or position -- that there was a breach of the public trust. However, no harm to the public fisc was accomplished or threatened here, compare *Maher, supra at 524-525*, there was no improper or illegal gain involved, compare *MacLean, supra at 349-350*, and, as the trial judge recognized, the offenses [***28] did not warrant concern about protection of the public. PERAC also argues that Bettencourt's offenses undermined the integrity of the civil service promotion process because the knowledge of the identities of his main competitors for promotion to captain and their examination scores provided an advantage to him. But, as the District Court judge stated, despite PERAC's attempts to speculate about how Bettencourt could have gained from knowledge of the scores, nothing in the record demonstrates that Bettencourt received any personal benefit, [*75] profit, or gain from his actions. Over-all, although there certainly was harm caused by Bettencourt, it was relatively small as compared to our other cases.[25]

25 PERAC also argues that the forfeiture of $659,000, plus an undetermined value of health insurance benefits, is not excessive because it is comparable to other forfeiture amounts upheld by this court and the Appeals Court under *§ 15 (4)*. See *Maher, 452 Mass. at 525* ($576,000 not excessive); *MacLean, 432 Mass. at 348-350* ($625,000 not excessive); *Flaherty, 83 Mass. App. Ct. at 124-125* ($940,000 not excessive). We disagree. The facts of each of these cases are very different, and each case must be decided on its own facts. See *Bajakajian, 524 U.S. at 336 n.10*. Cf. *Gaffney v. Contributory Retirement Appeal Bd., 423 Mass. 1, 5, 665 N.E.2d 998 (1996)* (court must look to facts of each case to determine whether [***29] "direct link" between criminal offense and public employee's position exists). Unlike Bettencourt's offenses, MacLean's offenses resulted in substantial pecuniary benefits to himself and his wife; the forfeiture was triggered

by multiple illegal activities that concerned the financial interest of the State; and the offenses occurred over a lengthy period of time. The crimes to which Maher pleaded guilty -- breaking and entering in the daytime with intent to commit a felony, stealing in a building, and wanton destruction of property -- were far more serious in nature, including felonies; Maher faced a potential maximum penalty of seventeen and one-half years of imprisonment; there was evidence that he stood to gain a substantial salary from his misconduct; and Maher's crimes "could have undermined public confidence in the selection and appointment of officials to supervisory positions," *Maher, 452 Mass. at 525*. Flaherty was the superintendent of the Haverhill highway department and was convicted of larceny over $250, a felony, for stealing paving supplies from the highway department in concert with his son, who also worked for the highway department and was under Flaherty's supervision, in order to make use [***30] of the supplies in a side business Flaherty operated; the acts of larceny occurred several times over the course of three years. The fact that Flaherty stole from the government for years with the help of his government-employed son and used the stolen materials for personal gain added to his level of culpability, justifying the forfeiture of his pension benefits. No such facts are present in this case.

Considering the factors discussed above, we conclude that the complete forfeiture of Bettencourt's retirement benefits [**681] in excess of $659,000, accrued over a lengthy career as a full-time municipal police officer, was not proportional to the gravity of the underlying offenses of which he was convicted. In sum, the forfeiture violates the excessive fines clause of the *Eighth Amendment*.

3. *If the mandatory forfeiture of a public employee's retirement allowance qualifies as an excessive fine, what is the appropriate remedy*?[26] Although the United States Supreme Court in *Bajakajian* [*76] declined to consider the issue,[27] we recognize that like the trial judge in *Bajakajian* (see note 27, *supra*), as PERAC points out, a number of courts, after concluding that a statutory forfeiture operated as an excessive fine in the [***31] particular circumstances of the case, have proceeded to determine a forfeiture amount that would not be excessive, and have imposed it. See, e.g., *United States v. Castello, 611 F.3d 116, 121 (2d Cir. 2010)*, cert. denied, *562 U.S. 1251, 131 S. Ct. 1533, 179 L. Ed. 2d 362 (2011)* (where forfeiture amount is constitutionally excessive, court must impose alternative fine in exact amount over which fine would become excessive); *United States v. Sarbello, 985 F.2d 716, 724 (3d Cir. 1993)* (holding in context of case involving Racketeer Influenced and Corrupt Organizations Act violations that lower court is required to impose maximum fine amount that would not be excessive under *Eighth Amendment*).[28] Cf. *United States ex rel. Bunk v. Gosselin World Wide Moving, N.V., 741 F.3d 390, 405-410 (4th Cir. 2013)* (civil qui tam actions under Federal False Claims Act; relator's acceptance of less than statutory False Claims Act penalty was permissible solution to *Eighth Amendment* excessive fines concern and amount agreed upon did not qualify as constitutionally excessive). But see, e.g., *United States v. One Parcel of Real Prop. Located at 461 Shelby Rd. 361, Pelham, Ala., 857 F. Supp. 935, 939-940 (N.D. Ala. 1994)* (declining to adopt holding in *Sarbello* and impose alternative fine, noting difficulty judges would face in determining exact amount defendant could be fined without violating excessive fines clause).

26 Following oral argument in this case, we invited the parties to address this and related subsidiary questions in supplemental memoranda. The parties [***32] and the Massachusetts Coalition of Police, as amicus, all did so.

27 In *Bajakajian, 524 U.S. at 326*, the trial judge, after determining that the statutory forfeiture amount was excessive and therefore constitutionally invalid, proceeded to establish an alternative forfeiture amount that the judge deemed appropriate. The Supreme Court, however,

declined to consider the propriety of that determination, as the defendant had not cross-appealed that issue. See *id. at 337 n.11*.

28 See also *United States v. Corrado, 227 F.3d 543, 552, 558 (6th Cir. 2000)*; *United States v. Bieri, 21 F.3d 819, 824 (8th Cir.)*, cert. denied, *513 U.S. 878, 115 S. Ct. 208, 130 L. Ed. 2d 138 (1994)*.

We agree with PERAC that, as a general proposition, where a court determines that imposition of a statutorily mandated forfeiture would violate the *Eighth Amendment's* excessive fines clause, it is likely within the court's authority to determine a level or amount of forfeiture or fine that would be constitutionally permissible -- whether the statutory forfeiture is criminal (as in the *Castello* and *Sarbello* cases) or, as here, civil in nature. However, we decline to attempt such a determination in this case. [*77] We do so because even if we put to one side the inherent difficulty in determining the maximum amount of retirement allowance forfeiture that is constitutionally permissible,[29] implementation [**682] of this judicially established forfeiture determination [***33] would involve the creation of procedures to be carried out by administrative bodies such as the local retirement board and perhaps PERAC, for which there is currently no legislative authorization or direction.[30] Stated in more general terms, the decision that a public employee's retirement allowance should be forfeited completely upon conviction of certain types of crimes constitutes a policy choice for the Legislature to make -- as it has by enacting *§ 15 (4)*.

29 In those cases where a court has ordered that a statutory forfeiture amount would be an excessive fine and has imposed a lesser fine, the property subject to forfeiture has been readily divisible, the total value of the property was established, and the forfeiture was to be imposed on a one-time basis by payment to the government. See *United States v. Castello, 611 F.3d 116, 118 (2d Cir. 2010)*, cert. denied, *562 U.S. 1251, 131 S. Ct. 1533, 179 L. Ed. 2d 362 (2011)* (forfeiture amount determined as percentage of value of checks exceeding $10,000 for which no currency transaction reports were filed, funds connected to crime committed, and defendant's equity interest in his home); *Bieri, 21 F.3d at 824* (real property potentially subject to forfeiture was divisible by plots of land); *United States v. Sarbello, 985 F.2d 716, 724 (3d Cir. 1993)* (specific percentage of defendant's interest in business required to be forfeited). None of [***34] those factors is known with adequate certainty in this case.

30 In a hypothetical case in which a court determines that total pension forfeiture is constitutionally excessive, PERAC has proposed an implementation plan that appears to require the following. First, the local retirement board would determine the total value of the employee's (here, Bettencourt's) retirement allowance and health insurance benefits; using the total value, the local board would then determine what the employee's monthly retirement allowance and health insurance benefits would be; and the local board would then calculate how many months need to pass until the sum of the monthly payments withheld equaled the constitutionally permissible forfeiture amount imposed by the judge. Then, at the end of that calculated period of time, the employee would be entitled to begin receiving monthly payments (if the employee were still alive). Presumably, there would need to be some additional adjustments to this implementation plan if the employee had elected, as Bettencourt did, a retirement plan option that included payments to a beneficiary in the event of the employee's death.

This is the first case in which this court has [***35] held (rather than assumed) that the forfeiture required by *§ 15 (4)* is subject to the excessive fines clause of the *Eighth Amendment*, and the first case in which the court has determined that a total forfeiture of a public employee's pension pursuant to *§ 15 (4)* would violate that clause. Accordingly, the Legislature has not had the opportunity to consider what should occur if and when such a judicial deter- [*78] mination of

excessiveness is made, and questions of policy abound. For example, assuming that where a court finds that total forfeiture of a public employee's pension would be constitutionally excessive, the Legislature would seek to require forfeiture of the maximum amount a court found constitutionally permissible -- an assumption that itself obviously incorporates a policy judgment -- what method for implementation of such a decision would the Legislature choose? The method suggested by PERAC?[31] A method that distributed to the employee a reduced benefit payment on a periodic basis immediately following the court's judgment, calculated to account for the constitutionally permissible forfeiture amount? A different method altogether? Or, in light of our determination that the excessive fines clause applies to the [***36] statutory pension forfeiture program prescribed by *§ 15 (4)*, might the Legislature choose to establish a wholly different forfeiture system -- for example, one that provided for different percentages of pension forfeiture depending on the nature and circumstances of the crime?

31 See note 30, *supra*.

These types of determinations are ones that fit squarely within the legislative, not [**683] the judicial, domain, and we believe that the more prudent approach is to defer to the Legislature for its resolution of such issues in the first instance. See *Ayotte v. Planned Parenthood of N. New England, 546 U.S. 320, 329, 126 S. Ct. 961, 163 L. Ed. 2d 812 (2006)* (where Court determines statute is unconstitutional as applied, its "ability to devise a judicial remedy that does not entail quintessentially legislative work often depends on how clearly [it has] already articulated the background constitutional rules at issue and how easily [it] can articulate the remedy").

*Conclusion*. There is no question that the mandatory forfeiture provisions of *§ 15 (4)* serve an important public interest in protecting the honesty and integrity of those who are paid with public funds to carry out the responsibilities of government. We emphasize that the Legislature properly may provide for such forfeitures. We hold today, however, that under the [***37] pension forfeiture scheme established by *G. L. c. 32, § 15 (4)*, the complete forfeiture of a public employee's retirement allowance upon conviction of a crime "involving violation of the laws applicable to his office or position" is a fine that is subject to the *Eighth Amendment's* proscription against excessive fines. In the present case, because *§ 15 (4)*, as applied to Bettencourt, results in the [*79] imposition of an excessive fine under the *Eighth Amendment*, the statute cannot be enforced, and his retirement allowance cannot be forfeited pursuant to the statute's terms.[32] Any changes to the system of retirement allowance forfeiture established by *§ 15 (4)* implicate policy determinations that the Legislature should have an opportunity to make in the first instance.

32 Our conclusion that Bettencourt is entitled to his retirement allowance in full is based solely on the application of the mandatory total forfeiture provision in *G. L. c. 32, § 15 (4)*, to the particular facts presented in this case -- as discussed, commission of a misdemeanor with a relatively light maximum sentence, no attempt by Bettencourt to divert or misuse public funds, no evidence that the private information he improperly gained was misused (or used at all), and no injury beyond the invasion of the other officers' [***38] privacy interest in their respective test scores. If history is any guide, cases involving such a relatively minimal degree of culpability and harm to the public are highly unusual. It is significant that in the cases previously before this court and the Appeals Court in which the courts assumed without deciding that the *Eighth Amendment's* excessive fines clause applied to forfeitures imposed under *§ 15 (4)*, the total forfeitures of the employees' retirement allowances were not deemed to be excessive. See *Maher, 452 Mass. at 518, 523-525*; *MacLean, 432 Mass. at 348-350*; *Flaherty, 83 Mass. App. Ct. at 124-125*.

The judgment of the Superior Court is vacated, and the case remanded to that court for entry of judgment affirming the judgment of the District Court.

*So ordered.*

**ALAN SLISKI & ANOTHER[1] v. BOARD OF ASSESSORS OF LINCOLN.**

1 Susan Sliski.

**14-P-1644.**

**APPEALS COURT OF MASSACHUSETTS**

***89 Mass. App. Ct. 1107*; *45 N.E.3d 612***
***2016 Mass. App. Unpub. LEXIS 179***

**February 23, 2016, Entered**

**NOTICE:** SUMMARY DECISIONS ISSUED BY THE APPEALS COURT PURSUANT TO ITS *RULE 1:28*, AS AMENDED BY 73 MASS. APP. CT. 1001 (2009), ARE PRIMARILY DIRECTED TO THE PARTIES AND, THEREFORE, MAY NOT FULLY ADDRESS THE FACTS OF THE CASE OR THE PANEL'S DECISIONAL RATIONALE. MOREOVER, SUCH DECISIONS ARE NOT CIRCULATED TO THE ENTIRE COURT AND, THEREFORE, REPRESENT ONLY THE VIEWS OF THE PANEL THAT DECIDED THE CASE. A SUMMARY DECISION PURSUANT TO *RULE 1:28* ISSUED AFTER FEBRUARY 25, 2008, MAY BE CITED FOR ITS PERSUASIVE VALUE BUT, BECAUSE OF THE LIMITATIONS NOTED ABOVE, NOT AS BINDING PRECEDENT. SEE *CHACE V. CURRAN, 71 MASS. APP. CT. 258, 260 N.4, 881 N.E.2d 792 (2008)*.

PUBLISHED IN TABLE FORMAT IN THE MASSACHUSETTS APPEALS COURT REPORTS.

PUBLISHED IN TABLE FORMAT IN THE NORTH EASTERN REPORTER.

**JUDGES:** Cohen, Grainger & Wolohojian, JJ. [*1]

**OPINION**

*MEMORANDUM AND ORDER PURSUANT TO RULE 1:28*

This is an appeal from a decision of the Appellate Tax Board (board) that determined the plaintiffs' property valuation by the town of Lincoln's board of assessors (town) was correct viewing the property as a whole. The plaintiffs own two parcels of land: the larger one lies in Lincoln and Wayland and is 4.665 acres (273 Concord Road); the smaller one also lies in both Lincoln and Wayland but is only .07 acre (0 Concord Road).[2] Approximately twenty-five years ago, the plaintiffs received a *G. L. c. 61A* exemption for 273 Concord Road, except for the 5,445 square feet (or 0.125 of an acre) that lie under the plaintiffs' house.[3] The town refers to this 0.125 acre as the "prime site."

2 Only the portions of the lots that are in Lincoln are the subject of this appeal.

3 273 Concord Road encompasses a single-family house with an attached garage and deck, and some "yard items" that are also valued and taxed.

The plaintiffs dispute their fiscal year 2010 tax assessment for both parcels.[4] As to 273 Concord Road, they argue that the

assessment accurately reflects neither the value of the prime site nor [*2] the value of the land as a whole due to the c. 61A exemption.[5] The 2010 "tax card" for that property shows a total taxable valuation of $726,397, of which $314,300 is attributed to the house, $58,800 to yard items, $352,800 to the .0125 acre of land under the house, $382 to the 3.54 acres of pasture, and $115 to the 1.00 acre of woodland. The town appraised the agricultural portions at $30,000 per acre, but appraised the prime site at a rate of $2,822,688 per acre. The town appears to have arrived at this latter figure by assigning a value of $7.20 per square foot to the prime site and then applying a multiplier of 9.00. Because the factor of 9.00 is unexplained in the record and indeed appears to be contradicted by the town's own documents, we vacate that portion of the board's decision pertaining to the 2010 tax for 273 Concord Road and remand the matter for further consideration by the board.

4 The plaintiffs also sought an abatement for fiscal year 2011, but there is no evidence pertaining to that fiscal year in the record. The inadequate record precludes us from reviewing the plaintiffs' arguments with respect to fiscal year 2011. See *Mass.R.A.P. 18(a)*, as amended, 425 Mass. 1602 (1997).

5 As to 0 Concord Road, which is [*3] valued, assessed, and taxed under *G. L. c. 59* as undeveloped land, the plaintiffs have failed to demonstrate any error in the board's decision. Although it is true that the plaintiffs purchased this "sliver" of unbuildable land for $100 from their neighbor, it does not follow unavoidably that the sales price is the fair market value. The sale was not an arm's-length transaction on the open market.

*Discussion.* "Exemption statutes are strictly construed." *New England Forestry Foundation, Inc. v. Assessors of Hawley, 468 Mass. 138, 148, 9 N.E.3d 310 (2014)*. The party seeking an exemption bears the burden of proving its entitlement. *Ibid.* We will not disturb the decision of the board "if it is based on substantial evidence and on a concrete application of the law." *Koch v. Commissioner of Rev., 416 Mass. 540, 555, 624 N.E.2d 91 (1993)*. "We limit ourselves in our review of this question to a determination whether the decision of the board is supported by substantial evidence. . . . Furthermore, '[o]ur determination must be made upon consideration of the entire record.'" *Nashawena Trust v. Assessors of Gosnold, 398 Mass. 821, 825, 501 N.E.2d 506 (1986)*, quoting from *New Boston Garden Corp. v. Assessors of Boston, 383 Mass. 456, 465-466, 420 N.E.2d 298 (1981)*.

As stated by the board, "[i]n abatement proceedings, 'the question is whether the assessment for the parcel of real estate, including both the land and structures thereon, is excessive. The component parts, on which that single assessment is laid, are each open to inquiry and revision by the appellate [*4] tribunal in reaching the conclusion whether that single assessment is excessive.' *Massachusetts Gen[.] Hosp[.] v. Belmont, 238 Mass. 396, 403, 131 N.E. 72 (1921)*."[6]

6 Here, the plaintiffs' real estate tax bill shows only the value of the land and the value of the buildings thereon. It is the property tax card which sets out the various components of the valuation and the appraised value of each. The property tax card also sets out the use value for the various components, but for the purposes of this decision, we rely solely upon the appraised value.

The board determined that most of the plaintiffs' "contentions addressed only the valuation or classification of the various land components of the subject properties. . . . [T]axpayers do not conclusively establish a right to abatement merely by showing that their land is overvalued. 'The tax on a parcel of land and the building thereon is one tax . . . although for statistical purposes they may be valued separately.' *Assessors of Brookline v. Prudential Ins[.] Co., 310 Mass. 300, 317, 38 N.E.2d 145 (1941)*."[7] Although we do not quarrel with this principle, we are troubled

here in two respects by the manner in which the board appears to have applied it.

> 7 The board made no specific findings regarding the valuation of the property, stating instead [*5] that "the appellants' contentions relative to the misclassifications of the portions of the subject properties . . . did not address the issue of whether the subject assessments, as a whole, reflect the fair cash values of the subject properties for both fiscal years at issue." See *Massachusetts Gen. Hosp. v. Belmont, 238 Mass. at 402*.

First, the board did not appear to have considered the methodology underlying the town's valuation of the prime site.[8] According to the town's "Residential Land Valuation Narrative" for 2010, the value for land in neighborhood MA (to which the plaintiffs' property is assigned)[9] is $576,000 per 80,000 square feet (i.e., $7.20 per square foot). That same document states that a factor of 1.00 should be applied to property within neighborhood MA. Nowhere in the town's valuation narrative is there a factor of 9.00; indeed, all the factors are 1.91 or less. The record does not show the origin of, or basis for, the factor of 9.00 or why the town applied it to the plaintiffs' property.[10] Accordingly, on this record, we are not confident that the board could, or did, determine that the requirement of *G. L. c. 61A, § 15*, inserted by St 1973, c. 1118, § 1, that "all land occupied by a dwelling or regularly used for family living shall be [*6] valued, assessed, and taxed by the same standards, methods and procedures as other taxable property" was satisfied.[11]

> 8 "Prime site is defined by the town as "[t]he first 80,000 [square feet] (1.84 acres) required under Lincoln zoning to have a conforming building site."
>
> 9 The plaintiffs also seek relief from the assignment of their property to an MA neighborhood. They seek reassignment to an XP neighborhood to reduce their tax bill. Based on the record before us, we discern no error in the board's determination that there was insufficient evidence submitted by the plaintiffs for reversal of the town's assignment of the property to the MA neighborhood.
>
> 10 At oral argument, town counsel stated that the valuation methodology for the prime site was related in some fashion to a previous decision of the Appellate Tax Board. But that information too is not in the record.
>
> 11 It is true that the plaintiffs bear the burden of proof for their claim against the town. In this instance, however, they were thwarted by the failure of the Department of Revenue, Division of Local Services to produce their records and certification review for the town for the year 2009.

Second, "[u]nder *G. L. c. 61A*, agricultural land is assessed at a rate [*7] significantly lower than its value under the highest and best use standard on which real property is typically assessed." *Billerica v. Card, 66 Mass. App. Ct. 664, 666-667, 849 N.E.2d 1275 (2006)*, citing *Sudbury v. Scott, 439 Mass. 288, 294, 787 N.E.2d 536 (2003)*. The record shows that the town took the c. 61A designation into account with respect to the valuation of the nonprime site portions of the parcel. It does not follow, however, that the c. 61A designation was properly reflected in the valuation of the property as a whole. See *Adams v. Assessors of Westport, 76 Mass. App. Ct. 180, 183-184, 920 N.E.2d 879 (2010)*, quoting from *Sudbury v. Scott, supra at 296 n.11* ("We strive to adopt a reading [of the exemption statute] 'consistent with purpose of the statute and in harmony with the statute as a whole,' . . . and we also bear in mind the general principle favoring strict construction of tax statutes to resolve doubt in favor of taxpayers"). The plaintiffs sufficiently raised -- and the record sufficiently supports -- the possibility that the unexplained factor of 9.00 on the prime site was employed to impermissibly offset the tax consequences of the c. 61A designation.

That portion of the board's decision relating 273 Concord Road for fiscal year 2010 is vacated, and the matter is remanded to the board for reconsideration and findings concerning the valuation of the prime site

(and, particularly, the use of [*8] the factor of 9.00), and whether the valuation of the prime site impermissibly undermined the tax purpose and effect of *G. L. c. 61A* on the remainder of the parcel and on the valuation of the property as a whole. The decision is otherwise affirmed.

*So ordered*.

By the Court (Cohen, Grainger & Wolohojian, JJ.[12]),

12 The panelists are listed in order of seniority.

Entered: February 23, 2016.

**THREE REGISTERED VOTERS v. BOARD OF SELECTMEN OF LYNNFIELD & ANOTHER.[1]**

1 Town administrator of Lynnfield.

**No. 15-P-936.**

**APPEALS COURT OF MASSACHUSETTS**

***90 Mass. App. Ct. 15***
***2016 Mass. App. LEXIS 99***

**March 9, 2016, Argued**
**August 12, 2016, Decided**

**PRIOR HISTORY:** [**1] Essex. CIVIL ACTION commenced in the Superior Court Department on January 5, 2015.

A motion to dismiss was heard by *Robert A. Cornetta*, J.

*Three Registered Voters v. Bd. of Selectmen of Lynnfield, 2015 Mass. Super. LEXIS 221 (Mass. Super. Ct., May 8, 2015)*

**DISPOSITION:** Judgment affirmed.

**HEADNOTES**

MASSACHUSETTS OFFICIAL REPORTS HEADNOTES

*Open Meeting Law*. *Municipal Corporations*, Open meetings.

Discussion of the new provisions of the open meeting law, *G. L. c. 30A, §§ 18-25*, inserted by St. 2009, c. 28, § 18.

A Superior Court judge properly dismissed a complaint brought by three registered voters (plaintiffs) in the town of Lynnfield, who alleged that the local board of selectmen (board) had violated the open meeting law, *G. L. c. 30A, §§ 18-25*, in the selection process for appointing the town administrator, where the board had given proper notice of the meeting in question, had not failed to properly process the plaintiffs' open meeting complaint, and had interviewed candidates individually but had deliberated on the candidates at an open meeting ; moreover, the plaintiffs lacked standing to challenge other appointments, where one plaintiff had not been a registered voter during the time period at issue.

**COUNSEL:** *Michael C. Walsh* (*David E. Miller* with him) for the plaintiffs.
*Thomas A. Mullen* for the defendants.

**JUDGES:** Present: CYPHER, COHEN, & NEYMAN, JJ.

**OPINION BY:** CYPHER

**OPINION**

**CYPHER**, J. The plaintiffs, three registered voters (voters)[2] in the town of Lynnfield (town), appeal from the dismissal in the Superior Court of their complaint alleging that the board of selectmen of Lynnfield (board)[3] violated the open meeting law, *G. L. c. 30A, §§ 18-25*, in the selection process for appointing several municipal officials. The voters argue that the board violated the open meeting law by (1) failing to give proper notice of the meeting at which the new town administrator was appointed; (2) fail- [*16] ing to properly process their complaint; and (3) failing to interview and to deliberate on applicants for the town administrator position in an open meeting. We affirm the dismissal of the complaint.

2 Ryan Collard, David Miller, and Michael Walsh.

3 Specifically, chair David Nelson, vice-chair Phil Crawford, and Thomas Terranova, as they are or were members of the board.

This [**2] case appears to be the first under *G. L. c. 30A, §§ 18-25*, to reach an appellate court. This new statute, inserted by St. 2009, c. 28, § 18,[4] was a significant revision of the former open meeting law, *G. L. c. 39, §§ 23A-23C*, which was repealed by St. 2009, c. 28, § 20. Therefore, we briefly summarize provisions of the new law as relevant to the present case.

4 Unless otherwise noted, we refer to this version of the statute.

The open meeting law continues to "manifest[ ] ... a general policy that all meetings of a governmental body should be open to the public unless exempted by ... statute." *Attorney Gen. v. School Comm. of Taunton, 7 Mass. App. Ct. 226, 229, 386 N.E.2d 1295 (1979)*. *Section 20(a)* of the open meeting law declares that "all meetings of a public body shall be open to the public," and *§ 20(b)* states that a public body "shall post notice of every meeting at least 48 hours prior to such meeting." *G. L. c. 30A, § 20*, as appearing in St. 2014, c. 485.

*Section 19(a)* of the new law established a division of open government in the office of the Attorney General and provided her authority pursuant to *§ 25(a)* to "promulgate rules and regulations to carry out enforcement of the open meeting law,"[5] and authority pursuant to *§ 25(b)* to "interpret the open meeting law and to issue written letter rulings or advisory opinions according to rules established under this section." [**3]

5 Comprehensive regulations now appear at *940 Code Mass. Regs. §§ 29.00 through 29.09* (2010) and *940 Code Mass. Regs. § 29.10* (2011).

Of particular significance in the present case, *§ 23(b)* of the new law provides a procedure for the prompt review of allegations that a public body has violated the open meeting law and for bringing the complaint to the attention of the Attorney General.

*Procedural background*. Plaintiff Michael Walsh, a resident of the town, submitted a complaint dated December 2, 2014, to the board, alleging a pattern of violations of the open meeting law in the appointment process for several municipal positions, centering his complaint on the board meeting on November 3, 2014, where it voted to appoint a new town administrator to replace the administrator who was retiring. Walsh, following the procedure stated in *G. L. c. 30A, § 23(b)*,[6] timely submitted his complaint to [*17] the board, attached to the Attorney General's open meeting law complaint form. The town administrator, acting for the board, referred the complaint to town counsel, who reviewed the complaint and within fourteen days sent a detailed analysis and his findings to the Attorney General, with a copy sent to Walsh. Town counsel determined that the board did not violate the open meeting law and concluded [**4] that no remedial action was necessary.

> 6 *Section 23(b)* states in relevant part that a complainant is required to file a "written complaint with the public body [within 30 days of the alleged violation], setting forth the circumstances which constitute the alleged violation and giving the body an opportunity to remedy the alleged violation . ... The public body shall, within 14 business days of receipt of a complaint, send a copy of the complaint to the attorney general and notify the attorney general of any remedial action taken."

There was no response from Walsh until, acting with the two other plaintiffs and following the alternate procedure in *G. L. c. 30A, § 23(f)*,[7] the voters filed a complaint in the Superior Court on January 5, 2015, seeking injunctive relief, and a short order of notice issued. The voters also subpoenaed records and the testimony of town officials.

> 7 *Section 23(f)* provides that "3 or more registered voters may initiate a civil action to enforce the open meeting law."

We pause here to note that we are unable to determine from the record why there was no response to town counsel's analysis and findings from Walsh, whose abrupt change of course, not explained by the parties, appears to have been an abandonment [**5] of the procedure set in motion by his complaint to the board. While there is nothing in *§ 23(b)* that states what action either the Attorney General or a complainant may take after a public body has submitted its determination to the Attorney General, *940 Code Mass. Regs. § 29.05(6)* (2010) provides that if "at least 30 days have passed after the complaint was filed with the public body, and if the complainant is unsatisfied with the public body's resolution of the complaint, the complainant may file a complaint with the Attorney General."[8] Assuming that Walsh overlooked these explications of the path open for a complainant unsatisfied with a public body's response, a paralegal at the office of the Attorney General, in a letter to Walsh, stated that a notification and a response had been received from town counsel, but because no complaint had been filed with the Attorney General, it would be assumed that the "action taken by the public body was sufficient" and the file would be closed unless a request was made for [*18] further review.

> 8 Also, the Attorney General's complaint form states: "If you are not satisfied with the action taken by the public body in response to your complaint, you may file a copy of your complaint with [**6] the Attorney General's Office 30 days after filing your complaint with the public body."

The voters' complaint proceeded to a hearing on January 15, 2015. At the hearing, town counsel argued a motion to dismiss that had been filed by the board the previous day, which contended that the action should be decided without an evidentiary hearing and the subpoenas should be quashed; that the statute of limitations did not permit consideration of the appointments prior to the vote on November 3, 2014; and that no violations of the open meeting law occurred. Specifically, town counsel argued that because the voters' complaint had been submitted under *§ 23(f)*[9] of the open meeting law, there were two reasons why injunctive relief and an accompanying evidentiary hearing were inappropriate: first, because it was the board's burden to show that the actions the voters complained of complied with the open meeting law, the hearing should be limited to the town's papers; and second, because there must be regard to the "speediest possible determination" of the case, and pursuing documentary or testimonial evidence and injunctive relief cannot be viewed as speedy. The judge stated that he was "not accepting [**7] any evidence" at the hearing, and Walsh agreed that the voters would rest on their arguments and the "multitude of papers."[10]

> 9 *Section 23(f)* states: "In any action filed under this subsection, the order of notice on the complaint shall be returnable not later than 10 days after the filing and the complaint shall be heard and determined on

> the return day or on such day as the court shall fix, having regard to the speediest possible determination of the cause consistent with the rights of the parties . ... In the hearing of any action under this subsection, the burden shall be on the respondent to show by a preponderance of the evidence that the action complained of in such complaint was in accordance with and authorized by the open meeting law."
>
> 10 It is not clear what the nature and the scope of a hearing should have been, but we decline to resolve the question because the voters' allegations fail as a matter of law.

*Discussion*. 1. *Standard of review*. We follow the well-known standard for review of a motion to dismiss pursuant to *Mass.R.Civ.P. 12(b)(6)*, 365 Mass. 754 (1974), considering the pleadings de novo, drawing reasonable inferences in favor of the voters, and considering whether the allegations plausibly suggest an [**8] entitlement to relief.[11] See *Iannacchino v. Ford Motor Co., 451 Mass. 623, 636, 888 N.E.2d 879 (2008)*; *Dartmouth v. Greater New Bedford Regional Vocational Technical High Sch. Dist., 461 Mass. 366, 373-374, 961 N.E.2d 83 (2012)*.

> 11 The voters argue that the motion to dismiss should have been converted to a motion for summary judgment and that they should have been permitted to present witnesses at the hearing. At the time of the hearing, however, the voters did not object to the procedure followed by the judge.

[*19] 2. *Notice of meeting*. The notice required by *G. L. c. 30A, § 20(b)*, states that in addition to posting notice at least forty-eight hours prior to a meeting, the notice shall contain the date, time, and place of the meeting, and a "listing of topics that the chair reasonably anticipates will be discussed at the meeting." The voters complain that the notice for the November 3, 2014, meeting only stated, "Update on town administrator search," and did not indicate that there could be a vote appointing the town administrator.[12] It appears from the record that, at the time of the preparation of the meeting notice, it was not known that a decision would be reached by the board. The decision to appoint came up unexpectedly during the discussion of the candidates when two board members realized that they agreed on the same candidate. It was decided that further deliberation was unnecessary and that a vote [**9] should be taken in order to expedite the process. Nothing in *§ 20(b)* requires anything more than listing the topics reasonably anticipated by the chair to be discussed at the meeting. The notice process, therefore, was proper and in accordance with the open meeting law.[13]

> 12 The notice of an update followed the discussion at the previous open meeting on July 15, 2014, when the candidate search process began.
>
> 13 Although listing an agenda topic as an update does not put the public on notice that a vote would take place, the statute only requires the agenda topics to be reasonably anticipated. The outcome of a case could differ where the chair knew a vote would be taken, but only listed the agenda topic as an update.

3. *Alleged mishandling of the voters' complaint*. The voters complain that the board should have held a public discussion on their complaint. There is no requirement in the statute for public discussion of an open meeting law complaint prior to the public body sending its response to the complaint to the Attorney General. Title *940 Code Mass. Regs. § 29.05(4)* (2010) specifies only that complaints shall timely be reviewed to "ascertain the time, date, place and circumstances which constitute the alleged violation." The [**10] board's response was timely, and it may be inferred that town counsel ascertained the circumstances of the complaint. The board adhered to the requirements of *§ 23(b)*.[14]

> 14 Although nothing in the open meeting law requires it, the town concedes that in order to comply with the Attorney General's regulations, as she has construed them, the board should have voted to delegate to the town counsel the

investigation of and the response to the complaint, or authorized him to take any other action with respect to it.

4. *Interviews and deliberation on candidates*. The voters only generally assert that the process for appointment of the town [*20] administrator violated the open meeting law.

The town obtained the assistance of the MMA Consulting Group (MMA) in an open meeting where it was agreed that MMA would select seven candidates from among the applicants who responded to the notice of the vacancy in the position of town administrator. After information and the names of seven candidates had been submitted to the board, it began an interviewing process on October 29 and 30 where individual board members interviewed each individual candidate in separate rooms at the town hall. The then-town administrator asked [**11] each board member to rank the candidates he had interviewed; one board member declined. The town administrator did not discuss the rankings with other members of the board, and the board members avoided discussing the candidates with each other or with anyone who might communicate their view to another board member.

On November 3, 2014, at a regularly scheduled public meeting for which proper notice had been given, when the agenda item "[u]pdate on town administrator search" was reached, the individual board members began to discuss their views and the rankings of the candidates they had interviewed. During that discussion it soon became apparent that two board members thought that one of the candidates was outstanding and should be hired. A vote was taken. Although the third board member agreed the candidate was a strong candidate, he thought further interviews should be conducted.[15]

15 The discussion is described in considerable detail in the minutes of the meeting. The minutes record the names of the candidates being considered and the names of the board members and the summaries of their statements about the candidates. Two residents spoke at the meeting. One asked about provision for removal [**12] of the town administrator and the other asked the board to hold a forum and publicly interview the candidates. The board chair explained that public input was not part of the hiring process nor could the public participate in the interview process.

The minutes readily appear to conform to *G. L. c. 30A, § 22*, which states that the minutes shall "set[ ] forth the date, time and place, the members present or absent, a summary of the discussions on each subject, ... the decisions made and the actions taken at each meeting, including the record of all votes."

Nothing in the open meeting law proscribes the individual interviews that took place. As the judge properly concluded, these interviews did not constitute deliberations "between or among a quorum of a public body" which, as required by *G. L. c. 30A*, [*21] *§ 18*, must be conducted in an open meeting.[16] The individual interviews in these circumstances allowed the individual board members to obtain information and to form an opinion on each candidate in preparation for deliberation with the other board members at an open meeting. There was no violation of any provision in the open meeting law. Contrast *Gerstein v. Superintendent Search Screening Comm., 405 Mass. 465, 470, 541 N.E.2d 984 (1989)*.[17]

16 "Deliberation" is defined in *§ 18* as "an oral or written communication through any [**13] medium, including electronic mail, between or among a quorum of a public body on any public business within its jurisdiction; provided, however, that 'deliberation' shall not include the distribution of a meeting agenda, scheduling information or distribution of other procedural meeting or the distribution of reports or documents that may be discussed at a meeting, provided that no opinion of a member is expressed."

17 The voters appear to favor public interviews of candidates. The open meeting law is silent on whether such interviews

should be public, although it does provide for a public body to meet in executive session where an "open meeting will have a detrimental effect in obtaining qualified applicants," as stated in *G. L. c. 30A, § 21(a)(8)*. No argument has been made in the present case regarding any potential detrimental effects on qualified candidates.

5. *Other appointments*. The voters also challenge under the open meeting law the previous appointments of the fire chief, the town clerk, and the director of public works, whose appointments were made respectively on December 16, 2013; February 24, 2014; and July 15, 2014. It appears from the record that the voters do not have standing to challenge these [**14] appointments because one plaintiff had been a registered voter in the town only since September 29, 2014. The statute may be enforced only by "3 or more registered voters." *G. L. c. 30A, § 23(f)*. Compare *Vining Disposal Serv., Inc. v. Selectmen of Westford, 416 Mass. 35, 39-40, 616 N.E.2d 1065 (1993)*.[18]

18 The voters do not address this issue on appeal except in a footnote in their brief, where they state only that "[t]he Court dismissed counts four and five in error believing that all three voters must have been [town] voters during the entire course of conduct in order to object." We need not consider an argument raised only in a footnote or a single sentence because it does not rise to the level of appellate argument; it may be deemed waived. See *Mole v. University of Mass., 442 Mass. 582, 603 n.18, 814 N.E.2d 329 (2004)*; *Boston v. Commonwealth Employment Relations Bd., 453 Mass. 389, 402 n.11, 902 N.E.2d 410 (2009)*; *Boston Edison Co. v. Massachusetts Water Resources Authy., 459 Mass. 724, 726 n.3, 947 N.E.2d 544 (2011)*.

*Judgment affirmed*.

**WEST BEIT OLAM CEMETERY CORPORATION v. BOARD OF ASSESSORS OF WAYLAND.**

**No. 15-P-128.**

**APPEALS COURT OF MASSACHUSETTS**

***89 Mass. App. Ct. 677***
***2016 Mass. App. LEXIS 80***

**April 8, 2016, Argued**
**July 7, 2016, Decided**

**PRIOR HISTORY:** [**1] Suffolk. APPEAL from a decision of the Appellate Tax Board.

**HEADNOTES**

MASSACHUSETTS OFFICIAL REPORTS HEADNOTES

*Cemetery*. *Taxation*, Real estate tax: exemption, cemetery.

The appellate tax board properly denied a tax exemption sought by a religious nonprofit cemetery corporation under *G. L. c. 59, § 5*, Twelfth, for a large part of a lot and a building located on it, where the undisputed facts found by the board established that no burials or interments had taken place on the parcel, and the parcel and building were contractually restricted to residential use for seven years, including the tax year in question.

**COUNSEL:** *Sander A. Rikleen* for the taxpayer.

*Mark J. Lanza* for board of assessors of Wayland.

**JUDGES:** Present: KAFKER, C.J., WOLOHOJIAN, & MALDONADO, JJ.

**OPINION BY:** KAFKER
**OPINION**

**KAFKER**, C.J. This is an appeal from a decision of the Appellate Tax Board (board) by West Beit Olam Cemetery Corporation (West Beit Olam), a nonprofit corporation organized in accordance with *G. L. c. 114*.[1] West Beit Olam is the record owner of lot 1A, located at 59 Old Sudbury Road in Wayland (town). In 2012, pursuant to *G. L. c. 59, § 5, Twelfth* (Clause Twelfth), West Beit Olam applied to the town's board of assessors (assessors) for a tax abatement for lot 1A.[2] The assessors denied the application, and West Beit Olam appealed to the board. After an evidentiary hearing, the board determined that a portion of lot 1A, known as parcel A, was exempt under Clause Twelfth, but the rest of the property was taxable. West Beit Olam appeals, claiming that all of lot 1A is exempt from taxation under Clause Twelfth. For the reasons discussed below, we affirm the board's decision. In [*678] particular, we conclude that the board properly denied a tax exemption for the large part of lot 1A and a building located [**2] on it that were contractually restricted to residential use for seven years, including the tax year in question.

1 *General Laws c. 114* governs the organization of cemetery corporations.

2 *General Laws c. 59, § 5, Twelfth*, as appearing in St. 1966, c. 262, exempts from taxation "[c]emeteries, tombs and rights of burial, so long as dedicated to the burial of the dead, and buildings owned by religious nonprofit corporations and used exclusively in the administration of such cemeteries, tombs and rights of burial."

1. *Background*. We summarize the facts as the board found them, noting that they are essentially undisputed by the parties. In 1998, the Jewish Cemetery Association of Massachusetts, Inc. (JCAM), a nonprofit cemetery corporation, purchased property in the town and created the Beit Olam Cemetery. As part of that purchase, JCAM also secured a right of first refusal on an adjoining parcel, lot 1A, which is the focus of this appeal. Lot 1A is contiguous to the Beit Olam Cemetery's western border and is improved with a single-family residence.

To accommodate the future expansion of the Beit Olam Cemetery, JCAM created West Beit Olam in 2007 for the purpose of acquiring lot 1A. On July 26, 2007, West Beit Olam purchased lot 1A for $1.3 million. [**3] [3] Although West Beit Olam thought this price well exceeded market value, it was viewed as a necessary expense to ensure that the Beit Olam Cemetery could expand onto adjoining property in the future.

3 Although JCAM created West Beit Olam for the purpose of purchasing lot 1A, JCAM is not a named party to this case, and West Beit Olam was the only taxpayer that filed for an abatement concerning lot 1A. Furthermore, West Beit Olam is the record owner of lot 1A.

Shortly after purchasing lot 1A, West Beit Olam created a cemetery development plan depicting the intended design of the future cemetery expansion on lot 1A. West Beit Olam also secured statutory approvals required by *G. L. c. 114, § 34*, from the town meeting and the board of health to use lot 1A for burials. However, at the time of the board's decision, lot 1A had not been dedicated as a cemetery in accordance with Jewish law and tradition, and no interments had been conducted on the land.

Concomitant with West Beit Olam's purchase of lot 1A, JCAM endeavored to establish a private access road to the East Beit Olam Cemetery, another of its cemeteries located on a noncontiguous parcel to the east of the Beit Olam Cemetery. To this end,

JCAM purchased a [**4] property at 44 Concord Road, which is adjacent to the East Beit Olam Cemetery and was owned by Janette Howland (Howland) and her husband. In exchange for the Concord Road property, JCAM paid a total purchase price of $410,000, of which $210,000 was paid to Howland "in the form of housing as set forth in the Cemetery Caretaker Agreement." [*679] The "Cemetery Caretaker Agreement" (caretaker agreement) grants to Howland and her family the right to live for seven years (until October 14, 2017), "rent-free," in the house located on lot 1A. The caretaker agreement describes the grant of "rent-free" occupation to Howland "as consideration for the sale of the [Howland] Property."[4] The caretaker agreement designates Howland as the "on site caretaker for the Beit Olam Cemetery, East Beit Olam Cemetery, and West Beit Olam Cemetery (if such cemetery is developed for burials)" for the duration of the agreement, and mandates two duties: that she continuously "occupy the Premises for residential purposes only," and "caus[e] the gates at the Cemeteries to be opened and closed on a daily basis." The Beit Olam Cemetery and the East Beit Olam Cemetery are owned by JCAM.

> 4 The terms of the caretaker agreement further [**5] provide that "[a]s an inducement to the sale by Howland of the Concord Road property and in exchange for the services described herein, West Beit Olam has agreed to provide housing for Howland for a period of seven (7) years at no cost to Howland."

The caretaker agreement reserves West Beit Olam's right to subdivide a specific area of lot 1A, designated as parcel A, for burial purposes at any time during the term of the agreement.[5] However, the caretaker agreement does not restrict Howland's ability to use the rest of lot 1A for residential purposes. The caretaker agreement also allows West Beit Olam to install an irrigation well on lot 1A "for the purpose of watering the Beit Olam Cemetery and any future expansion thereof," so long as the well does not "unreasonably interfere with Howland's occupancy of the Premises."[6] West Beit Olam installed an irrigation well on the western-most portion of lot 1A in 2011. The well has the capacity to irrigate the existing Beit Olam Cemetery and a future cemetery on lot 1A. The well has not been used to irrigate lot 1A or otherwise prepare it for burials.

> 5 Parcel A is an 11,466 square foot rectangular section situated on the eastern-most portion of lot 1A, [**6] bordering the original Beit Olam Cemetery. It accounts for 15.2 percent of lot 1A's total area.
>
> 6 The caretaker agreement also permits any of West Beit Olam's "affiliates" to install the irrigation well.

Shortly after executing the caretaker agreement, Howland and her family moved into the house on lot 1A, and she began her caretaking duties of daily opening and closing the cemetery gates at the Beit Olam and East Beit Olam cemeteries. The board found that she also provided additional services to these JCAM cemeteries, but none involved substantial landscaping or mainte-[*680] nance.[7] Extensive landscaping, caretaking, and burial preparations for the JCAM cemeteries were performed by outside vendors, not Howland. The board further found that Howland lacked training, education, or experience in cemetery landscaping, maintenance, or administration. Further, she neither listed her occupation in the town census as cemetery caretaker, nor was she an employee of West Beit Olam.

> 7 The board found that Howland also placed and removed American flags at gravesites during certain times of the year, patrolled the cemeteries during the day, wiped down benches, contacted animal control when neighborhood dogs disrupted [**7] funerals, and reported required maintenance issues in the cemeteries.

The board found that the majority of lot 1A and the house were not entitled to the Clause Twelfth exemption. The board concluded that the property and house were

used primarily for residential purposes and that Howland performed minimal cemetery-related services. However, the board determined that parcel A was exempt under Clause Twelfth because West Beit Olam specifically reserved it for cemetery purposes throughout the term of the caretaker agreement. Further, the board determined that West Beit Olam sufficiently demonstrated that parcel A was dedicated to the burial of the dead. The board issued a final abatement of $812.38 for the land constituting parcel A.

2. *Standard of review*. Property tax "[e]xemption statutes are strictly construed, and the burden lies with the party seeking an exemption to demonstrate that it qualifies according to the express terms or the necessary implication of a statute providing the exemption." *New England Forestry Foundation, Inc. v. Assessors of Hawley, 468 Mass. 138, 148, 9 N.E.3d 310 (2014)* (*New England Forestry*). Moreover, "[a]ny doubt in the application of an exemption statute operates against the party claiming tax exemption." *Mount Auburn Hosp. v. Assessors of Watertown, 55 Mass. App. Ct. 611, 616, 773 N.E.2d 452 (2002)*.

In reviewing the board's decision, "we affirm findings of fact ... that [**8] are supported by substantial evidence." *Regency Transp., Inc. v. Commissioner of Rev., 473 Mass. 459, 464, 42 N.E.3d 1133 (2016)*. See *New Boston Garden Corp. v. Assessors of Boston, 383 Mass. 456, 465, 420 N.E.2d 298 (1981)*. Substantial evidence is "such evidence as a reasonable mind might accept as adequate to support a conclusion." *Boston Gas Co. v. Assessors of Boston, 458 Mass. 715, 721, 941 N.E.2d 595 (2011)*, quoting from *Tennessee Gas Pipeline Co. v. Assessors of Agawam, 428 Mass. 261, 262, 700 N.E.2d 818 (1998)*. "We review conclusions of law, including questions of statutory construction, de novo." *New* [*681] *England Forestry, 468 Mass. at 149*. However, we accord "some deference to the board's expertise in interpreting the tax laws of the Commonwealth." *Schussel v. Commissioner of Rev., 472 Mass. 83, 87, 32 N.E.3d 1239 (2015)* (quotations omitted).

3. *Discussion*. *Clause Twelfth*, as appearing in St. 1966, c. 262, exempts from local property taxation "[c]emeteries, tombs and rights of burial, so long as dedicated to the burial of the dead, and buildings owned by religious nonprofit corporations and used exclusively in the administration of such cemeteries, tombs and rights of burial." The question we must thus answer is whether lot 1A was "dedicated to the burial of the dead" during tax year 2012.[8] *G. L. c. 59, §§ 5, 11*. As the undisputed facts found by the board establish, no burials or interments have taken place on lot 1A. Moreover, the board found that in tax year 2012, lot 1A, with the exception of parcel A, was contractually restricted to the Howlands' residential use "with no interference" by West Beit Olam, thereby precluding burials on most of the property. We conclude that [**9] under these circumstances, lot 1A, with the exception of parcel A, is not entitled to a tax exemption for tax year 2012. We so hold even though the property was purchased for future use as a cemetery, the arrangement with the Howlands presently benefits other cemetery parcels owned by a different taxpayer (JCAM), and Howland performs a minimal amount of cemetery-related work for those other properties.

> 8 *General Laws c. 59, § 11*, provides that "[t]axes on real estate shall be assessed, in the town where it lies, to the person who is the owner on January first, and the person appearing of record ... shall be held to be the true owner thereof." West Beit Olam, not JCAM, was the taxpayer of record of lot 1A. See *Middlesex Retirement Sys., LLC v. Assessors of Billerica, 453 Mass. 495, 500, 903 N.E.2d 210 (2009)* (legal entity created to acquire property and designated as record owner was party subject to taxation even though it was wholly owned and operated by tax-exempt regional retirement system).

a. *Application of Clause Twelfth to lot 1A*. Property taxes are assessed on a yearly basis.

*G. L. c. 59, § 11*. Accordingly, the focus of this tax exemption inquiry pursuant to Clause Twelfth is on the circumstances of the land during the relevant assessment period, although future plans for the land may also be taken into account. *Assessors of Sharon v. Knollwood Cemetery, 355 Mass. 584, 590, 246 N.E.2d 660 (1969)* (*Knollwood*) ("This language of [C]lause Twelfth [**10] indicates to us that the statute, as a basis of exemption, looks to the situation at the time of assessment despite the possibility of future change"). See *G. L. c. 59, § 5* (date of determination for whether property is exempt from taxation is July 1 of [*682] each year). See *New England Forestry, 468 Mass. at 149* (whether property is tax exempt depends on owner's use of it "during the relevant tax year").

The caretaker agreement is critical to our analysis of the situation of lot 1A at the time of assessment because it dictates what uses West Beit Olam could make of lot 1A for tax year 2012. As the board found, the caretaker agreement establishes Howland's continuous occupancy of the greater part of the property for "residential purposes," "with no interference" by West Beit Olam except for reasonable inspection. With the exception of parcel A and the installation of the irrigation well, the caretaker agreement also precludes West Beit Olam from actively developing the land for "cemetery purposes" during the term of the agreement. Thus, during the tax year in question, the property was contractually dedicated to residential use, not burials or other cemetery-related activity. The latter is effectively prohibited. None of the cases cited by West [**11] Beit Olam provides an exemption to property that has been contractually restricted to noncemetery-related purposes during the relevant time period. Compare *Knollwood, 355 Mass. at 590* (agreement concerning property "restricts use to cemetery purposes").

There was also substantial evidence to support the board's findings that Howland's cemetery-related duties were minimal. She was not in any way a full-time cemetery caretaker. Providing a residence for Howland and her family at no cost and requiring minimal services are very different from providing a residence for a person substantially engaged in taking care of a cemetery. Cf. *Woodlawn Cemetery v. Everett, 118 Mass. 354, 363 (1875)* (*Woodlawn*) (court nonetheless denied tax exemption where house occupied by cemetery gardener). The actual caretaking and administrative duties for the Beit Olam and East Beit Olam cemeteries were provided by outside contractors and employees of JCAM. Furthermore, the very limited cemetery-related duties Howland performed were not performed on lot 1A, the property at issue, or for West Beit Olam, the taxpayer at issue.

The question then becomes whether West Beit Olam's intent to develop lot 1A into a cemetery in the future entitles it to a tax exemption for lot 1A for tax year 2012. We [**12] conclude that, in the circumstances of this case, it does not. Unlike the cases upon which West Beit Olam relies, the taxpayer here was contractually precluded from undertaking burial-related activities on the property during the tax year in question.

[*683] The Supreme Judicial Court has stated that Clause "Twelfth, cannot reasonably be interpreted as requiring that, to qualify for exemption, *all* land acquired (with municipal consent) for burial purposes must be developed at one time." *Knollwood, 355 Mass. at 589*. Rather "[i]t must be expected that a cemetery corporation ... will prudently develop its property in an orderly fashion as the need for doing so arises." *Ibid.* However, where no interments have taken place on the subject property, the taxpayer must demonstrate that the property has been dedicated for burial purposes through "planning and substantial actual use" of the land to prepare it for burials or other activities "necessary for, administration and operation of the cemetery." *Id. at 589-590*.

It is well established that land is not dedicated to the burial of the dead by "[a] mere dedication or appropriation on paper."

*Woodlawn, 118 Mass. at 361*. See *Knollwood, 355 Mass. at 588-589*. Similarly, "minor use of the purchased land for activities incidental to a cemetery d[oes] not constitute [**13] 'dedication of such land ... for ... a ... burial place.'" *Ibid.*, quoting from *Woodlawn, supra.*

The facts of the relevant cases are instructive. In *Woodlawn*, after the principal cemetery had been developed, a property purchased for future cemetery use was determined not to be dedicated to the burial of the dead because "no part of th[at] land ha[d] been used for burials or divided off or laid into lots or permanent avenues, and that no attempt ha[d] been made to sell it for purposes of burial." *118 Mass. at 362*. Even "the occupation of a house by the cemetery gardener, the storage of cemetery supplies and the conduct of a hothouse and an evergreen nursery" were found insufficient under the statute. *Knollwood 355 Mass. at 588*, citing *Woodlawn, 118 Mass. at 357*.

In contrast, the court in *Knollwood, 355 Mass. at 589*, concluded that a taxpayer's large tract of land was sufficiently dedicated to the burial of the dead by its substantial actual use of a portion of the subject land to prepare it for burials, although some portions remained undeveloped. By demonstrating that its use of the land was for "cemetery purposes," which entailed interments, development of the land for future burials, and the sale of 42,566 burial spaces, the taxpayer sufficiently dedicated all of the land to the burial [**14] of the dead. *Ibid.* The court concluded that "[s]imilar considerations apply to buildings on the cemetery land and a tree nursery used in, and necessary for, administration and operation of the cemetery." *Id. at 590*.

[*684] Finally, in *Blue Hill Cemetery, Inc. vs. Assessors of Braintree, 2 Mass. App. Ct. 602, 603, 317 N.E.2d 831 (1974)* (*Blue Hill*), the court affirmed the board's decision granting a tax exemption for property not prepared for burial but containing an administration building, a pump house for cemetery irrigation, two garages for cemetery vehicles and equipment, a caretaker's house, and a nursery that provided shrubs and flowers for the cemetery. The parties stipulated that the property at issue was "used ... for the operation of the cemetery and to supply services closely connected therewith." *Id. at 604*. The taxpayer cemetery also owned a larger parcel of land across the street from the subject property, which was used "exclusively for the actual interment of bodies and [was] exempt from taxation." *Id. at 603*. See *Woodlawn, 118 Mass. at 362* (taxpayer cemetery corporation owned adjoining land to subject property, where more than 8,000 burials had occurred); *Knollwood, 355 Mass. at 586* (9.78 acres of land actively prepared for burial and 42,566 burial spaces sold by taxpayer).

As previously noted, it is undisputed that West Beit Olam took certain limited prefatory [**15] steps to enable the future development of a cemetery on lot 1A, notably, creating a cemetery plan and securing the statutory approvals to conduct burials. See *G. L. c. 114, § 34*. However, these actions are not the type of substantial use of the land for burials or cemetery-related activities found in either *Knollwood* or *Blue Hills*. See *Knollwood, 355 Mass. at 589* ("Very considerable development and use of large parts of the land for burials have taken place"); *Blue Hills, 2 Mass. App. Ct. at 606* ("The stipulation of the parties and the findings of the board make clear that the ... land is used predominantly for cemetery purposes"). Indeed there is less cemetery-related activity here than in *Woodlawn*. See *118 Mass. at 362*. Most importantly, the property here was contractually reserved for residential purposes during the tax year in question. The fact that West Beit Olam is precluded from dedicating the land to the burial of the dead underscores why lot 1A is markedly different from the properties in *Woodlawn*, *Knollwood*, or *Blue Hills*, where the tax payers were not restricted from developing the properties for burial or other necessary cemetery-related purposes during the relevant tax year. See *Woodlawn, 118 Mass. at 361*; *Knollwood, 355 Mass. at*

*587-589*; *Blue Hill, 2 Mass. App. Ct. at 606* (partial abatement granted for property usable for cemetery purposes, but denied [**16] for wetlands not usable for burial of bodies).

West Beit Olam's installation of the irrigation well on lot 1A does not change this conclusion. Installation of the well does not [*685] alter the predominately residential nature of lot 1A. See *Woodlawn, 118 Mass. at 362* (preliminary actions "to be ultimately used in preparing and ornamenting a cemetery, [are] no dedication of such land itself for the purposes of a cemetery").[9] As provided in the caretaker agreement, "[a]ny such well shall be installed so as not to unreasonably interfere with Howland's occupancy of the Premises" for residential purposes. During the relevant tax year, the primary cemetery-related purpose of the irrigation well was to provide an incidental benefit to separate land, the Beit Olam Cemetery, owned by JCAM, a different, albeit related, taxpayer. This is not sufficient under Clause Twelfth to warrant a tax exemption for the majority of lot 1A, particularly when that land itself is not dedicated to the burial of the dead, but rather restricted to noncemetery related purposes. See *New England Forestry, 468 Mass. at 148*. See also *Knollwood, 355 Mass. at 587-589*.

> 9 Testimony before the board indicated that the immediate purpose of the lot 1A well was to irrigate the Beit Olam Cemetery as a result of a town water restriction [**17] which limited Beit Olam Cemetery's use of a well on its property that drew from the town water supply. The lot 1A well was installed with the capacity to irrigate both the Beit Olam Cemetery and a future cemetery on lot 1A, but there is nothing indicating that the well is currently used for the benefit of lot 1A.

West Beit Olam also argues that lot 1A is sufficiently dedicated to the burial of the dead because the property was "used" as partial consideration for the purchase of the Howlands' home on Concord Road for access to the East Beit Olam Cemetery. Essentially West Beit Olam is claiming that lot 1A should be exempt from taxation because it provides an economic benefit that furthers the over-all cemetery purposes of a related corporation, JCAM. This type of indirect economic benefit to a related cemetery corporation has too attenuated a connection to the dedicated use of lot 1A for the burial of the dead to justify a tax exemption under Clause Twelfth, at least where the use of lot 1A itself is contractually restricted primarily to noncemetery-related purposes during the relevant tax year. To hold otherwise would be a significant expansion of what uses constitutes a "dedication" [**18] of land under Clause Twelfth. Given that tax exemption statutes are to be strictly construed, we conclude that West Beit Olam's interpretation is unsupported by the plain language of Clause Twelfth. See *New England Forestry, 468 Mass. at 148*.

In sum, West Beit Olam has failed to demonstrate that the majority of lot 1A is dedicated to the burial of the dead. More-[*686] over, the caretaker agreement's preclusive effect ensures that lot 1A, aside from parcel A, is currently dedicated to residential purposes until October 14, 2017.

b. *The house on lot 1A and the caretaker agreement*. We also conclude that the house on lot 1A does not satisfy the statutory requirements for tax exemption under *Clause Twelfth*. *Clause Twelfth* plainly distinguishes between the tax treatment of "cemeteries, tombs and rights of burial" on the one hand, and "buildings" on the other. See *Bridgewater State Univ. Foundation v. Assessors of Bridgewater, 463 Mass. 154, 158, 972 N.E.2d 1016 (2012)* (rule that statute's plain language must be interpreted with usual and natural meaning of words has particular force in interpreting tax statutes). The statute requires that in order for buildings on cemetery property to be exempt from taxation, they must be used exclusively in the administration of the cemetery. The board's conclusion that the house here is not "used exclusively in the administration of [**19] such cemeteries, tombs and rights of burial" is supported by substantial evidence. Indeed as explained

above, the house is used primarily for residential purposes, and during the tax year in question, the house was restricted to such use. The exemption for the house was therefore properly denied.

*Conclusion*. West Beit Olam has failed to demonstrate that lot 1A, with the exception of parcel A, is entitled to an exemption pursuant to Clause Twelfth for tax year 2012. Accordingly, we affirm the board's decision.

*So ordered*.

**TALLAGE LLC v. PAUL MEANEY, MICHELE MEANEY and SOVEREIGN BANK**

**CASE NO. 11 TL 143094**

**MASSACHUSETTS LAND COURT**

***23 LCR 375***
***2015 Mass. LCR LEXIS 113***

**June 26, 2015, Decided**

**PRIOR HISTORY:** *City of Worcester v. College Hill Props., LLC, 80 Mass. App. Ct. 757, 956 N.E.2d 1222, 2011 Mass. App. LEXIS 1389 (2011)*

**HEADNOTES**

*Tax Title Foreclosure-Water and Sewer Bills-Motion to Vacate Judgment Foreclosing Right of Redemption-Legal Fees of Charlestown Attorney Daniel C. Hill Representing "Investors" Rejected in Large Part*

**SYLLABUS**

In a decision explaining in great detail the pitfalls of tax title foreclosure for properties whose liens municipalities have sold to private "investors," Justice Keith C. Long vacated a tax title foreclosure judgment obtained by a predatory tax title purchaser that would have foreclosed the owner's equity of redemption. The case offered a particularly egregious example of tax title trafficking since the Plaintiff purchaser obtained title to the property for less than 1% of its value after acquiring municipal liens for trivial outstanding water and sewer charges. Moreover, the owner had only overlooked or neglected to pay the bills because of grievous health problems afflicting his wife and family as they struggled with the trauma of a multiple sclerosis diagnosis. Justice Long also rejected a request for $25,582 in legal fees from Charlestown lawyer Daniel C. Hill who represented the "investors." The fee award was limited to $1,597 for services relating strictly to the redemption.

**COUNSEL:** Daniel C. Hill, Esq., Law Offices of Daniel C. Hill, Cambridge, MA, for Plaintiff.

Gary S. Brackett, Esq., Steven C. Fletcher, Esq., Brackett & Lucas, Worcester, MA, for Defendant.

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**JUDGES:** [**1] Keith C. Long, Justice.

**OPINION BY:** Keith C.Long

**OPINION**

[*375] **FINDINGS, RULINGS AND ORDER ON DEFENDANTS' MOTION TO VACATE JUDGMENT FORECLOSING RIGHT TO REDEEM TAX TITLE**

INTRODUCTION

This case is a tax lien foreclosure proceeding on the property at 28 Caro Street in Worcester--a three family dwelling, presently used as apartments for rental to students at the nearby College of the Holy Cross--brought by plaintiff Tallage LLC, a private company which purchases municipal tax liens, against the property's owners, defendants Paul and Michele Meaney, for failure to pay a fiscal year 2010 $224.58 water bill and $267.93 sewer charge. Defendant Sovereign Bank (now Santander Bank) is the holder of a $230,500 mortgage on the property, granted by the Meaneys in connection with a 2005 refinancing.

Water and sewer services are city-provided in Worcester, so their unpaid bills are considered "taxpayer receivables" and can thus result in property tax liens. *See G.L. c. 60, §43* (definition of "taxes"). Tax liens are unique. When mortgage foreclosures occur, or when sheriff's auctions take place on judgment liens, any surplus remaining after the obligation is paid is returned to the property owner. In stark contrast, when the right of redemption on a property tax lien [**2] is foreclosed, the holder of the lien acquires "absolute title" to the property, eliminating all of the owner's equity and all interests that derived from the owner (the owner's mortgage, for example),[1] regardless of the amount owed on the lien. *G.L. c. 60, §64*. None of the surplus over and above what the holder of the tax lien is owed is returned to the taxpayer or any of his creditors; once foreclosure is final, the tax lienholder keeps it all. *Id.*

> 1 The owner remains personally liable on the promissory note, but is now no longer able to sell the property to satisfy that obligation or, if an income property, to apply its rents to the mortgage obligation. The mortgagee no longer has a secured interest in the property.

Since May 2008, Worcester has auctioned its tax receivables to private entities, which bid on them individually (the receivables go to their respective highest bidder), and can thus pick and choose the ones they want. *See G.L. c. 60, §43*.[2] Private entities are interested in tax receivables for two reasons.

> 2 All receivables of $10 or more are offered at auction (*G.L. c. 60, §2* abates receivables less than that amount). The City retains all unsold receivables, and later acts on those itself.

*First*, as tax liens, they accrue [**3] interest at 14% from the time they are due until the collector's sale or tax taking occurs, *G.L. c. 59, §57*, and then at 16% thereafter, *G.L. c. 60, §62* --a rate of return not easily obtained from other investments. Moreover, once a tax lien foreclosure proceeding is filed, the foreclosing party can also be awarded its counsel fees and costs. *See G.L. c. 60, §§65* & *68*. A small bill can thus rapidly become much larger.

*Second*, as noted above, once a judgment enters foreclosing the taxpayer's right of redemption, the foreclosing party has "absolute title" to the property, regardless of the amount at issue in the foreclosure. *G.L. c. 60, §64*. A small investment--a few hundred dollars for a water or sewer lien, say--can thus potentially result in the acquisition of the entire title to the property, free and clear of all mortgages and owner equity claims, and thus an astronomical return.

Private entities thus seek out and bid on properties with considerable "upside"--the spread between the purchase price and the property's fair market value--and, as discussed more fully below, such was the case here. For a net investment of only $1052.84,[3] Tallage acquired tax title to the 28 Caro Street property--an income-producing rental

property in a prime location [**4] --with a fair market value in excess of $270,000.

> 3 In addition to the amount of the unpaid 2010 water and sewer bill ($492.51) and the interest accrued on that bill to the date of the auction ($133.74), the City required bidders to pay all 2011 property taxes and water and sewer charges accrued to that date, even if not yet due. These 2011 charges totaled $1150.59. Unaware of the auction, the Meaneys' bank paid the property-tax portion of that sum ($724) out of the Meaneys' tax escrow account on May 6, 2011. Rather than contacting the Meaneys or their bank about the payment, the City simply refunded $724 to Tallage. Tallage's net total payment for 28 Caro Street was thus $1052.84.

Tallage then perfected the tax lien by recording the collector's deed, filed this case, received a default judgment foreclosing the Meaneys' right of redemption and then, less than three weeks after securing that judgment and well within the one year period in which this court has discretion to vacate the judgment (*see G.L. c. 60, §69A*), sold its interest in the property to a third party, HIGCO Corp., for $150,000. The Meaneys' offer to redeem the property, made shortly after the HIGCO transaction, was rejected by Tallage, [**5] and both the Meaneys and Sovereign then moved to [*376] vacate the judgment and allow them to redeem. This court has explicit statutory authority to allow such motions "after careful consideration and in instances where it is required to accomplish justice," so long as they are filed within a year after judgment entered. *See Sharon v. Kafka, 18 Mass. App. Ct. 541, 542, 468 N.E.2d 656 (1984). See also Glusgol v. Ortiz*, Land Court Tax Lien Case No. 10 T.L. 141689, Order Granting Motion to Vacate Judgment (Dec. 20, 2011) (Patterson, Recorder)[4] (hereafter, *Glusgol*) (granting motion to vacate, filed within the year, even though property had been conveyed to a third-party in the interim).

> 4 In addition to the judges of this court, the Recorder has statutory authority to hear and decide tax lien matters. *G.L. c. 185, §6*.

Put briefly, and as more fully discussed below, the parties' contentions were these.

At the time these events occurred (2010 and 2011), the Meaneys were overwhelmed with health and other issues and either did not see or, as I find more probable, were distracted from the water and sewer bill at issue,[5] the notice sent by the city that those charges would be auctioned, and the subsequent notices regarding these court proceedings, and thus left them unattended and unaddressed. [**6] They certainly never appreciated, and none of the notices they received ever stated, that they could lose their entire equity in the property, while remaining personally liable for the now-unsecured mortgage debt, as the result of a judgment in this case. They are not rich, and this property, along with the income it produces, is an important part of their family's livelihood and savings, and to be obligated on the mortgage debt without any corresponding property to meet that obligation will be crippling. Finally, they point to the fact that only Tallage has refused their offer of redemption. Their three other properties, caught up in the same events but with a different purchaser of the tax liens, have all been redeemed with that purchaser's assent.

> 5 The two charges (one for water, one for sewer), listed separately, were on the same invoice. Only one such invoice was ever sent and, as discussed more fully below, the unpaid balance never appeared on any subsequent invoice. Those subsequent invoices only reflected subsequent water and sewer charges.

Tallage, in response, points to the many notices that were sent to the Meaneys and argues that they should have been more attentive, with [**7] no one but themselves to blame for their loss. Tallage also makes the further argument that, as a matter of law, its sale of the property to a third party prior to

the Meaneys' offer to redeem cuts off the one-year period within which this court may vacate the foreclosure judgment--a legal argument the Land Court has previously considered and rejected in *Glusgol, supra*.

An evidentiary hearing was held on the motion to vacate and, for the reasons stated on the record at the conclusion of that hearing, the motion to vacate was allowed and the parties were directed to implement the redemption with these written findings and rulings, confirming that direction, to follow.

TAX LIEN FORECLOSURE PROCEEDINGS

Before discussing the matters presently before the court, an explanation of tax lien foreclosure proceedings generally, followed [by] one on how private companies can come to possess a citizen's municipal tax obligation, may be helpful. I thus begin with a summary of the law regarding the assessment and collection of property taxes in Massachusetts, and a broad overview of the issues raised by the "privatization" of such collection.

Municipalities assess taxes on real property, *see* G.L. c. 59, and a detailed statutory [**8] framework exists for their collection when they go unpaid, *see* G.L. c. 60. Such taxes are not limited to the property assessments alone. Unpaid municipal water and sewer charges can also be added to the tax account. *See G.L. c. 60, §43* (definition of "taxes").

In the usual case, collection enforcement proceeds as follows. An instrument of taking is recorded at the Registry of Deeds and, if against the proper party(ies) and in compliance with the statutory prerequisites, places title in the municipality subject to the property owner's right of redemption. Generally speaking, the municipality then proceeds against the property owner itself. Some municipalities, however, will sell some or all of their tax titles to private investors, leaving it to them to pursue. If, as here, the municipality has sold the tax *receivable* to a private investor, a collector's deed (rather than an instrument of taking) is recorded, putting title in the private investor, once again subject to the taxpayer's redemption right. Unless previously resolved by agreement, an action is then filed in the Land Court to foreclose the right of redemption.[6] One of two alternatives then occurs: (1) the municipality or investor enter into an agreement [**9] with the property owner on a redemption figure and payment plan and, upon satisfaction, the case is dismissed, or (2) in the absence of such voluntary agreement, after due proceedings, the court makes a "finding" of the amount necessary to redeem and the date by which redemption must take place, often involving a payment schedule. If the taxpayer fails to comply with the finding, the right of redemption is foreclosed and judgment enters accordingly. As previously noted, that judgment may be vacated within one year if the court, "after careful consideration and in instances where it is required to accomplish justice," so allows. *See Sharon v. Kafka, 18 Mass. App. Ct. 541, 542, 468 N.E.2d 656 (1984)*. Once past the year, it may be vacated only if a "due process" violation occurred, *e.g.* the failure adequately to notify the record owners or mortgagees of the foreclosure proceeding.[7] *See Christian v. Mooney, 400 Mass. 753, 760-761, 511 N.E.2d 587 (1987)*.[8]

6 The Land Court has exclusive jurisdiction over such actions. *G.L. c. 185, §1(b)*; *G.L. c. 60, §64.*

7 Mortgage holders are given notice of tax foreclosure proceedings because, since Massachusetts is a "title theory" state, *see Faneuil Investors Group, LP v. Bd. of Selectmen of Dennis, 458 Mass. 1, 6-8, 933 N.E.2d 918 (2010)*, they have a title interest in the property securing the mortgage.

8 Note, however, that the *due process clause of the Fourteenth Amendment to the United States Constitution* does not require a property owner to receive *actual* notice [**10] of foreclosure proceedings. *Jones v. Flowers, 547 U.S. 220, 226, 126 S. Ct. 1708, 164 L. Ed. 2d 415 (2006)* (citing *Dusenbery v. United States, 534 U.S. 161, 170, 122 S. Ct. 694, 151 L. Ed. 2d 597 (2002))*. Rather, due process only requires "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." *Id.* (quoting *Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865 (1950)*; *Town of Andover v. State Financial Services, Inc., 432 Mass. 571, 574, 736 N.E.2d 837 (2000)* (same). The Supreme Court "has implicitly accepted the fallibility of mail delivery and the possibility that some interested parties may not in fact receive notice delivered by this method." *Andover, 432 Mass. at 574-75* (citing *Tulsa Professional Collection Servs., Inc. v. Pope, 485 U.S. 478, 489-90, 108 S. Ct. 1340, 99 L. Ed. 2d 565 (1988)*). However, if the government becomes aware that notice has failed, it must take "additional reasonable steps to notify [the property owner], if practicable to do so." *Jones, 547 U.S. at 234*. "What steps are reasonable in response to new information depends upon what the new information reveals." *Id.*

[*377] As noted above, tax foreclosure cases are unlike any other in certain important respects. Interest accrues at 14% from the time taxes are due until the collector's sale or tax taking occurs, *G.L. c. 59, §57*, and at 16% thereafter, *G.L. c. 60, §62*. A small tax bill can thus rapidly become much larger. Also, unlike mortgage foreclosures or executions on money judgments in ordinary civil cases, the tax-foreclosing [**11] party keeps all surplus. Once the right of redemption has been foreclosed, tax title is "absolute" and neither the property owner nor any party claiming through the owner (such as mortgagees, lienors, or attaching creditors) has any claim, then or later, to the property or any part of its value. *G.L. c. 60, §64*; *Buk Lhu v. Dignoti, 431 Mass. 292, 296, 727 N.E.2d 73 (2000)*.

Property owners should pay their taxes, but a Procrustean application of 14%/16% interest rates and a complete loss of equity once redemption rights are foreclosed can arguably lead to inequitable results. Those who make these arguments are often the elderly or widowed who, once behind in their payments, find it difficult to "catch up"; those whose employment has been interrupted and have the same issue; heirs who have difficulty co-ordinating amongst themselves after a parent or relative's death; or those, as here, who have had severe health issues that disrupted their lives. The Legislature has thus enacted three safeguards. *First*, the municipality may reduce the interest owed and enter into payment plans with the property owner. *G.L. c. 60, §62A*. *Second*, the municipality may apply to the Commissioner of the Department of Revenue for a reduction in the principal owed. *G.L. c. 58, §8*. *Third*, the Land Court has been [**12] given discretion to "make a finding allowing the [property owner] to redeem, within a time fixed by the court..." and to "impose such other terms as justice and the circumstances warrant." *G.L. c. 60, §68*. This last allows the court "to determine whether the party seeking to redeem can meet the financial burdens imposed by statute, and if he can, on what terms payment to the town should be made." *Lynnfield v. Owners Unknown, 397 Mass. 470, 475, 492 N.E.2d 86 (1974)*. The Land Court may also exercise other potential powers to address inequities, either inherent or conferred by statute, expressly or by implication. *See, e.g., G.L. c. 60, §75*; *G.L. c. 220, §2*; *G.L. c. 185, §25*, and *G.L. c. 185, §25A*.[9] These include the explicit power at issue here: the court's discretion under *G.L. c. 60, §69A*, "after careful consideration and in instances where it is required to accomplish justice," to vacate a judgment foreclosing redemption if the motion is brought within a year after that judgment entered.

9 These include the power to set legal fees, taking into consideration the property owner's ability to pay (*G.L. c. 60, §65*), and may also include, for example (analogous to partition cases), the power to appoint commissioners to sell properies, preserving "surplus" for the property owner and other creditors, and the appointment of guardians, receivers or representatives to [**13] take action on behalf of absent heirs, with "escrow" funds established to hold those surplus funds. (*see G.L. c. 241,*

*§§9, 22, 31, 34, 35*). They potentially also include the power to reduce interest. *See G.L. c. 60, §62A* (allowing a municipality to do so). The court does not have the power to reduce principal, since that is the exclusive province of the Appellate Tax Board in abatement proceedings.

With the exception of payment plans, the scope of the court's powers to address inequities has rarely been explored in the context of tax foreclosure cases. One reason may be that, until recently, actions to foreclose a property owner's right of redemption have generally been brought and pursued by the municipalities themselves. They have thus been conducted within the political process and, much like a District Attorney's office, with a large measure of discretion, cognizant of special circumstances.

Tax foreclosure proceedings brought and pursued by private entities are outside the political process. Such entities are responsible to their investors, not the citizens of a city or town, and their goals and incentives are not the same. Maximizing return on investment may not include accommodation to individual circumstance to the [**14] same extent a municipality, acting for itself, might otherwise deem warranted.[10] Constitutional problems arising from such privatization are thus raised and, to avoid them, the court has appropriate discretion to address circumstances that a municipality would likely have accommodated, but a private entity has not. *See McCulloch v. Maryland, 17 U.S. 316, 407, 431, 4 L. Ed. 579 (1819)* (identifying the "great powers" of government as "to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies" and observing, "the power to tax involves the power to destroy").

10 For example, a private investor has no incentive to "compromise" any aspect of a tax bill, either interest or principal, and every incentive to acquire the property itself (eliminating all owner and mortgagee interests) for development and re-sale at often considerable profit. This is why investors, when bidding on properties, are often willing to pay a "premium" for the tax title over and above the actual taxes owed. As testimony in other tax lien cases brought by private investors has shown, at least some of those investors will not voluntarily enter into any kind of payment plan with the property owner, forcing the [**15] owner to come to court to request and obtain a court-ordered plan.

FACTS

Based on the sworn testimony of the witnesses, my assessment of the witnesses' credibility, the admitted exhibits, the records of the Land Court of which I may take judicial notice, and the infernces I draw from the entirety of the evidence, these are the facts as I find them after trial.

Defendant Paul Meaney is a financial advisor with Integrated Financial Partners in Waltham. He and his wife, defendant Michele Meaney, have two small children--Jack, who was seven at the time of trial, and Kate, who was five. Michele has stayed home with the children, taking time from her career while they are young. They currently live in Natick.

The Meaneys are not rich. To supplement Mr. Meaney's earnings and to save for their children's educations and their ultimate reirement, the Meaneys have purchased four three-family homes on Caro Street in Worcester near Mr. Meaney's *alma mater*, the College of Holy Cross. The four are: (1) 21 Caro Street, (2) 23 [*378] Caro Street, (3) 25 Caro Street, and (4) 28 Caro Street. Each is used for apartments for rental to Holy Cross students. The one at issue in this case is 28 Caro Street, purchased [**16] by the Meaneys in January 2003 for $270,000, and refinanced by them in September 2005 with a mortgage to defendant Sovereign Bank in the principal amount of $230,500.[11] Sovereign is also the mortgagee on 21, 23 and 25 Caro Street.

11 For consistency and clarity of reference, I will refer to the bank as "Sovereign" throughout these Findings and Rulings

since Sovereign was the originally-named bank defendant and the substitution of Santander as successor defendant (due to a corporate name change) did not occur until after trial.

Mr. Meaney manages the properties himself. He contracts with a property maintenance company to handle building maintenance and repairs, but he is the one who finds and interacts with tenants, collects rents, and pays building-related expenses. The monthly mortgage payments include a property tax escrow, and Sovereign employs a company named CoreLogic which monitors the City's tax records to learn the taxes owed and then pay them from the tax escrow funds. CoreLogic, however, does not monitor water and sewer bills. These are sent to the Meaneys who, in the ordinary course, pay the City directly.

Worcester's water and sewer charges are mailed quarterly. If a quarter's [**17] bill is unpaid, it is added to the next quarter if within the same tax year. No bill goes beyond the tax year, however. If unpaid at fiscal year's end,[12] it is added to the taxpayer's tax account for that fiscal year where it can become a tax lien. Water and sewer bills in the next fiscal year do not reflect unpaid charges from previous years.

12 Worcester's fiscal years, like the commonwealth's and all its municipalities, go from July 1 to June 30. Thus, fiscal year 2010 runs from July 1, 2009 to June 30, 2010.

The Meaneys have failed to pay water and sewer bills on one or more of their Worcester properties on occasion in the past. CoreLogic learned of this on those occasions, and arranged for their payment from the Meaneys' tax escrow. The tax escrow obligation was then adjusted upwards to cover the shortfall, and these readjustments (reflected on subsequent monthly mortgage bills) alerted Mr. Meaney to the fact that he had missed the payments. His conclusion from this--wrong, as it turned out--was that CoreLogic would *always* catch unpaid water and sewer bills added to the tax title account, arrange for their payment, and then readjust his escrow payments. Such was not the case with the [**18] water and sewer bill at issue in this proceeding. CoreLogic learned of the unpaid bill in January 2011 after it had been added to the Meaneys' tax account[13] but, for reasons neither it nor Sovereign could explain at trial, never paid it. Most likely, it was never brought to the proper person's attention--one more in the series of unfortunate events that occurred in this case. *See* discussion below.

13 It appears on a CoreLogic record from that date.

The City mailed water and sewer bills on all four Caro Street properties on December 31, 2009. Mr. Meaney paid all of them in timely fashion. All previous water and sewer bills had likewise been paid. The ones that were missed were the next ones, mailed on April 1, 2010--four separate bills, one each for each of the four buildings. The charges that led to the lien foreclosed in this proceeding (28 Caro Street) were $224.58 for water and $267.93 for sewer.

The Meaneys claim that they never saw the April 1, 2010 bill for 28 Caro Street or any of the April 1 bills for the other three properties, all of which were mailed by the City to their residential address at that time: 357 Commercial Street, Apartment 725, Boston MA 02109. These bills were mailed [**19] when the Meaneys were moving from that address to their new home at 17 Davis Brook Drive in Natick. I am not convinced that none of these bills were seen. One bill may have gone astray, but it is difficult to believe that none of the four arrived, and seeing a bill for even one of the buildings would have alerted the Meaneys that bills for the three others had also been sent. More likely, the bills were received, put in moving boxes, and then overlooked after the move was completed in the expectation that any unpaid charges would simply appear on the next bill.[14] What the Meaneys did not realize was that, because the fiscal year changed on

July 1, 2010, the April 1, 2010 charges from the prior fiscal year would *not* be added to any future water and sewer bill but, instead, go on the tax account for collection there. None of these charges appeared on any later water and sewer bill.

> 14 The Meaneys notified Worcester of their change of address on September 16, 2010, specifically noting that it was for both "real estate" and "water/sewer" bills.

Worcester does not sell its tax receivables as soon as they are overdue. Instead, it waits until it has a large number of them, and then schedules a public [**20] auction. Each taxpayer whose receivable will be auctioned is mailed notice of the auction, and that occurred here. By letter from the City Treasurer dated February 7, 2011, sent to their new address in Natick, the Meaneys were told that, unless they paid $597.23 by no later than March 16, 2011,[15] a collector's deed granting the right to collect their "fiscal year 2010 outstanding Real Estate tax due" on the 28 Caro Street property would be auctioned on April 5, 2011.[16] The letter went on to say that the collector's deed "will grant authority to a third party purchaser to proceed with collection actions as provided by the statute [*G.L. c. 60, §43*] including perfecting a lien on the property and filing a Foreclosure complaint with the Massachusetts Land Court." Notice of the auction, with specific identification of the 28 Caro Street property, was also published in the Worcester Telegram on March 22, 2011.

> 15 Although the letter did not say so (it nowhere stated that the amount arose from an unpaid water and sewer bill), the amount demanded in the notice consisted of the $492.51 unpaid water and sewer charge plus accrued interest.
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> 16 Similar letters were sent for the other properties.

The Meaneys claim that they [**21] did not see this letter or the published notice. Again, I am not convinced. Four such letters were sent, one for each of the four properties with an April 1, 2010 unpaid water and sewer bill. Surely at least the *envelope* from at least one of those letters would have been seen. They were, after all, from the City--not an advertisement or solicitation from a [*379] bulk mailer. But I give full credibility to this: the Meaneys were in the midst of a health and related family crisis, and many things simply fell through the cracks. The City's letters said they were for "outstanding Real Estate tax due," an accurate but misleading statement (many people--perhaps most, including the Meaneys at this time--have no appreciation that unpaid municipal water and sewer charges fall within the category of "real estate tax due")[17] and the Meaneys, quite understandably, believed that Sovereign Bank was attending to all such taxes through their tax escrow, paid monthly by automatic deduction from Mr. Meaney's bank account.[18] Moreover, I agree (and so find) that the Meaneys' health and family issues were both overwhelming and the primary reason why more attention was not paid to both this and later notices. [**22] These issues were as follows.

> 17 Worcester has a document entitled Notice of Intent to Lien which it claims it sends to property owners who have not paid their water and sewer charges, letting them know that unpaid balances "will be added to the Real Estate tax bills as a lien." There was no evidence, however, that any such notice was sent to the Meaneys, and I find that it was not.
>
> 18 This was not an unreasonable expectation. As noted above, Sovereign had done so in the past. Moreover, Sovereign's tax-monitoring contractor, CoreLogic, became aware of the delinquency on January 6, 2011 as the result of a periodic check of the City's tax delinquency records. *See* Trial Ex. T-5. In the ordinary course of things, it would have paid the delinquency, informed Sovereign, and Sovereign would then have readjusted the Meaneys' tax escrow payments. As previously noted, neither Sovereign nor CoreLogic could explain why this did not happen.

> Continuing the series of unfortunate events, this deficiency would never have remained unpaid had it not taken place at the end of the 2010 fiscal year. According to the City's testimony, newly received tax payments are applied to the oldest pending balance. Sovereign's [**23] next payment (through CoreLogic) from the Meaneys' tax escrow (all new tax bills were fully and timely paid) would thus have been applied to this deficiency, putting the *new* tax bill in shortfall. But this only occurs if the obligation in deficiency and the new bill being paid are in the same tax year. Each tax year has a separate account. By the time this unpaid water and sewer bill (a 2010 obligation) was added to the tax account, the new payments were being made for fiscal 2011 obligations and were thus not applied to 2010 balances.

As noted above, the Meaneys are a young family with young children. In January 2010, while on a family vacation in Arizona, Mrs. Meaney began experiencing a "tingling" sensation in both of her feet. She also lost strength in her right arm, and was unable to lift anything with weight. She sought medical attention immediately upon returning to Boston, and was told her symptoms were likely caused by a pinched nerve. They worsened, however--she lost all strength in her right side and dropped her daughter when she ran to her after ballet practice--and thus began the first of many brain scans and other tests. Her condition was not diagnosed at that time (the [**24] MRIs could not identify anything specific), but she was told that she had a "strong potential" for multiple sclerosis (MS)--a chronic, typically progressive disease involving damage to the sheaths of nerve cells in the brain and spinal cord, whose symptoms may include numbness, impairment of speech and muscular coordination, blurred vision, and severe fatigue, s*ee* The Concise Oxford Dictionary (10th Ed.) at 1282 (Oxford University Press, 1999)--and, after many tests and many months, this diagnosis ultimately was confirmed. The tests themselves caused problems. Among them was a spinal tap leak, undetected, that caused blinding headaches and an emergency ambulance ride to the hospital. In addition, Mrs. Meaney began having gastrointestinal issues and was housebound as a result. Cervical and colon biopsies gave troubling results, there was concern that Mrs. Meaney might have celiac disease,[19] and she also had an abnormal pap smear.

> 19 A chronic nutritional disturbance, caused by the inability to metabolize gluten and resulting in malnutrition and a distended abdomen. *See* The Concise Oxford Dictionary (10th Ed) at 232 (Oxford University Press, 1999).

These events had profound effects on the [**25] Meaneys' family life. The children were terrified that their mother might be dying and regularly had nightmares, waking up four and five times a night. Moreover, at this same time, Jack was diagnosed with a learning disability, doubtless not helped by his concerns for his mother, which required special schooling and therapy. Kate developed vision problems that needed regular therapy sessions. Mr. Meaney, as fearful for his wife as the children, pushed his work aside to take his wife to her numerous doctor and hospital visits (she could not drive herself) and to be with the children both at home and their activities. Mail would come in and be scattered around the house. Tenant rent checks went uncashed. Other tenants skipped paying, leaving town before Mr. Meaney noticed and could take effective action. Many of Mr. Meaney's long-time clients fired him because he was distracted from their work. A babysitter was hired to help out, but described her work as "damage control." All this continued through December 2012, when family life began stabilizing. In addition, for much of this time, the Meaneys were involved in a zoning dispute with the City, including complaints for contempt, over [**26] whether the apartments in their Caro Street properties were "lodging houses" being operated without a license[20]--a dispute not finally resolved until the Supreme Judicial Court ruled in the Meaneys' favor on May 15, 2013. *City of*

*Worcester v. College Hill Properties LLC, et al., 465 Mass. 134, 987 N.E.2d 1236 (2013)* (addressing the Meaneys' case and those of other similarly-situated apartment owners).

20 The cases were filed in the Housing Court on January 13, 2010.

The auction notice letters from the City arrived at the Meaneys' house in early February 2011, and it is not surprising that they were pushed aside for a later attention that never occurred. The auction itself took place April 6, 2011. Coco Bella LLC purchased the collector's deeds for 21, 23 and 25 Caro Street, and Tallage purchased the collector's deed for 28 Caro Street--the property at issue in this case. Each of these deeds was recorded at the Worcester Registry in May.

Tax lien foreclosure cases were filed in the Land Court in November 2011 against each of the four properties--*Coco Bella LLC v. Meaney*, 11 TL 143163 (21 Caro Street), *Coco Bella LLC v. Meaney*, 11 TL 143157 (23 Caro Street), *Coco Bella LLC v. Meaney*, 11 TL 143161 (25 Caro Street), and *Tallage LLC v. Meaney*, 11 TL 143094 (28 Caro Street). Each arose from an unpaid water and sewer bill from April 2010--none in a principal amount over $500[21]--and each sought foreclosure and the resulting "absolute title" to the entirety of the property. Following the [**27] usual Land Court procedures, a title examiner was appointed in [*380] each of these cases to determine all persons with an interest in the property so that certified mail citations could be sent.[22] The title examiners completed their work in early 2012 and, in April 2012, citations were sent in each case to each of the Meaneys (Paul and Michele, in separate envelopes), mailed to their former address on Commercial Street in Boston (these were forwarded by the post office to the Meaneys' Natick home), and to the Meaneys' mortgagee bank, Sovereign, mailed to its central mailroom located at 1130 Berkshire Boulevard in Reading, Pennsylvania.

21 The principal amounts of the unpaid water and sewer charges were $354.08 for 21 Caro Street, $352.51 for 23 Caro, $290.49 for 25 Caro, and $492.51 for 28 Caro.

22 Service of process in tax lien cases is made by certified mail/return receipt requested "citations" (the tax lien action equivalent of a summons and complaint), mailed directly to each defendant by the Land Court Recorder's Office in a Land Court-headed envelope. There is thus no mistaking that it comes from a court. All persons and entities identified as having an interest in the property become named [**28] defendants, and a diligent search is conducted to learn their addresses. Where addresses cannot be found, service is made by publication. Service on corporate entities no longer in business and without successors is made on their former officers and directors and by publication.

The notices sent to the Meaneys were either signed-for by their babysitter, Christine McDonough, or by Mrs. Meaney. The notices to Sovereign Bank were signed-for by an employee of Pitney Bowes (a third-party contractor that receives and sorts Sovereign's mail), who should have forwarded them to Sovereign's Escrow Servicing department at 601 Penn Street in Reading, but instead sent them to the Default Operations department, located at 450 Penn Street--a separate building. The Default Operations department received them, but never forwarded them to Escrow Servicing or took any action regarding them. Part of this may be due to the wording of the Citations--a Land Court form that has since been changed. The wording in the Citations sent to the Meaneys and Sovereign said:

NOTICE

A tax lien complaint has been presented to said Court [the Land Court] by the above plaintiff(s) to foreclose all right of redemption concerning [**29] the land described as:

[DESCRIPTION OF LAND]

You have been named as a party who may have an interest in this proceeding.

> If you desire to make any objection or defense to said complaint you or your attorney must file a written appearance and an answer, setting forth clearly and specifically your objections or defenses to said complaint, in the office of the Recorder of said Court in Boston, Three Pemberton Square, Room 507, or in the office of the Assistant Recorder of said Court at the local Registry of Deeds, on or before the return day set forth above.
>
> Unless your appearance is filed, your default will be recorded, the said complaint will be taken as confessed and you may be forever barred from contesting said complaint or any judgment entered thereon.

The Citation then gave the name and contact information for the plaintiff's attorney. There was nothing on the form that gave any indication that the recipient's ownership interest was at risk, much less the entirety of that interest.[23]

> 23 The Land Court has since remedied this. The new form accompanying the Citation in cases brought by private purchasers of tax liens now reads as follows:
>
> PLEASE READ THIS NOTICE CAREFULLY
>
> IT CONTAINS IMPORTANT [**30] INFORMATION REGARDING YOUR PROPERTY RIGHTS
>
> This is a Tax Foreclosure Action concerning the property identified in the attached Citation.
>
> You are being sent this Notice because property taxes and/or water and sewer bills are owed, the statutory interest rate is 16%, and the Land Court has determined that you are the owner of the property referenced above OR that you may have a legal interest in that property. You are at risk of foreclosure. If a judgment of foreclosure is entered you will lose ALL of your ownership or other rights in this property, regardless of the amount of the tax lien, and you will not be refunded any amount exceeding the balance due.
>
> The private party named in the enclosed Citation has purchased the tax lien on this property from the City or Town that assessed it. This lien may also include unpaid water and sewer bills. The private party is now the Plaintiff in this Action.
>
> You can keep your interest in this property and avoid foreclosure by promptly paying the Plaintiff the amount currently owed. Contact the Plaintiff's attorney directly to make this arrangement.
>
> You can OBJECT to the amount sought by the Plaintiff, raise any defenses you believe you may have, or [**31] REQUEST MORE TIME TO PAY by filing a written appearance and answer with the Land Court, Room 507, Suffolk County Courthouse, Three Pemberton Square, Boston, MA 02108, prior to the return date listed on the attached Citation. Your appearance and answer must give your name, your address, the case number, and state whether you plan to pay or

> contest the total balance due. It must also state and explain any defenses you wish to raise. You must send a copy to the Plaintiff's attorney as well as to the Court. After the return day, you may schedule a hearing or wait for the Plaintiff to do so. You must attend the hearing on the date and time scheduled. If you do not attend this hearing, you risk a default judgment being entered against you. If you have any questions about this proceeding please contact John Harrington at the Land Court, (617) 788-7480.
>
> IF YOU FAIL TO RESPOND TO THIS NOTICE the Land Court may enter a Final Judgment against you. If so, this will give the Plaintiff complete ownership of your property. The Plaintiff will have authority to SELL your property and keep any and all proceeds, INCLUDING ANY AMOUNT EXCEEDING THE TOTAL BALANCE DUE. You will lose any and all ownership rights [**32] you may have in your property.

Mr. Meany handles all business-related mail that comes to the house, and he first saw the letters and notices regarding the unpaid water and sewer charges, previously unopened or put aside, in mid-April, 2012. The ones he recalls seeing are the ones in the *Coco Bella* cases (not the ones related to this property, the deed to which had been acquired by Tallage), and he called Coco Bella's attorney to see what they were about. He spoke with her briefly, and subsequently received an email with invoices to redeem 21 Caro Street for $5,135.91 and 23 Caro Street for $4,648.28--figures that shocked him since the principal of the unpaid water and sewer charge for 21 Caro Street was only $354.08 (the demanded figure was over 14 times that amount) and $352.51 for 23 Caro (the demanded figure was over 13 times that amount).[24] Caught up in his family problems and believing that--at worst--he would simply owe money whose amount could be addressed later, he did not respond to those demands or follow up with Coco Bella's law firm at that time. At no time did he realize that [*381] he was at risk of losing the properties themselves. He did not call Tallage's attorney because [**33] he did not see the notices for the Tallage case, and he did not file answers in any of the four cases, Coco Bella's or Tallage's. Because of its internal mail-forwarding failures, Sovereign, likewise, did not file answers in any of the cases prior to entry of judgment.

> 24 Nearly half the sums demanded were for Coco Bella's attorneys' fees and the title search it conducted before bidding on the lien, which it insisted it be paid, in full, before it would agree to the properties' redemption. The email indicates that it also attached an invoice for the third Coco Bella-acquired property--25 Caro Street--but that invoice was not attached to the exhibit introduced into evidence at trial. I infer from the testimony at trial that this missing invoice made demands in amounts similar to those for the other two properties.

These failures to file responses in the court cases had consequences. Default judgments were entered in each of the four in July 2012, foreclosing both the Meaneys' and Sovereign's rights of redemption and, for Sovereign, terminating its mortgages on the properties. Coco Bella sold 25 Caro Street to HIGCO Corporation[25] for $150,000 on July 19, nine days after judgment in that case [**34] was entered, and Tallage sold 28 Caro Street to HIGCO for $150,000 on July 26, only fifteen days after the July 11 entry of judgment. HIGCO was aware in both instances that the interests it was purchasing came from tax lien foreclosures, and was thus on notice that those judgments and resulting titles could be vacated by the court on motion

brought within a year. *G.L. c. 60, §69A*. The deed it received from Tallage was a release deed, conveying only such interest as Tallage had acquired in the 28 Caro Street property with no warranties of any kind, and its agreement with Tallage contained an express provision addressing the possibility of a motion to vacate, as follows:

> 25 HICGO's business is the acquisition of apartment buildings and the subsequent rental of their units.
>
> 26. Tax Title - Buyer's Option for Indemnification
>
> Buyer acknowledges that Seller's title to the Property is through the foreclosure of a municipal property tax lien pursuant to G.L. 60, and that under said statute interested parties may attempt to vacate the foreclosure judgment entered by the Land Court on July 11, 2012 within one year of the judgment. Buyer agrees that the Seller shall have no obligation to defend and indemnify Buyer for any damages, expense or loss arising out of any such action or motion to vacate the judgment, provided [**35] however that the Seller shall defend and indemnify the Buyer upon the occurrence of the following conditions precedent: (a) a motion to vacate the foreclosure decree is filed and docketed by the Land Court before July 11, 2013; and (b) within five days of the entry of such motion to vacate in the Land Court, the Buyer gives written notice to the Seller exercising its option to obtain Seller's defense and indemnification of said motion to vacate and Seller delivers $25,000 in good and clear funds to the Buyer. In the event that the Buyer exercises the option described above, the Buyer agrees to defer to the Seller's defense strategy, including any compromises of claims, and to fully cooperate in good faith with any such defense. The Buyer further agrees that the Seller may, at its option and in its sole judgment and discretion, take any justiciable appeals from any adverse rulings or judgments in connection with this defense. The Seller may, at its own option and in the absence of the Buyer's exercise of the option described above, defend against any such motion to vacate. The Seller's obligations to indemnify Buyer under this section 26 shall be limited to $175,000, expressly excluding any other [**36] damages or losses incurred by the Buyer such as carrying costs or costs to improve the Property, and shall only arise if the foreclosure decree is vacated by a court of competent jurisdiction following any and all appeals.

Purchase and Sale Agreement, 28 Caro Street (Jul. 26, 2012) (Trial Ex. T-29).

The Meaneys learned of the 25 and 28 Caro Street conveyances in August when Mrs. Meaney's mother saw a report of the property transfers in the Worcester Telegram and called her about it. Mrs. Meaney then immediately called Mr. Meaney, who immediately contacted the attorney who was representing them in the zoning litigation (Gary Brackett), and attorney Brackett immediately called Coco Bella's attorney and negotiated the redemption of 21 and 23 Caro Street. Sovereign became aware of the situation at approximately the same time by notice from CoreLogic.

Coco Bella rejected the Meaneys' redemption of 25 Caro Street (the one it had sold to HIGCO) and, shortly thereafter, the Meaneys and Sovereign each filed a formal

motion to vacate the judgment of foreclosure in that case.

Attorney Brackett made [**37] a similar request to Tallage to redeem the 28 Caro Street property, contacting its attorney on August 23, 2012. Tallage refused this request. Sovereign then filed a motion to vacate the 28 Caro Street judgment on October 9, 2012, and the Meaneys followed with their own motion to vacate on October 23, both well within the *G.L. c. 60, §69A* one-year period. A consolidated evidentiary hearing on the motions to vacate in both the Coco Bella 25 Caro Street case and this case was subsequently held before this court. The motions to vacate were allowed at the conclusion of that hearing (April 1, 2013), with these explanatory findings and supplementary rulings to follow.

Coco Bella later came to agreement with the Meaneys on the terms of redemption in the 25 Caro Street case. *See Coco Bella LLC v. Paul Meaney, Michele Meaney and Sovereign Bank*, Tax Lien Case No. 11 TL 143161, Joint Motion for Approval of Agreement for Judgment, allowed by the court on June 27, 2013. Tallage has not agreed, leaving only that case for final resolution. These findings and rulings are thus addressed solely to that case.

DISCUSSION

As noted above, even if no "due process" violation has occurred, judgments in tax lien cases foreclosing [**38] a taxpayer's right to redeem may be vacated if (1) a motion to do so is filed within one year after entry of the judgment, *G.L. c. 60, §69A*, and (2) the court, after "careful consideration," finds that to do so "is required to accomplish justice," *see Sharon, 18 Mass. App. Ct. at 542*. I find and rule that both conditions have been met.

There is no dispute that both Sovereign's and the Meaneys' motions to vacate the Tallage (28 Caro Street) judgment were filed within the year. Indeed, the evidence showed that they were filed promptly after the Meaneys and Sovereign learned of that judgment, and shortly after the Meaneys' offer to Tallage to redeem the property was rejected.

I begin with a fundamental point. "[T]he only legitimate interest of a town in seeking to foreclose rights of redemption is the collection of the taxes due on the property, together with other costs and interest. When an owner of property taken for the nonpayment [*382] of real estate taxes comes forward with sufficient funds to redeem the property, the purpose of the statute has been fulfilled." *Lynnfield v. Owners Unknown, 397 Mass. 470, 474, 492 N.E.2d 86 (1986). See also Boston v. James, 26 Mass. App. Ct. 625, 631, 530 N.E.2d 1254 (1988)* (quoting *Lynnfield*). "In keeping with the respect with which our society regards the private ownership of property, the long standing policy in this Commonwealth favors allowing [**39] an owner to redeem property taken for the nonpayment of taxes." *Lynnfield, 397 Mass. at 473-474*.

The Meaneys should have been more attentive to the many notices sent their way, but I fully credit their explanation that (1) they were overwhelmed with Mrs. Meaney's and the children's health issues at the time the notices were sent, (2) once they were able to focus on their mail, they fully intended to take care of these obligations, (3) as a backstop, they assumed their bank would take care of anything related to their tax account, and they'd have their mortgage tax escrow adjusted accordingly, and (4) they had no idea--no idea at all--that their failure to pay what started out as minor utility bills could result in the total loss of their properties. The fact that rent checks sent to them went uncashed and tenants' skipped rental payments went unnoticed shows the depths of the crises they were experiencing, and negates any thought that they intentionally ignored these bills and notices.[26] These are "extraordinary" circumstances fully justifying the exercise of this Court's discretion to vacate the foreclosure. *See Sharon, 18 Mass. App. Ct. at 542* (citing *Lynch v. Boston, 313 Mass. 478, 480, 48 N.E.2d 26 (1943)).*

Moreover, in these circumstances, it would be inequitable to allow [**40] Tallage to profit from such a windfall--the acquisition of full title to a $270,000 property for $1052.84 plus court expenses, which it immediately turned around and sold for $150,000.

> 26 Because I find and rule that the Meaneys may redeem the property, I need not and do not separately address the merits of Sovereign's motion to vacate, except to note that Sovereign has far less excuse for having left the court's Citation unattended. Sovereign is a sophisticated institution, one of the world's largest banks, no stranger to court proceedings, and should arrange its internal mail sorting and delivery appropriately. Its agent, CoreLogic, was also at fault. As shown by its own records, CoreLogic learned of the tax delinquency in January 2011, well before the tax collector's auction and thus at a time when it could have been satisfied for less than $600 ($597.23 to be exact, *see* Trial Ex. T-11), and yet failed to act.

Tallage bases both its refusal to agree to redemption, and its opposition to any court order vacating the foreclosure of that right, on an argument that the one-year period for the owner to file a motion to vacate the foreclosure judgment is superseded and ends once the property [**41] is sold to an "innocent third-party purchaser for value," citing *G.L. c. 60, §69*. Tallage is incorrect, however, both in its reading of the law and in its factual assertion that HIGCO is an "innocent purchaser for value." By its express terms, *G.L. c. 60, §69* only bars the *petitioner* in the tax lien foreclosure case (here, Tallage) from moving to vacate the judgment foreclosing the right of redemption once the property has been sold to an innocent purchaser for value. *G.L. c. 60, §69A* governs motions to vacate by "any person *other* than the petitioner" (emphasis added)--for example, as here, by the owners and their mortgagee bank--and is thus the applicable provision. *See Glusgol v. Ortiz*, Land Court Tax Lien Case No. 10 T.L. 141689 (DJP), Order Granting Motion to Vacate Judgment (Dec. 20, 2011), cited *supra*. Moreover, HIGCO is not an "innocent purchaser for value," and Tallage did not sell the property to HIGCO as such. The fair market value of 28 Caro Street is in excess of $270,000. Its rushed sale by Tallage to HIGCO for approximately half that was a recognition, by both Tallage and HIGCO, that the property might well be redeemed by either the Meaneys or their mortgage bank (Sovereign, with $230,500 at risk) within the one-year [**42] period set forth in *G.L. c. 60, §69A*. This is corroborated by the fact that Tallage's deed to HIGCO was a *release* deed, conveying only whatever interest Tallage had, with no warranties or covenants of any kind. Moreover, the purchase and sale agreement between Tallage and HIGCO contained a specific provision addressing a *G.L. c. 60, §69A* motion to vacate, and was thus an explicit allocation of risk between the two of them if such an event occurred. As the agreement provides, once the motion to vacate is granted and redemption occurs, HIGCO gets its money back (the $150,000 it paid Tallage, plus the $25,000 it advanced to fund Tallage's opposition to the motion to vacate) and the parties have no other obligations to each other.

RELIEF

As ordered at the conclusion of the evidentiary hearing, the motion to vacate the judgment foreclosing the Meaneys' right of redemption is **ALLOWED**. The property has been the Meaneys' since that time, with only the dollar amount owed Tallage for the redemption in question. Unlike Coco Bella,[27] and although it had full power to do so,[28] Tallage has not come to an agreement with the Meaneys on that number, leaving this court to set it.[29] The cause of this is plain from their differing submissions. [**43]

> 27 *See Coco Bella LLC v. Paul Meaney, Michele Meaney and Sovereign Bank*, Tax Lien Case No. 11 TL 143161, Joint Motion for Approval of Agreement for Judgment, allowed by the court on June 27, 2013, discussed above.

28 *See* Purchase and Sale Agreement, 28 Caro Street (Jul. 26, 2012) at 9 ("In the event the Buyer [HIGCO] exercises the [defense and indemnification] option described above [it did], the Buyer agrees to defer to the Seller's [Tallage's] defense strategy, including any compromises of claims, and to fully cooperate in good faith with any such defense.").

29 *See* n. 10, *supra*, discussing how private investors' incentives to compromise differ markedly from municipalities'.

Tallage identifies and itemizes its requests as follows:

| | |
|---|---|
| Principal paid at auction: | $626.24[30] |
| Interest and fees paid at auction: | $554.04 |
| Principal interest (post auction): | $75 |
| Recording cost of collector deed: | $125 |
| 2011 tax payment: $1150.59[31] | |
| Recording cost-2011 tax payment certificate: | $75 |
| Recording administrative fee (2011 tax certificate): | $75 |
| Tax lien foreclosure petition deposit with Land Court: | $515 |
| Supplemental title and other services: | $137 |
| Recording cost of notice of filing petition: | $75 |
| Administrative fee (notice of filing petition): | $75 [**44] |
| Recording cost of final decree/judgment: | $75 |
| Administrative fee (final decree): | $75 |
| Property management and insurance: | $162.87 |
| Recording cost of vacation of judgment/withdrawal: | $150 |
| Administrative fee (withdrawal/vacate): | $200 |
| Closing costs (to HIGCO) (deed stamps,etc.): | $884 |
| Legal fees-Law Offices of Daniel C. Hill: | $25,582.50 |
| TOTAL: | $30,612.24 |

30 This figure has a minor typographical error. As reflected in the parties' agreed facts, the actual principal paid was $626.25.

31 As discussed above, however, Tallage received a $724 refund within days after making this payment. The net paid for this portion of the purchase price was thus $426.59.

[*383] Sovereign, joined by the Meaneys, offered redemption as follows:

| | |
|---|---|
| Principal paid at auction: | $626.25 |
| Interest at 16% on the tax sale figure of $626.25 from | $199.03 |
| the date of the tax sale deed (May 6, 2011) to May 1, | |
| 2013 (the motion to vacate was allowed April 1, 2013) | $426.59 |
| 2011 tax payment ($1,150.59 payment minus $724 refund | |
| by the City of Worcester): | |
| Interest at 16% on $426.59 tax payment from date of | $135.57 |
| payment (May 6, 2011) to May 1, 2013) | |
| Land Court filing fee: | $515 |
| Record tax collector's deed: | $125 |
| Record notice of filing at the Registry: | $75 |
| Title search: | $137 |
| Record 2011 [**45] tax payment certificate: | $75 |
| Record final decree/judgment: | $75 |

| | |
|---|---|
| Record vacated judgment: | $75 |
| Record withdrawal: | $75 |
| Legal fees: | $4,455[32] |
| TOTAL: | $6,994.44 |

32 This figure included all of Tallage's legal fees incurred in connection with the conveyance of Tallage's interest in the property to HIGCO, including the negotiation and drafting of all related documents. As discussed below, I find and rule that these fees are not properly part of the appropriate redemption amount.

Interest, costs and fees in tax lien cases are governed by *G.L. c. 60, §§65* & *68*. Interest is set at 16%, "costs of the proceeding" are to be awarded, and the petitioning party is entitled to "such counsel fee as the court deems reasonable", not to exceed the actual costs incurred, and taking into account "the taxpayer's ability to pay said fees in any such fee award." *Id.*

I need not and do not reach the question of whether the 16% interest rate should be abated to some degree in this case, since neither Sovereign nor the Meaneys has requested I do so. I likewise need not and do not reach the question of whether the interest period should end on the date the Meaneys offered to redeem the property (August 23, 2012), the date I find a *municipality* would have [**46] accepted that offer, since, again, neither Sovereign nor the Meaneys has made that request. I do, however, concur with the defendants that the interest period stops on the date the motions to vacate were orally granted in court (April 1, 2013), with the one-month extra (to May 1, 2013) which the defendants apparently accept as the time by which the funds would have been paid. As explained more fully below, the fact that this matter did not end at that time is entirely due to the amount Tallage insisted upon receiving, which I find unjustified.

The appropriate redemption figure certainly includes the principal paid at auction for the water and sewer lien at issue ($626.25), plus interest on that amount at 16% from the date of auction (May 6, 2011) to May 1, 2013 ($199.03). It also includes the net tax payment made the day of the auction ($426.59), plus 16% interest to May 1, 2013 ($135.57).

The appropriate redemption figure also includes the costs of this proceeding: the Registry charge to record the Collector's Deed ($125), the Land Court filing fee ($515), the Registry charge to record the Land Court petition ($75), the cost of the Land Court examiner who searched the title to ascertain [**47] the persons entitled to notice ($137), the Registry charge to record the 2011 tax payment certificate ($75), the Registry charge to record the foreclosure judgment ($75), and then the Registry charges to record the redemption documents--$75 for the order vacating the foreclosure judgment ($75), and then $75 for the document withdrawing the Land Court case ($75). None of these recording fees are contested by the defendants.

The core of the dispute is over the legal and HIGCO-related charges.

I begin by allowing what Tallage characterizes as the "administrative charges" related to the various Registry filings, but which more properly should be seen as "legal fees" so related-the law firm's fee for the time it took to have the filings taken to the Registry by a legal assistant or similarly-qualified employee or outside contractor, and put on record. A fee for such time is appropriate and, with two exceptions, awarded in the requested amounts: $75 total (not $150) for the time involved in recording the tax collector's deed and 2011 tax payment certificate ($75),[33] $75 for the time involved in recording the Land Court petition ($75), $75 for the time involved in recording the foreclosure [**48] judgment ($75), and $75 (not $200) for the time involved in recording the order vacating the foreclosure judgment and the document withdrawing the Land Court case ($75).[34]

33 These would have been recorded at the same time, involving only one trip to the Registry. I thus do not award the additional $75 requested.

34 Again, these would have been recorded at the same time, involving only one trip to the Registry. The time involved should be the same as that for the other documents. Since $75 was the fee requested for those trips, it should also (not $100) be sufficient for these.

Tallage's request for "property management and insurance" ($162.87) is unusual but, in the context of these proceedings, reasonable. It reflects the cost to oversee and ensure the property while it was formally in Tallage's name (after the July 11, 2011 foreclosure judgment was entered, and before the August 23, 2012 request for redemption was received), and it would have been irresponsible for insurance and supervision not to have been irrefutably in place at that time.

*

Tallage's legal fees related to the preparation and filing of the petition to foreclose, and then in connection with the action to foreclose, to and including [**49] the time it received the Meaneys' request to vacate the foreclosure judgment and redeem the property (Aug. 23, 2012) and then, thereafter, its receipt and evaluation of the actual motion to vacate (Oct. 15, 2012),[35] are an appropriate part of the redemption figure and, tracking the Hill Law Affidavit [*384] of Legal Fees and attached invoices submitted (Apr. 8, 2013), are awarded as follows:

35 I allow case-related legal fees after the request to redeem was made, to and including the time the motion to vacate was actually filed (and no further), because the filing of that motion was absolute confirmation that redemption would be pursued and that Sovereign would fund it if necessary, removing any possible doubt.

| | | |
|---|---|---|
| 11/7/2011 | Perform title search and evaluate sufficiency of city's tax taking, prepare complaint to foreclose and related papers; file same in Land Court | |
| | 4 hours @ $225/hour | $900[36] |
| 12/20/2011 | Prepare and file notice of petition with registry of deeds | |
| | .2 hours @ $225/hour | $45 |
| 6/19/2012 | Prepare and file motion for default, military affidavit | |
| | .7 hours @ $225/hour | $157.50 |
| 7/25/2012 | Land court research; pull files/obtain copies of returns of service | |
| | 3 hours @ $225/hour | $67.50 |
| 7/25/2012 | Deliver copy of judgment to Tremont [**50] Street[Tallage's office] which I presume also included a discussion with Tallage regarding that judgment | |
| | .6 hours @ $225/hour | $135 |
| 8/23/2012 | Review letter from G. Brackett [the Meaneys' attorney]; conference with client re: options, defenses; tc with buyer re status | |
| | .5 hours @ $225/hour | $112.50 |
| 10/15/2012 | Review motion to vacate; tc with client re: same; emails re Same | |
| | .8 hours @ $225/hour | $180 |

36 I find both the time and rate reasonable for these services. Attorney Hill is a highly capable, experienced, and efficient attorney, and a $225 rate for his time is more than reasonable in the Cambridge/Boston area. The preparation and filing of the Land Court petition were clearly appropriate, and a title search and evaluation of the sufficiency of the city's tax taking was an appropriate *Mass. R. Civ. P. 11* investigation to perform prior to filing the petition.

Legal fees and other expenses related to Tallage's almost-immediate sale of its interest to HIGCO--a transaction it knew was problematic, at best, until the one-year period for filing a motion to vacate the

foreclosure judgment had passed--and the legal fees and expenses Tallage incurred in opposing the motions to vacate, are not appropriately a part of the sum the [**51] Meaneys and Sovereign should pay to redeem the property, nor is anything else. The foreclosure judgment had been entered by default, so Tallage knew that the merits of any response by the Meaneys and/or Sovereign had never been reviewed by the court. The disparity between the fair market value of 28 Caro Street (in excess of $270,000) and the price Tallage paid to acquire the tax lien title ($1,052.84), not to mention Sovereign's interest in preserving its $230,500 mortgage, were such that a motion to vacate was *certainly* to be expected, and the rush to sell the property to HIGCO (by release deed, with no warranties or covenants, at approximately *half* its fair market value), along with the detailed defense/indemnification clause contained in the purchase and sale agreement, show that Tallage *fully* expected its filing. Quite apart from the health and other circumstances of the Meaney family, that disparity alone put Tallage on notice of the high likelihood that the Land Court would vacate the foreclosure and allow redemption. Moreover, the court's allowance of such a motion in the *Glusgol* case, discussed *supra*, seven months before the default judgment in this case was entered and expressly [**52] rejecting the argument that a third-party sale terminated the otherwise one-year period, was further notice that any sale prior to the end of the one-year period, challenged by a timely-filed motion to vacate, would likely not remain. Simply put, Tallage should have agreed to redemption at that time, and its opposition thereafter was unreasonable and cannot monetarily be assessed against the defendants in any amount.

CONCLUSION

For the foregoing reasons, the court's order vacating the foreclosure judgment is confirmed, and the amount to be paid Tallage for the redemption is $4,599.81. Payment shall be made no later than thirty (30) days from the date of this Order. Since this is less than the $6,994.44 figure the defendants offered in April 2013,[37] no interest is owed.

37 Sovereign Bank's Submission as to Redemption Figure (Apr. 12, 2013), joined in by the Meaneys (Apr. 23, 2013).

**SO ORDERED**.

By the court.